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SAN FRANCISCO SCIENCE FICTION CONVENTIONS, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

JONATHAN DEL ARROZ,

Plaintiff,

v.

SAN FRANCISCO SCIENCE FICTION CONVENTIONS, INC. ("SFSFC") aka "WORLDCON76" David W. Gallaher (2019), President; David W. Clark (2020), Vice President; Lise Detusch Harrigan (2020), Treasurer; Kevin Standlee (2018), Secretary; Sandra Childress (2019); Bruce Farr (2018), Chair; 2018 SMOF Con Committee; Cheryl Morgan (2020); Kevin Roche (2018), Chair; 2018 Worldcon (Worldcon 76) Committee; Cindy Scott (2018); Randy Smith (2019), Chair; New Zealand 2020 Worldcon Agent Committee; Andy Trembley (2020); Jennifer "Radar" Wylie (2019), Chair; CostumeCon 2021 Organizing Committee; Lori Buschhaum; Susie Rodriguez and DOES 1 through 30, inclusive.,

Defendants.

Case No. 18-CV-334547

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[Filed Concurrently with Notice of Motion, Memorandum of Points and Authorities, Declaration of Kevin Roche, Declaration of Lindsey Pho, and Separate Statement of Undisputed Facts]

Date: May 11, 2021
Time: 9:00 a.m.
Dept.: 20
Judge: Honorable Socrates P. Manoukian

Action Filed: April 16, 2018
Trial Date: June 14, 2021

TO: PLAINTIFF AND HIS ATTORNEY OF RECORD:

Pursuant to Evidence Code § 452(d), "[j]udicial notice may be taken of… [r]ecords of… any court of the United States or of any state of the United States."

Here, Defendant San Francisco Science Fiction Conventions, Inc. ("Defendant") respectfully request that this Court take judicial notice of the following documents:

1. The decision of the U.S. District Court in *Bartnicki v. Scranton School District* (M.D. Pa. 2019) 2019 WL 5864453, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 1.**

2. The decision of the U.S. District Court in *Chapman v. Journal Concepts, Inc.* (D. Haw. 2007) 528 F.Supp.2d 1081, 1092, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 2.**

3. The decision of the Supreme Court of New York in *Covino v. Hagemann* (1995) 627 N.Y.S. 894, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 3.**

4. The decision of the U.S. Court of Appeal in *Dacey v. Florida Bar, Inc.* (5th Cir. 1969) 414 F.2d 196, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 4.**

5. The decision of the U.S. Court of Appeal in *Dilworth v. Dudley* (7th Cir. 1996) 75 F.3d 307, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 5.**

6. The decision of the Court of Appeal of South Carolina in *Garrard v. Charleston County School District* (2019) S.C. 170, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 6.**

7. The decision of the U.S. District Court in *Harris v. Tomczak* (E.D. Cal. 1982) 94 F.R.D. 687, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 7.**

8. The decision of the Supreme Court of Appeals of West Virginia in *Hupp v. Sasser* (1997) 200 W.Va. 791, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 8.**

9. The decision of the U.S. District Court in *Smith v. School District of Pennsylvania* (E.D. Pa. 2000) 112 F.Supp.2d 417, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 9.**

10. The decision of the U.S. Court of Appeal in *Stevens v. Tillman* (7th Cir. 1988) 855 F.2d 394, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 10.**

11. The decision of the U.S. Court of Appeal in *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 11.**

12. The decision of the Supreme Court of New Jersey in *Ward v. Zelikovsky* (1994) 136

N.J. 516, pursuant to Evidence Code § 452(d), and attached hereto as **Exhibit 12.**

Additionally, pursuant to Evidence Code section 452(g) and (h) judicial notice may also be taken of "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" and "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by sources of reasonably indisputable accuracy."

Judicial notice can be taken of Wikipedia entries (See *Conservatorship of O.B.* (2019) 32 CA5th 626, 631 (judicial notice taken of fact that SpongeBob Square Pants "is depicted as being a good-natured, optimistic, naïve, and enthusiastic yellow sea sponge residing in the undersea city of Bikini Bottom alongside an array of anthropomorphic aquatic creatures)). Defendant further requests the Court take judicial notice of the Wikipedia page of "Comicsgate," not for the truth of its content, but for the fact that it exists. (See accompanying Declaration of Lindsey Pho, ¶10)

13. Wikipedia page of "Comicsgate," pursuant to Evid. Code § 452(g) and (h), and attached hereto as **Exhibit 13.**

Dated: February 19, 2021

MESSNER REEVES LLP

By: _____

ANN A. P. NGUYEN
LINDSEY V. PHO
Attorneys for Defendant
SAN FRANCISCO SCIENCE FICTION CONVENTIONS, INC.

EXHIBIT "1"

2019 WL 5864453
Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

Steve BARTNICKI, Plaintiff
v.
SCRANTON SCHOOL DISTRICT,
and Alexis Kirijan, Defendants

CIVIL ACTION NO. 3:18-1725
|
Signed 11/08/2019

Attorneys and Law Firms

Cynthia L. Pollick, The Employment Law Firm, Pittston, PA, for Plaintiff.

Brendan N. Fitzgerald, Jennifer Menichini, Joseph J. Joyce, III, Joyce, Carmody & Moran, P.C., Pittston, PA, Regina M. Blewitt, The Perry Law Firm, Scranton, PA, for Defendants.

MEMORANDUM

MALACHY E. MANNION, United States District Judge

***1** Pending before the court is the defendants' motion to dismiss the plaintiff's second amended complaint. (Doc. 26). Based upon a review of the motion and related materials, the motion to dismiss will be granted in part and denied in part.

By way of relevant background, the plaintiff filed the instant action on September 5, 2018. (Doc. 1). The defendants filed a motion to dismiss the original complaint on September 27, 2018. (Doc. 7). Prior to any ruling by the court on the defendants' motion to dismiss, on November 19, 2018, the plaintiff filed an amended complaint. (Doc. 18). The defendants responded on December 3, 2018, with a motion to dismiss the amended complaint. (Doc. 21). Rather than oppose the defendants' motion to dismiss the amended complaint, on December 18, 2018, the plaintiff filed a second amended complaint. (Doc. 23). On January 2, 2019, the defendants filed a motion to dismiss the plaintiff's second amended complaint (Doc. 26) followed by a supporting brief on January 16, 2019 (Doc. 30). The plaintiff filed a brief in opposition to the defendants' motion on January 28, 2019 (Doc. 31), which was followed by the defendants' reply brief on February 11, 2019 (Doc. 32).

The defendants' motion to dismiss is brought pursuant to the provisions of Fed.R.Civ.P. 12(b)(6). This rule provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated, Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005), and dismissal is appropriate only if, accepting all of the facts alleged in the complaint as true, the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face," Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (abrogating "no set of facts" language found in Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The facts alleged must be sufficient to "raise a right to relief above the speculative level." Twombly, 550 U.S. 544. This requirement "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of" necessary elements of the plaintiff's cause of action. Id. Furthermore, in order to satisfy federal pleading requirements, the plaintiff must "provide the grounds of his entitlement to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (brackets and quotations marks omitted) (quoting Twombly, 550 U.S. 544).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. *See* Sands v. McCormick, 502 F.3d 263 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002). However, the court may not rely on other parts of the record in determining a motion to dismiss. *See* Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

***2** Generally, the court should grant leave to amend a complaint before dismissing it as merely deficient. *See*, e.g.,

Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 482 F.3d 247, 252 (3d Cir. 2007); Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113, 116-17 (3d Cir. 2000). "Dismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility." Alston v. Parker, 363 F.3d 229, 236 (3d Cir. 2004).

According to the general allegations in the plaintiff's second amended complaint, the plaintiff is employed as a high school teacher for the defendant Scranton School District ("School District"). Defendant Alexis Kirijan was the Superintendent for the School District. The plaintiff alleges that defendant Kirijan was an official policymaker of the School District and, pursuant to Scranton School District Policy 309, she was responsible for assignment, reassignment, or transfers of district employees.

In the first of three counts in the second amended complaint, the plaintiff sets forth a First Amendment retaliation claim. In support of this claim, the plaintiff alleges that, in the summer of 2015, he was appointed to an executive position with the Union and, in that position, he represents employees who have been accused of misconduct. Throughout 2017-2018, the plaintiff alleges that he represented many employees.

In his position, the plaintiff alleges that he has been a vocal critic of defendant Kirijan and has appeared in the newspaper and on television criticizing the handling of various school district matters. On or about November 14, 2017, the plaintiff alleges that he gave a televised speech at a school board meeting criticizing the school administration. In or around December 2017, the plaintiff alleges that he spoke out at a school board meeting criticizing defendant Kirijan, specifically mentioning her corruption and gross malfeasance. After this, in or about February or March of 2018, defendant Kirijan is alleged to have mentioned the plaintiff at a school board meeting at which adult bullying was being discussed.

On or about March 20, 2018, the plaintiff appeared on the front page of the Scranton Times in relation to an article regarding his protesting the school administration. Shortly thereafter, around the Easter holiday, the plaintiff alleges that defendant Kirijan went outside the work site and interfered with his volunteer activities for his church. Specifically, defendant Kirijan is alleged to have told the plaintiff's priest that she did not want the plaintiff to be a reader during mass stating that he attends school board meetings and upsets her and that she finds him offensive because of his speech.

On or about June 4, 2018, the plaintiff spoke out against the School District with respect to the furloughing of 99 employees. In the same month, the plaintiff alleges that he requested to teach an Honors class for the Fall 2018-2019 school year and was denied the same. The Scranton School District listed the Honor classes "TBA," even though the plaintiff has 14 years of experience and an unblemished work record.

In August 2018, the plaintiff applied for a soccer coaching position. He had been a soccer coach in the past. There were only two candidates for the position, the plaintiff and another individual, who was not a teacher. The plaintiff was not selected for the position, even though he alleges he was more qualified than the other applicant. The plaintiff alleges that he lost money because he was not selected for the position.

***3** According to the plaintiff, he has no official duty to report school district and officials' misconduct, and he was acting as a citizen when he spoke out at school board meetings and appeared on television and in the newspaper. The plaintiff alleges that he was acting as a citizen when he represented the union and that his free speech is a matter of public concern since it has been publicized and is of interest to the community.

In count two of his second amended complaint, the plaintiff sets forth a state law defamation claim. In support of this claim, the plaintiff alleges that defendant Kirijan called him "offensive" to his parish priest. The plaintiff alleges that he is not offensive and, therefore, that fact is false. The plaintiff alleges that defendant Kirijan knew that calling him offensive was false. In calling him offensive, the plaintiff alleges that defendant Kirijan was not expressing her opinion, but rather the fact that the plaintiff was offensive, and that she was motivated by ill will and malice when she stated this to the priest. The plaintiff alleges that defendant Kirijan intended to harm his reputation and deter the priest and others from associating with him and, specifically, that defendant Kirijan intended to have the priest stop the plaintiff from helping in parish activities such as reading at mass. The plaintiff alleges that defendant Kirijan's statement implies that he has acted in a way that would be inconsistent with the proper, honest and lawful performance of his profession and conveyed that the plaintiff was unfit to properly, honestly and lawfully perform his duties for the church.

Also in this count, the plaintiff alleges that defendant Kirijan mentioned his name during a discussion on adult bullying and implied that he was a bully. The plaintiff alleges that this statement is false and was motivated by ill will and malice. Again, the plaintiff alleges that defendant Kirijan sought to deter others from associating with him by mentioning his name when discussing bullying.

Finally, in the third count of his second amended complaint, the plaintiff sets forth a state law false light invasion of privacy claim. Here, the plaintiff alleges that defendant Kirijan specifically made negative reference to him to his parish priest stating that he was offensive and requesting that he not be allowed to participate in parish activities, thereby placing him in false light to his priest by implying that he did something wrong. The plaintiff alleges that defendant Kirijan was specifically intending to harm him and was motivated by ill will and had malice toward him.

In their motion to dismiss the plaintiff's second amended complaint, the defendants initially argue that the plaintiff's First Amendment retaliation claims premised on his alleged non-selection to instruct an Honors course and non-appointment to the extracurricular position of soccer coach fail as against defendant Kirijan for lack of personal involvement. Specifically, the defendants argue that the plaintiff has not alleged any facts indicating that defendant Kirijan made the decision not to select him to instruct the Honors class or made the decision to not appoint him as the soccer coach. Moreover, the defendants argue that the plaintiff's second amended complaint does not contain any factual allegations that support the contention that defendant Kirijan had contemporaneous, personal knowledge of the plaintiff's non-selection or non-appointment and acquiesced in it.

***4** In response, the plaintiff argues that he has alleged that defendant Kirijan is the Superintendent for the Scranton School District and that, as Superintendent, pursuant to School District Policy 309 [1] , defendant Kirijan is responsible for the assignment, reassignment, or transfers of district employees. The plaintiff has alleged that, after speaking out against the School District and defendant Kirijan, his request to teach an Honors class was denied, as was his application for a soccer coaching position. The plaintiff argues, therefore, that he has sufficiently alleged defendant Kirijan's involvement in the decision not to place him in the Honors program and not to appoint him as the soccer coach.

Although the plaintiff's allegations are scant, drawing all reasonable inferences in the plaintiff's favor, as the court must do on a motion to dismiss, the court finds that the plaintiff has barely alleged enough to proceed with his retaliation claims based upon the failure to place him in the Honors program and the decision not to hire him for the soccer coaching position. The defendants' motion to dismiss will therefore be denied on this basis.

The defendants next argue that defendant Kirijan was not acting under color of state law when she allegedly "told Plaintiff's priest that she does not want Plaintiff to be a reader during mass." To this extent, the defendants argue that the allegations indicate that defendant Kirijan violated the plaintiff's First Amendment rights "by going outside the work site and interfering with his volunteer activities for his Church," namely, by telling "Plaintiff's priest that she does not want Plaintiff to be a reader during mass." The defendants argue that such private conduct does not satisfy the "under-color-of-state-law element of § 1983." The defendants argue that,

> "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " See West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988) (emphasis added). "[G]enerally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." See West, 487 U.S. at 50. "Thus, the essence of section 1983's color of law requirement is that the alleged offender, in committing the act complained of, abused a power or position granted by the state." See Bonenberger v. Plymouth Township, 132 F.3d 20, 24 (3d Cir. 1997); see also Mark v. Borough of Hatboro, 51 F.3d 1137, 1150 (3d Cir. 1995) ("[A]n otherwise private tort is not committed under color of law simply because the tortfeasor is an employee of the state"). "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.' " See Am. Mfrs. Mut. Ins. Co., 526 U.S. at 50. "[A] state employee who pursues purely private motives and whose interaction with the victim is unconnected with his execution of official duties does not

act under color of law." See Bonenberger, 132 F.3d at 24; see also Barna v. City of Perth Amboy, 42 F.3d 809, 816-17 (3d Cir. 1994).

(Doc. 30, pp. 9-10).

The defendants argue that because the alleged conduct by defendant Kirijan occurred outside of the work site and was related to a comment concerning the plaintiff's non-secular volunteer activities, her comment was not, as a matter of law, an exercise of her statutory authority as a public school superintendent, nor was her alleged comment "made possible only because [she was] clothed with the authority of state law." See West, 487 U.S. at 49.

***5** The plaintiff responds that defendant Kirijan was acting pursuant to her authority as Superintendent because she mentioned school district business in her comments to the priest. Specifically, the plaintiff alleges that defendant Kirijan stated that the plaintiff attends school board meetings and upsets her. The plaintiff argues that, but for the fact that defendant Kirijan was a Superintendent, she would have no knowledge about the plaintiff's alleged offensive conduct at School Board meetings and that, but for her position, she would never have asked a third party to inflict her retaliatory actions upon the plaintiff based on events that occurred at School Board meetings.

"[T]he ultimate resolution of whether an actor was ... functioning under color of law is a question of law for the court." See Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 344 n. 7 (4th Cir. 2000); Blankenship v. Buenger, 653 Fed.Appx. 330 (5th Cir. June 28, 2016) (collecting cases). Here, the court finds that, simply because defendant Kirijan may have referenced the plaintiff's attendance at school board meetings during her conversation with the priest is insufficient to deem her activity under-color-of-state-law. There is no indication from the allegations of the plaintiff's second amended complaint that Dr. Kirijan was performing duties more akin to those performed by Superintendents in having the alleged conversation with the priest. See 24 P.S. § 10-1081.[2] Rather, the allegations are more akin to defendant Kirijan having a private conversation regarding matters that affected her personally. Moreover, the plaintiff's argument that "[b]ut for the fact that Defendant Kirijan was a superintendent, she would have no knowledge about Plaintiff's alleged offensive conduct at School Board meetings" is unavailing, as the plaintiff himself acknowledges the open and public nature of the school board meetings and his activities, including that he has appeared on television and in the newspapers criticizing the School District and its officials. The court finds that the allegations of the plaintiff's second amended complaint fail to sufficiently allege that defendant Kirijan acted under-color-of-state-law when she allegedly engaged in the conversation with the plaintiff's parish priest. As such, the court finds the conduct non-actionable under § 1983 and the defendants' motion to dismiss the plaintiff's retaliation claim will be granted on this basis.

Next, the defendants argue that the plaintiff has failed to adequately allege a state law claim for defamation based upon his allegations that defendant Kirijan called him offensive and implied that he was a bully. The defendants argue that these statements constitute statements of opinion and are not actionable.

To establish a prima facie claim of defamation under Pennsylvania law, a plaintiff must prove that: (1) the communication was defamatory in nature, (2) the communication was published by the defendant, (3) the communication applied to the plaintiff, (4) the recipient of the communication understood its defamatory meaning and its application to the plaintiff, and (5) the plaintiff suffered special harm as a result of the communication's publication. 42 Pa.C.S. § 8343(a). It is for the court to determine, as a matter of law, whether a particular communication is capable of a defamatory meaning. See U.S. Healthcare v. Blue Cross of Greater Phila., 898 F.2d 914, 923 (3d Cir. 1990); 12th St. Gym, Inc. v. Gen. Star Indem. Co., 93 F.3d 1158, 1163 (3d Cir. 1996). If a communication tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him, it will be considered defamatory. See 12th St. Gym, 93 F.3d at 1163. If words are simply annoying, embarrassing, or uncouth, they will not qualify as defamatory. See Beverly Enters. v. Trump, 182 F.3d 183, 187 (3d Cir. 1999). The "way in which the communication would have been interpreted by the reasonable, average person in its intended audience" constitutes the deciding factor as to whether words will qualify as defamatory. Karl v. Donaldson, Lufkin & Jenrette Sec. Corp., 78 F.Supp.2d 393, 397 (E.D. Pa. 1999). In tandem with the foregoing, is the Pennsylvania courts' recognition that 'statements of opinion, without more, are not actionable.' " Levenson v. Oxford Global Res., Inc., 2007

WL 4370911, at *5 (W.D. Pa. Dec. 11, 2007) (quotation omitted). Specifically, an opinion that could not reasonably be construed as implying undisclosed defamatory facts will not substantiate a claim. See Cornerstone Sys. v. Knichel Logistics, L.P., 255 Fed.Appx. 660, 665 (3d Cir. 2007) (reiterating that opinions may be defamatory only if the are "reasonably understood as implying ... undisclosed facts" of a defamatory nature).

***6** As to the plaintiff's allegation that defendant Kirijan stated "that Plaintiff attends school board meetings and upsets her and that *she* finds Plaintiff offensive," (emphasis added), the court finds that this is the personal opinion of defendant Kirijan. No one could reasonably believe that defendant Kirijan's statement derived from any implied defamatory facts because it was exclusively the perspective of defendant Kirijan. Therefore, the court finds that the statement is not defamatory.

As to the plaintiff's allegation that defendant Kirijan mentioned his name while speaking on adult bullying, here, the plaintiff does not even allege that a specific statement was made about the plaintiff, only an implication. Even assuming that defendant Kirijan had actually stated that the plaintiff was a bully, such has been found to be a non-actionable opinion which is insufficient to support a claim of defamation. See Purcell v. Ewing, 560 F.Supp.2d 337, 344 (M.D. Pa. 2008).

In light of the foregoing, the court finds that the plaintiff has insufficiently pleaded a claim for defamation. Because the court finds that any amendment of the complaint would be futile on this basis, the plaintiff's claim for defamation will be dismissed with prejudice.

Finally, the defendants argue that the plaintiff has failed to state a claim for false light invasion of privacy. To establish an invasion of privacy/false light claim a plaintiff must show there was "publicity, given to private facts, which would be highly offensive to a reasonable person and which are not of legitimate concern to the public." Rush v. Phila. Newspapers, Inc., 732 A.2d 648, 654 (Pa. Super. Ct. 1999). In addition, there must be widespread dissemination, and communication to only a few will not suffice. Id.

The plaintiff bases his false light claim on the statement allegedly made by defendant Kirijan to the plaintiff's priest. To the extent that defendant Kirijan told the plaintiff's priest that he attends school board meetings and upsets her and that she finds him offensive because of his speech, the court finds that this statement to the plaintiff's priest is not sufficient to satisfy the "widespread dissemination" element required to support a false light invasion of privacy claim. As such, the defendants' motion will be granted on this basis.

Based upon the foregoing, the defendants' motion to dismiss will be granted in part and denied in part. An appropriate order shall issue.

All Citations

Slip Copy, 2019 WL 5864453

Footnotes

1 School District Policy 309 provides,

> Delegation of Responsibility
>
> The Superintendent or designee shall provide a system of assignment or reassignment for district employees that includes consideration of requests for voluntary transfers.

(Doc. 32, Ex. A).

2 "The duties of district superintendents shall be to visit personally as often as practicable the several schools under his supervision, to note the courses and methods of instruction and branches taught, to give such directions in the art and methods of teaching in each school as he deems expedient and necessary, and to report to the board of school directors any insufficiency found, so that each school shall be equal to the grade for which it was established and that there may be, as far as practicable, uniformity in the courses of study in the schools of the several grades, and such other duties as may be required by the board of school directors. The district superintendent shall have a seat on the board of school directors of the district, and the right to speak on all matters before the board, but not to vote."

See 24 P.S. § 10-1081.

End of Document

EXHIBIT "2"

gue that they were acting to the best of their knowledge under appropriate *Keyhea* protocol when medicating Plaintiff against his will, and therefore they are entitled to qualified immunity. (*Defendants' Memorandum*, 18–19.) The Court finds that this key question is more properly resolved on a motion for summary judgment or at trial, when Defendants may present evidence in support of their claim, and the Court may properly consider such evidence. Defendants' mere assertion of good faith is insufficient to support a complete defense at this stage in the litigation. The Court cannot conclude at this juncture that a reasonable official in any of the various defendants' positions would have believed that Plaintiff's extended period of involuntary medication was authorized and that their conduct was lawful in light of Plaintiff's allegations that the required stringent procedures were not followed. Thus, for the purposes of the instant motion, the Court cannot resolve the issue of whether Defendants are entitled to qualified immunity. Therefore, the Court **RECOMMENDS** that Defendants' claim that they are entitled to qualified immunity be **DENIED** without prejudice.

CONCLUSION

Based on the foregoing reasons, the Court **RECOMMENDS** that:

1. Defendants' Motion to Dismiss be **GRANTED IN PART** and Plaintiff's state law negligence claim be **DISMISSED;**

2. Defendants' Motion to Dismiss be **GRANTED IN PART** and Plaintiff's Eighth Amendment claim be **DISMISSED;**

3. Defendants' Motion to Dismiss be **DENIED IN PART** and Plaintiff be allowed to pursue his Fourteenth Amendment claim; and,

4. Defendants' qualified immunity claim be **DENIED** without prejudice.

This report and recommendation of the undersigned Magistrate Judge is submitted pursuant to 28 U.S.C. § 636(b)(1) to the United States District Judge assigned to this case.

IT IS HEREBY ORDERED that no later than ***September 28, 2007*** any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than ***October 5, 2007.*** The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

IT IS SO ORDERED.

DATED: August 27, 2007.

Craig Elmer ("Owl") CHAPMAN, Plaintiff,

v.

JOURNAL CONCEPTS, INC., a California Corporation, d.b.a, The Surfer's Journal; Jeff Johnson; Steve Pezman; Debbee Pezman; Dan Milnor; Scott Hulet; and Jeff Divine, Defendants.

Civil No. 07–00002 JMS/LEK.

United States District Court,
D. Hawai'i.

Nov. 7, 2007.

Background: Surfer brought action against surfing magazine, author, photog-

rapher, editor, photo editor, and publishers, alleging defamation or libel per se, disparagement of trade, appropriation or unauthorized use of an individual's name or photograph in an unfavorable publication, tortious interference with business, unjust enrichment, invasion of privacy, false light, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendants moved for partial summary judgment.

Holdings: The District Court, J. Michael Seabright, J., held that:

(1) surfer was public figure for purposes of defamation action;

(2) surfer could not sustain claim for misappropriation or unauthorized use of name and photograph; and

(3) facts concerning surfer's drug use and drinking were not private.

Motion granted in part and denied in part.

1. Libel and Slander ⇐48(1)

A general purpose public figure has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.

2. Libel and Slander ⇐48(1)

Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.

3. Libel and Slander ⇐48(1)

An individual who is merely well known in some circles, but has achieved no general fame or notoriety in the community remains a private figure.

4. Libel and Slander ⇐48(1)

A sports figure may be considered a general purpose public figure within a limited sporting community for purposes of a defamation claim.

5. Libel and Slander ⇐48(1)

To make determination whether a sports figure may be considered a general purpose public figure within a limited sporting community, the court must define the applicable community, consider whether plaintiff is in fact a general purpose public figure in the community in general terms, whether he has access to media, whether he has assumed the risk of publicity, and whether any public figure status has eroded over time.

6. Libel and Slander ⇐48(1)

Surfers ascribed to a unique culture, lingo, style of dress, and etiquette, and thus the surfing community was a clearly definable segment of society, as required to apply public figure actual malice standard to surfer's defamation claim against magazine, author, editors and publisher.

7. Libel and Slander ⇐48(1)

Magazine containing allegedly defamatory article about surfer was dedicated to and targeted at a subsection of the surfing community, namely mature surfing enthusiasts, and was not likely to appeal to ordinary sports fans or individuals with only a casual or passing interest in surfing as sport or culture, and thus relevant population to determine applicability of public figure actual malice standard in surfer's defamation action against magazine was the surfing community, members of which were targeted and reached by magazine.

8. Libel and Slander ⇐48(1)

To fall under the actual malice standard, allegedly defamatory statements must occur within the limits of the particular community in which plaintiff is claimed to be a public figure.

9. Libel and Slander ⇐48(1)

Surfer alleging that magazine printed defamatory article about him was well-known and celebrated figure within surfing

community, as required to apply general purpose public figure standard to surfer's defamation suit against magazine; surfer was featured or mentioned in several magazine articles, was described as "famous in the early and mid–70's for his tuberiding at Sunset Beach and Maalaea and for his flamboyant 'hood ornament' stance at Pipeline" and as "one of the most dedicated surfers on the North Shore," and was featured in surf movies.

10. Libel and Slander ⚿48(1)

The first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.

11. Libel and Slander ⚿48(1)

Public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy; private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

12. Libel and Slander ⚿48(1)

Surfing media was, and continued to be, interested in surfer who alleged that magazine printed defamatory article about him, and thus surfer had effective opportunity for rebuttal to alleged defamatory statements and could counter criticism, correct falsehoods, and set right any fallacies contained in article, as required to apply general purpose public figure standard to surfer's defamation suit against magazine.

13. Libel and Slander ⚿48(1)

In a limited purpose public figure case, the simple fact that events attract media attention is not conclusive of the public-figure issue; a private individual is not automatically transformed into a public figure just by becoming involved or associated with a matter that attracts public attention.

14. Libel and Slander ⚿48(1)

it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.

15. Libel and Slander ⚿48(1)

Surfer alleging that magazine printed defamatory article about him assumed a role or position of special prominence and notoriety within the surfing community by tackling exceptionally dangerous and difficult waves and causing a certain degree of mischief, and thus voluntarily exposed himself to increased risk of injury from defamatory falsehood, as required to apply general purpose public figure standard to surfer's defamation suit against magazine.

16. Libel and Slander ⚿48(1), 51(5), 112(2)

Surfer who alleged that magazine printed defamatory article about him was public figure, and thus was required to prove by clear and convincing evidence that defendants acted with actual malice, that is, with knowledge that the statement was false or with reckless disregard of its truth, in defamation action against magazine, author, publishers and editors.

17. Torts ⚿385

To make out a common law prima facie claim for misappropriation or unauthorized use under Hawai'i law, plaintiff must show (1) that defendants used his photograph or name, (2) for the defendants' commercial advantage, (3) without plaintiff's consent, and (4) thereby injured plaintiff.

18. Torts ⚿387

Liability under theory of misappropriation or unauthorized use under Hawai'i

law is generally limited to unauthorized use in connection with the promotion or advertisement of a product or service and not for use in a magazine story.

19. Constitutional Law ⚿2070

Publication of newsworthy matters which are in the public interest is constitutionally privileged under First Amendment. U.S.C.A. Const.Amend. 1.

20. Torts ⚿393

"Newsworthiness" privilege to unauthorized use claims under Hawai'i law is a line to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

21. Constitutional Law ⚿2070

The First Amendment newsworthiness defense extends to almost all reporting of recent events, as well as to publications about people who, by their accomplishments, mode of living, professional standard or calling, create a legitimate and widespread attention to their activities. U.S.C.A. Const.Amend. 1.

22. Torts ⚿393

Author's tale of his interactions with surfer, including surfer's quirky mannerisms, quips, and colorful history, shed light on one of surfing's more intriguing personalities and, by extension, on the sport and culture itself, and thus article, photographs, and liner notes were newsworthy and relevant, for purposes of surfer's claim for misappropriation or unauthorized use under Hawai'i law. U.S.C.A. Const. Amend. 1.

23. Torts ⚿351

Facts concerning surfer's drug use and drinking were previously disclosed in other publications, and thus were not private, as required for surfer to allege public disclosure of private facts against magazine under Hawai'i law.

24. Torts ⚿351

Surfer created a business and placed his product into stream of commerce, and thus surfers's custom board shaping business and interactions with author who purchased surfboard were not private facts, as required for surfer to allege claim that magazine article regarding his custom surf board shaping and business transactions constituted public disclosure of private facts in violation of Hawai'i law.

Arthur E. Ross, Law Office of Arthur E. Ross, Honolulu, HI, for Plaintiff.

Elijah Yip, Jeffrey S. Portnoy, Cades Schutte LLP, Honolulu, HI, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

J. MICHAEL SEABRIGHT, District Judge.

I. *INTRODUCTION*

Craig "Owl" Chapman ("Plaintiff"), a surfer and surfboard craftsman, sued *The Surfer's Journal*, author Jeff Johnson ("Johnson"), photographer Dan Milnor ("Milnor"), editor Scott Hulet, photo editor Jeff Divine, and publishers Steve and Debbee Pezman (collectively, "Defendants") over an August/September 2006 magazine issue in which Defendants published an

article recounting Johnson's pursuit of a custom-shaped single-fin surfboard, photographs, and other surfers' recollections of Plaintiff. The court finds that Plaintiff is a general public figure within the surfing community and that his defamation and defamation-based claims are governed by the actual malice standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and its progeny. The court also finds that Plaintiff's claims for invasion of privacy and misappropriation/unauthorized use of his name and photograph in an unfavorable publication are not viable. Finally, the court declines to grant summary judgment on Plaintiff's false light claim.

II. *BACKGROUND*

A. Factual Background

Plaintiff is a surfer and surfboard shaper living on Oahu's North Shore. As described in The Encyclopedia of Surfing, Plaintiff became

> famous in the early and mid–70's for his tuberiding at Sunset Beach and Maalaea, and for his flamboyant "hood ornament stance" at Pipeline, where he'd race through the tube with arms spread and his right knee dropped to the deck of his board.... Craig—nicknamed "Owl" as a play on his woeful nearsightedness—soon became one of the most dedicated surfers on the North Shore.... Chapman remained a part of the North Shore surf scene long after most all his contemporaries moved on, and became known for his zoned-out but epigrammatic phrasing. "When I was 22," he said in 1985, "I had a Cadillac, ten surfboards, and ten girlfriends. Man, I thought it would be like that forever." As journalist Mike Latronic later described it, Chapman "walks the fine line between profound philosopher and space-cadet."

Defs.' Ex. A at D00498–99. Plaintiff dominated the surf breaks for many years. As a 1985 article in *Surfing Magazine* observed,

> [o]f all the ... surf cats who were early pioneers of performance surfing at big Sunset Beach and Waimea Bay, only Owl Chapman has persevered. You could never take an ounce of respect away from legends like Jeff Hakman or Sam Hawk or any of those brave souls of fifteen years ago, venturing out to second reef Sunset, testing their equipment and state of mind; all of these men are brave heroes. But who still lives there and surfs Sunset like an anxious zealot? Craig "Owl" Chapman, the man time forgot.
>
> ...
>
> Here is a man who has been invited to seven or eight Duke Classics, surfed in the Smirnoff, Masters, Coke, Stubbies and Gunston contests and proven himself as one of the greatest big-wave riders in history, and at thirty-five still possesses the drive and initiative to rush into dribbling Laniakea to compete with some of the world's best small-wave competitors.

Defs.' Ex. C at D00517.

Revered as a daring and elite athlete who routinely surfed the island's biggest and most dangerous wave breaks, Plaintiff was considered to be one of the

> North Shore's most committed surfers—not the touring professionals or visiting superstars, but an elite group within that realm, the ones who live in Hawaii and base their entire existence around riding mountainous, terrifying surf ... [and who] share the same qualities of presence and bravado in life-threatening conditions, and ... possess a brand of intelligence that can only be drawn from the ocean.

Defs.' Ex. D at D00521; *see also* Defs.' Ex. H. A "key figure" in surfing, Plaintiff was

> fully legit in the water. He's been out in more big swells than anyone his age . . . dodging, scratching, diving, styling and sensing waves before most. . . .
>
> Owl made his mark with a style born of originality. . . . [H]e came away with some of the more memorable photos, and his signature move had as much panache as a goofyfoot's barrel.

Defs.' Ex. E at D00527–28. Plaintiff's unique surfing style, innovative surfing moves, and colorful personality have made him well-known. Recalling some of Plaintiff's "classic, anti-hero antics," an author for *Surfer* magazine writes, "I knew Owl before I met him. It seemed like all the best tales my mentor . . . used to tell involved [Owl] in some bizarre manner." *Id.* at D00527. In short, Plaintiff is exalted as "a living legend on the North Shore, a man who surfed second-reef Pipeline backside when it was considered beyond the limits of good sense; a man who has surfed big Sunset as much as anyone," and a surfer who "knew no fear." Defs.' Ex. D at D00522, D00524.

Plaintiff turned his surfing talent into a business: surfboard shaping. Surfboard designs may be customized by length, width, material, shape, rails, fins, rocker, and lift to account for a surfer's height, weight, and surfing ability and to maximize speed or stability in waves of a certain size and break. *See, e.g., Surfboard Design, available at* http://360guide.info/surfing/surfboard-design.html?Itemid=75 (last visited Oct. 20, 2007) (describing design elements taken into consideration for custom surfboards). When Johnson, a surfer himself, was looking for a custom surfboard to use at Waimea, he was pointed in Plaintiff's direction. As Johnson recounts in "El Hombre Invisible (With Apologies to William S. Burroughs): An Owl Chapman Story," published in the August/September 2006 edition of *The Surfer's Journal,* a bi-monthly magazine,

> [a] good single-fin gun is hard to find. And the guys who know how to shape them are either dead, too drunk, or living in some dusty trailer on the outskirts of Cabo. I wanted one but was at a loss for names. I talked to shaper Jeff Busman about it and without hesitation he mentioned Owl.
>
> "Owl," Jeff said, "has never strayed from what he believes. His boards are the same now as they were 20 years ago: flat decks, box rails, flat rocker with that beak nose. They really work. He's Brewer '71 to '73, but it's not a retro thing with him. It was and is what he does. You know, the wave at Sunset has never changed, so why should he? The guy is one of my biggest heroes."

Defs.' Ex. O at D00107. Thus began the story of Johnson's experience purchasing a custom surfboard from Plaintiff, and the impetus for Plaintiff's present suit.

In the allegedly defamatory article, Johnson writes of his initial meeting with Plaintiff:

> The measurements were made, the lines were drawn, and he was slicing through the foam with a handsaw. Owl made a humming sound as he walked back and forth around the blank. He would stop here and there to make the tiniest adjustments, explaining to me exactly what he was doing. Out came the Surform® and he ran it up and down a few times on each rail. I looked at my watch and realized we had been there for over an hour.
>
> "Now," he said as he put the Surform® away and clapped the dust from his hands, "you see that I am almost done here, and I can finish the rest of it this week. Do you have any money on you?"
>
> "Money?"

"Yeah, money. I need a deposit. I don't work for free."

The first rule of backyard board orders is that you never, NEVER pay up front. But for some reason I felt powerless. I wasn't thinking straight. Next thing I knew, we were in my van driving to Foodland to get money out of the bank machine.

"Alright," I said to Owl as I handed him a wad of cash, "you gotta promise me that you'll finish it this week."

"Yeah, yeah," he said looking nervously from side to side. "Of course. This week."

Id. at D00109. Johnson, however, did not receive his surfboard that week, or for the next several. He narrates his efforts to find Plaintiff, searching Plaintiff's usual haunts, the supermarket, and the waves, all to no avail. As Johnson writes,

[t]he first swell of the season had come and gone, and I didn't have a board for Waimea. This became an ongoing joke with my friends. And it was all my fault. You NEVER pay up front.

Checking the waves at Ehukai one afternoon I ran into fellow lifeguard and disgruntled airbrusher Mike Heart. "Got your board from Owl yet?" he said laughing.

"What do you think?" I said, trying not to laugh with him. "It's really not that funny."

"No, I know. It's just ... you should've seen what happened the other day: so classic. I was out at Sunset and Owl must have cut Bradshaw off or something, 'cause Bradshaw was pissed. He's sitting there yelling at Owl, calling him all sorts of names and Owl's just sitting there like he could give a shit, you know, and it's making Bradshaw madder and madder—his veins are popping out in his neck, his face is all red, everybody's watching. Finally Owl says 'You know what, Kenny? FUCK YOU!' It was all-time! So Bradshaw freaks out and grabs Owl's head and starts dunking him over and over, and Owl is still telling him to fuck off between dunks 'FUCK YOU ... FUCK YOU.' I mean, those two have been sharing that lineup for 25 years. It was so classic, like high school—the stoner and the jock. And you know what? The funny thing is I think Owl got the best of him."

Id. at D00111.

Finally, two months after their first meeting, Johnson's surfboard was complete. Upon inspecting the board, Johnson said,

"Uh, Owl, ... the rails seem a little sharp."

"What? Give me that thing."

He grabbed the board by the rails and pointed the nose to the sky.

"No," he said, "this is what you want. Rails hold a line. Are you kidding me? You'll be doing bottom turns from Waimea to Haleiwa!"

I had to stand my ground. Hard rails catch chop and there is always a good amount of chop in big waves. "Can you just take them down a bit?" I said. "Just a little softer."

"Alright," he said walking into the shack. "It's your board...."

Id. at D00112. When Plaintiff finished, Johnson

stood the thing on its tail looking up at the forward rocker, the flattened beak nose, the sun glistening off the blood-red tinted glass. It was absolutely beautiful. I wrapped my hands around the paddleboard-like rails. I noticed right away that Owl didn't round off the edges like I asked him to.

> "Man," said Edis [Johnson's friend and master glasser] standing next to me. "It's perfect."

Id. at D00113.

Johnson's article is accompanied by several photographs shot by Milnor, including photos of Plaintiff surfing and at the beach, and of Plaintiff's shaping room. The August/September 2006 issue of *The Surfer's Journal* also included a four-photograph series of Plaintiff surfing with the following caption:

> Starting around 1966, the third distinct wave of Californians to invade the North Shore surf scene (following the Malibu/Santa Cruz and WindanSea crews) was a group of hard-knock teenaged standouts from the Huntington Pier who had already earned some local cred in and amongst those cement pilings and powerful sandbar conditions and for whom the Island heavies seem a natural progression.... Some escaped. Several augered in. A few survive intact to this day. Of that group, Owl is a survivor on his own planet. We like to inspect people like that. On page 110, Jeff Johnson, himself a piece of true grit, shares some Owl droppings. The above Jeff Divine photo set of Owl poses was taken in 1974. Since then Owl hasn't changed his act much, except at 58, he's sworn off Pipe.

Defs.' Ex. P at D00102. The liner notes included in the same issue tells another surfer's recollection of Plaintiff:

> On land he wore Coke-bottle lenses, but contacts weren't invented yet so he went out there blind. Later in his surfing career he started riding big waves; by big I mean HUGE! I always figured it was because he couldn't see what he was getting into. He was always taking these really big waves.... He'd just drop in and go for it, which sometimes caused bad energy in the water because he couldn't see you. You'd already be in the spot, and he'd drop right in front of you and you'd yell, "Owl! Owl!" And he'd look back at you startled, like he didn't know you were there ... but, you know, he knew you were there.... I heard he's been sober for the last year. One year out of [the last] 40? (Laughing) That's good!

Id. at D00114.

B. Procedural Background

Plaintiff filed a Complaint on January 3, 2007 and a First Amended Complaint on August 15, 2007 alleging claims of defamation or libel per se, disparagement of trade, appropriation or unauthorized use of an individual's name or photograph in an unfavorable publication, tortious interference with business, unjust enrichment, invasion of privacy, false light, intentional infliction of emotional distress, and negligent infliction of emotional distress. Defendants filed a Motion for Partial Summary Judgment on July 26, 2007. Plaintiff filed a Memorandum in Opposition on September 10, 2007.[1] Defendants filed a Reply on September 18, 2007. The court heard oral arguments on September 24, 2007.

III. *STANDARD OF REVIEW*

A party is entitled to summary judgment where there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). When reviewing a motion for summary judgment, the court construes the evidence—

1. Plaintiff subsequently filed several Errata. On September 20, 2007, two days after Defendants filed their Reply, Plaintiff also filed an Amended Memorandum in Opposition, which the court struck. The next day, Plaintiff filed a request under the local rules for the court's permission to file the Amended Memorandum in Opposition; the court granted Plaintiff's ex parte motion during oral arguments on September 24, 2007.

and any dispute regarding the existence of facts—in favor of the party opposing the motion. *Snead v. Metro. Prop. & Cas. Ins. Co.,* 237 F.3d 1080, 1086 (9th Cir. 2001). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Thus, summary judgment will be mandated if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Broussard v. Univ. of Cal. at Berkeley,* 192 F.3d 1252, 1258 (9th Cir.1999) (*quoting Celotex,* 477 U.S. at 322, 106 S.Ct. 2548).

IV. *ANALYSIS*

A. Plaintiff Is a Public Figure Within the Surfing Community and His Defamation and Defamation–Based Claims Are Thus Governed By the "Actual Malice" Standard

Plaintiff alleges that the August/September 2006 issue of *The Surfer's Journal* contained defamatory content.[2] A statement is defamatory if it "tends to 'harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him.' " *Fernandes v. Tenbruggencate,* 65 Haw. 226, 228, 649 P.2d 1144, 1146 (1982) (*quoting* Restatement (Second) of Torts § 559 (1976)). To prevail on a defamation-based claim, a public figure plaintiff must establish (1) a false and defamatory statement; (2) an unprivileged publication to a third party; (3) special harm or per se defamation; and (4) actual malice. *See New York Times,* 376 U.S. at 279–80, 84 S.Ct. 710; *Curtis Publ'g Co. v. Butts,* 388 U.S. 130, 155, 164, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); *Beamer v. Nishiki,* 66 Haw. 572, 578–79, 670 P.2d 1264, 1271 (1983) (*citing* Restatement (Second) of Torts § 558 (1977)).

Defendants move for partial summary judgment on the issue of whether Plaintiff is a public figure. This is a question of law for the court. *See Rosenblatt v. Baer,* 383 U.S. 75, 88, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). "[D]etermining precisely what individuals are public figures is an uncertain practice not readily susceptible to the application of mechanical rules." *Kroll Assocs. v. City & County of Honolulu,* 833 F.Supp. 802, 805 (D.Haw.1993) (*citing Rosanova v. Playboy Enters., Inc.,* 411 F.Supp. 440, 443 (S.D.Ga.1976), *aff'd,* 580 F.2d 859 (5th Cir.1978) ("Defining public figure is much like trying to nail a jellyfish to the wall.")).

In *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 44, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality opinion extended the *New York Times* actual malice standard to all "matters of public or general concern." This rule—requiring judges to determine matters of public interest—was abandoned three years later. In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court re-directed the focus to center on the public versus private status of the plaintiff in order to strike the proper balance between freedom of the press and society's interest in redressing claims of defamation.

Gertz explained "public figure" status:

> 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.

2. Plaintiff's First Amended Complaint includes Johnson's article, the photograph and caption appearing on the interior or back cover, and the liner notes, all of which were published in the August/September 2006 edition of *The Surfer's* Journal. *See* Defs.' Exs. O, P & Q.

> 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.

Id. at 345, 94 S.Ct. 2997. Gertz justified the distinction between public and private figures on two grounds. First, public figures have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344, 94 S.Ct. 2997. Private individuals, without access to the media or other effective means of communication, are correspondingly more vulnerable to injury. In other words, unlike a private individual, a public figure is likely able to "resort to effective 'self-help.'" *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). Second, and more importantly, the media may act on the assumption that "public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *Gertz*, 418 U.S. at 345, 94 S.Ct. 2997.

The court must determine a workable framework to analyze properly whether Plaintiff is a public figure. Most courts addressing the public figure status of athletes have applied the limited purpose public figure framework. That legal theory is inapplicable here—Plaintiff has not inserted himself into any public interest dispute in order to bring about its resolution; and, even if surfing could fall within an extremely broad definition of a public interest controversy, the allegedly defamatory publication does not directly cover Plaintiff's surfing feats or performance but instead discusses private and personal facts, such as Plaintiff's drug use. Defendants thus concede that Plaintiff is not a limited purpose public figure, and assert instead that Plaintiff tends towards being a general purpose public figure, thereby triggering the actual malice standard.

[1–3] As articulated in *Gertz*, a general purpose public figure has "achieve[d] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Id.* at 351, 94 S.Ct. 2997. However, "absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* at 352, 94 S.Ct. 2997. Thus, an individual who is merely "well known in some circles," but has "achieved no general fame or notoriety in the community" remains a private figure. *Id.* at 351–52, 94 S.Ct. 2997.

Plaintiff argues that he is not a general purpose public figure "for all purposes and in all contexts." Clearly, he is not a household name like legendary sports stars Michael Jordan or Tiger Woods. In other words, as Plaintiff states, he is not a general purpose public figure for *all* purposes and in *all* contexts. However, the question remains whether his iconic status in the surfing community makes him a public figure *within the particular context of the surfing community.*

This court does not read *Gertz*'s categorizations as finite or absolute prototypes. Plaintiff's suggestion would result in the application of an inflexible test, often ignoring the underpinnings for determining public figure status. *Gertz* recognized that it was "lay[ing] down broad rules of general application" and that "the foregoing generalities [might] not obtain in every instance." *Id.* at 343–45, 94 S.Ct. 2997. *See also* Bruce W. Sanford, *Libel and Privacy* § 7.4 (2d ed.) ("[*Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154–55, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967)] illuminates the most common misuse of the Gertz prototypes: the misconception that they are mutually exclusive. *Butts* makes it clear

that there is a middle ground.... Sports figures and entertainers are the most frequent occupants of this position. But the category should reach all those who engage in endeavors in which widespread public exposure necessarily and foreseeably accompanies success—entertainment, sports, journalism and even achievement in the arts and sciences.... Case law reflects this reasoning. The courts generally conclude that sports figures, entertainers and the like are 'public figures'—at least for the purpose of publications relating to the cause of their fame or notoriety, basis for achievement or fitness for position."); *Brewer v. Memphis Publ'g Co., Inc.*, 626 F.2d 1238, 1254 (5th Cir.1980) ("In our view, however, the Court in *Gertz* did not define all subcategories of the public figure classification."); *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1120 n. 13 (N.D.Cal.1984) (stating that *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir.1979) (en banc), "suggests that the *Gertz* test should not be applied woodenly, and that there may be persons whose fame is pervasive in a particular field or profession and who are public figures with respect to that field, without regard to whether there is a particular existing controversy.").

[4, 5] The court thus finds that a sports figure may be considered a general purpose public figure within a limited sporting community. To make this determination, the court must define the applicable community, consider whether Plaintiff is in fact a general purpose public figure in the surfing community in general terms, whether he has access to media, whether he has assumed the risk of publicity, and whether any public figure status has eroded over time.

1. Defining the Applicable Community and Relevant Population

[6] The first step is to define the limits of the community within which Plaintiff is averred to be a public figure. The court must therefore identify a relevant population that is specific and particular—that is, a clearly definable segment of society. *Cf. Wolston*, 443 U.S. at 165, 99 S.Ct. 2701 (noting that to fall under the actual malice standard, the allegedly defamatory statements must be inside the sphere within which plaintiff is a limited purpose public figure). The surfing community is a clearly definable segment of society: Surfers ascribe to a unique culture, lingo, style of dress, and etiquette. *See, e.g., Surfing Terminology, available at* http://learntosurf.surfkooks.com/surfing-terminology/ (last visited Oct. 20, 2007) (defining numerous surfing terms); *Surfing Etiquette, available at* http://www.surfline.com/surfology/surfology_borl_index.cfm (last visited Oct. 20, 2007) (discussing rules of surfing etiquette); *What is Surf Style?, available at* http://surfing.about.com/od/surfingfaq/a/122004style.htm (last visited Oct. 20, 2007) (discussing surfer chic and beach fashion). Although the surfing industry—boards, clothing, entertainment—has become a multi-million dollar market which has strongly influenced and permeated popular culture, there is still a cognizably distinct surfing community.

[7, 8] The court next measures the population of the relevant community by the distribution of the allegedly defamatory statements. *See, e.g., Harris v. Tomczak*, 94 F.R.D. 687, 701 (E.D.Cal.1982) ("The relevant population in considering the breadth of name recognition is to be measured by the audience reached by the alleged defamation."). To fall under the actual malice standard, the allegedly defamatory statements must occur within the limits of the particular community in which Plaintiff is claimed to be a public figure. Here, *The Surfer's Journal* is a magazine dedicated to and targeted at a subsection

of the surfing community, namely mature (over 40 years of age) surfing enthusiasts, and is not likely to appeal to ordinary sports fans or individuals with only a casual or passing interest in surfing as sport or culture. *See* Pezman Decl. ¶ 10. Over 95 percent of the magazine's subscribers are surfers. *Id.* ¶ 4. The court therefore finds that the relevant population or community is the surfing community, members of which were targeted and reached by *The Surfer's Journal.*

2. Plaintiff Is a Well-known, Iconic Figure in the Surfing Community

[9] Plaintiff has been celebrated in the surfing world. He has been featured or mentioned in several magazine articles, including *Surfer, The Surfer's Journal,* and *The New Yorker.* He has appeared in surfing movies and documentaries. In fact, he is described in the Encyclopedia of Surfing as "famous in the early and mid–70's for his tuberiding at Sunset Beach and Maalaea, and for his flamboyant 'hood ornament' stance at Pipeline." Defs.' Ex. A at D00498. He is further described as "one of the most dedicated surfers on the North Shore" and was featured in surf movies Cosmic Children (1970), A Sea for Yourself (1973) and Super Session (1975). *Id.* In short, Plaintiff is exalted as a "living legend on the North Shore . . . ." Defs.' Ex. D at D00522. Plaintiff is clearly a well-known and celebrated figure within the surfing community.

3. Access to Channels of Communication

[10, 11] Plaintiff argues that despite any previous notoriety, he is without access to the media and thus should not be considered a public figure. As *Gertz* explained,

> The first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation . . . . [P]ublic figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

418 U.S. at 344, 94 S.Ct. 2997; *see also Butts,* 388 U.S. at 154–55, 87 S.Ct. 1975 (1967) ("The courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call on the court for protection in light of his prior activities and means of self-defense . . . . And both Butts [a well-known football coach and the athletic director at the University of Georgia who was accused in an article of rigging a football game against the University of Alabama] and Walker [a citizen leader of riots protesting desegregation at the University of Mississippi accused in an article of instigating violence against federal marshals] commanded a substantial amount of independent public interest at the time of the publications . . . . [B]oth commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements.").

[12] In the case at bar, the sheer volume of published materials quoting or referencing Plaintiff indicate that the surfing media was, and continues to be, interested in him, along with his life story. Although the record on this matter is thin, it appears to the court that if Plaintiff wanted to rebut Johnson's article—whether through an interview, profile, or opinion piece—the surfing media would be receptive. Plaintiff thus had "the regular and continuing access to the media that is one

of the accouterments of having become a public figure." *Hutchinson v. Proxmire,* 443 U.S. 111, 136, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). Plaintiff, unlike a private individual, has an effective opportunity for rebuttal and could counter criticism, correct falsehoods, and set right any fallacies contained in the article.

4. The Assumed Risk of Publicity

[13, 14] Plaintiff next argues that he is a private person, such that he never assumed the risk of publicity. The court thus considers whether, and to what extent, Plaintiff purposefully assumed the risk of publicity.[3] As the Supreme Court explained in a limited purpose public figure case, "the simple fact that ... events attract[ ] media attention ... is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved or associated with a matter that attracts public attention." *Wolston,* 443 U.S. at 167, 99 S.Ct. 2701; *see also Time, Inc. v. Firestone,* 424 U.S. 448, 454, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) (finding that "even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public ... [plaintiff did not] freely choose to publicize issues as to the propriety of her married life" and was thus a private figure); *Gertz,* 418 U.S. at 352, 94 S.Ct. 2997 ("We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.").

[15] Plaintiff contends that he is an intensely private person who, unlike professional athletes, did not enter professional surfing competitions and did not seek lucrative endorsements. However, even assuming the truth of Plaintiff's contentions, which the court must do under Fed. R.Civ.P. 56, Plaintiff's argument fails if the court determines that he "invited attention and comment" through either his position or his conduct. As *Gertz*'s references to "fame or notoriety" make clear, both Plaintiff's surfing prowess and/or his misdeeds can catapult him to public figure status. Such is the case here: Plaintiff assumed a role or position of special prominence and notoriety within the surfing community by tackling exceptionally dangerous and difficult waves (and, according to press reports, causing a certain degree of mischief). *Cf. Butts,* 388 U.S. at 155, 87 S.Ct. 1975 (noting that one of the plaintiffs, a well-known football coach and athletic director, was a limited public figure by "position alone"); *Chuy v. Philadelphia Eagles Football Club,* 431 F.Supp. 254 (E.D.Pa. 1977), *aff'd* 595 F.2d 1265 (3d Cir.1979) (en banc) ("Where a person has, however, chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community,' even if he has no ideological thesis to promulgate, he invites general public discussion."). Moreover, the court observes that Plaintiff has not shunned or shied from the spotlight. Indeed, over time, Plaintiff granted several interviews, has been photographed on numerous occasions, has appeared in surfing movies and

3. "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Gertz,* 418 U.S. at 345, 94 S.Ct. 2997.

documentaries, and has publicly boasted of his own surfing skills and status as one of the preeminent surfers of particular shore breaks. *See* Defs.' Exs. A, C, E, L, M; Pl's. Exs. 31–35, 37. Plaintiff has also appeared in high-profile surfing events which were filmed and screened for the public. *See* Pezman Decl. ¶ 7. This, therefore, is not a case where a particularly gifted hobbyist consistently objected to, and tried to protect himself from, the public eye.

Because Plaintiff "invited attention and comment," by choosing to grant interviews, appear in movies, and generally act out on the public stage, *The Surfer's Journal* was "entitled to act on the assumption that [Plaintiff had] . . . voluntarily exposed [himself] to increased risk of injury from defamatory falsehood[.]" *Gertz*, 418 U.S. at 345, 94 S.Ct. 2997.[4]

5. The Passage of Time

Finally, Plaintiff argues that even if he were a public figure during his surfing heyday, he was a private individual by the time the allegedly defamatory article was published. The Ninth Circuit declined to address the question of whether the passage of time diminishes or nullifies one's limited purpose public figure status, noting that

> The Supreme Court has specifically declined to address whether an individual's status as a public figure can change over time. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166 n. 7, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). Few circuits have addressed this issue, and the Ninth Circuit is not among them. However, it appears that every court of appeals that has specifically decided this question has concluded that the passage of time does not alter an individual's status as a limited purpose public figure. *See Street v. Nat'l. Broad. Co.*, 645 F.2d 1227 (6th Cir.1981), *cert. dismissed*, 454 U.S. 1095, 102 S.Ct. 667, 70 L.Ed.2d 636 (1981); *see also Contemporary Mission v. New York Times Co.*, 842 F.2d 612 (2d Cir.1988), *cert. denied*, 488 U.S. 856, 109 S.Ct. 145, 102 L.Ed.2d 117 (1988); *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427, 431 (D.C.Cir.1978), *rev'd on other grounds*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238 (5th Cir.1980), *cert. denied*, 452 U.S. 962, 101 S.Ct. 3112, 69 L.Ed.2d 973 (1981); *Time, Inc. v. Johnston*, 448 F.2d 378, 381 (4th Cir.1971).

Partington v. Bugliosi, 56 F.3d 1147, 1152 n. 8 (9th Cir.1995); *see also Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1269 (7th Cir.1996). This majority view ap-

4. Plaintiff correctly notes that Defendants cannot transform Plaintiff from a talented surfer to a public figure through their own publications and to suit their own purposes. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) (''[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.''); *Kroll Assoc.*, 833 F.Supp. at 807 (Plaintiff was not a public figure where ''plaintiff merely accepted employment as a confidential investigator of corruption within the city bus system. To the extent there was a controversy over the investigation or the propriety of the fees, defendants created the controversy by their own conduct in refusing to pay the fees and in conducting their political battle in the press.''). The court rejects, however, Plaintiff's arguments that Defendants' prior publications concerning Plaintiff cannot be used to establish public figure status. Plaintiff has failed to demonstrate any nexus between prior publications and the alleged defamatory article. It is only the August/September 2006 issue of *The Surfer's Journal* that the court cannot consider. In any event, even accepting Plaintiff's argument, numerous other independent surfing publications have also covered Plaintiff. *See* Pezman Decl. ¶¶ 3–6; Defs.' Exs. A–M, Q, W–AA.

pears to be analytically sound. From a constitutional standpoint, "[i]t is no less important to allow the historian the same leeway when he writes the second or third draft" of history than when he writes the first draft. *Street,* 645 F.2d at 1235.

This court, however, need not determine whether the passage of time alters Plaintiff's status as a general purpose public figure within a specific and particular community. Recent publications from other surfing journals demonstrate that Plaintiff had not receded from the surfing public's view: He had been covered in *Surfer* magazine as recently as 2005, approximately a year before the article at issue in this case. *See* Defs.' Ex. G. Indeed, the tales of Plaintiff's surfing skills and his notoriety have been passed down to the next generation of surfers with one author observing, "I knew Owl Chapman before I met him." Defs.' Ex. E at D00527.

Given the preceding factors, the court finds as a matter of law that Plaintiff is a general public figure in the limited context of the surfing community. *Accord, Cepeda v. Cowles Magazines & Broad., Inc.,* 392 F.2d 417, 419 (9th Cir.1968) (" 'Public figures' are those persons who, though not public officials, are 'involved in issues in which the public has a justified and important interest.' Such figures are, of course, numerous and include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he has done. Orlando Cepeda, the principal character in the instant suit, was and is a 'public figure' . . . [given his] fame as an extraordinary baseball player."); *see also Brewer,* 626 F.2d at 1254–55 (finding that a former football player was a public figure not because he was involved in a public controversy, but due to his fame); *Chuy,* 595 F.2d at 1280 ("Professional athletes, at least to their playing careers, generally assume a position of public prominence. . . . The article, which discussed [plaintiff's] physical condition, his contractual dispute, and his retirement, clearly concerned a man who was a public figure, at least with respect to his ability to play football."); *Barry,* 584 F.Supp. at 1120 n. 13 (N.D.Cal.1984) ("[T]here may be persons whose fame is pervasive in a particular field or profession and who are public figures with respect to that field, without regard to whether there is a particular existing controversy."). *Cf. Butts,* 388 U.S. at 154–55, 87 S.Ct. 1975 (finding college athletic director and former coach to be a limited purpose public figure); *Vandenburg v. Newsweek, Inc.,* 507 F.2d 1024, 1025 n. 1 (5th Cir.1975) (finding a track coach to be a public figure "for a limited range of issues"); *Time, Inc. v. Johnston,* 448 F.2d 378, 380 (4th Cir.1971) (finding that a basketball player was a limited purpose public figure so far as an article concerned his public performance); *Celle v. Filipino Reporter Enters., Inc.,* 209 F.3d 163, 177 (2d Cir.2000) (finding defendant, a "well known radio commentator," was a public figure within the city's Filipino–American community); *Grayson v. Curtis Publ'g Co.,* 72 Wash.2d 999, 436 P.2d 756, 762 (1968) (finding that a basketball coach was a limited purpose public figure); *Brooks v. Paige,* 773 P.2d 1098, 1101 (Colo.Ct.App.1988) (holding that a soccer player was a public figure within the local sports community); *Gomez v. Murdoch,* 193 N.J.Super. 595, 475 A.2d 622, 625 (1984) (finding that a professional horse jockey was a public figure for a limited range of issues).

[16] Because Plaintiff is a public figure, he will be required to prove by clear and convincing evidence that Defendants acted with "actual malice—that is, with knowledge that the statement was false or with reckless disregard of its truth." *New York Times,* 376 U.S. at 279–80, 84 S.Ct. 710. The "actual malice" standard applies to both Plaintiff's defamation and defama-

tion-based claims.[5] *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1187 (9th Cir.2001); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 n. 4 (9th Cir.1988).

B. Plaintiff's Claim for Misappropriation/Unauthorized Use of Name and Photograph in an Unfavorable Publication Is Not Viable

[17, 18] In his third cause of action, Plaintiff alleges that Defendants misappropriated and used his name and likeness in an unfavorable publication without his authorization. To make out a common law prima facie claim for misappropriation/unauthorized use, Plaintiff must show (1) that Defendants used his photograph or name; (2) for the Defendants' commercial advantage; (3) without Plaintiff's consent; and (4) thereby injured Plaintiff. *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F.Supp.2d 1146, 1182 (C.D.Cal.2002). Liability under this legal theory is generally limited to unauthorized use in connection with the promotion or advertisement of a product or service and not, as is the case here, for use in a magazine story. This is true even if the article was arguably motivated by *The Surfer's Journal's* desire for profits or tangentially results in increased income. *See* Restatement (Second) of Torts § 652C, cmt. d (1977) ("It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes."); [6] *Daly v. Viacom, Inc.*, 238 F.Supp.2d 1118, 1122–23 (N.D.Cal.2002) (finding that the First Amendment protected use of the plaintiff's likeness in advertisements for a television show because the television show was an expressive work and the advertisements were an adjunct of the protected work and promoted the protected expression); *see also Guglielmi v. Spelling–Goldberg Prods.*, 25 Cal.3d 860, 867, 160 Cal.Rptr. 352, 603 P.2d 454 (Cal.1979) ("Entertainment is entitled to the same constitutional protection as the exposition of ideas.").

[19] More important, Defendants' publication of "newsworthy" matters which are "in the public interest," is constitutionally privileged. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir.2001) (" '[N]o cause of action will lie for the

5. Tort claims which are found to be artfully pled defamation claims will be analyzed under the applicable defamation framework and will be disallowed where the defamation claims themselves are invalid as a matter of law. *See Dworkin v. Hustler Magazine,* 867 F.2d 1188, 1193 n. 2 (9th Cir.1989) (noting that "[t]he district court ... properly granted summary judgment on Dworkin's emotional distress claims.... The district court reasoned, 'whatever the label, Dworkin cannot maintain a separate cause of action for mental and emotional distress where the gravamen is defamation.' *Dworkin,* 668 F.Supp. at 1420. As we recently noted, 'an emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action.' *Leidholdt,* 860 F.2d at 893 n. 4.").

6. In considering various invasion of privacy claims, Hawaii courts have referred to the Restatement (Second) of Torts §§ 652A–E (1977). *See Mehau v. Reed,* 76 Hawaii 101, 111, 869 P.2d 1320, 1330 (1994); *State of Hawaii Org. of Police Officers v. Soc'y of Prof'l Journalists–Univ. of Hawaii Chapter,* 83 Hawaii 378, 398, 927 P.2d 386, 406 (1996); *Chung v. McCabe Hamilton & Renny Co., Ltd.,* 109 Hawaii 520, 534, 128 P.3d 833, 847 (2006).

publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (citations omitted)); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128–29 (9th Cir.1975) ("The privilege to publicize newsworthy matters is included in the definition of the tort set out in Restatement (Second) of Torts § 652D (Tentative Draft No. 21, 1975). Liability may be imposed for an invasion of privacy only if 'the matter publicized is a kind which ... is not of legitimate concern to the public.' While the Restatement does not so emphasize, we are satisfied that this provision is one of constitutional dimension delimiting the scope of tort law and that the extent of the privilege thus is controlled by federal rather than state law.").

[20, 21] Newsworthiness is a

> line ... to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Virgil, 527 F.2d at 1129. The First Amendment newsworthiness defense "extends 'to almost all reporting of recent events,' as well as to publications about 'people who, by their accomplishments, mode of living, professional standard or calling, create a legitimate and widespread attention to their activities.' " *Downing,* 265 F.3d at 1001 (citations omitted).

[22] Defendants argue that surfing is newsworthy and a matter of public interest under the reasoning set forth in *Dora v. Frontline Video,* 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790, 792 (1993), in which the court found that a documentary chronicling the events and personalities of Malibu's early days of surfing was protected by the First Amendment. That court observed that

> surfing is more than passing interest to some. It has created a lifestyle that influences speech, behavior, dress, and entertainment, among other things. A phenomenon of such scope has an economic impact, because it affects purchases, travel, and the housing market. Surfing has also had a significant influence on the popular culture, and in that way touches many people. It would be difficult to conclude that a surfing documentary does not fall within the category of public affairs.

Id. at 794–95. The court thus found that the documentary's producers were not required to secure the plaintiff's consent prior to using his name, likeness, or voice. *Id.* at 793–94; *see also Downing,* 265 F.3d at 1002 (observing that "surfing and surf culture" is "a matter of public interest").

The court finds persuasive *Dora*'s teachings that journalism explaining, profiling, or examining a social subculture, such as surfing, is valuable and relevant because it serves as a type of anthropological reflection on modern society. The court notes, however, that the publication at issue in the case at bar does not address surfing in a generalized or historical sense, but instead focuses on the personality and behavior of one particular individual. Although the newsworthiness of such a piece may be suspect, Plaintiff is an iconic figure in the surfing world and his place in surfing history is secure. Johnson's tale of his interactions with Plaintiff—including Plaintiff's quirky mannerisms, quips, and colorful history—sheds light on one of surfing's more intriguing personalities and, by extension, on the sport and culture itself. The August/September 2006 volume of *The Surfer's Journal* captures a sliver of the surfing subculture, fleshes out our impression of a legend of the sport, illuminates the difficulties that may arise when doing business in the surfing community, and provides insight into the fast-

growing and highly profitable board shaping market. The published article, photographs, and liner notes are newsworthy and relevant. The court GRANTS Defendants' Motion for Partial Summary Judgment as to Plaintiff's claim for misappropriation/unauthorized use.

C. Plaintiff Cannot Make Out a Claim for Invasion of Privacy

In his sixth cause of action, Plaintiff alleges that Defendants invaded his privacy. The court construes this claim as an allegation of public disclosure of private facts. To make out a prima facie claim of public disclosure of private facts, Plaintiff must show (1) public disclosure of facts regarding Plaintiff; (2) that the facts disclosed were private facts; (3) that the disclosure is highly offensive and objectionable to a reasonable person; and (4) the facts disclosed are not of legitimate concern to the public. *See* Restatement (Second) of Torts § 652D (1977).

[23] Facts concerning Plaintiff's drug use and drinking are not private because they were previously disclosed in other publications. *See, e.g.,* Defs.' Ex. D at D00523 ("Owl will be really crazed, smoke a big joint, and [surf a huge wave]."); Defs.' Ex. F at D00534–36 (referring to Plaintiff's drug use); Defs.' Ex. K at D00586 (describing Plaintiff's escapades with a fellow surfer in which the two went on a road trip involving drugs, stolen license plates, and an arrest). Because these facts were published and disseminated within the surfing community by other sources, they were part of the public or historical record. Defendants cannot be held liable under an invasion of privacy theory for publishing previously circulated facts regarding Plaintiff's drug use and drinking.[7]

[24] The next question is whether the publication of derisive commentary regarding Plaintiff's custom board shaping and business transactions constitutes the public disclosure of private facts. The court finds that it is not. First, the court notes that Plaintiff's board shaping business and his interactions with Johnson do not appear to have been private facts: Plaintiff created a business and placed his products into the stream of commerce. An ordinary merchant does not have an expectation of privacy regarding his sales and business transactions with customers. Moreover, the content of Johnson's article is not of a nature that an ordinary and reasonable person would find objectionable—although being profiled as tardy and unresponsive might sting, it is not highly offensive and objectionable to a reasonable person. Finally, as discussed previously, the court finds that Johnson's article addresses a legitimate and newsworthy topic of public interest. The court thus finds that Plaintiff has failed to set forth facts sufficient to make out an element of his prima facie privacy claim and that Defendants' publication was privileged. *See, e.g., Shulman v. Group W Prods., Inc.,* 18 Cal.4th 200, 74 Cal.Rptr.2d 843, 955 P.2d 469, 479 (Cal. 1998) ("Although we speak of the lack of newsworthiness as an element of the private facts tort, newsworthiness is at the same time a constitutional defense to, or privilege against, liability for publication of truthful information."). The court GRANTS the Defendants' Motion for Par-

7. Plaintiff claims that Defendants' publications characterize him as a criminal. To the extent that such characterizations rest on his drug use, Plaintiff's claim is rejected for the same reasons as previously discussed. However, Plaintiff also attempts to argue that he is impliedly characterized as a criminal through Defendants' reference to William Burroughs in the title of the article. This argument is so far-fetched and highly attenuated that it lacks any merit whatsoever.

tial Summary Judgment as to Plaintiff's invasion of privacy claim.

D. The Court Denies Defendants' Motion for Summary Judgment as to Plaintiff's False Light Claim

Defendants argue that the Hawaii courts have not yet recognized a false light cause of action and submit that Plaintiff's claim is invalid as a matter of law. The court observes that the Hawaii Supreme Court has approvingly cited the Restatement (Second) of Torts § 652 (1977) which recognizes a false light claim. *See Chung v. McCabe Hamilton & Renny Co., Ltd.*, 109 Hawaii 520, 534–35, 128 P.3d 833, 847–48 (2006) ("In order to establish a claim for false light invasion of privacy, the plaintiff must show that defendant had 'knowledge of . . . or reckless disregard as to the falsity of the publicized matter and the false light in which [the plaintiff] would be placed[,]' Restatement § 652E, which would be 'highly offensive to a reasonable person[.]' *Id.*"); *Mehau v. Reed*, 76 Hawaii 101, 111, 869 P.2d 1320, 1330 (1994) ("[T]he Restatement (Second) of Torts §§ 652A–E (1977), recognizes a tort of invasion of privacy. The Restatement categorizes the tort into four types: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) false light. 'As it has developed in the courts, the invasion of the right to privacy has been a complex of four distinct wrongs.' ") (*citing* Restatement (Second) of Torts § 652A cmt. b (1977)). However, as was discussed during oral argument, the court declines to consider this issue given the lack of complete briefing of both parties. The court DENIES Defendants' Motion for Partial Summary Judgment as to Plaintiff's false light claim without prejudice.

V. *CONCLUSION*

The court GRANTS Defendants' Motion for Partial Summary Judgment as to the issue of whether Plaintiff's defamation and defamation-based claims are governed by the actual malice standard. The court also GRANTS Defendants' Motion for Partial Summary Judgment as to Plaintiff's claims for misappropriation/unauthorized use and invasion of privacy. The court DENIES Defendants' Motion for Partial Summary Judgment as to Plaintiff's false light claim.

IT IS SO ORDERED.

Tony Shomar LEWIS, Petitioner,

v.

Charles DANIELS, Warden, Federal Correctional Institution, Sheridan, Oregon, Respondent.

Civil No. 07–836–HA.

United States District Court,
D. Oregon.

Dec. 6, 2007.

Background: Federal prison inmate petitioned for writ of habeas corpus, alleging that Bureau of Prisons (BOP) had improperly declared him ineligible for sentence reduction based on completion of substance abuse treatment program.

Holding: The District Court, Haggerty, Chief Judge, held that prior conviction for being felon in possession of firearm did not disqualify inmate for discretionary sentence reduction.

Petition granted.

EXHIBIT "3"

New York Official Reports

165 Misc.2d 465, 627 N.Y.S.2d 894

Lee S. Covino, Plaintiff,
v.
Raymond E. Hagemann, Defendant.

Supreme Court, Richmond County,
13343/94, 3721
April 21, 1995

CITE TITLE AS: Covino v Hagemann

HEADNOTES

Libel and Slander
Opinions
Accusation That Public Official is "Racially Insensitive"

(1) Statements made by defendant, an official in the office of the Staten Island Borough President, to a newspaper and in a note to the Borough President characterizing plaintiff, a fellow official, as "racially insensitive", constitute nonactionable expressions of opinion under the applicable three-pronged test for determining the legal issue of whether a particular statement is one of fact or one of opinion. The challenged words in this case have no meaning which is readily understood and are also incapable of being objectively proven true or false. In addition, nothing under the circumstances signaled to the reader or listener that what was being read or heard was fact, not opinion, especially in light of the "broader social context" of such statements. Furthermore, the threat contained in defendant's note to file a complaint against plaintiff with two governmental agencies does not charge plaintiff with the commission of a crime so as to take defendant's statements out of the constitutional protections afforded opinions. Similarly, defendant's accusations are constitutionally protected opinions even if they tend to harm plaintiffs professional or business reputation. Accordingly, defendant is granted summary judgment dismissing the complaint.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Libel and Slander, §§ 105, 161-164.

Carmody-Wait 2d, Complaints in Particular Actions § 29:444.

NY Jur 2d, Defamation and Privacy, §§ 13-15.

ANNOTATION REFERENCES

See ALR Index under Libel and Slander.

APPEARANCES OF COUNSEL

Richard D. Emery, P. C., New York City, for defendant. *Edward L. Larsen,* Staten Island, for plaintiff.

OPINION OF THE COURT

Louis Sangiorgio, J.

Before the court is a motion to dismiss the three causes ofaction ***466** asserted in the complaint pursuant to CPLR 3211 (a) (7), and to further dismiss plaintiff's claim for attorneys' fees.

The salient facts are not in dispute. In July of 1994, both plaintiff and defendant were officials in the office of the Staten Island Borough President. Plaintiff was (and remains) the Director of Contract Oversight, and defendant was Chief Investigator of the office's Investigations Unit. A disagreement arose between the parties over the handling of a matter concerning one Ed Watkins, who is not a party to this action. Mr. Watkins, an African-American, is a basketball coach who runs the Rising Stars Athletic Program, and he negotiated with the Borough President's office for public funding for this program. When anticipated funds were not immediately forthcoming, Mr. Watkins arrived at the Borough President's office on or about July 13, 1994 to discuss the matter with someone responsible for the funding. At that time, plaintiff Lee Covino was not in the building, having business elsewhere. Mr. Watkins was escorted out of Borough Hall by a police officer who would not permit him to remain in the waiting room of Borough President Guy Molinari.

Defendant then authorized and dispatched a four-page note to plaintiff, apparently blaming him for this incident.[1] It demanded that plaintiff apologize to Mr. Watkins "for exhibiting unprofessional, racially insensitive attitudes toward him (Watkins) in your official capacity here at Borough Hall".

Plaintiff then commenced this action, alleging defamation.

The first cause of action asserting libel alleges that defendant composed, published, and distributed the note in question to Borough President Guy Molinari in which plaintiff is characterized as "racially insensitive", and charges that this is false, scandalous, malicious, defamatory, and libelous. The complaint also asserts that this note, directly and indirectly, and by innuendo, charges plaintiff "with being prejudiced and discriminatory against racial minorities".

The second cause of action, sounding in slander, alleges that defendant asserted the "racially insensitive" statements to employees of the Staten Island Advance, a daily newspaper.

The third cause of action, also sounding in slander, alleges that defendant repeated the "racially insensitive" statements to employees of the New York Daily News. ***467**

Only false assertions of fact may be the subject of an action for defamation; an expression of opinion is not actionable as a defamation, no matter how offensive, vituperative, or unreasonable it may be *(Weiner v Doubleday & Co.,* 74 NY2d 586, *cert denied* 495 US 930) since it cannot be subjected to the test of truth or falsity *(McManus v Doubleday & Co.,* 513 F Supp 1383, 1385). The proper inquiry, as to whether a particular statement is one of fact or one of opinion, is whether the reasonable reader could have concluded that the statements were conveying facts about, the plaintiff *(Gross v New York Times Co.,* 82 NY2d 146, 152, citing *600 W. 115th St. Corp. v Von Gutfeld,* 80 NY2d 130, 139). This inquiry entails an examination of the challenged statement "with a view toward (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to 'signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact' " *(Gross v New York Times Co., supra,* at 152-153, citing *Steinhilber v Alphonse,* 68 NY2d 283, 292).

Accusations of racism and prejudice and the like have been found in other jurisdictions to constitute nonactionable expressions of opinion.

In *Stevens v Tillman* (855 F2d 394, 400, *cert denied* 489 US 1065), a school principal brought an action in defamation against the president of the parent-teacher association. Part of the statements made by defendant found to constitute protected opinions were:

"We found in our investigation that our principal must be removed ... Our principal is very insensitive to the needs of our community, which happens to be totally black. She made very racist statements during the boycott. She is a racist. She must go. We cannot have racist people around our children ... She made numbers of very racist statements, so many that I would use all of my time to explain to you some of the statements that were made.

"Our children are afraid of her. I think discipline is fine. The child must respect the principal; he or she must respect the teachers. But I mean there is no sense--and our children feel as though they are on a plantation. And there is no reason in 1981 why we should have a principal making such ***468** racist statements. The teachers of the school have brought to most of our attention that it has been run as a dictatorship, and we do not need a dictatorship in our children's school ... They're being degraded and put down, and it's all because of a dictatorship with Miss Stevens.

"We have exposed the Mollison pollution ... Since 1975, the quality of education has gone down at Mollison School and Miss Stevens has sat and watched it. She did nothing about it ... Miss Stevens is insensitive to the children, the parents and the community. We can no longer allow her to destroy our children's minds."

The Seventh Circuit affirmed the District Court's finding that such statements are necessarily those of an opinion. It rejected plaintiff's claim that a statement of this nature is libel per se, and further rejected plaintiff's claim that it was actionable because it marked her as unfit to be a principal. The court in *Stevens (supra)* rationalized the usage of such terms in a realistic approach to contemporary political discourse:

"Accusations of 'racism' no longer are 'obviously and naturally harmful'. The word has been watered down by overuse, becoming common coin in political discourse. Tillman called Stevens a racist; Stevens issued a press release calling Tillman a 'racist' and her supporters 'bigots'. Formerly a 'racist' was a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races. Stevens, the principal of a largely-black school in a large city, obviously does not believe that blacks should be enslaved or that Jim Crow should come to

Illinois; no one would have inferred these things from the accusation. Politicians sometimes use the term much more loosely, as referring to anyone (not of the speaker's race) who opposes the speaker's political goals--on the 'rationale' that the speaker espouses only what is good for the jurisdiction (or the audience), and since one's opponents have no cause to oppose what is beneficial, their opposition must be based on race ... When Stevens called Tillman a 'racist', Stevens was accusing Tillman of playing racial politics in this way rather than of believing in segregation or racial superiority. That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning.

"So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to ***469** convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back (as Stevens did). It is not actionable unless it implies the existence of undisclosed, defamatory facts, and Stevens has not relied on any such implication." *(Supra,* at 402.)

In *Kimura v Superior Ct.* (230 Cal App 3d 1235, 281 Cal Rptr 691), a letter was published protesting a decision by University of California Officials, and plaintiff in particular, to cancel an event known as Filipino College Night because it was scheduled for December 7, 1988, the anniversary of the attack on Pearl Harbor. The author of the letter, who was of Japanese descent, accused plaintiff's actions of reinforcing "the view that [the University] is extremely racist, a growing campus view held by people of color and by enlightened faculty, staff, students, and campus administrators". (230 Cal App 3d, at 1240, 281 Cal Rptr, at 693, *supra.)* It went on to state that plaintiff's decision demonstrates an "incredible level of bigotry" and that plaintiff was a "perfect example ... of what enlightened people of all ethnic and cultural backgrounds define as 'racist' and 'bigoted' ". (230 Cal App 3d, at 1250, 281 Cal Rptr, at 701, *supra.)*

After reviewing the case law, the Sixth District Court of Appeal of California concluded that matters of race are a matter of public concern, and the use of the epithet " 'racist' does not have the tone of a reasoned accusation, but rather is more like the emotional rhetoric characteristic of debate in this area", and cited *Stevens v Tillman (supra)* in support. (230 Cal App 3d, at 1246, 281 Cal Rptr, at 698, *supra.)*

In accord with this rationale is *Pritchard v Herald Co.* (120 AD2d 956), in which a description of plaintiff as "controversial" and a "black activist" was not actionable since, "when judged by the temper of the times and the current of contemporary public opinion [it] does not arouse in the mind of the average person in the community an evil or unsavory opinion nor expose plaintiff to public hatred, contempt, or aversion".[2] ***470** So too in *Raible v Newsweek, Inc.* (341 F Supp 804), in which plaintiff's picture was used in an article entitled "The Troubled American--A Special Report on the White Majority" and was who described, among other things, as "racially prejudiced". The court found such description to be merely common "name calling", so prevalent in today's society *(see, Stevens v Tillman, supra),* and by inference to be a protected expression of opinion.

Application of the three-prong test enunciated in *Gross v New York Times Co. (supra)* leads to the same conclusion. "Racially insensitive" and "disrespectful racial insensitivity" have no meaning which is readily understood. As defendant points out, a certain set of facts might be viewed as racially insensitive by one group of people who share the same political or social views, but another group might view it as noncontroversial and socially acceptable. The court is not in a position to give its imprimatur to one view or the other; thus the phraseology used is one of opinion. Further, the statements are not capable of being proven true or false *(see, O'Loughlin v Patrolmen's Benevolent Assn.,* 178 AD2d 117; *Park v Capital Cities Communications,* 181 AD2d 192, 196, *appeal dismissed* 80 NY2d 1022, *lv denied* 81 NY2d 879). In *O'Loughlin,* remarks that police officers such as plaintiff who refused to contribute to a memorial for officers killed in the line of duty were "a disgrace" and "have no feelings" were held to be indefinite and ambiguous opinions and which cannot be characterized as true or false. Similarly, in the *Park* case, an ophthalmologist was described in a news report as a "rotten apple", and it was held that this reference was "vague, ambiguous, indefinite, and incapable of being objectively characterized as true or false". (181 AD2d, at 196, *supra.)* How does one empirically measure "racial sensitivities"? It is a concept for which reasonable people might differ. Thirdly, nothing under the circumstances signalled to the reader that what was being read or heard was fact, not opinion, especially

in light of the broader social context of such statements described in *Stevens v Tillman (supra)* hereinabove.

Plaintiff argues that the Court of Appeals standard set forthin ***471** *Immuno AG. v Moor-Jankowski* (77 NY2d 235, *cert denied* 500 US 954), on remand from the United States Supreme Court (497 US 1021), supports his position. Plaintiff points to language in *Immuno,* which predates *Gross (supra),* that suggests that the focus is on the context of the whole communication, its tone, and apparent purpose, and further points to language stating that the key inquiry is whether the challenged statement would reasonably appear to make statements of objective fact. Plaintiff, of course, takes the position that the apparent purpose of the note was to cast him in a negative light and that a reasonable person would find these to be statements of fact. However, for the reasons already set forth, such statements cannot be verified or confirmed, except upon reasonable differences of opinion. Further, the rather subjective standard of *Immuno* was later modified and refined in *Gross,* which set forth a more objective three-prong test which applies in the case at bar.

In certain circumstances, a statement of opinion may be actionable where it implies that it is based on facts unknown to the reader or listener, making it a "mixed opinion". (43A NY Jur 2d, Defamation and Privacy, § 14.) The actionability of such a statement is not based on the false opinion itself, but the implication that the speaker knows certain facts unknown to the reader, which support the opinion *(id.).* It is this exception plaintiff claims is applicable, citing certain portions of the note which state that "this incident follows several other similar occurrences that I am aware of". However, it appears that Borough President Guy Molinari, the only person identified in the complaint to whom the note was published and distributed, knew about the incidents of alleged racial insensitivity at least two days prior to receiving the note when he ordered an internal investigation thereof. Also, plaintiff himself dispatched a copy of the note to Mr. Molinari on the same day that the note was written, together with a cover note indicating that "due to these allegations, I am requesting to withdraw from all aspects of the Rising Stars program". (Exhibit A, affirmation of Andrew G. Chelli, Jr., Jan. 23, 1995.) Thus, it cannot be gainsaid that the allegations of instances of racial insensitivity at Borough Hall were unknown to Molinari at the time the note was published *(see, Steinhilber v Alphonse,* 68 NY2d, at 289, *supra; see also, Trustco Bank v Capital Newspaper Div.,* 213 AD2d 940) or that the parties to the communication did not assume such ***472** allegations existed *(see, Rand v New York Times Co.,* 75 AD2d 417, 422).

Plaintiff argues that the note at issue charges him with the commission of a crime, taking it out of the constitutional protections afforded opinions *(Rinaldi v Holt, Rinehart & Winston,* 42 NY2d 369, 382). In furtherance of this position, plaintiff argues that defendant's threat to file a complaint with two governmental agencies constitutes an accusation, whether direct or indirect, of criminal activity. However, the New York City Commission on Human Rights has no criminal jurisdiction, its powers are essentially equitable in nature *(see,* Administrative Code of City of NY, tit 8, ch 1; § 8-109 [2] [c]). The jurisdiction of the State Division of Human Rights is similarly limited (Executive Law art 15; § 297 [4] [c]). Thus, defendant never charged plaintiff with a specific indictable offense or a crime readily apparent from properly pleaded innuendo *(Privitera v Town of Phelps,* 79 AD2d 1, 4-5, *lv dismissed* 53 NY2d 796;[3] *Angel v Levittown Union Free School Dist. No. 5,* 171 AD2d 770, 772 [2d Dept]; *Meyer v Somlo,* 105 AD2d 1007, 1008). In this area, the law distinguishes between serious and relatively minor offenses *(Liberman v Gelstein,* 80 NY2d 429, 435), and there is nothing known in the Penal Law making the conduct for which plaintiff is accused a crime.[4] And assuming arguendo that the words used did imply a crime, it does not necessarily make the remarks actionable statements of fact *(Trustco Bank v Capital Newspaper Div., supra).* Depending on the context, accusations of this nature can be understood as mere nonactionable "rhetorical hyperbole" or a "vigorous epithet". *(Supra.)*

Plaintiff also argues that the statements made tend to injure him in his profession or occupation, similarly taking them out of the constitutional protections afforded opinions. However, in order for such criticisms to cross the borderline between fact and opinions, the accusations must be in terms subject to factual verification *(Trump v Chicago Tribune Co.,* 616 F Supp 1434, 1435) and for the reasons already set forth,the ***473** epithet "racially insensitive" cannot be verified as true or false. Further, the added description of plaintiff's conduct as "unprofessional" does not remove the statements from the constitutional protections afforded them *(see, Amodei v New York State Chiropractic Assn.,* 77 NY2d 890).

The case law is replete with examples of pejorative accusations, otherwise tending to harm one's professional or business reputation, found to have been protected opinions *(see, Weiner v Doubleday & Co.,* 142 AD2d 100, *affd* 74 NY2d 586, *cert denied* 495 US 930 [reference to a psychologist as a "big fat, ugly Jew" was not actionable]; *Parks v Steinbrenner,* 131 AD2d 60 [baseball owner's criticism of an umpire as incompetent and biased not actionable]; *Tufano v Schwartz,* 95 AD2d 852 [2d Dept] [cabinets built and installed by plaintiff were a "total misfit" held not actionable]; *Wecht v PG Publ. Co.,* 353 Pa Super 493, 510 A2d 769 [newspaper cartoons and articles referring to plaintiff, a public official and well-known physician, as "Pittsburgh's leading defendant" held not actionable]; *O'Loughlin v Patrolmen's Benevolent Assn.,* 178 AD2d 117, *supra* [characterizing police officers as a "disgrace" and having "no feelings" held an expression of opinion]; *Miller v Richman,* 184 AD2d 191 [statement that plaintiff was one of the "worst secretaries" in a law firm held a nonactionable statement of opinion]; *Steinhilber v Alphonse,* 68 NY2d 283, *supra* [defendant called plaintiff, a communication worker, a "scab", "a known failure", and lacks "talent, ambition and initiative" found to be protected opinion, however "tasteless" it may have been]; *Hollander v Cayton,* 145 AD2d 605 [2d Dept] [statement that plaintiff, a physician, was immoral, unethical, and had mismanaged cases held nonactionable opinion]; *DRT Constr. Co. v Lenkei,* 176 AD2d 1229, *lv denied* 79 NY2d 753 [developers were called "profit hungry land abusers"; held to be a statement of opinion and rhetorical hyperbole]; *DePuy v St. John Fisher Coll.,* 129 AD2d 972, *lv denied* 70 NY2d 602, [referenced to a teacher as a clown held mere name calling]; *Chaplin v Amordian Press,* 128 AD2d 81, 83 [record producer called "an unbelievably unscrupulous character", held to be an opinion]; *Ward v Zelikovsky,* 136 NJ 516, 643 A2d 972 [defendant made a public statement that plaintiff "hates Jews"; held not libelous]).

Plaintiff takes the position that defendant's statements must be taken as fact, not as opinion, because "[d]efendant [made] these statements as if they were fact" (plaintiff's mem in opposition, at 10). However, this is not the applicable ***474** standard. The standard is not the manner in which the speaker or writer presented the statements, but rather, how they are perceived from the perspective of the reasonable reader (or listener); it is whether such reasonable reader or listener could have concluded that the note or statements were conveying *facts* about the plaintiff *(Gross v New York Times Co., supra,* at 152; *see also, Janklow v Newsweek, Inc.,* 759 F2d 644, 651, *on reh* 788 F2d 1300, *cert denied* 479 US 883; *Mr. Chow of N. Y. v Ste. Jour Azur,* 759 F2d 219, 224). Such an inquiry is to be made by the court *(Gross v New York Times Co., supra,* at 153).

The question of whether or not a particular statement constitutes fact or opinion is clearly a question of law, not fact *(Rinaldi v Holt, Rinehart & Winston,* 42 NY2d, *supra,* at 381; *Silsdorf v Levine,* 59 NY2d 8, *cert denied* 464 US 831; *Lapar v Morris,* 119 AD2d 635 [2d Dept]). Thus, the question at bar upon defendant's motion to dismiss pursuant to CPLR 3211 (a) (7) is a legal one, not a factual one *(see, Matter of New York State AFL-CIO v Stimmel,* 105 Misc 2d 545, 546), and the facts alleged in the complaint are considered as if they are true *(Marone v Marone,* 50 NY2d 481).

Finally, as to the demand for attorney's fees, it is well settled that they are not recoverable in the absence of an agreement, statute, or court rule *(A. G. Ship Maintenance Corp. v Lezak,* 69 NY2d 1, 5).

Accordingly, the motion to dismiss the complaint for failure to state a cause of action is granted. The complaint is hereby dismissed.

APPENDIX 1 "7/15/94 LEE, BECAUSE OF AN UNFORTUNATE INCIDENT THAT OCCURRED EARLIER THIS WEEK AT OUR OFFICE INVOLVING YOU, MR. EDWARD WATKINS, MYSELF AND OTHERS I AM NOW DEMANDING THAT YOU MAKE AN APOLOGY TO MR. WATKINS FOR EXHIBITING INSENSITIVE ATTITUDES TOWARDS HIM IN YOUR OFFICIAL CAPACITY HERE AT BOROUGH HALL. THIS INCIDENT FOLLOWS SEVERAL OTHER SIMILAR *[SIC]* OCCURRENCES THAT I AM AWARE OF AND FORCES ME TO MAKE THIS DEMAND IN THE INTEREST OF PRESERVING GOOD RELATIONS WITH THE BLACK COMMUNITY. IF AN IMMEDIATE APOLOGY IS NOT MADE I WILL BE FORCED TO FILE A FORMAL COMPLAINT WITH THE COMMISSION ON HUMAN RIGHTS

AND THE STATE DIVISION OF HUMAN RIGHTS ON BEHALF OF MR. WATKINS. I WILL REQUEST A FULL, FORMAL INVESTIGATION AND ASK *475 THOSE AGENCIES TO TAKE WHATEVER ACTION IS LEGALLY WARRANTED AGAINST YOU. MY COMPLAINT ALONG WITH MR. WATKINS FORMAL STATEMENT WILL BE PREPARED AND PRESENTED TO THOSE AGENCIES BY MY ATTORNEY, MR. JAMES KELLEY. AGAIN, MY ACTION WILL BE DISCONTINUED ONLY UPON THE ISSUANCE BY *YOU* OF A FORMAL APOLOGY TO MR. WATKINS. SINCERELY, RAY E. HAGEMANN" *476

Footnotes

1 The text of the note is set forth at length at the end of this memorandum as Appendix 1.

2 The Court is aware of the 1964 Second Department decision in *Calore v Powell-Savory Corp.* (21 AD2d 877, 878), in which the allegedly false statements (not specified in the opinion) were found to be susceptible of meaning that the plaintiff, a union president, was guilty of anti-Negro discrimination against its members. It found the statements to be libelous per se, "in view of the temper of the times and the current of contemporary public opinion". Apparently, given the contrary conclusion in *Pritchard (supra),* the temper of the times have changed, as a matter of law.

3 In *Privitera v Town of Phelps (supra),* the complaint was allowed to stand because special damages were pleaded, a fact not present here.

4 The only reference found to illegal conduct on the basis of race is Penal Law § 240.30, aggravated harassment in the second degree, which requires striking, shoving, kicking, or subjecting another person to physical contact, or threatens or attempts to do so, because of one's race or color. Also, damaging premises used for religious purposes, by reason of race or color, is aggravated harassment in the first degree.

EXHIBIT "4"

sponsibility of Nipsco had concurred with Dehner's defective welding in causing the damage and Nipsco had been claimed to be and held liable, Dehner would have been obligated to defend, to indemnify, and to pay. It would be a possible reading of paragraph (5) that the damage was caused by the work done by Dehner notwithstanding the fact that Dehner's negligence (or work) would not have produced the damage but for Nipsco's concurring causal negligence. The question whether such meaning meets the standard of being *unequivocal* is close.

[2] But we think that the Indiana judicial policy of disfavor toward indemnification of the indemnitee from liability for his own negligence requires special scrutiny of the language where indemnitee's liability rests even in part on his own causal, active, negligence.

It seems that the type of situation where courts have usually dealt with this problem is that where the indemnitor who is free from negligence is being asked to pay liability created by the negligence of the indemnitee. That is not the situation here. But the instant case does present elements which may also be at the root of the judicial attitude. The indemnity provision is part of a standard, here a printed form; the potential liabilities assumed if the provision is construed broadly are awesome; and in the nature of things thoughtful exploration by the parties of such possibilities is improbable. Moreover the indemnitee here retained control of the work to a very significant degree.

[3] Obviously paragraph (5) does not say that there is to be indemnification whether or not the particular liability arises out of the negligence of Nipsco.[4] The damage was not incidental to Dehner's work.[5] It does not say that Dehner is to indemnify for liability for injury or damages, arising in any manner whatsoever from the installation of the pipeline. We agree with the district court that paragraph (5) does not evidence a clear intention to provide indemnification for the negligence (or joint negligence) of the indemnitee.

Having so decided, it is unnecessary to review the conclusions of the district court which supplied alternative bases for its decision, *i. e.*, that the indemnity provision did not survive acceptance of the work by Nipsco, or that because Nipsco is a public utility a provision indemnifying it for its own negligence would violate Indiana public policy.

The judgment appealed from is affirmed.

4. See the provision considered in Indemnity Insurance Co. of North America v. Koontz-Wagner Electric Co. (7th Cir., 1953), 233 F.2d 380, 382.

5. Cf. Spurr v. La Salle Construction Company (7th Cir., 1967), 385 F.2d 322, 330.

Norman F. DACEY, Plaintiff-Appellant,

v.

The FLORIDA BAR, INC., et al., Defendants-Appellees.

No. 27018.

United States Court of Appeals
Fifth Circuit.
July 22, 1969.

Action for libel against state Bar. The United States District Court, Southern District of Florida, Ted Cabot, J., dismissed action and plaintiff appealed. The Court of Appeals, Davis, J., held that where integration rule stated that it created Bar, body existing under authority of state Supreme Court, as "an official arm" of court, Bar had become integral part of judicial branch of government of state and the United States District Court was without jurisdiction under its diversity of citizenship jurisdiction to entertain libel suit that was based on Bar journal publication.

Judgment affirmed.

1. Attorney and Client ⇐31
Courts ⇐303(2)

Where integration rule stated that it created Bar, body existing under authority of state Supreme Court, as "an official arm" of court, Bar had become integral part of judicial branch of government of state and the United States District Court was without jurisdiction under its diversity of citizenship jurisdiction to entertain libel suit that was based on Bar journal publication. Fed. Rules Civ.Proc. rules 54(b), 58, 28 U.S.C.A.; 32 F.S.A. Integration Rule of the Florida Bar, art. 1 et seq., art. 1; F.S.A.Const.1885, art. 3, § 27.

2. Courts ⇐305

Even if integrated Bar was suable under state law for libel, Bar as state agency was not "citizen" within meaning of provision under which United States District Court can acquire jurisdiction in cases of diversity of citizenship. 28 U.S.C.A. § 1332.

See publication Words and Phrases for other judicial constructions and definitions.

3. Courts ⇐305

State is not citizen for purposes of provision under which United States District Court can acquire jurisdiction in cases of diversity of citizenship. 28 U.S.C.A. § 1332.

Arthur J. Berk, Courshon & Berk, Miami Beach, Fla., for appellant.

William C. Steel, William B. Killian, Scott, McCarthy, Steel, Hector & Davis, Miami, Fla., for The Florida Bar.

Herbert L. Nadeau, Shutts & Bowen, William M. Hoeveler, Miami, Fla., for other appellees.

Before WISDOM and MORGAN, Circuit Judges, and DAVIS,* Judge of the U. S. Court of Claims.

DAVIS, Judge:

Some time back, plaintiff-appellant Norman F. Dacey wrote a book called "How to Avoid Probate", which has stirred some flapping of wings in the legal aviary. This work was reviewed by Boyd H. Anderson, Jr., in an issue of the The Florida Bar Journal, a monthly publication of defendant-appellee, The Florida Bar (the Bar). Considering himself injured by the book-review, Dacey brought this action in the District Court for libel against Anderson and the Bar. The gravamen of the alleged defamation was that the article said, incorrectly, that plaintiff had been convicted in Connecticut of unauthorized practice of law. Jurisdiction in the court below was rested on diversity of citizenship, 28 U.S.C. § 1332, Dacey being a Connecticut citizen and the defendants said to be citizens of Florida.

The Bar moved to dismiss on the ground that it was an integral component of the State of Florida, which had not consented to be sued, and was therefore immune from liability for defamation. The district court granted this motion and dismissed the complaint as to the Bar with prejudice. The judge directed that final judgment be entered under F. R.Civ.P. Rules 54(b) and 58. Dacey has appealed from that final order.[1]

In 1949, the Supreme Court of Florida granted a petition by the then voluntary Florida State Bar Association (and others) that the bar of that State be integrated. Petition of Florida State Bar Ass'n, Fla., 40 So.2d 902 (1949). The court held that it had inherent power, under the Florida Constitution, to integrate the bar by rule of court, and that neither an express grant in the Constitution nor an act of the legislature was a prerequisite. After this ruling, the court issued its Integration Rule carrying the holding into effect, 32 Florida Statutes Annotated, p. 497. The preamble to this Rule designates the Florida Bar as "a body created by and existing under the authority of this Court" and "as an official arm of this Court". All Florida lawyers are required to maintain membership in the Bar and to pay

* Sitting by designation.

1. The case continued against Anderson, the other defendant.

membership fees and dues to it. The members elect the Bar's governing officials. Among its activities the Bar publishes The Florida Bar Journal; the Integration Rule expressly contemplates that such a periodical be issued.

The best source for discovering the status of the Integrated Bar vis-à-vis the State of Florida lies in the pronouncements of the Supreme Court of Florida.[2] The 1949 opinion squarely placed the power to establish the integrated bar on the court's inherent authority endowed upon it by the Florida Constitution: "Under our form of government it is the right that each department of government has to execute the powers falling naturally within its orbit when not expressly placed or limited by the existence of a similar power in one of the other departments". 40 So.2d at 905. The Integration Rule declares that the Bar is "a body created by and existing under the authority of this [the Supreme] Court" and is "an official arm of this Court". In 1962, the Supreme Court, on petition of the Bar, specifically ruled that "The Florida Bar, a body created by and existing as an agency of the Judicial branch of government under the constitutional powers of this Court, is a legal entity capable of taking and holding title to real property and of mortgaging and conveying the same". In the Matter of The Florida Bar (Case No. 32,132), decided November 21, 1962.[3]

What this adds up to, as we understand it, is a determination by the Florida Supreme Court that the Florida Bar is an integral part of the judicial branch of the government of that state. Plaintiff-appellant insists, however, that this cannot be so. The gist of his argument is that all the Supreme Court did was to transform the pre-existing voluntary Florida State Bar Association into a professional group with compulsory membership, and that the Integrated Bar does not conform to the concept of a state agency as that type of entity is known to the Florida Constitution. In the latter connection, he says that under the former State Constitution, F.S.A. (Art. III, Sec. 27) all state officials had either to be elected or appointed by the governor,[4] but that Bar officers are and have been selected by the Bar's membership; that the Bar undertakes activities alien to a state agency, such as publication of the *Journal*[5] and maintenance of a "clients security fund" to reimburse those suffering loss on account of the dishonesty of their lawyers; and that it would be anomalous for a state agency to obtain its funds from membership dues rather than from public revenues.

The cardinal error in plaintiff's position is the failure to recognize that the Florida Supreme Court did not simply endow the old, voluntary Florida State Bar Association with state-granted powers but established a new entity directly responsible to the court. As we have pointed out, the court's rationale in granting the petition to integrate was that it had inherent authority, under its constitutional powers, to integrate the bar, and its Integration Rule stated it "created" the Bar, a "body" "existing under the authority of this Court", as "an official arm" of the court.[6] The act

2. Florida law determines this status. Louisiana Land & Exploration Co. v. State Mineral Board, 229 F.2d 5, 7 (5 Cir., 1966), cert. denied, 351 U.S. 965, 76 S.Ct. 1029, 100 L.Ed. 1485.

3. The Bar desired to build a permanent headquarters building in Tallahassee.

4. "The Legislature shall provide for the election by the people or appointment by the Governor of all State and County officers not otherwise provided for by this Constitution, and fix by law their duties and compensation."

5. It is worth noting that such undoubted agencies of the Federal Government as the Administrative Office of the United States Courts and the Federal Judicial Center regularly publish news bulletins within their spheres.

6. Article I of the Rule provides: "The name of the *body created* by this Rule shall be THE FLORIDA BAR" (emphasis added).

of creation of a new body or entity was express. There was no direct line of descent from the former non-compulsory professional group.

By the same token, the Florida constitutional provisions, as well as the characteristics of other state agencies, which plaintiff invokes all fail to show that the Bar is something other than an agency of the State. The matters to which plaintiff points relate to agencies of the other branches of the State Government, not to the judicial branch. Under the Florida Constitution, the Supreme Court, as it has held, has inherent power to establish a state institution like the Florida Bar, because bar integration is a "judicial function", and lawyers are not state or county officers[7] but officers of the court "and as such constitute an important part of the judicial system". 40 So.2d at 906, 907. Similarly, the court held that "the doctrine of implied powers necessarily carries with it the power to impose" a membership fee as a means of defraying the expense of the integrated Bar. 40 So.2d at 906–907. A judgment against the Bar would expend itself against funds which are directly devoted to the purposes of "an official arm" of the State Supreme Court—plainly a public purpose.[8]

Plaintiff makes some argument that it would be a violation of equal protection for Florida to make the Bar an agency of the State without according the same status to the medical society and other professional associations. One answer, of course, is that the bar of a state has such a close connection to the judiciary —"the law practice is * * * intimately connected with the exercise of judicial power in the administration of justice", Petition of Florida State Bar Association, *supra*, 40 So.2d at 907—that it is reasonable for Florida to treat it differently from other professions.

[1–3] Since the Florida Bar is an agency of the State of Florida, it follows that the District Court had no jurisdiction of this suit against it. We need not decide whether the Bar, though an agency of Florida, is suable under state law for a tort. Cf. Seaboard Air Line R.R. Co. v. Sarasota-Fruitville Drainage District, 255 F.2d 622 (5 Cir. 1958). Even if that is so, there is no jurisdiction on the ground of diversity of citizenship under 28 U.S.C. § 1332. A state is not a "citizen" for the purposes of that provision (State Highway Commission of Wyoming v. Utah Construction Co., 278 U.S. 194, 199–200, 49 S.Ct. 104, 73 L.Ed. 262 (1929); De Long Corp. v. Oregon State Highway Commission, 343 F.2d 911 (9 Cir. 1965), affirming 233 F. Supp. 7, 10 (D.Ore.1964)), whether or not the state makes itself suable on the particular claim. Krisel v. Duran, 386 F.2d 179, 181 (2 Cir. 1967), cert. denied, 390 U.S. 1042, 88 S.Ct. 1635, 20 L. Ed.2d 303. In that respect, 28 U.S.C. § 1332 differs from the Eleventh Amendment. O'Neill v. Early, 208 F.2d 286, 289 (4 Cir. 1953).

The judgment is affirmed.

7. This statement by the Supreme Court was apparently a reference to Section 27, Article III of the former State Constitution, quoted *supra* in note 4.

8. It is not essential in Florida that a state agency obtain its funds from taxes. See Spangler v. Florida State Turnpike Authority, 106 So.2d 421, 422 (Fla.1958), holding that Authority a state agency even though, *inter alia*, "its revenues are derived primarily from tolls charged for the use of the road" and are devoted to a special public purpose, i. e. highway construction and maintenance.

EXHIBIT "5"

contempt, and if so the refuser could then obtain appellate review of the order by appealing from the judge's imposition of a sanction for contempt. *Cobbledick v. United States,* 309 U.S. 323, 328, 60 S.Ct. 540, 542–43, 84 L.Ed. 783 (1940); *In re Establishment Inspection of Skil Corp.,* 846 F.2d 1127, 1129 (7th Cir.1988). Were there any doubt about the mandatory character of the judge's order, he could embody it in a mandatory injunction, which would be appealable without the interim steps of defiance and sanction. Such severe measures are unlikely here despite the judge's evident exasperation with what he regards as the state's foot-dragging. Comity has its claims. Far more likely would it be for the judge to devise his own plan of compliance and order the state to put it into effect. At that point there would be a final decision from which the state would be entitled to appeal.

The United States points out, sensibly as it seems to us, that the dispute over appealability would have been avoided had the district judge, instead of issuing "orders" invalidating state regulations, simply directed the state to submit a compliance plan and then rejected it as noncomplying in various particulars. There would be no basis for arguing that the rejection was an appealable order. But this is, from a practical standpoint, what the judge did; and the fact that he used inapt words ought not convert an unappealable ruling into an appealable order.

The appeal is therefore

DISMISSED.

William DILWORTH, Plaintiff–Appellant,

v.

Underwood DUDLEY, Robert G. Bottoms, and Donald J. Albers, Defendants–Appellees.

No. 95–2282.

United States Court of Appeals, Seventh Circuit.

Submitted Nov. 14, 1995.

Decided Jan. 29, 1996.

Rehearing Denied March 18, 1996.

Engineer brought defamation claim against mathematics professor based on book in which professor called him a "crank" for his mathematical ideas. The United States District Court for the Western District of Wisconsin, John C. Shabaz, J., dismissed complaint for failure to state a claim, and engineer appealed. The Court of Appeals, Posner, Chief Judge, held that under common law of Wisconsin, engineer would have no remedy in defamation based on professor's labeling of him as a "crank" for publishing ideas which the professor found patently wrongheaded.

Affirmed.

1. Libel and Slander ⇐48(1), 51(5)

Engineer who brought defamation claim against mathematics professor whose book labeled engineer a "crank" because of his mathematical ideas was a "public figure" so as to be required to show actual malice on professor's part, though he was obscure in his own profession, where basis of professor's comments was an article which engineer had published; by publishing his ideas, engineer invited professor to publish a book saying engineer was wrong.

See publication Words and Phrases for other judicial constructions and definitions.

2. Libel and Slander ⇐48(1), 51(5)

Anyone who publishes becomes a "public figure" in the world bounded by the readership of the literature to which he has contributed, and thus must show actual malice in a

defamation suit arising from comments on his published work.

3. Libel and Slander ⇐9(1)

Term "crank," as used in book by mathematics professor to describe an engineer whose ideas on mathematics he found erroneous, was not defamatory under Wisconsin law as predicted by the United States Court of Appeals, where the word was used in work of scholarship and was a comment on engineer's own article in a mathematics journal.

4. Libel and Slander ⇐6(1)

"Rhetorical hyperbole" is a well-recognized category of privileged defamation, consisting of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions; and in the latter case the issue dissolves into whether those assertions are defamatory.

See publication Words and Phrases for other judicial constructions and definitions.

5. Libel and Slander ⇐123(2)

Pretrial Procedure ⇐648

Determining whether a term is capable of being defamatory is a question of law in Wisconsin, and so is amenable to determination on a motion to dismiss, provided that the complaint sets forth the allegedly defamatory term in its full context.

6. Federal Courts ⇐431

Adoption by United States Court of Appeals of Wisconsin rule, under which the determination of whether a term is capable of being defamatory is a question for the judge, was appropriate in reviewing dismissal of defamation claim governed by Wisconsin common law, even though federal procedural law would generally govern a division of responsibilities between judge and jury; the question was, in effect, whether a reasonable jury could find the term defamatory, and that was obviously a judgment that could not be left to a jury.

7. Libel and Slander ⇐19

Defamatory capability of specific terms cannot be determined without consideration of context.

8. Libel and Slander ⇐9(1)

Under Wisconsin law as predicated by the United States Court of Appeals, where one scholar calls another a "crank" for having taken a position that the first scholar considers patently wrongheaded, the second does not have a remedy in defamation.

William Dilworth, Beloit, WI, pro se.

Arthur J. Vlasak, Richard G. Kalkhoff, Vlasak, Britton & Konkel, Milwaukee, WI, for Underwood Dudley and Robert G. Bottoms.

Charles H. Bohl, Milwaukee, WI, Curtis A. Paulsen, Whyte Hirschboeck Dudek, Milwaukee, WI, for Donald J. Albers.

Before POSNER, Chief Judge, and FAIRCHILD and RIPPLE, Circuit Judges.

POSNER, Chief Judge.

The district judge dismissed this suit for failure to state a claim. Fed.R.Civ.P. 12(b)(6). The only colorable issue presented by the appeal is whether the judge erred in dismissing the plaintiff's defamation claim, which is governed, the parties agree, by the common law of Wisconsin. In 1992 the Mathematical Association of America published a book by defendant Underwood Dudley, a professor of mathematics at DePauw University in Indiana, entitled *Mathematical Cranks*. One of these "cranks" is the plaintiff, William Dilworth, an engineer who (the complaint alleges) has published a half dozen articles in mathematics journals. One of these articles, "A Correction in Set Theory," published in 1974 in the *Transactions of the Wisconsin Academy of Sciences, Arts and Letters*, drew Dudley's ire. Dilworth, according to Dudley, "chose to prove that Cantor's diagonal process is a snare and a delusion." "The reply to this argument," writes Dudley, "—which usually elicits an 'Oh' after a few seconds' thought from bright undergraduates—that the list [of the real numbers between 0 and 1] contains only the terminat-

ing decimals and none of the non-terminating ones, might not affect [Dilworth] at all. His article reads as if it is by someone convinced, whose mind is not going to be changed by anything. It is, in two words, a crank, and it is no credit to the state of [Wisconsin]." Earlier in the book Dudley had explained that the spectrum of mathematical cranks runs from those whose behavior "hardly deserves the label of crankery; 'crotchety' or 'slightly eccentric' describes it more accurately" to "people who are convinced that they have the truth, that it is revolutionary, that mathematicians are engaged in a vast conspiracy to suppress it, and that fame and wealth are rightfully theirs and that one day they will have them. Again, 'crank' is not as descriptive as another word—'lunatic' in this case." Dilworth seems to be in about the midpoint of this spectrum—the median "crank" in Dudley's system of classification.

[1, 2] The complaint alleges that because Dilworth is not a professional mathematician he finds it very difficult to get his articles on mathematics published and being labeled a "crank" will create an additional obstacle. The complaint alleges that Dudley acted with actual malice because he knew, or was reckless in failing to realize, that Dilworth's article explicitly acknowledged the very point—the difference between a rational and irrational number, or in Dudley's terminology a terminating or nonterminating decimal—the overlooking of which caused Dudley to pronounce the article the work of a crank. The allegation of actual malice is necessary because the plaintiff is a public figure. Not, it is true, a "public figure" in the lay sense of the term. Dilworth is an obscure engineer. But anyone who publishes becomes a public figure in the world bounded by the readership of the literature to which he has contributed. *Underwager v. Salter*, 22 F.3d 730 (7th Cir.1994); cf. *Contemporary Mission, Inc. v. New York Times Co.*, 842 F.2d 612, 619 (2d Cir.1988). By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition of the marketplace. Cf. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1537 (9th Cir.1989), rev'd on other grounds, 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). If Dilworth publishes an article saying that Cantor was wrong, he invites Dudley to publish a book in which he says that Dilworth was wrong in saying Cantor was wrong.

[3, 4] The district judge granted the motion to dismiss on the ground that the word "crank" is incapable of being defamatory; it is mere "rhetorical hyperbole." This is a well-recognized category of, as it were, privileged defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 2705–06, 111 L.Ed.2d 1 (1990); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Perry v. Columbia Broadcasting System, Inc.*, 499 F.2d 797 (7th Cir.1974); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 728 (1st Cir.1992). It consists of terms that are either too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions; and in the latter case the issue dissolves into whether those assertions are defamatory. If you say simply that a person is a "rat," you are not saying something definite enough to allow a jury to determine whether what you are saying is true or false. If you say he is a rat because ..., whether you are defaming him depends on what you say in the because clause.

[5, 6] Determining whether a term is capable of being defamatory is a question of law in Wisconsin, *Tatur v. Solsrud*, 174 Wis.2d 735, 498 N.W.2d 232, 233 (1993), and so is amenable to determination on a motion to dismiss, provided that as in this case the complaint sets forth the allegedly defamatory term in its full context. Although the division of responsibilities between judge and jury, and hence the fixing of the boundary between questions of law and questions of fact, is a matter of federal procedural law and therefore governed by federal rather than state law in diversity as in other federal suits, *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1349 (7th Cir.1995), the rule that makes the determination of whether a term is mere "rhetorical hyperbole" a question for the judge strikes us as a sound one that federal courts should follow. See *Mr.*

Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir.1985). For in effect the judge is being asked whether a reasonable jury could find the term defamatory, and that obviously is a judgment that cannot be left to the jury. So we must decide whether "crank" is capable of being defamatory, or more precisely whether the highest court of Wisconsin would so hold were it presented with the issue, which it has not been as yet.

[7] Among the terms or epithets that have been held (all in the cases we've cited) to be incapable of defaming because they are mere hyperbole rather than falsifiable assertions of discreditable fact are "scab," "traitor," "amoral," "scam," "fake," "phony," "a snake-oil job," "he's dealing with half a deck," and "lazy, stupid, crap-shooting, chicken-stealing idiot." It is apparent from the list that the defamatory capability of these terms cannot be determined without consideration of context. See *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1542, 26 L.Ed.2d 6 (1970) ("blackmail"); *McCabe v. Rattiner*, 814 F.2d 839 (1st Cir.1987) ("scam"). Each of the terms has both a literal and a figurative meaning and whether it is capable of being defamatory depends on which meaning is intended, a question that can be answered only by considering the context in which the term appears. "Scab," for example, means literally one who is hired to replace a striking worker, but it is also used figuratively, to denote a worker who is not a union supporter. If as in *National Association of Letter Carriers v. Austin*, *supra*, a person is called a "scab" in a union newsletter because he refuses to join a union, this is not defamation but merely an expression of hostility; the word is obviously being used in its figurative sense. But if a union leader were accused of having been a scab in his youth, this could well be understood to be a literal use of the word and therefore an assertion that he had engaged in conduct that demonstrated his unfitness to be a union leader. And so with "traitor," another word held nondefamatory in *National Association of Letter Carriers v. Austin*. The use of the word in the context of that case was plainly figurative rather than literal, but the word was being used in its literal sense when Whittaker Chambers called Alger Hiss a traitor. Another example would be calling a person a "lunatic."

"Crank" might seem the same type of word, but we think not. A crank is a person inexplicably obsessed by an obviously unsound idea—a person with a bee in his bonnet. To call a person a crank is to say that because of some quirk of temperament he is wasting his time pursuing a line of thought that is plainly without merit or promise. An example of a math crank would be someone who spent his time trying to square the circle. To call a person a crank is basically just a colorful and insulting way of expressing disagreement with his master idea, and it therefore belongs to the language of controversy rather than to the language of defamation.

This is especially clear where, as in this case, the word is used in a work of scholarship. As we emphasized in the *Underwager* case, judges are not well equipped to resolve academic controversies, of which a controversy over Cantor's diagonal process is a daunting illustration, and scholars have their own remedies for unfair criticisms of their work—the publication of a rebuttal. Unlike the ordinary citizen, a scholar generally has ready access to the same media by which he is allegedly defamed. If Dudley's criticisms of Dilworth are unsound, Dilworth should be able to publish a rebuttal in the same journal in which he published the article that Dudley attacked. The journal would be eager to publish a rebuttal since its own reputation was impugned by Dudley's charges.

We do not suggest that scholars can never maintain a suit for defamation. The *Masson* case is a notable example. If a professor is falsely accused of plagiarism or sexual harassment or selling high grades or other serious misconduct, rather than of having unsound ideas, he has the same right to damages as any other victim of defamation. The case before us is one in which not the character but the ideas of the scholar are attacked.

[8] Nor do we go so far as to hold that the word "crank" can never be defamatory. We recall that Dudley defined "crank," and

had he defined it in terms that called into question Dilworth's character or sanity rather than merely his judgment or learning, we would have a different case. We hold only that where one scholar calls another a "crank" for having taken a position that the first scholar considers patently wrongheaded, the second does not have a remedy in defamation.

AFFIRMED.

Willie May ANTHONY, et al., Plaintiffs–Appellants,

v.

SECURITY PACIFIC FINANCIAL SERVICES, INCORPORATED, Defendant–Appellee.

No. 95–1673.

United States Court of Appeals, Seventh Circuit.

Argued Oct. 26, 1995.

Decided Jan. 31, 1996.

Borrowers brought diversity action against purchaser of loans, alleging tortious interference with settlement agreement with original lender and spoliation of evidence. The United States District Court for the Northern District of Illinois, 1995 WL 88998, Paul E. Plunkett, J., dismissed action for lack of subject matter jurisdiction, and borrowers appealed. The Court of Appeals, Manion, Circuit Judge, held that: (1) under no circumstances could borrowers recover punitive damages on their tortious interference with contract claim such that jurisdictional amount of their allegations would exceed $50,000, as required for diversity jurisdiction; (2) punitive damages were not recoverable as matter of Illinois law on cause of action for spoliation of evidence; and (3) punitive damages recovery, if rendered for amount necessary to exceed $50,000 on spoliation of evidence claim, would be excessive.

Affirmed.

1. Federal Courts ⇐776

Court of Appeals reviews de novo the dismissal of complaint for lack of subject matter jurisdiction.

2. Federal Courts ⇐818

Under motion to dismiss for lack of subject matter jurisdiction, Court of Appeals defers to district court in resolution of jurisdictional factual issues, which Court of Appeals reviews for abuse of discretion. Fed. Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

3. Federal Courts ⇐337

When both actual and punitive damages are recoverable under complaint, each must be considered to extent claimed in determining jurisdictional amount in controversy. 28 U.S.C.A. § 1332.

4. Federal Courts ⇐335

It is necessary to exceed, not just to achieve, $50,000 in controversy for federal court to have diversity jurisdiction. 28 U.S.C.A. § 1332.

5. Federal Courts ⇐337, 350.1, 415

Two-part inquiry is necessary when punitive damages are required to satisfy jurisdictional requirement in diversity case: first question is whether punitive damages are recoverable as matter of state law, and, if answer is yes, court has subject matter jurisdiction unless it is clear beyond legal certainty that plaintiff would under no circumstances be entitled to recover jurisdictional amount. 28 U.S.C.A. § 1332.

6. Federal Courts ⇐351

When claim for punitive damages makes up bulk of amount in controversy in diversity action, and may even have been colorably asserted solely to confer jurisdiction, punitive damages claim should be scrutinized closely. 28 U.S.C.A. § 1332.

7. Federal Courts ⇐339

If uncontested, courts will accept plaintiff's good faith allegation of amount in con-

EXHIBIT "6"

429 S.C. 170

Amy GARRARD and Lee Garrard, Guardians Ad Litem for R.C.G., A Minor; and Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., A Minor, Richard Nelson and Cheryl Nelson, Guardians Ad Litem for D.G.N., A Minor; Adam Olsen Ackerman; and A.E.P., III, Plaintiffs,

v.

CHARLESTON COUNTY SCHOOL DISTRICT, Kevin Clayton, Axxis Consulting Company, and Jones Street Publishers, LLC, Defendants,

and

Eugene H. Walpole, Plaintiff,

v.

Charleston County School District, Kevin Clayton, Axxis Consulting Company, and Jones Street Publishers, LLC, Defendants,

Of Whom Eugene H. Walpole, Amy Garrard and Lee Garrard, Guardians Ad Litem for R.C.G., A Minor; and Dean Frailey and Kathryn Frailey, Guardians Ad Litem for C.F., A Minor, Richard Nelson and Cheryl Nelson, Guardians Ad Litem for D.G.N., A Minor; Adam Olsen Ackerman; and A.E.P., III, are the Appellants,

and

Of Which Jones Street Publishers, LLC, is the Respondent.

Appellate Case No. 2016-002525
Opinion No. 5691

Court of Appeals of South Carolina.

Heard April 1, 2019

Filed November 6, 2019

Rehearing Denied March 18, 2020

Background: Six members of high school football team and team's coach filed a defamation complaint against, among others, a newspaper that had published two opinion editorials concerning a racially insensitive post-victory locker room ritual repeatedly performed by the football team. The Circuit Court, Charleston County, Jean H. Toal, J., granted summary judgment in favor of newspaper. Team members and coach appealed.

Holdings: The Court of Appeals, Geathers, J., held that:

(1) article's description of team's ritual was protected by fair report privilege;

(2) articles addressed a matter of public concern;

(3) articles' characterizations of coach's and players' behavior as racist constituted expressions of writer's opinion and rhetorical hyperbole;

(4) coach and players failed to establish that they suffered actual injury due to articles' publication;

(5) statements in articles were not statements of and concerning players who brought suit;

(6) coach was a public figure; and

(7) coach failed to demonstrate that newspaper acted with constitutional actual malice.

Affirmed.

1. Judgment ⇦181(2)

Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ.

2. Judgment ⇦181(2)

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law.

3. Judgment ⇦181(2)

If triable issues exist on a motion for summary judgment, those issues must go to the jury.

4. Judgment ⇦181(2)

A jury issue precluding summary judgment is created when there is material evidence tending to establish the issue in the mind of a reasonable juror; however, this

rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury.

5. Judgment ⚿185(6)

If evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied.

6. Judgment ⚿178

The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder.

7. Judgment ⚿185(2)

When a party has moved for summary judgment, the opposing party may not rest upon the mere allegations or denials of his or her pleading to defeat it; rather, the nonmoving party must set forth specific facts demonstrating to the court there is a genuine issue for trial.

8. Judgment ⚿185(5)

Where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment.

9. Judgment ⚿185.3(21)

The appropriate standard at the summary judgment phase on the issue of constitutional actual malice as an element for a defamation action is the clear and convincing standard. U.S. Const. Amend. 1.

10. Judgment ⚿185.3(21)

Unless the circuit court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice as an element of a defamation action, it should grant summary judgment for the defendant.

11. Libel and Slander ⚿1, 117

The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communication to others of a false message about the plaintiff.

12. Libel and Slander ⚿1

"Slander" is a spoken defamation.

See publication Words and Phrases for other judicial constructions and definitions.

13. Libel and Slander ⚿1

"Libel" is a written defamation or one accomplished by actions or conduct.

See publication Words and Phrases for other judicial constructions and definitions.

14. Libel and Slander ⚿1

To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm.

15. Libel and Slander ⚿42(.5, 1)

The "fair report privilege" is the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability.

See publication Words and Phrases for other judicial constructions and definitions.

16. Libel and Slander ⚿49

Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged.

17. Libel and Slander ⚿42(.5, 1)

For the purposes of the fair report privilege, the publisher of judicial and other governmental proceedings is not required to investigate the truth of the underlying matter.

18. Libel and Slander ⚿42(.5)

Description in newspaper article of high school football team's post victory locker room ritual constituted a fair and substantially accurate report of statements made by superintendent at press conference concerning school district's investigation into allegations about racially insensitivity of ritual, and therefore newspaper's description was protected by fair report privilege; allegations that team drew faces on watermelons, which were described as caricatures, named water-

melons after a formerly segregated local African American school, and smashed watermelons while making monkey sounds were all described by superintendent at press conference, and article writer, who was present at press conference, knew superintendent and considered her honest and trustworthy.

19. Libel and Slander ⚿41, 50.5

Under the defense of a qualified privilege, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it qualifiedly or conditionally privileged, and (2) the privilege is not abused.

20. Libel and Slander ⚿123(8)

Whether an occasion is one that gives rise to a qualified privilege of a communication for defamation purposes is a question of law.

21. Libel and Slander ⚿41, 50

A qualified privilege of a communication for defamation purposes arises when there is 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.

22. Libel and Slander ⚿42(.5), 50.5

The fair report privilege extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged.

23. Libel and Slander ⚿123(8)

Where there is conflicting evidence, the question of whether a qualified privilege of a communication has been abused is one for the jury in a defamation action.

24. Constitutional Law ⚿2168

Libel and Slander ⚿48(1)

Newspaper articles about local high school football team's post-victory locker room ritual addressed a matter of public concern, and therefore were protected under First Amendment; articles covered allegations by a school board member of team ritual's racial insensitivity, as well as head football coach's removal from his position as a result, events in question occurred in a city with a historical legacy of racial tension, story garnered widespread coverage in local and national media, and school district had conducted an investigation into allegations that team's ritual was racist, released a press statement, and held a press conference where superintendent described findings of district's investigation. U.S. Const. Amend. 1.

25. Constitutional Law ⚿1555

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. U.S. Const. Amend. 1.

26. Constitutional Law ⚿1555

Speech deals with "matters of public concern," and is therefore entitled to special protection under the First Amendment, when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

27. Constitutional Law ⚿1555

Whether speech addresses a matter of public concern, and is therefore entitled to special protection under the First Amendment, must be determined by the content, form, and context of a given statement, as revealed by the whole record. U.S. Const. Amend. 1.

28. Constitutional Law ⚿1555

In considering content, form, and context of speech to determine whether it addresses a matter of public concern, and therefore is entitled to special protection under the First Amendment, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. U.S. Const. Amend. 1.

29. Constitutional Law ⚿2168
Libel and Slander ⚿6(1), 10(1)

Characterizations of behavior of high school football coach and players as racist in articles covering allegations that team's post-victory locker room ritual was racially insensitive did not state actual facts about coach or players, but rather constituted expressions of writer's opinion and rhetorical hyperbole, and therefore were protected under First Amendment; statement that coach and players displayed racist behavior could not be objectively proved or disproved, and was susceptible to varying viewpoints and interpretations, as one person could view behavior as disrespectful and offensive while another person could view behavior as non-controversial and social acceptable, as evidenced by observers' different views on subject, which was a highly contested issue for school district. U.S. Const. Amend. 1.

30. Constitutional Law ⚿1620

Under the First Amendment, there is no such thing as a false idea. U.S. Const. Amend. 1.

31. Constitutional Law ⚿1620
Libel and Slander ⚿6(1)

There is no constitutional value in false statements of fact; therefore an expression of opinion that conveys a false and defamatory statement of fact can be actionable. U.S. Const. Amend. 1.

32. Libel and Slander ⚿6(1)

There are certain statements that cannot reasonably be interpreted as stating actual facts about an individual, and statements such as opinion, satire, epithets, or rhetorical hyperbole cannot be the subject of liability for defamation.

33. Constitutional Law ⚿1622

A statement of opinion relating to matters of public concern that does not contain a provably false factual connotation will receive full constitutional protection. U.S. Const. Amend. 1.

34. Libel and Slander ⚿32

High school football coach and players failed to establish that they suffered actual injury due to publication of purportedly defamatory newspaper articles covering allegations that team's post-victory locker room ritual was racially insensitive, although players and coaches stated that they felt more self-conscious after articles' publications and had been questioned by various people about articles' content; coach and players did not identify individuals who viewed them differently as a result of reading articles, they did not provide evidence of lost opportunities, they did not lose friends, they remained employed at their places of employment, and players were accepted to colleges they desired to attend.

35. Libel and Slander ⚿33, 101(1)

In a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumptions that the defendant acted with common law malice and the plaintiff suffered general damages do not apply.

36. Libel and Slander ⚿100(.5)

In a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the private-figure plaintiff must plead and prove common law malice and show actual injury in the form of general or special damages.

37. Damages ⚿5

"General damages" include injuries such as injury to reputation, mental suffering, hurt feelings, and other similar types of injuries that are incapable of definite money valuation.

See publication Words and Phrases for other judicial constructions and definitions.

38. Damages ⚿5

"Special damages" are tangible losses or injury to the plaintiff's property, business, occupation, or profession, capable of being assessed monetarily.

See publication Words and Phrases for other judicial constructions and definitions.

39. Damages ⚿5

"Special damages" do not include hurt feelings, embarrassment, humiliation, or emotional distress.

See publication Words and Phrases for other judicial constructions and definitions.

40. Libel and Slander ⚿101(1)

In a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumption that the libelous statement is false is not applied.

41. Libel and Slander ⚿30

In a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the private-figure plaintiff must prove the statement is false.

42. Libel and Slander ⚿21

Statements in newspaper articles covering allegations that high school football team's post-victory locker room ritual was racially insensitive were not statements of and concerning six football players who brought defamation action against newspaper; articles made only general statements about conduct of team as a whole, articles did not reference any names of particular players or contain any facts or commentary specific to particular players, and articles did not include any pictures of members of football team.

43. Libel and Slander ⚿21

To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred.

44. Libel and Slander ⚿73

Where a publication affects a class of persons without any special personal application, no individual of that class can sustain a defamation action for the publication.

45. Libel and Slander ⚿73

Where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action.

46. Libel and Slander ⚿73

Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class.

47. Libel and Slander ⚿48(1)

An important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure.

48. Libel and Slander ⚿123(8)

The determination as to whether a plaintiff in a defamation action is a public official, public figure, or private figure is a matter of law which must be decided by the court.

49. Libel and Slander ⚿48(2)

In general, for purposes of a defamation action, a "public official" is a person who, among the hierarchy of government employees, has or appears to the public to have substantial responsibility for or control over the conduct of governmental affairs.

See publication Words and Phrases for other judicial constructions and definitions.

50. Libel and Slander ⚿48(2)

In considering the question of whether a person is a "public official" for purposes of a defamation action, the employee's position must be one that would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

See publication Words and Phrases for other judicial constructions and definitions.

51. Libel and Slander ⚿48(2)

The status of a public official for purposes of a defamation action may be deemed sufficient not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context.

52. Constitutional Law ⚿2164

Once it is determined that the plaintiff in a defamation action is a public official, the plaintiff in a defamation action must show

proof that the publication was made with actual malice or else the publication is constitutionally privileged. U.S. Const. Amend. 1.

53. Libel and Slander ⚿112(2)

Actual malice must be proven by clear and convincing evidence in a defamation action.

54. Libel and Slander ⚿51(1)

"Actual malice" in the context of a defamation action has been defined as the publication of an article with knowledge that it was false or with reckless disregard of whether it was false or not.

See publication Words and Phrases for other judicial constructions and definitions.

55. Libel and Slander ⚿123(6)

Whether the evidence in a defamation action is sufficient to support a finding of actual malice is a question of law.

56. Appeal and Error ⚿3732

When reviewing an actual malice determination in a defamation action, the appellate court is obligated to independently examine the entire record to determine whether the evidence sufficiently supports a finding of actual malice.

57. Libel and Slander ⚿51(1)

A reckless disregard for the truth, for purposes of finding actual malice in a defamation action, requires more than a departure from reasonably prudent conduct.

58. Libel and Slander ⚿51(1)

In order to find that a defamation defendant had a reckless disregard for the truth, and therefore made a publication with actual malice, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his or her publication.

59. Libel and Slander ⚿51(1)

In order to find that a defamation defendant had a reckless disregard for the truth, and therefore made a publication with actual malice, there must be evidence the defendant had a high degree of awareness of probable falsity.

60. Libel and Slander ⚿51(1)

Actual malice may be present in the publication of information for purposes of a defamation claim where one fails to investigate and there are obvious reasons to doubt the veracity of the information.

61. Libel and Slander ⚿48(2)

High school football coach who brought defamation action against newspaper for publishing articles covering allegations that football team's post-victory locker room ritual was racially insensitive was a public figure; coach held many positions within school district, including as head high school football coach, head high school women's basketball coach, and a teacher at a district school, coach interacted with athletes' parents after each game, was responsible for oversight of teams' activities, and participated in newspaper and television interviews about teams.

62. Constitutional Law ⚿2170
Libel and Slander ⚿51(5)

High school football coach suing newspaper for defamation failed to demonstrate that newspaper acted with constitutional actual malice when it published articles covering allegations that football team's post-victory locker room ritual was racially insensitive; coach failed to show that newspaper entertained serious doubts as to truth of its publications, and in fact newspaper provided affidavits from its editors indicating that they had no reason to doubt statements made by superintendent concerning district's investigation into team's ritual. U.S. Const. Amend. 1.

Appeal From Charleston County, Jean H. Toal, Circuit Court Judge

John E. Parker and William F. Barnes, III, of Peters, Murduagh, Parker, Eltzroth, & Detrick, P.A., of Hampton, for Appellants.

Wallace K. Lightsey and Meliah Bowers Jefferson, of Wyche, PA, of Greenville, for Respondent.

GEATHERS, J.:

In this defamation action, Appellants—six members of the 2014-2015 Academic Magnet

High School (AMHS) football team and their head coach, Eugene Walpole (Coach Walpole)—appeal the circuit court's order granting summary judgment to Respondent Jones Street Publishers. Appellants contend the circuit court erred in (1) finding the statements of fact in certain articles published by Jones Street Publishers are protected by the fair report privilege, (2) finding the opinions expressed in the articles are not actionable, (3) finding Appellants have not shown proof of injury to reputation, (4) finding the alleged defamatory statements were not "of and concerning" the students, and (5) finding Coach Walpole has not shown that Jones Street Publishers acted with actual malice. We affirm.

FACTS/ PROCEDURAL HISTORY

Appellants initiated this defamation action against Jones Street Publishers following its publication of two opinion editorials in the *Charleston City Paper* (*City Paper*)[1] concerning a post-game watermelon ritual performed by the AMHS football team. News regarding the watermelon ritual began on October 21, 2014, when the superintendent of Charleston County School District (the School District), Dr. Nancy McGinley, issued a press release stating,

> There was an allegation related to inappropriate post game celebrations by the Academic Magnet High School (AMHS) Football Team. An investigation was conducted and, as a result of the investigation, the head football coach will no longer be serving as a coach for Charleston County School District.

Following this press release, Superintendent McGinley held a press conference in which she described the post-game ritual that prompted the investigation. Superintendent McGinley stated that "allegations" were brought to her attention by one of the School District's board members who indicated AMHS's football team was practicing a watermelon ritual that involved students making "monkey sounds" as part of their post-game celebration. She expressed that the board member was concerned about the "racial stereotypes related to this type of ritual." Superintendent McGinley contacted AMHS's principal to investigate the matter. The principal indicated that "the coaches were aware of the ritual following the victories[,] but they did not observe any cultural insensitivities." The principal reported back to Superintendent McGinley that it was an "innocent ritual." However, Superintendent McGinley decided that further investigation was necessary because the board member stated that the football team engaged in a "tribal-like chant that [was] animalistic or monkey-like."

Superintendent McGinley asked the School District's diversity consultant, Kevin Clayton and Associate Superintendent Louis Martin to conduct the investigation. Mr. Clayton and Mr. Martin interviewed the students on the football team and the coaches. The investigation revealed that "players would gather in a circle and smash the watermelon while others were either standing in a group or locking arms and making chanting sounds that were described as 'Ooo ooo ooo,' and several players demonstrated the motion." Superintendent McGinley stated the AMHS team named the watermelons "Bonds Wilson"[2] and drew a face on each watermelon "that could be considered a caricature." A copy of the caricature that was drawn on the watermelons was shown at the press conference.[3] Superintendent McGinley concluded the press conference by stating that it was "our conclusion that the accountability lies with the adults" and that the Charleston County School District (the School District) had "taken action to relieve the head coach of his responsibilities." No students were named during the press conference.

After the press conference, several news media outlets ranging from national publica-

1. Jones Street Publishers owns and publishes the *City Paper*.

2. Bonds Wilson is the name of a formerly segregated African-American school that was located at the campus where AMHS is now located and was named in honor of two prominent African-American educators from Charleston.

3. The picture was drawn by the same football player who drew the faces on the watermelons during most of the post-game celebrations.

tions to the AMHS's newspaper reported on the firing of Coach Walpole, and numerous commentators expressed their opinions concerning the post-game ritual.

City Paper's editor, Chris Haire, watched Superintendent McGinley's press conference by a live television broadcast from the School District's public hearing room. After viewing the press conference, Mr. Haire wrote an opinion editorial about the events described entitled, "Melongate: Big toothy grins, watermelons, and monkey sounds don't mix," which was published in the *City Paper* on October 21, 2014. The article, in its entirety, provided,

> Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid allegations that his players more or less behaved like racist douchebags. And if there's one lesson to be learned from all of this[,] it's this: big toothy grins, watermelons, and monkey noises don't mix. Any sensible person can see that.
>
> Apparently not. And apparently not the coaching staff and the players on the Academic Magnet Raptors.
>
> Somewhere along the way in this year's unexpectedly successful season, the Raptors took a liking to buying watermelons before their games. They apparently drew a face on it each time—a big toothy, grinning face. The first time the watermelon was named Junior. The next time it was Bonds Wilson, the name of the campus the AMHS shares with School of the Arts. That name stuck.
>
> But here's where the things get even worse. At the close of each game, the players smashed the watermelon on the ground while reportedly making the monkey-like sounds of 'ooh ooh ooh ooh.' Apparently, the players did this after four or five games, each time evidently after the largely white Raptor squad beat one of their opponents, each one largely an African-American team. Parents of players on one of the opposing teams reportedly brought this to the attention of African-American Board member Michael Miller last week.
>
> That the coaching staff of the Academic Magnet Raptors and none of its players, including at least one African-American, didn't see the trouble with this toxic combination of monkey sounds, toothy grins, and watermelons is at best baffling and at worst indicative of the casual acceptance of racism in Charleston today, even among the best and brightest that the county has to offer. After all, AMHS is not only the No. 1 ranked school in the state, it's one of the tops in the nation[ ].
>
> Seriously, did everyone at AMHS forget the last 100 years of American history? Did they forget about blackface, Buckwheat, and *Birth of a Nation*? Did they forget about minstrel shows? Did they forget about Coons Chicken, lawn jockeys, golliwogs, and the like? Apparently so. I don't know about you, but I think it's time to reconsider Academic Magnet's rankings because clearly they are producing nothing more than grade-A dumbas[***].
>
> Even more troubling is the degree to which Raptor Nation has circled the wagons around Walpole and the team. Frankly, this has nothing to do with the fact that the coach is by all accounts a good man. Walpole's merits are meaningless.
>
> The point is that an entire team of players thought it was OK to draw a grinning face on a watermelon, smash it on the ground each time they beat a largely black team, and make monkey noises—and no one apparently told them to stop.
>
> No one said, "Hey guys, I know not a single one of you has a racist bone in your body, you know, because that's a bad thing, and well, you're an Academic Magnet kid, and you come from a good middle-class white family and you're going to college, and there's no way in hell you'd, you know, draw a racist caricature on a watermelon and make monkey noises and do it fully aware of, like, what all that stuff means, because if you did, knowing all that stuff, then yikes, people might start thinking you're racists. Hell, I'd think you're a racist, and, well, I just don't know if I can deal with the fact that Charleston's best and brightest students are racist douchebags. I mean, it's just a joke right? Right?"

> Actually, it's not. It's the sad truth about life here in Charleston, S.C. today.

In a reversal, Superintendent McGinley issued a press statement on October 22, 2014 indicating she was reinstating Coach Walpole as head coach and that he would resume his coaching duties on October 23, 2014. Shortly thereafter, the Charleston County School Board announced the resignation of Superintendent McGinley.[4] Following this announcement, Mr. Haire wrote a second article entitled, "Mob Rules: School district forces out superintendent who fired coach who condoned racist ritual." This article was published in the *City Paper* on November 5, 2014.

Later that month, six members of the AMHS football team filed a defamation complaint against Jones Street Publishers, the School District, Kevin Clayton, and Axxis Consulting Company.[5] In December 2014, Coach Walpole also filed a defamation complaint against the same defendants. Both cases were consolidated on October 23, 2015.[6]

Appellants alleged the two opinion editorials contained defamatory statements. Specifically, as to the article "Melongate," Appellants argued the reference to the students as "racist douchebags" was defamatory, and as to the article "Mob Rules," Appellants argued the title of the article itself was defamatory because it stated Coach Walpole "condoned a racist act." Appellants also alleged Jones Street Publishers damaged their reputations "by publishing articles that accused [Appellants] of participating in racially-motivated post-game celebration rituals." Essentially, Appellants argued the articles implied that the football team and the coach were racist.

Jones Street Publishers moved for summary judgment, and a hearing was held on October 11, 2016. Jones Street Publishers argued the following facts were reported by the *City Paper* in its publications: "the fact that watermelons were smashed as part of this ritual, that there was a face drawn on them, that there was a caricature, that monkey sounds were made, [that] the ritual took place and that a watermelon was named Bonds Wilson." Jones Street Publishers maintained that these facts were protected by the fair report privilege because "all of the facts came from the press conference that the Charleston County School District held to report its finding of its investigation of the ritual." As for the remaining content in the articles, Jones Street Publishers argued that "[the] *City Paper* gave its editorial view of those facts, its view of what had happened." Specifically, Jones Street Publishers indicated the following to be its editorial viewpoint of those facts:

> That the football players had behaved like racist douchebags, that if they did not realize that their actions would be perceived as racially offensive, that that was indicative of the casual acceptance of racism in Charleston today, that the school had not taught its students about the history of the watermelon trope, and it was turning out a bunch of grade A dumbas[***] and not the best and brightest and that this was a racist ritual, a racist behavior, on the part of the people [who] participated in it.

Jones Street Publishers argued the opinions were protected by the First Amendment.[7] Additionally, Jones Street Publishers produced affidavits from two of its editors indicating that they had no reason to doubt the truth of the statements made by Superintendent McGinley at the press conference.

Appellants opposed Jones Street Publishers' motion for summary judgment, arguing Jones Street Publishers acted with actual malice by "labeling" the students and coach "as racist douchebags without any investigation, without any evidence, without anything to come to that conclusion . . . ." Appellants argued Jones Street Publishers was negligent "because they made no effort to find the truth," and "made up the fact that the stu-

4. The record is unclear regarding the reason for Superintendent McGinley's resignation.

5. Mr. Clayton was an employee of Axxis Consulting Company.

6. This appeal solely concerns Jones Street Publishers. The record does not contain any details regarding the outcome of Appellants' claims against the other defendants.

7. U.S. Const. amend. I.

dents and coaches are racist douchebags." Instead, Appellants asserted the players' motives were not racially based but more akin to the movie Castaway where Tom Hanks drew a face on a volleyball and named it "Wilson;" here, the football players drew a face on the watermelon and named it "Bonds-Wilson." Appellants argued the testimony in their case would prove "their intentions."

First, the circuit court found that all of the factual statements in the articles were "accurate reproductions of comments made publicly by School District officials, and thus [were] protected by the fair report privilege." Next, the circuit court found the remaining statements in the articles were "merely expressions of the writer's opinions and ideas on a matter of public concern. Under established First Amendment jurisprudence, Jones Street [Publishers] cannot be held liable for such statements." The circuit court stressed that the "subject of the Jones Street publications addressed a matter of public concern." To this point, the circuit court stated,

> The AMHS football team's ritual, the School District's investigation into the AMHS football team's ritual, and Coach Walpole's removal as head coach of the team were subjects of great interest to the Charleston Community and garnered widespread coverage from media outlets both locally and throughout the United States. The controversy involved allegations of racial insensitivity in a city steeped with a historical legacy of racial tension. When viewing the record as a whole, there is little doubt that the speech at issue in this case was addressed to a matter of public concern.

The court indicated that it was "settled law that expressions of opinion on matters of public concern are immune from liability for defamation." The court noted that once the factual statements in the articles that summarized the statements made by the School District are removed, none of the remaining statements "assert[ ] any verifiable, objectively provable fact. They are expressions of the editorial writer's ideas and opinions, using rhetorical hyperbole to emphasize his views." The court further stated,

> Whether the football players acted like "racist douchebags," whether the team's failure to perceive the negative racial connotations of their actions is "indicative of the casual acceptance of racism in Charleston today," whether the watermelon ritual was an act that "any sensible outside observer" would "perceive[ ] as racist," or an example of "inadvertently ... hurtful racially offensive behavior"—these are all statements on which different persons could have different views and sentiments. In fact, many people did express different views on the matter[,] and it was a highly contested issue for the School District. None of the statements, as expressed in the Jones Street publications, are statements of fact that can be objectively proved or disproved in a court of law.

Lastly, the circuit court found that Appellants failed to produce any evidence of either special damages or general damages arising from an injury to their reputations as a result of the *City Paper* publications. Specifically, the court noted that the alleged defamatory statements were not " 'of and concerning' [Appellants], in that they refer to the entire football team and not to any of [Appellants] individually." In regard to Coach Walpole, the court found that he was a public official and noted that "public school teachers and athletic coaches have been held to be public officials." Therefore, Coach Walpole was required to prove that Jones Street Publishers acted with actual malice. The circuit court determined that Coach Walpole failed to prove actual malice. The court noted that there was evidence from Jones Street Publishers' editors indicating that "they had no reason to doubt that the reported information was anything other than completely true and accurate." The court found that Coach Walpole failed to "direct the [c]ourt to a single line of testimony in the depositions or any passage of the publications that constitutes evidence that anyone at Jones Street [Publishers] knew of any false statement in the editorials or articles or in fact entertained serious doubts as to the truthfulness of them." The circuit court granted Jones Street Publishers' motion for summary judgment and this appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding the statements of fact in the articles were protected by the fair report privilege?
2. Did the circuit court err in finding the opinions expressed in the articles were not actionable?
3. Did the circuit court err in finding Appellants did not show proof of injury to reputation?
4. Did the circuit court err in finding the alleged defamatory statements were not "of and concerning" the students?
5. Did the circuit court err in finding Coach Walpole did not show that Jones Street Publishers acted with actual malice?

STANDARD OF REVIEW

[1] "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment should be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009).

[2–5] "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860. "[S]ummary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Pee Dee Stores*, 381 S.C. at 240, 672 S.E.2d at 802. "If triable issues exist, those issues must go to the jury." *BPS, Inc. v. Worthy*, 362 S.C. 319, 325, 608 S.E.2d 155, 158 (Ct. App. 2005). "A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror." *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." *Id.* (quoting *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997)). Moreover, "[i]f evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied." *Pee Dee Stores*, 381 S.C. at 240, 672 S.E.2d at 802.

[6–10] "The purpose of summary judgment is to expedite disposition of cases [that] do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "[W]hen a party has moved for summary judgment[,] the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it." *Fowler v. Hunter*, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008). "Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." *Id.* Furthermore, "where the federal standard applies or where a heightened burden of proof is required, there must be more than a scintilla of evidence in order to defeat a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Thus, "the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard." *George*, 345 S.C. at 454, 548 S.E.2d at 875. "Unless the [circuit] court finds, based on pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice, it should grant summary judgment for the defendant." *McClain v. Arnold*, 275 S.C. 282, 284, 270 S.E.2d 124, 125 (1980).

LAW/ANALYSIS

I. Legal Background

[11–14] "The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." *Holtzscheiter v. Thomson*

Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). "Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." *Id.* "To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm." *West v. Morehead*, 396 S.C. 1, 7, 720 S.E.2d 495, 498 (Ct. App. 2011); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006); *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

However, there are certain communications that give rise to qualified privileges. *West*, 396 S.C. at 7, 720 S.E.2d at 498. One of the qualified privileges recognized as a common law and constitutional privilege by South Carolina courts is the "fair report" privilege. *See generally Padgett v. Sun News*, 278 S.C. 26, 38, 292 S.E.2d 30, 37 (1982) (Ness, J., dissenting) (recognizing a constitutional basis for the common law privilege of fair report).

II. Fair Report Privilege

[15, 16] The fair report privilege is "the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability." *West*, 396 S.C. at 7, 720 S.E.2d at 498; *Padgett*, 278 S.C. at 33, 292 S.E.2d at 34 (indicating that to hold a publisher liable for an accurate report of a public action or record would constitute liability without fault and would "make it impossible for a publisher to accurately report a public record without assuming liability for the truth of the allegations contained in such record"); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991) (en banc) ("The fair report privilege encourages the media to report regularly on government operations so that citizens can monitor them."). Additionally, "[f]air and impartial reports in newspapers of matters of public interest are qualifiedly privileged." *Jones v. Garner*, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). "It is not necessary that [the report] be exact in every immaterial detail or that it conform to that precision demanded in technical or scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings." Restatement (Second) of Torts § 611 cmt. f (Am. Law. Inst. 1977).

[17] Furthermore, the publisher is not required to investigate the truth of the underlying matter. *See Padgett*, 278 S.C. at 33, 292 S.E.2d at 34 ("[O]ur decision in *Lybrand v. The State Co.*[8] completely refutes the contention that the publisher is required to go behind the allegations contained in the public record."); *see also Reuber*, 925 F.2d at 712 ("In return for frequent and timely reports on governmental activity, defamation law has traditionally stopped short of imposing extensive investigatory requirements on a news organization reporting on a governmental activity or document.").

[18] As to the case at bar, Appellants contend the circuit court erred in holding the statements of fact in the articles are protected by the fair report privilege. Appellants argue Jones Street Publishers did not accurately report the statements made by Superintendent McGinley at the press conference. We disagree.

[19–23] Under the defense of a qualified privilege, "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged, and (2) the privilege is not abused." *West*, 396 S.C. at 7, 720 S.E.2d at 499 (alteration in original) (quoting *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)); *Jones*, 250 S.C. at 487, 158 S.E.2d at 913 ("[T]he privilege attending the publication of a news report arises by reason of the occasion of the communication, and a communication or statement [that] abuses or goes beyond the requirement of the occasion, loses the protection of the privilege."). "Whether the occasion is one [that] gives rise

8. 179 S.C. 208, 184 S.E. 580 (1936).

to a qualified privilege is a question of law." *West*, 396 S.C. at 7, 720 S.E.2d at 499. A qualified privilege arises when there is "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." *Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (quoting *Manley v. Manley*, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987)). Furthermore, the fair report privilege "extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." *Jones*, 250 S.C. at 487, 158 S.E.2d at 913. "Where there is conflicting evidence, 'the question [of] whether [a qualified] privilege has been abused is one for the jury.' " *West*, 396 S.C. at 8, 720 S.E.2d at 499 (second alteration in original) (footnote omitted) (quoting *Swinton Creek*, 334 S.C. at 485, 514 S.E.2d at 134).

Here, a review of the "Melongate" article reveals a fair and substantially accurate report of the statements made by Superintendent McGinley at the press conference.[9] *See Jones*, 250 S.C. at 487, 158 S.E.2d at 913 ("Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged."). Jones Street Publishers argued the following were factual statements taken from the press conference: "watermelons were smashed as part of this ritual," "there was a face drawn on them, [ ] there was caricature, [ ] monkey sounds were made, the ritual took place and that a watermelon was named Bonds Wilson." All of those statements were in fact made by Superintendent McGinley at the press conference. The article included details of how the ritual was performed, the sounds that were allegedly made by the players as described by Superintendent McGinley, and a description of the caricature that was shown at the press conference. Furthermore, Superintendent McGinley stated that all of the details she described were allegations that the school district was investigating, and the first paragraph of the article informs the reader that "allegations" were made against the football team.

Additionally, Jones Street Publishers submitted to the circuit court two affidavits from its editors, including Mr. Haire, indicating they had no reason to doubt the veracity of the statements made by Superintendent McGinley. *See Fleming*, 350 S.C. at 497, 567 S.E.2d at 861–62 ("The evidence shows [respondent] relied on the results and conclusions of an investigation conducted by two highly respected investigators. [Respondent] testified he had no reason to doubt the investigation was not thorough, solid, correct, and truthful. ... The evidence shows [respondent] ... had full faith in the veracity of their report."). Mr. Haire affirmed that he had known Superintendent McGinley for a period of time and "always considered her to be completely honest and trustworthy," and consequently relied upon the conclusion she drew from her in-depth investigations. Thus, Jones Street Publishers was not required to investigate the statements made by Superintendent McGinley. *See West*, 396 S.C. at 11, 720 S.E.2d at 500 ("[T]he mere failure to investigate an allegation is not sufficient to prove the defendant had serious doubts about the truth of the publication."); *id.* ("The media has no duty to verify the accuracy or measure the sufficiency of a party's legal allegations. The Constitution does not require that the press 'warrant that every

9. We note that at oral argument, Appellants maintained that Jones Street Publishers did not accurately report the statements made by Superintendent McGinley in an undated written statement. Superintendent McGinley's written statement provided, in pertinent part:

> [T]here was no evidence to suggest that the football players understood the negative cultural implications of their ritual that included buying a watermelon, drawing a caricature (face) on the watermelon, naming the watermelon "Bonds-Wilson," transporting the watermelon on the team bus, sitting it on the team bench and surrounding and smashing the watermelon after a victory. However, it was clear the coaches either knew or should have known about the negative racial stereotypes of this watermelon ritual.

The entirety of the statement recounts events occurring from October 13, 2014 to October 22, 2014. Thus, it appears the statement was released after the live televised press conference that occurred on October 21, 2014. Jones Street Publishers maintained that it relied on the factual statements that were released at the live press conference.

allegation that it prints is true.' " (quoting *Reuber*, 925 F.2d at 717)).

Therefore, the circuit court correctly found that the factual statements reported in *City Paper*'s publications regarding the ritual were accurate accounts of comments made publicly by school district officials. *See McClain*, 275 S.C. at 285, 270 S.E.2d at 125 (holding summary judgment was proper where newspaper accurately reported information of a judicial proceeding). Thus, we find the statements of fact are protected by the fair report privilege. *See West*, 396 S.C. at 7, 720 S.E.2d at 499 ("Under this defense ... one who publishes defamatory matter concerning another is not liable for the publication" as long as "the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged" and "the privilege is not abused." (alteration in original)). We further note that Appellants concede in their brief that, "[a]ny factual reporting by the *City Paper* regarding actual statements made by Academic Magnet or [Charleston County School District] officials is protected by the fair report privilege."

Appellants focus their arguments on the articles' use of the words "racist" and "racist douchebag." Appellants maintain that characterizing the student's actions as "racist" does not fall under the fair report privilege. However, Jones Street Publishers does not contend that using the word "racist" in the articles would fall under the fair report privilege. The circuit court also made no findings to suggest that Jones Street Publishers' use of the word "racist" was either protected or not protected under the fair report privilege. Instead, Jones Street Publishers argued, and the circuit court found, the remaining statements in the articles were opinions protected by the First Amendment.

III. Opinions Expressed in the Article

In order to determine the level of protection that the speech at issue is entitled to under the First Amendment, we must first address whether Jones Street Publishers reported on a matter of public or private concern.

Matter of Public Concern

[24] Appellants contend the circuit court erred in finding the opinions expressed in the articles were not actionable because they were expressions of opinions protected under the First Amendment. Appellants argue Jones Street Publishers should not be protected "because the statements are assertions that the members of the [AMHS] football team are racists." Appellants allege Jones Street Publishers' statements "concerned the character and beliefs" of Appellants and, thus, were a matter of private, not public, concern. We disagree.

[25] At the heart of the First Amendment's protection is speech on matters of public concern. *Snyder v. Phelps*, 562 U.S. 443, 451–52, 131 S.Ct. 1207, 179 L.Ed.2d 172 (2011). "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' " *Id.* at 452, 131 S.Ct. 1207 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). "That is because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.' " *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). Thus, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (quoting *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982)).

However, when "matters of purely private significance are at issue, First Amendment protections are often less rigorous." *Snyder*, 562 U.S. at 452, 131 S.Ct. 1207.

> That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: "[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas"; and the "threat of liability" does not pose the risk of "a reaction of self-censorship" on matters of public import[ance].

Id. (first alteration in original) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985)).

[26–28] "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Id.* at 453, 131 S.Ct. 1207 (citations and internal quotation marks omitted). "Whether ... speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48, 103 S.Ct. 1684. "In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said." *Snyder*, 562 U.S. at 454, 131 S.Ct. 1207; *see Connick*, 461 U.S. at 148 n.7, 103 S.Ct. 1684 ("The inquiry into the protected status of speech is one of law, not fact.").

First, we note that Appellants conceded this issue and agreed with the circuit court that the speech was a matter of public concern. The following colloquy occurred between Appellants' counsel and the circuit court regarding whether the speech at issue was a matter of public or private concern:

> THE COURT: Tell me this. With respect to, of course, you got two different kind[s] of [plaintiffs]. You have Mr. Walpole, then you have the players, team players. Do you seriously contend this is not a matter of public interest?
>
> [APPELLANTS]: I don't contend that. For the coach it is. I don't think that as far as the kids it is. I think that the kids have a different standard. I think the coach—
>
> THE COURT: Why is it a public—matter of public interest as far as the coach is concerned? He may be a public figure. They may be private figures, but the event is the event. Why [isn't it] equally a matter of public interest whether a bunch of kids did it or the coach or both of them?
>
> [APPELLANTS]: I don't seriously contend that is not a matter of public interest. I think that it probably was and is.

Because Appellants conceded this issue at the summary judgment hearing, they cannot now argue the issue on appeal. *See TNS Mills, Inc. v. S.C. Dep't. of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal."); *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (finding an issue procedurally barred when the appellants expressly conceded the issue at trial); *see also Erickson*, 368 S.C. at 476, 629 S.E.2d at 670 ("Moreover, a party may not complain on appeal of error or object to a trial procedure [that] his own conduct has induced.").

Nonetheless, even if this matter was not conceded below, when viewing the record as a whole, we find the speech at issue addressed a matter of public concern. *See Connick*, 461 U.S. at 147–48, 103 S.Ct. 1684 ("Whether ... speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."). The School District released a press statement and held a press conference to inform the community on a matter that affected students and teachers within the district—not just at AMHS. The watermelon ritual, the School District investigation of the watermelon ritual, and Coach Walpole's removal as head coach of the football team were subjects of great interest to the Charleston community. At the press conference, Superintendent McGinley stated the board member who brought the allegations to her attention was "concerned about the racial stereotypes" related to activities like the watermelon ritual practiced by AMHS's football team. The board member informed Superintendent McGinley that a concerned parent witnessed the ritual and reported it to the board member. Thus, the content of Mr. Haire's speech about these events concerned broad issues of interest to society at large—i.e., allegations of racial insensitivity. Moreover, the events reported during the press conference gained national attention from media outlets throughout the United States. Therefore, we find the circuit court did not err in finding

this was a matter of public concern. *See Holtzscheiter*, 332 S.C. at 531–32, 506 S.E.2d at 513 (Toal, J., concurring in result) ("[M]atters of public concern are those related to the 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " (quoting *Dun & Bradstreet*, 472 U.S. at 759, 105 S.Ct. 2939)).

Fact or Expressions of Opinion

[29] As contended by Appellants, the "central issue is whether [a person] being referred to as a 'racist douchebag' and someone [who] condones a 'racist act' is defamatory." Specifically, the statement at issue in the first article "Melongate" provides: "Today, Charleston was consumed by one story and one story only: the removal of Academic Magnet football coach Bud Walpole amid *allegations that his players more or less behaved like racist douchebags*." (emphasis added). The statement at issue in the second article is the title itself: "Mob Rules: School district forces out superintendent who fired *coach who condoned racist ritual*." (emphasis added). Thus, we must consider whether the statements are factual assertions about Appellants. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19–20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations ... where a media defendant is involved."); *see also Connick*, 461 U.S. at 148 n.7, 103 S.Ct. 1684 ("The inquiry into the protected status of speech is one of law, not fact.").

[30, 31] "Under the First Amendment[,] there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." *Gertz v. Welch*, 418 U.S. 323, 339–40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Therefore, an expression of opinion that conveys a false and defamatory statement of fact can be actionable. *See Milkovich*, 497 U.S. at 18, 110 S.Ct. 2695 (noting that "a wholesale defamation exemption" was not created "for anything that might be labeled 'opinion' " because "it would ... ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact").

[32] There are certain "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Id.* at 20, 110 S.Ct. 2695 (alteration in original) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)). Statements such as opinion, satire, epithets, or rhetorical hyperbole cannot be the subject of liability for defamation. *See id.* ("This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation.").

[33] Although the Supreme Court has not delineated a test [10] to determine whether certain statements are "fact" or "opinion," the *Milkovich* court indicated that "statement[s] on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, ... where a media defendant is involved." 497 U.S. at 19–20, 110 S.Ct. 2695. Moreover, "a statement of opinion relating to matters of public concern [that] does not contain a provably false factual connotation will receive full constitutional protection." *Id.* at 20, 110 S.Ct. 2695.

We do not find that the term "racist douchebag" can "reasonably [be] interpreted as

10. We note that the Fourth Circuit has adopted a set of factors to consider when distinguishing between statements of fact and opinion. *See Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1288 (4th Cir. 1987) (noting that the threshold inquiry is whether the challenged statement can be characterized as true or false; if the statement cannot be characterized as either true or false then it is not actionable); *id.* at 1287–88 (noting that if the challenged statement can be characterized as either true or false, then three additional factors must be considered to determine whether the statement is nevertheless an opinion because "a reasonable reader or listener would recognize its weakly substantiated or subjective character—and discount it accordingly"); *id.* (noting the additional factors are "the author or speaker's choice of words;" "the context of the challenged statement within the writing or speech as a whole;" and "the broader social context into which the statement fits").

stating actual facts" about Appellants. *See Milkovich*, 497 U.S. at 20, 110 S.Ct. 2695 (indicating there is protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about a person to ensure "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' [that] has traditionally added" to topics of great debate); *cf. id.* at 21–22, 110 S.Ct. 2695 (finding statement written in newspaper that high school coach lied under oath was actionable because the "language [was] an articulation of an objectively verifiable event").

Additionally, whether someone "more or less behaved like [a] racist douchebag" or whether someone condoned an act that was "racist" is susceptible to varying viewpoints and interpretations. One person may view certain behavior as disrespectful and offensive, but another person might view the same behavior as non-controversial and socially acceptable. Importantly, we note that all of the Appellants agreed during their deposition testimony that whether something is racist is a matter of opinion.[11]

Furthermore, the opinion editorials at issue were published in the "Views" section of the newspaper. This is a section of the newspaper that is dedicated to the expression of opinions by the newspaper's editors, guest editorial writers, and readers. Essentially, the article was published in a section devoted to opinions and commentary. *See Potomac Valve & Fitting Inc.*, 829 F.2d. at 1288 ("Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it."). Thus, we find that the use of the term "racist" in an opinion editorial to describe a sequence of events related to a racially sensitive matter does not assert any verifiable, objectively provable fact about Appellants. We find the circuit court correctly held the use of the terms "racist" and "racist douchebag" in the articles were not actionable because they were expressions of opinion and rhetorical hyperbole.[12] *See* 3 Dan B. Dobbs et. al., *The Law of Torts* § 572 (2011) (" '[R]acist' is sometimes said to be mere name-calling and not actionable in some contexts[; however,] the term can be actionable where it plainly imputes *acts* based on racial discrimination." (emphasis added)); *see also* 50 Am. Jur. 2d *Libel and Slander* § 200 (2017) ("However, general statements charging a person with being racist, unfair, or unjust, without more, such as contained in the signs carried by

11. Appellant Adam Ackerman was asked, ''Do you believe that whether or not something is racist is a matter of opinion?'' Appellant replied, ''It is a matter of opinion.''

Appellant R.M. was asked, ''[D]o you think that people can have different opinions as to what is racist?'' Appellant responded, ''Absolutely.''

Appellant C.F. was asked, ''Do you think whether or not the watermelon ritual, the perception of the watermelon ritual, whether or not that's racist is a matter of opinion?'' Appellant responded, ''[I]t is a matter of opinion, but it's also—it's an opinion generated on what you've heard.''

Appellant Coach Walpole was asked, ''Who determines whether or not something is racist?'' Appellant responded, ''It's up to the—it depends on what it is, up to the individual interpretation, I don't know.''

12. We note that other jurisdictions have held that referring to someone as ''racist'' is an expression of one's opinion and is not actionable for defamation. *See Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (noting that calling someone a racist ''is not actionable unless it implies the existence of undisclosed[ ] defamatory facts''); *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) (finding that use of the word ''fascist'' ''cannot be regarded as having been proved to be [a] statement[ ] of fact''); *Meissner v. Bradford*, 156 So.3d 129, 133–34 (La. Ct. App. 2014) (holding statement that former president of youth football league ''has a problem with people of color'' was a statement of opinion in the nature of hyperbole rather than an actionable statement of fact); *Ward v. Zelikovsky*, 136 N.J. 516, 643 A.2d 972, 983 (1994) (holding statement that plaintiff hated or did not like Jews was not actionable); *id.* (''[T]he statement [that plaintiff hated or did not like Jews] cannot be distinguished from characterizations that a person is a 'racist,' 'bigot,' 'Nazi,' or 'facists.' ''); *Silverman v. Daily News, L.P.*, 129 A.D.3d 1054, 1055–56, 11 N.Y.S.3d 674 (N.Y. App. Div. 2015) (holding defendant's publication that plaintiff authored ''racist writings'' is a statement of opinion, not fact); *Covino v. Hagemann*, 165 Misc.2d 465, 627 N.Y.S.2d 894, 899–900 (N.Y. Sup. Ct. 1995) (holding statements that characterized plaintiff's behavior as ''racially insensitive'' were protected expressions of opinion and did not give rise to an action for defamation); *id.* (''In daily life [the word] 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face[.]'').

protestors, constitute mere name calling and do not contain a provably false assertion of fact as required for defamation.").

Accordingly, Appellants did not meet their burden of proving that Jones Street Publishers published a false and defamatory statement and thus, summary judgment was proper. *See West*, 396 S.C. at 7, 720 S.E.2d at 498 ("To establish a defamation claim, a plaintiff *must* prove: (1) a false and defamatory statement was made . . . ." (emphasis added)); *see also Milkovich*, 497 U.S. at 19–20, 110 S.Ct. 2695 ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."); *see also Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001) ("The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery[,] against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof at trial." (quoting *Carolina All. for Fair Emp't v. S.C. Dep't of Labor, Licensing, and Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999))).

Because the qualified privilege of fair report applies to the factual statements of the articles and the remaining statements in the articles are protected under the First Amendment as opinion, ideas, and rhetorical hyperbole, the statements are not actionable. Therefore, Appellants have failed to establish the first element of defamation. *See West*, 396 S.C. at 7, 720 S.E.2d at 498 ("To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made . . . ."). Nonetheless, we will address the remaining issues.

IV. Proof of Injury

[34] Appellants maintain the circuit court erred in finding that they have not shown proof of injury to reputation. Appellants contend they have suffered actual injury to their reputations and standing in the community as well as personal humiliation and mental anguish. Appellants argue the students are private figures and do not need to provide proof of damages to defeat summary judgment.[13] We disagree.

[35–41] "[I]n a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumptions [that] the defendant acted with common law malice and the plaintiff suffered general damages do not apply." *Erickson*, 368 S.C. at 466, 629 S.E.2d at 665. "Instead, the private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages." *Id.* General damages include injuries such as "injury to reputation, mental suffering, hurt feelings, and other similar types of injuries [that] are incapable of definite money valuation." *Holtzscheiter*, 332 S.C. at 510 n.4., 506 S.E.2d at 502 n.4 (quoting *Whitaker v. Sherbrook Distrib. Co.*, 189 S.C. 243, 246, 200 S.E. 848, 849 (1939)). "[S]pecial damages are tangible losses or injury to the plaintiff's property, business, occupation or profession, capable of being assessed monetarily, . . ." *Id.* However, special damages do not include hurt feelings, embarrassment, humiliation, or emotional distress. *Wardlaw v. Peck*, 282 S.C. 199, 205–06, 318 S.E.2d 270, 274–75 (Ct. App. 1984). Additionally, "in a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law presumption that the libelous statement is false is not applied." *Erickson*, 368 S.C. at 466, 629 S.E.2d at 665. "Instead, the private-figure plaintiff must prove the statement is false." *Id.* Appellant bears the burden of proving the defamation case by a preponderance of the evidence. *Id.* at 475, 629 S.E.2d at 670.

In viewing the evidence in the light most favorable to Appellants, Appellants did not produce evidence of either general or special damages arising from injury to their reputations as a direct result of the *City Paper*'s publications. *See Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860 ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed

13. Jones Street Publishers conceded that the football players were private figures.

in the light most favorable to the non-moving party."); *see also Erickson*, 368 S.C. at 466, 629 S.E.2d at 665 ("[T]he private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages."). Appellants could not identify individuals who read the *City Paper*'s publications and as a result of those publications, viewed Appellants in a different light. Nor did Appellants provide evidence of any lost opportunities as a result of the articles. Appellants agreed that they did not lose any friends, remained employed at their places of employment, and were accepted to the colleges they desired to attend. At most, Appellants contended they felt "more self-conscious" and that their school had been defamed. *See Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001) ("The focus of defamation is not on the hurt to the defamed party's feelings, but on the injury to his reputation." (quoting *Fleming v. Rose*, 338 S.C. 524, 532, 526 S.E.2d 732, 737 (Ct. App. 2000), *rev'd on other grounds*, 350 S.C. 488, 567 S.E.2d 857 (2002))); *see also Johnson v. Nickerson*, 542 N.W.2d 506, 513 (Iowa 1996) ("While a defamation suit can be viewed as serving the purpose of vindicating the plaintiff's character by establishing the falsity of the defamatory matter, if no harm can be established[,] the action must be regarded as trivial in nature."). Some Appellants indicated that they had been questioned about the watermelon incident by various people; however, Appellants were unable to identify those individuals and unable to concretely state whether those individuals were questioning them as a result of reading the *City Paper*'s publications. *See Jackson*, 383 S.C. at 17, 677 S.E.2d at 616 ("A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror. 'However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury.' " (internal citation omitted) (quoting *Small*, 329 S.C. at 461, 494 S.E.2d at 841)).

As previously stated, the watermelon ritual controversy gained local and national attention resulting in reports by media outlets, including television and radio broadcasts, throughout the United States. Importantly, the *City Paper* was not the first medium to produce a story on the events. Moreover, the factual statements in *City Paper*'s article were a substantially accurate report of the statements made by Superintendent McGinley at the live press conference. Thus, we find that Appellants did not meet their burden of showing proof of injury. *See id.* ("Finally, assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact."); *see also Boone*, 347 S.C. at 579, 556 S.E.2d at 736 ("The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." (quoting *Carolina All. for Fair Emp't*, 337 S.C. at 485, 523 S.E.2d at 800)).

V. Whether Statements Were "Of and Concerning" the Students

[42] Appellants argue the circuit court erred in finding the alleged defamatory statements were not "of and concerning" the students because the statements refer to the entire football team and not to any individual student. Appellants cite to *Fawcett Publ'ns, Inc. v. Morris*, 377 P.2d 42 (Okla. 1962)[14] for

14. The case cited by Appellants is the only defamation case that our research uncovered that has held a member of a football team can prevail when the defamatory language concerns the entire team. In *Fawcett,* the Supreme Court of Oklahoma held that a fullback on the alternate squad of the University of Oklahoma football team had been defamed by an article alleging that members of the team had used amphetamines. 377 P.2d at 52. None of the players were named in the article; however, the article referred specifically to the 1956 football season. *Id.* at 47, 52. Specifically, the article stated "several *physicians observed Oklahoma players being sprayed in the nostrils with an atomizer.*" *Id.* at 47. Thus, the article insinuated the players were using amphetamines. *Id.* at 44. The court held the fullback presented evidence that he was a constant player during the 1956 season; the substance administered with the atomizer was a harmless substance used to help players with mouth dryness; and he did not use amphetamines or any other narcotic drugs. *Id.* at 47. Therefore, the court determined that despite the

the proposition that a member of a football team may be defamed even if the individual is not specifically named.

[43–46] "To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred." *Burns v. Gardner*, 328 S.C. 608, 615, 493 S.E.2d 356, 359 (Ct. App. 1997). "Where a publication affects a class of persons without any special personal application, no individual of that class can sustain an action for the publication." *Hospital Care Corp. v. Commercial Cas. Ins. Co.*, 194 S.C. 370, 377, 9 S.E.2d 796, 800 (1940) (citation omitted). Thus, "where defamatory statements are made against an aggregate body of persons, an individual member not specially imputed or designated cannot maintain an action." *Id.* "Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class." *Id.* at 378, 9 S.E.2d at 800 (citation omitted); *see also* 50 Am. Jur. 2d. *Libel and Slander* § 225 (2017) ("Under the 'group libel doctrine,' a plaintiff has no cause of action for a defamatory statement directed to some of, but less than, the entire group when there is nothing to single out the plaintiff; consequently, the plaintiff has no cause where the statement does not identify to which members it refers.").

However, in *Holtzscheiter*, our supreme court held that "[w]hile the general rule is that defamation of a group does not allow an individual member of that group to maintain an action, this rule is not applicable to a small group." *Holtzscheiter*, 332 S.C. at 514, 506 S.E.2d at 504. The *Holtzscheiter* court held a newspaper liable for publishing a statement that a murder victim lacked "family" support. *Id.* The murder victim's mother sued for defamation alleging the statement defamed her. *Id.* at 508, 506 S.E.2d at 500. The *Holtzscheiter* court indicated there was evidence from which a jury could find the statement was "of and about" the victim's mother. *Id.* at 514, 506 S.E.2d at 504. In the instant matter, by any measure, a football team would not constitute a small group—at least not under the analyses of *Holtzscheiter*.[15] *See Hospital Care Corp.*, 194 S.C. at 377-87, 9 S.E.2d at 800–04 (affirming the circuit court's order ruling that a small insurance company could not maintain a defamation action against defendants who published pamphlet stating that small insurance companies that had recently entered into the insurance business were inexperienced and financially unstable); *id.* (affirming the finding that the pamphlet was not actionable because the defamation, if any, was to a class and had no specific application to the plaintiff); *see also Burns*, 328 S.C. at 615-16, 493 S.E.2d at 360 (holding two blind citizens lacked standing to maintain defamation action on behalf of blind population in general).

Here, we conclude the circuit court did not err in finding the statements were not "of and concerning" Appellants. *City Paper*'s publication made only general statements about the conduct of the AMHS's football team as a whole. The article did not reference any names nor did it include any pictures of the members of the football team. Additionally, the *City Paper* did not publish any facts or commentary specific to any particular member of the AMHS football team. Thus, there are no statements within the articles that single out any particular member of the football team. Accordingly, Appellants have not met their burden of proving the allegedly defamatory statements con-

football team consisting of sixty or seventy players, the fullback had ''established his identity in the mind of the average lay reader as one of those libeled.'' *Id.* at 52.

15. *See Evans v. Chalmers*, 703 F.3d 636, 659–60 (4th Cir. 2012) (''One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.'' (quoting Restatement (Second) of Torts § 564A (1977))) (Wilkinson, J., concurring); *Church of Scientology Intern. v. Daniels*, 992 F.2d 1329, 1331 (4th Cir. 1993) (''[D]efamatory statement about a large group cannot support a libel action by a member of the group'' (citing *Ewell v. Boutwell*, 138 Va. 402, 121 S.E. 912, 915 (Va. 1924))).

cerned Appellants. *See Hospital Care Corp.*, 194 S.C. at 378, 9 S.E.2d at 800 ("Where defamatory words reflect upon a class of persons impartially, and there is nothing showing which one is meant, no action lies at the suit of a member of the class."); *see also Burns*, 328 S.C. at 615, 493 S.E.2d at 359 ("To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred.").

VI. Constitutional Actual Malice

Lastly, Appellants argue the circuit court erred in finding that Coach Walpole did not show that Jones Street Publishers acted with actual malice. First, Appellants contend that Coach Walpole is a private figure and not a public official as the circuit court held. Appellants also assert the *City Paper*'s use of the word "racist" in the articles constituted actual malice. Conversely, Jones Street Publishers maintains that Coach Walpole is a public official and he must prove constitutional actual malice. Jones Street Publishers contends that Coach Walpole failed to produce evidence of actual malice. We agree with Jones Street Publishers.

[47–51] "[A]n important initial step in analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." *Erickson*, 368 S.C. at 468, 629 S.E.2d at 666. "This determination is a matter of law which must be decided by the court, . . ." *Id.* "In general, a public official is a person who, among the hierarchy of government employees, has or appears to the public to have 'substantial responsibility for or control over the conduct of governmental affairs.' " *Id.* at 469, 629 S.E.2d at 666 (quoting *Holtzscheiter*, 332 S.C. at 520 n.4, 506 S.E.2d at 507 n.4 (Toal, J., concurring in result)). "In considering the question of whether one is a public official, the employee's position must be one [that] would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* (quoting *Holtzscheiter*, 332 S.C. at 520 n.4, 506 S.E.2d at 507 n.4 (Toal, J., concurring in result)). "The status of a public official may be deemed sufficient . . . not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular context." *Id.* at 469, 629 S.E.2d at 666–67 (quoting *McClain*, 275 S.C. at 284, 270 S.E.2d at 125).

For purposes of a First Amendment analysis, our courts have held a variety of public school administrators and employees to be public officials. *See Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991) (finding school board members to be public officials); *Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978) (finding school trustee to be a public official). Other jurisdictions have held that public school teachers and athletic coaches are public officials for purposes of applying the *New York Times* doctrine. *See Mahoney v. Adirondack Publ. Co.*, 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365, 1368 (1987) (finding a public high school football coach to be a public figure); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1102 (Okla. 1978) (finding person holding the dual positions of public school coach and physical education teacher to be a public official); *Johnson v. Sw. Newspapers Corp.*, 855 S.W.2d 182, 184 (Tex. Ct. App. 1993) (finding person holding the dual position of athletic director and head football coach to be a public official).

[52–56] Once it is determined that the plaintiff is a public official, pursuant to *New York Times Co. v. Sullivan*,[16] the plaintiff must show proof that the publication was made with "actual malice" or else the publication is constitutionally privileged. *See McClain*, 275 S.C. at 283, 270 S.E.2d at 124. Actual malice must be proven by clear and convincing evidence. *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). "Actual malice in this context has been defined as the publication of an article 'with knowledge that it was false or with reckless disregard of whether it was false or not.' " *McClain*, 275 S.C. at 283, 270 S.E.2d at 124 (quoting *New York Times*, 376 U.S. at

16. 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

280, 84 S.Ct. 710). "Whether the evidence is sufficient to support a finding of actual malice is a question of law." *Elder,* 341 S.C. at 113, 533 S.E.2d at 901–02. "When reviewing an actual malice determination, [the appellate court] is obligated to independently examine the entire record to determine whether the evidence sufficiently supports a finding of actual malice." *Id.* at 113–14, 533 S.E.2d at 902.

[57–60] However, a "reckless disregard" for the truth "requires more than a departure from reasonably prudent conduct." *Id.* at 114, 533 S.E.2d at 902. "There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth* of his publication." *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968)). "There must be evidence the defendant had a '*high degree of awareness of . . . probable falsity.*' " *Id.* (alteration in original) (quoting *Garrison*, 379 U.S. at 74, 85 S.Ct. 209). Thus, "[a]ctual malice may be present . . . where one fails to investigate and there are obvious reasons to doubt the veracity of the [information]." *Id.* at 114, 533 S.E.2d at 902.

[61] Here, the circuit court correctly held that Coach Walpole is a public official for purposes of applying the *New York Times* doctrine. Coach Walpole holds many positions within the School District. He is the head football coach at AMHS, the head coach of the women's basketball team at AMHS, and a teacher at Liberty Hill Academy. Coach Walpole testified that he interacts with the parents of the athletes after each game and he participates in newspaper and television interviews. Furthermore, as head coach, he is responsible for the oversight of the teams' activities.

[62] As a public official, Coach Walpole was required to demonstrate constitutional actual malice by clear and convincing evidence. A review of the record indicates that Coach Walpole failed to produce sufficient evidence to support such a finding. *See id.* at 114, 533 S.E.2d at 902. Coach Walpole failed to produce evidence showing Jones Street Publishers had "in fact entertained serious doubts as to the truth" of the publications. *See id.* ("[T]here must be evidence at least that the defendant purposefully avoided the truth."). Jones Street Publishers provided affidavits from its editors indicating they did not have any reason to doubt the veracity of Superintendent McGinley's statements regarding the events and circumstances surrounding the watermelon ritual. *See id.* ("Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements."). Thus, Jones Street Publishers was not required to investigate the School District's statements when it did not have reason to doubt its truth. *See id.* ("Actual malice may be present, . . . where one fails to investigate and there are obvious reasons to doubt the veracity of the [information]."); *id.* ("Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."). Therefore, we conclude the circuit court correctly found Coach Walpole failed to show proof of actual malice.

CONCLUSION

Accordingly, we find (1) the statements of fact in the articles are protected by the fair report privilege and (2) the remaining statements in the articles are expressions of opinion, ideas, and rhetorical hyperbole protected under the First Amendment. Because we find the statements at issue are not actionable, Appellants have failed to meet their burden of proving the first element of their defamation claim, and therefore, summary judgment was appropriate.[17] Furthermore,

17. *See West,* 396 S.C. at 7, 720 S.E.2d at 498 ("To establish a defamation claim, a plaintiff *must* prove: (1) a false and defamatory statement was made; . . ." (emphasis added)); *see also Boone,* 347 S.C. at 579, 556 S.E.2d at 736 ("The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery[,] against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof at trial." (quoting *Carolina All. for Fair Emp't,* 337 S.C. at 485, 523 S.E.2d at 800)).

we find Appellants (1) have not shown proof of injury to their reputations,[18] (2) have not shown that the allegedly defamatory statements were "of and concerning" Appellants, and (3) have not shown that Jones Street Publishers acted with actual malice.

AFFIRMED.

WILLIAMS and HILL, JJ., concur.

18. *See Erickson,* 368 S.C. at 466, 629 S.E.2d at 665 ("[T]he private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages.").

EXHIBIT "7"

V.

[18] Summary judgment may be awarded to a non-moving party where it appears from the papers, affidavits and other proofs that there are no disputed issues of fact and that judgment for the non-moving party would be appropriate as a matter of law. *Lowenschuss v. Kane*, 520 F.2d 255, 261 (2nd Cir. 1975); *see generally*, C. Wright and A. Miller, *Federal Practice & Procedure*, Civil § 2720.

Accordingly, for the reasons stated herein, defendants shall have 20 days from entry of this opinion and order to supplement the record or else partial summary judgment shall issue in favor of plaintiff as to liability on the denial of his right to call witnesses and to have a written statement by the hearing officer as to the evidence and reasons relied on for the disciplinary decision, subject to the defense of qualified immunity. Defendants' motion for summary judgment on the denial of the right to compel relevant departmental documents is denied without prejudice. Defendants' motion for summary judgment on the basis of qualified immunity is also denied without prejudice.

SO ORDERED.

which a reasonable person would have known." *Id.* at ——, 102 S.Ct. at 2738. If the law was clearly established at the time the action occurred, the immunity defense will ordinarily fail, "since a reasonably competent public official should know the law governing his conduct." *Id.* However, the defense may yet be sustained if the official both shows "extraordinary circumstances" and "that he neither knew nor should have known of the relevant legal standard." *Id.* The Supreme Court's overriding concern in articulating these elements was to establish an objective standard for measuring qualified immunity so that the issue could be determined more readily on summary judgment, thus protecting government officials from exhaustive discovery and the risk of trial where only bare allegations of "malice" are made to counter the qualified immunity defense.

Thomas A. HARRIS, M.D. and Amy Harris, Plaintiffs,

v.

Larry TOMCZAK, etc., et al., Defendants.

Civ. No. S–80–206 LKK.

United States District Court, E. D. California.

July 12, 1982.

Psychiatrist author and his wife brought defamation action against lay preacher and others arising from comments made during two separate speeches. On defendants' motion for partial summary judgment, the District Court, Karlton, J., held that: (1) material issues of fact as to whether psychiatrist author was either a "general purpose public figure" or a "limited purpose public figure" precluded summary judgment, and (2) wife of psychiatrist author was not a general purpose public figure.

Motion denied.

1. States ⇐4.2

Although states retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood, boundaries of

Thus, under *Harlow*, defendants' motion should address (i) whether the constitutional law regarding their obligations to respond to plaintiff's request for witnesses and to provide an adequate statement of facts and reasons supporting the hearing decision was clearly established as of October 28, 1977, (ii) whether a reasonable person in defendants' positions would have known of these legal obligations, and (iii) whether, if defendants in fact were unaware of their legal obligations, extraordinary circumstances justify their lack of knowledge. Of particular significance will be the rules or internal policy guidelines in place at the time of the hearing, since prison officials are charged with knowledge of their own regulations. *Chavis*, 643 F.2d at 1289.

that power are defined by Federal Constitution and, accordingly, no state may impose liability for a defamatory statement, subject of which is a "public official" or "public figure," unless plaintiff proves that it was made with knowing falsehood or reckless disregard of the truth. U.S.C.A.Const. Amend. 1.

2. Federal Civil Procedure ⇐2551

In resolving a motion for summary judgment on public figure status of a particular defamation plaintiff, conventional standards apply and, accordingly, if there are any contested issues of material fact, the motion should be denied. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

3. Libel and Slander ⇐48(1)

Access to the media is not determinative of, or material to, determination of whether a defamation plaintiff is a "public figure."

4. Libel and Slander ⇐48(1)

A "general purpose public figure" in context of a defamation suit is a person whose name is immediately recognized by a large percentage of relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts can reasonably be expected to be known and considered by that group in course of their own individual decision making; relevant population in considering breadth of name recognition is to be measured by audience reached by the alleged defamation, and fame or notoriety achieved by a public figure must have preexisted the allegedly defamatory statements which give rise to the litigation.

See publication Words and Phrases for other judicial constructions and definitions.

5. Libel and Slander ⇐48(1)

Definition of "general purpose public figure" in context of a defamation suit is to be strictly construed and doubts are to be resolved in favor of a person being either a limited purpose public figure or a private person.

6. Libel and Slander ⇐48(1)

Those charged with defamation cannot, by their own conduct, create their own defense by making claimant a public figure.

7. Libel and Slander ⇐48(1)

Nationwide fame is not required for a defamation plaintiff to be a "general purpose public figure;" rather, question is whether the individual had achieved necessary degree of notoriety where he was defamed, i.e., where the defamation was published.

8. Libel and Slander ⇐48(1)

Definition of a "general purpose public figure" does not focus upon activities of defamation plaintiff in seeking public attention.

9. Libel and Slander ⇐48(1)

A "limited purpose public figure" for purposes of a defamation action is a person who, by voluntary and intentional conduct, has vigorously sought to directly influence resolution of a particular controversy, identifiable as such from intended audience's perception, resolution of which can reasonably be said to have a perceptible impact on persons other than immediate participants in the controversy; for a person to be classified as a "limited public figure" for these purposes, allegedly defamatory statement must be made within scope of the particular controversy and must be reasonably related to that controversy.

See publication Words and Phrases for other judicial constructions and definitions.

10. Federal Civil Procedure ⇐2011

Uncontested hearsay material which is not objected to may be considered by court.

11. Federal Civil Procedure ⇐2515

In defamation action brought by psychiatrist author, issue of fact as to whether plaintiff was a "general purpose public figure" precluded summary judgment.

12. Federal Civil Procedure ⇐2515

In defamation action brought by psychiatrist author, defendant failed to demonstrate that plaintiff's remarks were in any way directed to field of psychotherapy

which plaintiff characterized as the controversy, and thus disputed issues of fact as to whether plaintiff was a "limited purpose public figure" precluded summary judgment.

13. Libel and Slander ⇐48(1)

Wife of psychiatrist author who coauthored successful book but who was not listed as such on the book itself was not a "general purpose public figure" for purposes of defamation action.

Richard G. Gay, Washington, D. C., Weldon Reeves, Sacramento, Cal., for defendants Tomczak and Tag Ministries.

Gary Nevers, Hodge & Skoog, Inc., Los Angeles, Cal., for plaintiffs.

F. Michael Ford, Tuscaloosa, Ala., Walter Gallawa, Sacramento, Cal., for defendant Robert Mumford.

James Clymer, Lancaster, Pa., Don E. Bennett, Lodi, Cal., for defendant Harry Rutt.

Michael B. Moore, Cartwright, Sucherman, Slobodin & Fowler, Inc., San Francisco, Cal., for defendant Jimmy Moore.

OPINION AND ORDER

KARLTON, District Judge.

Plaintiffs, Dr. Thomas Harris and his wife Amy Harris, authors of "I'm Okay—You're Okay," brought this defamation action seeking damages from defendant Tomczak and others. The defendants have brought on a variety of motions. This published opinion will be restricted to considering defendant Tomczak's motion for partial summary judgment requesting that this court find that the plaintiffs are "public figures."[1] The effect of such a holding, of course, would be to require plaintiffs to prove "constitutional malice" in order to prevail. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).[2]

I

CHOICE OF LAW

[1] Plaintiffs have brought this action predicating jurisdiction upon diversity of citizenship, 28 U.S.C. § 1332. Accordingly, this court must apply the California law of defamation. *Erie RR v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Nonetheless, by virtue of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny "[t]he time is long since past when cases such as this could be treated independent of First Amendment standards." *Lewis v. Time, Inc.*, 83 F.R.D. 455, 461 n.5 (E.D.Cal.1979), *appeal docketed* (9th Cir. Jan. 14, 1982). As Justice White explained, the cumulative effect of the Supreme Court cases considering the effect of the first amendment on the law of defamation has been that "the Court

1. The other motions will be disposed of in a companion unpublished opinion. The reasons for bifurcating this opinion are set forth in my opinion in *Kouba v. Allstate Insurance Co.*, 523 F.Supp. 148, 151 n.2 (E.D.Cal.1981), *appeal docketed* No. 81–4566 (9th Cir. Oct. 19, 1981).

2. The doctrine that in certain cases a plaintiff must prove that allegedly defamatory statements were expressed with knowledge of falsity or reckless disregard for the truth was first enunciated by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S.Ct. 710, 725–726, 11 L.Ed.2d 686 (1964) (public officials), and was quickly extended to "public figures." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 164–65, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094 (1967). The court described the requisite showing as "actual malice." The use of this term, connoting as it does, common law notions of hatred and ill will (*see* 4 Witkin, *Summary of California Law*: Torts § 304 at 2575 (8th ed. 1974)), is most unfortunate (*see* W. Prosser, *The Law of Torts* at 821 (4th ed. 1971)), and in early cases led to confusion. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S.Ct. 197, 198, 19 L.Ed.2d 248 (1967); *Meiners v. Moriarity*, 563 F.2d 343, 350–51 (7th Cir. 1977). For the balance of this Opinion and in order to distinguish the two, when referring to the common law meaning I shall use the term "common law" malice, while when referring to the constitutional doctrine, I shall use the term "constitutional" malice. This usage is consistent with the Ninth Circuit's description of the doctrine as one of "constitutional privilege." *See Arnheiter v. Random House Inc.*, 578 F.2d 804, 805 (9th Cir. 1978), *cert. denied*, 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 189 (1979).

. . . has federalized major aspects of libel law. . . ." *Gertz v. Welch*, 418 U.S. 323, 370, 94 S.Ct. 2997, 3022, 41 L.Ed.2d 789 (1974) (White, J. dissenting). In sum, although "the states . . . retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood . . ." (*Gertz v. Welch*, 418 U.S. at 345–46, 94 S.Ct. at 3009–3010) the boundaries of that power are defined by the Federal Constitution. Accordingly, no state may impose liability for a defamatory statement the subject of which is a "public official" or "public figure" unless the plaintiff proves that it was made with knowing falsehood or reckless disregard of the truth. *New York Times Co. v. Sullivan*, 376 U.S. at 279–80, 84 S.Ct. at 725–726 (public official); *Curtis Publishing Co. v. Butts*, 388 U.S. at 155, 164–65, 87 S.Ct. at 1991, 1996 (public figure). Since no claim is made in this case that plaintiffs are public officials, the ultimate task here is to ascertain the definition of a public figure for purposes of defamation cases[3] and to determine whether the record before the court permits resolution of the plaintiffs' status on summary judgment.

Prior to addressing this task, however, certain preliminary legal matters must be considered. Accordingly, a consideration of the facts will be deferred to a later portion of this Opinion (*see* Part IV, *infra*). The first of these legal issues is the role of the court and the jury in determining who is a public figure.

II

QUESTIONS OF LAW, QUESTIONS OF FACT AND MATTERS FOR SUMMARY JUDGMENT

As I have noted, defendant seeks the application of the doctrine of constitutional privilege[4] which is dependent upon whether the plaintiffs, or either of them, are public figures. Defendant's selected procedural device for seeking pretrial disposition of this issue is a motion for partial summary judgment. Fed.R.Civ.P. 56.

Ordinarily, of course, the question tendered on a motion for partial summary judgment is whether it has been demonstrated that there is no genuine issue of dispute as to any material fact and that the moving party is entitled to the judgment sought as a matter of law. *See Avila v. Travelers Insurance Co.*, 651 F.2d 658, 660 (9th Cir. 1981); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), *cert. denied*, 445 U.S. 951, 100 S.Ct. 1600, 63 L.Ed.2d 786 (1980). Accordingly, "the court's task is the discovery of material disputes of fact, not their resolution." *Kouba v. Allstate Insurance Co.*, 523 F.Supp. 148, 154 (E.D.Cal. 1981), *appeal docketed* No. 81–4566 (9th Cir. Oct. 19, 1981). A material issue of fact, of course, "is one that makes a difference in the litigation." *Kouba v. Allstate Insurance Co.*, 523 F.Supp. at 154; *see also Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979); *Beltz Travel Service Inc. v. International Air Transport Association*, 620 F.2d 1360, 1364 (9th Cir. 1980). The first step, then, in resolution of such a motion is for the court to "identify material facts" and to do so it "must turn to the substantive law." *Kouba v. Allstate Insurance Co.*, 523 F.Supp. at 154. This case, however, presents a variation of the ordinary procedures. Said variation is necessary since, as I will explain

3. Although the issue of who is a public figure is initially a matter of constitutional minima and thus a federal question, there appears to be no impediment to a state according greater protection to free speech by broadening the definition of a public figure, *see* Restatement, Second, Torts § 580A, Comment (e) at p. 219 (1977), or indeed broadening the scope of speech protected, *see AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind.App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976) (rejecting the public figure standard in favor of the "public interest" or "public controversy" test posited by the plurality in *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971)).

4. A privilege is an excusing condition. "One who otherwise would be liable for a tort is not liable if he acts in pursuance of and within the limits of a privilege. . . ." Restatement, Second, Torts § 890 at p. 355.

below, plaintiffs' status as public or private figures has been held to be a question of law to be resolved by the court rather than a question of fact to be resolved by the jury.[5]

The classification of the problem of public figures as one of law was first announced by the Supreme Court shortly after the decision in *New York Times* itself. Justice Brennan almost offhandedly observed "We remark only that, as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966).[6] Although the Supreme Court has not explicitly discussed the problem since *Rosenblatt*, it is certainly true that the Court has treated the issue of public figure status as a matter of law. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979). In these two cases the district court resolved the question of whether the plaintiff was a public figure in the context of motions for summary judgment. *See Hutchinson v. Proxmire*, 431 F.Supp. 1311, 1326 (W.D.Wis.1977); *Wolston v. Reader's Digest Ass'n, Inc.*, 429 F.Supp. 167, 176, n.30 (D.D.C.1977). In this judgment they were joined by the courts of appeals. *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427 (D.C. Cir.1978); *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978). In both cases the Supreme Court reversed.

In doing so, the Court did not suggest that there were contested issues of fact nor that there being no contested issues of fact only one conclusion was possible. Rather, the Court found that the plaintiffs simply were not public figures. This treatment can only be understood as the Court review-

5. This court has recently considered the persistent and perplexing problem of distinguishing between issues of law and fact in another context. *See Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F.Supp. 940, 943 n.3 and n.4, (E.D.Cal.1981). I observed there that "Law traditionally is viewed as society's judgment as to competing values and thus a way of meaningfully ordering events in the physical universe. Facts, on the other hand, are instances in the physical universe about which judgments are made." 525 F.Supp. at 943–44, n.4. *See also* I Wigmore on Evidence, § 1 at p.2 (3d ed. 1940). Under this analysis I found that the classification of the issue of "patentability" as one of law not particularly troublesome since it is a conclusion that a product is worthy of the law's protection, whatever its commercial value. I did, however, express my concern with the classification of the "obviousness" of a particular design as a question of law inasmuch as said determination requires a subjective judgment regarding events in the physical universe. Thus, the determination of whether a given design was "obvious" appeared to me to be a factual determination in that it involved a process of sifting evidence. 525 F.Supp. at 943–44, n.4. Nonetheless, as in that case, I do not now write upon a clean slate and thus my own conclusion as to the proper characterization of the public figure question as one of law or fact may be beside the point.

6. Justice Brennan did not explain why such a classification was appropriate. Applying the analytical mode that I employed in *Famolare Inc. v. Edison Bros. Stores, Inc.*, 525 F.Supp. 940, (*i.e.* that questions of law consist of the application of value judgments as ordering principles to particular events), it seems relatively clear that the existence of a "privilege" may well be reasonably classified as a question of law. That is, upon determining that the speech is "privileged," it enjoys protection which it would not otherwise have, in the same fashion that a product, once it is determined to be patentable, gains protection which it would not otherwise enjoy. *See* 525 F.Supp. at 942–43 and n.1, 3. Nonetheless, the issue of whether certain speech is "privileged" (like whether a product is patentable) turns upon the facts underlying the particular case in question. As I will explain in the body of this Opinion, the resolution of such a factual predicate is ordinarily left to the jury as the trier of fact. Indeed, even if the ultimate determination of whether one is a public figure is properly characterized as a question of law, it appears to this court that the means of reaching that determination are mired in the same law/fact confusion as the determination of "obviousness" is in the patent law. In both instances the courts have confused the process of ascertaining the historical facts with the process of applying legal principles to the ascertained facts. As in *Famolare Inc. v. Edison Bros. Stores, Inc.*, however, I am bound by the rulings of the higher courts on the issue. In the following portion of this Opinion I will attempt to discover the holdings of the higher courts which pertain to this case.

ing the issue as one of law. Moreover, the resolution of the question of "public figure" status on summary judgment failed to elicit any comments by the Supreme Court on its review. The Court's silence in this regard must be contrasted with the Court's suggestion that the question of whether defendants acted with constitutional malice would not appear to be amenable to disposition on summary judgment because of the complex factual issues which underlie that question. *Hutchinson v. Proxmire*, 443 U.S. at 120 n.9, 99 S.Ct. at 2680 n.9.[7]

Rosenblatt's characterization of the public official question as one for the court, has been extended to public figures, repeatedly recognized, and indeed has become a commonplace feature of libel law. *See e.g., Rebozo v. Washington Post Co.*, 637 F.2d 375, 379 (5th Cir.), *cert. denied*, 454 U.S. 964, 102 S.Ct. 504, 70 L.Ed.2d 379 (1981); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293, n.12 (D.C.Cir.), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 8 (1980); *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 1247 (5th Cir. 1980), *cert. denied*, 452 U.S. 962, 101 S.Ct. 3112, 69 L.Ed.2d 973 (1981); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130, n.13 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976); *Velle Transcendental Research Ass'n., Inc., v. Sanders*, 518 F.Supp. 512, 515 (C.D.Cal. 1981); *Hoffman v. Washington Post Co.*, 433 F.Supp. 600, 604 (D.D.C.1977), *aff'd*, 578 F.2d 442 (D.C.Cir.1978); *Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 444 (S.D.Ga.1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978); *Hotchner v. Castillo-Puche*, 404 F.Supp. 1041, 1045 (S.D.N.Y.1975). The same rule is followed in California. *Weingarten v. Block*, 102 Cal.App.3d 129, 134, 162 Cal.Rptr. 701 (1980), *cert. denied*, 449 U.S. 899, 101 S.Ct. 267, 66 L.Ed.2d 128 (1980).

Classification of the public figure issue as one of law raises complex and difficult questions. In particular, this formulation invites inquiry as to the role contested issues of fact play in determining whether a particular plaintiff is a "public" or "private" figure. In the context of this motion, an accurate way of posing the question is whether, by virtue of the classification of the issue of "public figure" as a legal question, the traditional role of the court on summary judgment has been modified? To be frank, the cases are in profound disarray.[8]

As I have noted, in *Rosenblatt* the Supreme Court taught that the question of whether a plaintiff is a public official is one of law. Because of the nature of the definition of a public official, however, it is unlikely that there will arise disputed issues of fact material to the ultimate determination. This has led one court to observe that "[i]n most cases it is a relatively simple matter to determine whether the plaintiff is a public official . . . ." *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 588 (5th Cir. 1967), *cert. denied*, 393 U.S. 825, 89 S.Ct. 88, 21 L.Ed.2d 96 (1968). Thus, the question raised above regarding the role which contested issues of fact play in the ultimate determination may not arise in cases where "public officialdom" is at issue. The question may become acute, however, when the plaintiff is asserted to be a public figure, since "there is substantially more room for the interplay of facts . . ." where the latter classification is the issue. *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d at

7. While such a close reading of Supreme Court cases may be no more useful than the examination of the entrails of a sacrificed animal in Greek times, the contrast exists and may throw some light on whether there is a distinction between the appropriate treatment on summary judgment of the issues of constitutional malice and public figures.

8. In determining this question I look to the federal cases. Under California law the public figure question is to be determined by the trial court prior to the commencement of the jury trial. *Weingarten v. Block*, 102 Cal.App.3d 129, 134–35, 162 Cal.Rptr. 701 (1980). Despite the fact this is a diversity case, however, California law is not determinative. *See Byrd v. Blueridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 537–38, 78 S.Ct. 893, 900–901, 2 L.Ed.2d 953 (1958). (Allocation of tasks between judge and jury are questions of federal, not state law).

588. In what appears to be the first case to consider the effect of *Rosenblatt's* classification, the district court in question perceived that its task in considering a motion for summary judgment on the public figure issue had been changed and that under *Rosenblatt* it was required to weigh the evidence tendered in ruling on the motion. *See Hotchner v. Castillo-Puche*, 404 F.Supp. at 1045–47. Although this perception has been frequently alluded to in subsequent cases, as I will now point out, the appropriate role of disputed issues of fact in resolving the public figure issue remains unsettled.

A surprising number of courts, while recognizing the applicability of the *Rosenblatt* classification to the public figure issue, have found that in the case before them there were no material facts in dispute as to that issue and thus have not been required to consider the effect of the classification upon the role which contested issues of material fact play in the context of a motion for summary judgment. *See, e.g., Fitzgerald v. Penthouse International Ltd.*, 525 F.Supp. 585 (D.Md.1981); *Velle Transcendental Research Ass'n Inc. v. Sanders*, 518 F.Supp. 512; *Hoffman v. Washington Post Co.*, 433 F.Supp. 600; *Hutchinson v. Proxmire*, 431 F.Supp. 1311; *Wolston v. Reader's Digest Ass'n, Inc.* 429 F.Supp. 167; *Trans World Accounts Inc. v. Associated Press*, 425 F.Supp. 814 (N.D.Cal.1977).

In two recent cases the Fifth Circuit has directly addressed the issue. That circuit has held that the matter of whether a plaintiff is a public figure must be resolved by the court and that submission of the issue to the jury by way of special interrogatories is reversible error. *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d at 1247. Nonetheless, the circuit has also held that the issue may be resolved on summary judgment only if there is no dispute as to the material facts. *Rebozo v. Washington Post Co.*, 637 F.2d at 379. Thus in the Fifth Circuit, if there is a dispute as to material facts, the dispute must be resolved by the court, but only after an "evidentiary hearing." *Rebozo v. Washington Post Co.*, 637 F.2d at 379.[9]

The Fifth Circuit has not explained whether the "evidentiary hearing" following which the court is to resolve the public figure issue is the trial or some separate proceeding.

In the District of Columbia Circuit a different procedure is apparently employed. There the court of appeals views the issue as one "analogous to a court's ruling on the question of probable cause for a search and seizure, a matter which of course is for the court and not the jury." *Wolston v. Reader's Digest Ass'n Inc.*, 578 F.2d 427, 429 (D.C.Cir.1978), *reversed on other grounds, Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). In the face of an appellant's claim that the issue of whether a plaintiff is a public figure is a "complex factual question ... properly a jury matter," the court observed that appellant was "unable to cite any case in which a jury has been permitted to decide whether a plaintiff, as a matter of 'constitutional fact,' is a public figure." 578 F.2d at 429. Moreover, in the District of Columbia Circuit it appears that the court is to weigh and evaluate the evidence. In a recent case reviewing the granting of summary judgment, that court of appeals held that "[i]n undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1292. Is the analogy to search and seizure suggestive that in response to a summary judgment motion a pretrial hearing and disposition with the court weighing the evidence is required? The answer may be that such is the suggestion, but in the Third Circuit, in any event, such is not the answer.

Gordon v. Random House Inc., 486 F.2d 1356 (3d Cir. 1973), *vacated and remanded*,

9. It is interesting, nonetheless, that in both of those cases the appellate court, having resorted to the "undisputed portions of the evidence" (*Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 1247 (5th Cir. 1980)) and the "undisputed facts" (*Rebozo v. Washington Post Co.*, 637 F.2d 375, 379 (5th Cir. 1981)) found each plaintiff to be a public figure.

419 U.S. 812, 95 S.Ct. 27, 42 L.Ed.2d 39 (1974) (for consideration in light of *Gertz*), represents the Third Circuit's attempt to traverse this doctrinal muck. There the trial court was confronted with an analogous issue of whether under the *Rosenbloom v. Metromedia Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) plurality opinion, the subject matter of the speech charged as libel concerned "an issue of public or general concern." 403 U.S. at 44, 91 S.Ct. at 1820. The trial court applied the conventional summary judgment standard (*see Gordon v. Random House Inc.*, 349 F.Supp. 919, 924–25 (E.D.Pa.1972)). Nonetheless, the court of appeals reversed and remanded "for the development of a complete record at trial." 486 F.2d at 1357. Although the district court was reversed so that a complete record could be developed at trial, the appeals court recognized that the question was one for the trial court and not the jury. 486 F.2d at 1361–62.[10] In so holding the court relied on a previous decision of the circuit where in an analogous situation it was held that "[j]ust as disputed facts in a non-jury case are determined by trial and not on summary judgment motion, a trial judge's decision to instruct the jury with the New York Times standard .... [is] made after a full trial on the contested factual issues." *Taggart v. Wadleigh-Maurice Ltd.*, 489 F.2d 434, 439 (3d Cir. 1973), *cert. denied*, 417 U.S. 937, 94 S.Ct. 2653, 41 L.Ed.2d 241 (1974).[11]

Thus, three lines of decision appear to have emerged from the federal courts. In one line of opinions the court's duty on summary judgment has changed (*Hotchner v. Castillo-Puche*, 404 F.Supp. 1041; *Waldbaum v. Fairchild Publications, Inc.*, 627 F. 2d 1287); the two other lines of opinion require application of conventional summary judgment standards but require the court to resolve the situation either at an evidentiary hearing (*Rebozo v. Washington Post Co.*, 637 F.2d 375), or at trial (*Gordon v. Random House, Inc.*, 486 F.2d 1356).

Insofar as this court can tell, the Ninth Circuit has apparently not yet addressed the question. In an obscure piece of dicta, the court in discussing whether the issue of constitutional malice was a jury question observed that "*Rosenblatt v. Baer* [citation omitted] deals with privilege—whether the evidence shows the plaintiff to be a public official. It says nothing about how the trial judge is to view the evidence in making that determination." *Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael*, 492 F.2d 438, 442 (9th Cir.), *cert. denied*, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974). Nonetheless, subsequent dicta recognizes that the public figure issue is one for the court and not the jury. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 n.13 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976). Neither case provides guidance as to the procedure I am to employ.

This state of utter disarray appears wholly unwarranted. Justice Brennan in writing *Rosenblatt* cited to three sources in support of his observation that the public official issue was one for the court "in the first instance": Harper and James, *Torts* § 5.29 (1956); Prosser, Torts § 110, p. 823 (3d ed. 1964); Restatement, Torts § 619. 383 U.S. at 88, n.15, 86 S.Ct. at 677, n.15. The court explained that the purpose of limiting the issue to the judge in the first instance was to "[l]essen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record

10. Unfortunately the court of appeals was not particularly helpful in guiding the district court as to when and how the decision should be made. It merely observed "[w]e do not indicate at what stage of the litigation this ruling must be made, other than to require that '[t]he court shall inform counsel of its proposed action ... prior to ... arguments to the jury ...' Fed.R.Civ.P. 51." *Gordon v. Random House, Inc.*, 486 F.2d 1356, 1362 n.8 (3d Cir. 1973).

11. In the Ninth Circuit it is unclear whether the issue of public or general interest (as contrasted with public figures) is one for the court or the jury. *See and compare Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976) with *United Medical Laboratories, Inc., v. Columbia Broadcasting System, Inc.*, 404 F.2d 706, 711–12 (9th Cir. 1968), *cert. denied*, 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454 (1969).

and findings required for review of constitutional decisions." 383 U.S. at 88, n.15, 86 S.Ct. at 677, n.15. As to the latter matter, the court cited two specific cases: *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460 (1958) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964). An examination of each of these sources clearly demonstrates that no confusion is warranted.

The Restatement, Second, of the Law of Torts explains the issue and the process to be applied for its resolution simply and clearly. "The court determines whether the occasion upon which the defendant publishes the defamatory matter gives rise to a privilege." Restatement, Second, Torts § 619 at p. 316 (1977). In the comment following that section the Restatement explains "Whether a privilege exists at all is a question for the court. This requires the court to determine whether the circumstances under which the publication was made were such as . . . to make the publication privileged. . . . If the facts are in dispute, the jury is called upon to consider the evidence and pass upon the issues thus raised. It is for the court, however, to decide whether the facts found by the jury made the publication privileged or to instruct the jury as to what facts they must find in order to hold the publication privileged." *Id.* § 619 comment (a) at p. 316.

Concerning the precise issue addressed here, the Restatement opines that "[t]he question of whether a plaintiff is a public official or a public figure . . . is one of law, not of fact, though the facts on which the determination is to be made may be in dispute and therefore subject to the determination of the fact finder." *Id.* at § 580a, comment (c) p. 217. Examination of Professor Prosser's treatise also demonstrates that the confusion need never have arisen. As Prosser explains, "[w]hether the occasion was a privileged one, is a question to be determined by the court as an issue of law, unless of course the facts are in dispute, in which case the jury will be instructed as to the proper rules to apply." Prosser, *supra* § 115 p. 796. Thus the texts cited by the Supreme Court in support of the announced rule in no fashion suggests that the traditional role of the court and jury is in any way altered by the classification of the public figure privilege as one of law.

Moreover, an examination of the two cases cited by the court, *Speiser* and *New York Times Co.*, in support of the policy argument does not require a different result. Both cases are instances of what has come to be known as the "constitutional facts" doctrine. In such cases the Supreme Court has held that it is critically important that we distinguish "between speech unconditionally guaranteed and 'speech which may legitimately be regulated. . . .' " *Speiser v. Randall*, 357 U.S. at 525, 78 S.Ct. at 1341. In order to ensure that such a distinction is made each court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' " *New York Times Co. v. Sullivan*, 376 U.S. at 285, 84 S.Ct. at 728, *quoting Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946). This requirement is explicitly placed upon the court in terms of an independent examination of the record and extends to all forms of litigation involving application of first amendment principles including libel. *New York Times Co. v. Sullivan*, 376 U.S. at 285, 84 S.Ct. at 728; *Letter Carriers v. Austin*, 418 U.S. 264, 282, 94 S.Ct. 2770, 2780, 41 L.Ed.2d 745 (1974). Nonetheless, the constitutional facts doctrine does not require any unusual pretrial activity on the court's part. On the contrary, it requires independent scrutiny of the entire record, a task that can only be accomplished after the trial. This court wishes to be clear. I have already observed that "[e]ven well established procedural rules must bow to First Amendment considerations." *Lewis v. Time, Inc.*, 83 F.R.D. at 461. Nonetheless, in all other contexts the doctrine of "constitutional facts" (i.e. independent review of the factual determinations of the jury be each court having the

matter properly before it), has been viewed as a sufficient protection of first amendment values.[12]

As I have noted, neither the Ninth Circuit nor the United States Supreme Court has directly addressed the issues discussed above. The role which contested issues of material fact play in resolution of a motion for summary judgment on the public figure status of a particular plaintiff remains unsettled. "Thus this court is free to consider the issue as one of first impression." *Hassan v. Delta Orthopedic Medical Group, Inc.*, 476 F.Supp. 1063, 1064 (E.D.Cal.1979).

It is my own conclusion that the courts have misconstrued *Rosenblatt*. If writing on a clear slate I have no doubt as to what I would do—I would follow the suggestions of the Restatement and Prosser and submit the contested facts to the jury for resolution. Despite the absence of binding authority, however, I clearly do not write on a clean slate. Too many courts have considered the subject and the result, if not the reasoning or the procedure, is simply too clear. Disputed questions of fact involving the "constitutional fact" issue of whether the plaintiff is a public figure, may not be submitted to the jury. *Rebozo v. Washington Post Co.*, 637 F.2d 375; *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238; *Wolston v. Reader's Digest Ass'n, Inc.*, 578 F.2d 427; *Gordon v. Random House, Inc.*, 486 F.2d 1356.[13]

[2] On the other hand, it now seems clear that in resolving a motion for summary judgment on the public figure status of a particular plaintiff, conventional Rule 56 standards apply. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. at 162, n.5, 99 S.Ct. at 2704, n.5 (conventional standards of appellate review apply); *Rebozo v. Washington Post Co.*, 637 F.2d at 376; *Woy v. Turner*, 533 F.Supp. 102, 105 (N.D.Ga.1981); *Fitzgerald v. Penthouse International Ltd.*, 525 F.Supp. at 589; *Lerman v. Chuckleberry Publishing, Inc.*, 521 F.Supp. 228, 232 (S.D.N.Y.1981); *Velle Transcendental Research Ass'n. v. Sanders*, 518 F.Supp. at 515; *Trans World Accounts Inc. v. Associated Press*, 425 F.Supp. at 822. Accordingly, if there are any contested issues of material fact, the motion should be denied.

Having ascertained the role disputed material facts play in a motion for summary judgment relative to "public figures," I must now turn to the substantive law for a definition of a public figure. It is from that definition that one can determine what facts are "material" to the resolution of the public figure issue.

III

DEFINITION OF PUBLIC FIGURES

The late Dean Prosser once aptly observed:

> It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, . . . The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation of the maligning tongue.

W. Prosser, *The Law of Torts*, § 111 at p. 737 (4th ed. 1971). The history of our Supreme Court's effort to accommodate traditional notions of freedom of expression as embodied in the first amendment with sympathy for the victim's reputation as embod-

12. Of course the threat of litigation itself may have a chilling effect on the exercise of free speech (*New York Times Co. v. Sullivan*, 376 U.S. at 279, 84 S.Ct. at 725), and thus pretrial disposition, where possible, is desirable (*see Time, Inc. v. McLaney*, 406 F.2d 565, 566 (5th Cir.), *cert. denied*, 395 U.S. 922, 89 S.Ct. 1776, 23 L.Ed.2d 239 (1969)). Nonetheless, such considerations have not generally been thought to require modification of the constitutional facts doctrine.

13. Whether this issue should be resolved by an evidentiary hearing, *Rebozo v. Washington Post Co.*, 637 F.2d at 379, or by the court after a trial, *Gordon v. Random House, Inc.*, 486 F.2d at 1362 n.8, need not be resolved in this Opinion.

ied in the law of defamation has been repeatedly traced since *New York Times v. Sullivan.* This court will resist the temptation to retrace that history and simply cite interested counsel to appropriate sources. *See Gertz v. Welch,* 418 U.S. at 332–39, 94 S.Ct. at 3003–3006 (from *New York Times Co. v. Sullivan* through *Rosenbloom v. Metromedia, Inc.*); *Hutchinson v. Proxmire,* 443 U.S. at 133–34, 99 S.Ct. at 2687 (from *New York Times Co.* through *Gertz v. Welch*); *Brewer v. Memphis Publishing Co., Inc.,* 626 F.2d at 1249–57 (from *Gertz* through *Wolston v. Reader's Digest Ass'n, Inc.*); *Yiamouyiannis v. Consumers Union of United States, Inc.,* 619 F.2d 932, 937–38 (2d Cir.), *cert. denied,* 449 U.S. 839, 101 S.Ct. 117, 66 L.Ed.2d 46 (1980). Although retracing that history helps explain the present state of the law it does not provide the court with the appropriate resolution of the pending summary judgment motion, my immediate task. In order to resolve defendant's motion I must first arrive at a definition for what constitutes a public figure.

Central to the process of legal reasoning is the notion that it is possible to define and classify events and persons. Although the notion that definitions are possible has recently been challenged by modern linguistic philosophers, *see* Ludwig Wittgenstein, *Philosophical Investigations* (1953), the legal system presupposes that some form of definitional process is possible. Even if at some level of philosophic discourse this presupposition is in error, the notion is indispensible to the operation of the law. As a rational matter a system of law, as contrasted with a series of ad hoc judgments, requires standards. *See Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d at 1293. It is impossible to judge the propriety of imposing liability as a matter of law if the trier of fact is unable to ascertain what standards are to be applied. By necessity, the distinction between events which give rise to liability and those which do not, requires the drawing of lines and implicitly, then, definitions.[14] As Justice Powell observed in the seminal case restricting the *New York Times* standard to public figures "[b]ecause an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." *Gertz v. Welch,* 418 U.S. at 343–44, 94 S.Ct. at 3008–3009.

As I will now attempt to show, a fundamental problem in the resolution of libel cases is the failure of the Supreme Court to provide an adequate definition of the term "public figure." As Judge Tamm so gently put it, "[u]nfortunately, the Supreme Court has not yet fleshed out the skeletal description of public figures and private persons enunciated in *Gertz.*" *Waldbaum v. Fairchild Publications, Inc.,* 627 F.2d at 1292. *See also Rosanova v. Playboy Enterprises, Inc.,* 580 F.2d 859, 861 (5th Cir. 1978) ("the public figure concept has eluded a truly working definition").

In *Gertz,* the Court observed that:

> For the most part those who attain this status [public figure] 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."

418 U.S. at 345, 94 S.Ct. at 3009.[15] In a recent case the Chief Justice characterized

14. For the purposes of this Opinion, I use the term definition in its traditional sense. " 'Definition' = 'statement that one term has the same designation as another term.' " Monroe C. Beardsley, *Practical Logic* at p. 162 (1950).

15. This observation echoes the first case which extended the *New York Times* standard to public figures. The court there observed that "both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; ... Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy...." *Cur-*

the Court's observation in *Gertz* as "a general definition of 'public figures'." *Hutchinson v. Proxmire*, 443 U.S. at 134, 99 S.Ct. at 2687; *see also Time, Inc. v. Firestone*, 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976). Application of this so-called "definition," however, has been difficult and has led to wholly inconsistent results.[16]

The difficulty and inconsistency is not the result of the failure of the courts to apply the "definition" but, rather, abides in the "definition" itself. As shall appear, when treated as a definition, the quotation from *Gertz* violates various well recognized standards concerning the adequacy of a definition. As an example, the purported "definition" of public figure includes the term "public controversy" and thus violates the rule that a definition should not be circular.[17]

Secondly, the "definition" violates the standard that an adequate definition must use terms that are themselves clear and unambiguous.[18] Thus as an example the purported definition uses various uncertain terms such as "affair of society" (*see and compare Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 with, *e.g., Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238. Moreover, this standard for the adequacy of a definition generally precludes use of figures of speech which abound in the *Gertz* "definition" (e.g., "public figures have thrust themselves to the forefront . . . ."[19] 418 U.S. at 345, 94 S.Ct. at 3009.

Finally, and perhaps most essentially, the "definition" does not appear to include all the essential characteristics of a public figure.[20] Thus in *Hutchinson* the Court taught that central to the so-called limited purpose public figure determination is the degree of public attention. The Court observed in that case that the plaintiff's activities did not invite the "degree of public attention and comment . . . essential to meet the public figure level." 443 U.S. at 135, 99 S.Ct. at 2688. If the "degree of public attention" is indeed an "essential" element of the classification of one as a public figure, then its absence from the definition renders said definition insufficient. Similarly, *Wolston* teaches that in determining whether one is a public figure it is essential to "focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.' " 443 U.S. at 167, 99 S.Ct. at 2707. If this is an essential element, then the absence of such a focus in the definition is equally fatal to its utility.[21]

All of the deficiencies noted above militate against the classification of the quoted language in *Gertz* as a definition. Nonetheless, as a subordinate court I would be bound to apply the language as a definition had the Supreme Court held it to be such, whether or not the holding was "misguided." *See Hutto v. Davis*, —— U.S. ——,

tis Publishing Co. v. Butts, 388 U.S. at 154–55, 87 S.Ct. at 1991.

16. Thus in the *Hutchinson* case both the district court and the court of appeals found that the plaintiff was a public figure. The Supreme Court reversed. The same pattern appears in *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). *See and compare Meeropol v. Nizer*, 381 F.Supp. 29 (S.D.N.Y.1974), *aff'd in relevant part* 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978), *with Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450.

17. "The term being defined or a synonym of it should not appear in the definition." Daniel S. Robinson, *The Principles of Reasoning*: Introduction to Logic and Scientific Method, at p. 58 (3 ed. 1947).

18. "The definition *must not be obscure and confused.* Since accuracy, clearness and precision is the goal of definition every obscure and ambiguous definition defeats its own purpose." Robinson, *supra* at 57 (emphasis in original).

19. "Sometimes it [obscurity] is due to the use of figurative expressions, especially metaphores." Robinson, *supra* at 57.

20. "The basic rule is that the definition *must state all the essential attributes of the object which is being defined.*" Robinson, *supra* at p. 56 (emphasis in original).

21. It is of course true that the definition speaks of thrusting one's self before the public but that metaphore, while descriptive, hardly describes the necessary level of participation required.

——, 102 S.Ct. 703, 705, 70 L.Ed.2d 556, 561 (1982). Although the Court characterized the language as a "definition" in *Hutchinson* a review of subsequent cases indicates that said characterization does not represent the holding of the Court. In fact, in an opinion filed the same day as *Hutchinson* the Court quoted the exact language from *Gertz* and stated that it "identified two ways in which a person may become a public figure for purposes of the First Amendment." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. at 164, 99 S.Ct. at 2705. Of course the mechanism for becoming a public figure is something quite different from the definition of a public figure. Moreover, as I have noted above, various courts have concluded that the Supreme Court has not articulated a final and binding definition of "public figures."

Based upon the analysis set forth above, I conclude that binding authority is absent and that I must seek my own definition of a public figure. To aid in the formulation of that definition I will first turn to a variety of cases which I believe have attempted to define a public figure with unsatisfactory results.

Because the quoted language in *Gertz* is inadequate to serve as a definition, various courts have searched elsewhere in that Supreme Court opinion [22] for an aid in defining the term. Some courts have seized upon the various rationales for limiting the *New York Times* standards to "public figures," and have sought to make them the definition. Thus, among the rationales advanced by the *Gertz* Court was that public figures were not in as great need of protection from defamation because they had access to the media and, accordingly, self help was more available to public figures than to private persons. *See, generally*, 418 U.S. at 344, 94 S.Ct. at 3009.[23]

[3] It appears to this court that perceiving "access to the press" as an element of the definition of a "public figure" is probably erroneous. Accessability to the press arose originally in *Gertz* as a rationale for limiting the *New York Times* standard to public officials and not as a defining term. As such it confounds the purpose of a definition (a rule of law) with the reasons for the rule. Despite the cases' repeated resort to this factor at least two other courts have also questioned whether access to the media is a proper part of the definition of a public figure. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980); *Reliance Ins. Co. v. Barron's*, 442 F.Supp. 1341, 1348 (S.D.N.Y.1977). Moreover, it seems clear to this court that the Supreme Court itself has deprecated access to the media as a term of the definition. The Court has described the possession of such access as "one of the accouterments of having become a public figure." *Hutchinson v. Proxmire*, 443 U.S. at 136, 99 S.Ct. at 2688.[24] It appears that evidence regarding the presence or absence of one's access to the media would be relevant evidence, appropriately presented to the trier of fact. However, because access to the media is not an element of the definition it is not deter-

22. As one court bemoaned "Of course, litmus tests that define what is and is not protected [are required]. Unfortunately, we do not have such tests. Until we find them, we must search for more precise articulations of all aspects of the *New York Times* rules...." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 (D.C.Cir.), *cert. denied*, 449 U.S. 898, 101 S.Ct. 266, 66 L.Ed.2d 8 (1980).

23. Both of the lower courts in *Hutchinson* apparently adopted this rationale as part of their definition and other courts have, to a lesser or greater degree, relied on this factor. *See Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d at 1254; *Rebozo v. Washington Post Co.*, 637 F.2d at 379; *Buchanan v. Associated Press*, 398 F.Supp. 1196, 1203, n.1 (D.D.C.1975); *Meeropol v. Nizer*, 381 F.Supp. at 34.

24. An accouterment, of course, is "an identifying but usually extraneous characteristic." Webster's Third New International Dictionary at p. 13 (1976). In some systems of logic, accouterments are known as "signs." That is, the presence of "a," usually signals the existence of "b," but not all "b's" need possess the characteristic of "a," nor does the absence of "a" necessarily require the conclusion that "b" is not present.

minative of, nor material to, the public figure determination.[25]

Accordingly, a dispute about a plaintiff's access to the media does not necessarily bar summary judgment. Disputed questions of fact only preclude summary judgment where they are material to the issue under consideration. The issue under consideration is whether a plaintiff is a public figure. Since as I hold above, access to the media is not a necessary element to determining who is a public figure, disputes concerning access to the media will not preclude summary judgment even though such evidence is admissible at trial. That is to say, evidence of access to the media has *some* tendency to prove that a plaintiff is a public figure and is thus admissible; nevertheless, since it is not a necessary element, nor is its absence determinative, a dispute concerning whether plaintiff has access will not preclude summary judgment.

Alternatively, some courts have sought to resolve the definitional question in terms of explicit or implicit lists of examples. *See Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F.2d 417, 419 (9th Cir.), *cert. denied*, 393 U.S. 840, 89 S.Ct. 117, 21 L.Ed.2d 110 (1968). This approach is equally unsatisfactory. A fundamental principle of logic is that an example is not a definition.[26] Sometimes the courts do not even articulate the exemplar mode but simply operate from some conscious (or possibly unconscious) list.[27] Indeed one court has admitted its inability to define who is a public figure and explicitly endorsed the application of inarticulable subjective judgments. *See Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d at 861 ("it [public figuredom] falls within that class of legal abstractions where 'I know it when I see it' .... [citation omitted]."). Aside from the fact that the Supreme Court has specifically rejected such an approach, *see Gertz v. Welch*, 418 U.S. at 343–44, 94 S.Ct. at 3008–3009, I do not believe such despair is justified. I believe articulable definitions capable of application may be extracted from the Supreme Court cases. I refer to "definitions" in the plural since it is generally agreed that "[i]n trying to define who is a public figure, the court in *Gertz* created two subclassifications, persons who are public figures for all purposes and those who are public figures for particular public controversies." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1292. Below I will attempt to ascertain a definition of both public figure classifications.

A. *General Purpose Public Figure*

[4, 5] For reasons expressed below, it is this court's opinion that a general purpose public figure in the context of a defamation suit may be defined as a person whose name is immediately recognized by a large percentage of the relevant population, whose activities are followed by that group with interest, and whose opinions or conduct by virtue of these facts, can reasonably be expected to be known and considered by that group in the course of their own indi-

25. Relevant evidence is evidence "having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable...." (Fed.R.Evid. 401).

26. "To give examples is not to define a term." Beardsley, *supra* at 162. This is not to say that examples are not useful. As has been observed "[a]n exemplar is a (paradigmatic) device completely at home in the common law. Like case law, an exemplar fleshes out the meaning of a rule by generalizing the instances of its application. It is an authoritative example in which 'the general gains bite from the particular application.' [citation omitted]." *People v. Kimbrel*, 120 Cal.App.3d 869, 875, n.6, 174 Cal.Rptr. 816 (1981) (Blease, J.).

27. Thus one court disposed of the issue as follows: "In a defamation case, the question of public figure status is pervasive, and it should be answered as soon as possible. In some cases it may not be possible to resolve the issue until trial, but this is not such a case. [Plaintiff], a high-ranking official of a union of tremendous importance to our economy, as relates to his official duties is a public figure." *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041, 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981). *Compare with Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1299 ("Being an executive within a prominent and influential company does not by itself make one a public figure.").

vidual decision-making. The relevant population in considering the breadth of name recognition is to be measured by the audience reached by the alleged defamation. The fame or notoriety achieved by a public figure must have preexisted the allegedly defamatory statements which give rise to the litigation. This definition is to be strictly construed and doubts are to be resolved in favor of a person being either a limited purpose public figure or a private person.

It is this court's belief that the definition set forth above accords with both the holdings of the Supreme Court and the purpose underlying the public figure doctrine. Thus, in *Gertz* the Court held that a person could become a public figure only upon a demonstration "of general fame or notoriety in the community, and pervasive involvement in the affairs of society...." 418 U.S. at 352, 94 S.Ct. at 3013. Such a person must have acquired a "role of especial prominence in the affairs of society...." *Time, Inc. v. Firestone*, 424 U.S. at 453, 96 S.Ct. at 964. The definition I have formulated above addresses these standards and also recognizes that in defining a public figure no specific field or public controversy is implicated. Thus, the definition I have arrived at above, rather than focusing on a particular public controversy, broadens the relevant scope of inquiry and focuses upon the decision making process of the relevant population.[28] Moreover, by focusing on the audience's decision making in general, the definition formulated here avoids the danger repeatedly adverted to by the Supreme Court that the definition of a public figure must not become a disguised vehicle for reintroduction of inquiry into what is a public controversy. *See Gertz v. Welch*, 418 U.S. at 346, 94 S.Ct. at 3010; *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. at 167, 99 S.Ct. at 2707; *Hutchinson v. Proxmire*, 443 U.S. at 135, 99 S.Ct. at 2688. In this regard, the Supreme Court has repeatedly admonished that the classification must not depend upon the content of the defendant's activities since such a standard "would involve the courts in the dangerous business of deciding 'what information is relevant to self-government.' [citations omitted]." *Gertz v. Welch*, 418 U.S. at 339, 94 S.Ct. at 3006; *Hutchinson v. Proxmire*, 443 U.S. at 135, 99 S.Ct. at 2688; *see also Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d at 1251–52, & n.20 (note particularly the Court's discussion of R. Posner, *The Right of Privacy*, 12 Ga.L.Rev. 393, 395–96 (1978)). *But cf. Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d at 590 & n.7 (suggesting that the task cannot be avoided under the *Gertz* approach to identifying public figures).

[6] It is also clear that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. at 135, 99 S.Ct. at 2688; *see also Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. at 167–68, 99 S.Ct. at 2707. The definition expressed here addresses this aspect of the problem by requiring that one's public figure status be determined only on the basis of those facts which preexisted the alleged defamation. *See Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d at 591.

[7] Although the question of whether a particular person is a public figure must turn on the "public" that is being referred to, the question of the relevant population has rarely been addressed by the courts. One court has observed, however, that "[i]n examining the status of the plaintiff in *Gertz*, the Court noted that he had 'no

28. The court wishes to emphasize that a general purpose public figure need not actually be seeking to influence public opinion. Rather, it is merely that the public figure's status permits us to assume that he or she is able to do so. This assumption, of course, underlies the endorsement mode of advertising, both in the commercial and political world. None of us is surprised when we see a particularly famous sports figure endorsing a certain brand of soda pop or a famous entertainer endorsing a particular politician. Brief consideration demonstrates that there is no reason to believe that either one knows anything more than the general public about the endorsed product or person. What is important to the advertiser is the status of the endorser, not his or her expertise concerning the endorsee.

general fame and notoriety *in the community*' and that he was not generally known to 'the local population.' [citation omitted]. We therefore conclude that nationwide fame is not required. Rather, the question is whether the individual had achieved the necessary degree of notoriety where he was defamed—i.e. where the defamation was published." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1295–96 n.22.[29] Some courts have apparently measured the population in terms of the region of the plaintiff's residence, *see Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d at 1253 ("[b]oth [plaintiffs] achieved 'pervasive fame or notoriety' at least regionally"); see also *Lawrence v. Moss*, 639 F.2d 634, 636 (10th Cir.), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3021, 69 L.Ed.2d 400 (1981) (status to be measured by state where "the events pertinent to this lawsuit all occurred. . . ."). Such a standard does not appear helpful. First, one cannot know what region is appropriate—after all, every father may be considered well known in his own home. To put it another way, such a definition ultimately is circular. Everyone is always well known somewhere depending on how narrowly the region is drawn and, if the measure is to be where that person is well known, the standard is never a measure of anything. More to the point, however, it appears that this approach has been specifically rejected by the Supreme Court. In *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154, the plaintiff was held to be a private person despite the fact that the plaintiff might have been a person of especial prominence in the affairs of Palm Beach Society. 424 U.S. at 453, 96 S.Ct. at 964.

Measuring the relevant population by the audience of the defamed statement, as the definition I propose here does, fulfills the purpose of the public figure doctrine. This focus accommodates the desire to provide breathing room necessary for free and open debate while protecting the individual's right to his or her good name. By restricting the scope of the relevant population to the population which the alleged defamation actually reached, one's public figure status is related directly to the potential harm caused but does not extend beyond the range of the defamation in issue.

Regarding the requirement that the definition of a public figure offered here is to be strictly construed, it should be noted that the Supreme Court has repeatedly observed that it is only a "small group of individuals who are public figures for all purposes." *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. at 165, 99 S.Ct. at 2706; *see also Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1296 ("[f]ew people, of course, attain the general notoriety that would make them public figures for all purposes.") As the Supreme Court said in *Gertz* "We [should] not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." 418 U.S. at 352, 94 S.Ct. at 3013.

[8] An additional observation regarding the public figure definition set forth here appears to be called for. The definition of a general purpose public figure does not focus upon the activities of the plaintiff in seeking public attention. Initially this may be perceived as a weakness in the proposed definition, in that the Supreme Court has described one's attainment of public figure status as being dependent upon "the notoriety of their achievements or the vigor and success with which they seek the public's

29. The *Waldbaum* court observes, however, that this definition might not always pertain. It notes that "[d]issemination to a wide audience creates special problems. For example, an individual may be well known in a small community, but the publication covers a larger area. In such a situation, it might be appropriate to treat the plaintiff as a public figure for the segment of the audience to which he is well known and as a private individual for the rest. In any event, the defamation's audience may be relevant in assessing damages, for injury may be less if the audience does not know of the victim and will have no occasion to interact with him in the future." 627 F.2d at 1296, n.22. For reasons set forth above, I have rejected the notion of subsections of population but, rather, address the problem in terms of the population to which the alleged defamation was addressed.

attention. . . ." *Gertz v. Welch*, 418 U.S. at 342, 94 S.Ct. at 3008. It must be noted, however, that the Court's observation on this point is in the disjunctive in that it offers alternative means of attaining public figure status. Moreover, the court has recognized that "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own. . . ." 418 U.S. at 345, 94 S.Ct. at 3009. Because this theoretical possibility must be accounted for, it appears to this court that the proposed definition is proper in omitting reference to the plaintiff's activities in seeking attention. As will be seen, however, the limited purpose public figure doctrine does focus on plaintiff's efforts in this regard.

In essence, the proffered definition seeks to confine the general purpose public figure to those individuals who can be fairly characterized as a "celebrity," *i.e.*, those whose names are a "household word." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1294. Only this limited group of people, whose names are recognized by the population at large and whose opinions and activities are regularly noted by the general public, fall into that category.

B. *Definition of Limited Purpose Public Figure*

[9] For reasons set forth below, this court defines a limited purpose public figure for purposes of a defamation action as a person who, by voluntary and intentional conduct, has vigorously sought to directly influence resolution of a particular controversy, identifiable as such from the intended audience's perception, resolution of which can reasonably be said to have a perceptible impact on persons other than the immediate participants in the controversy. For a person to be classified as a limited public figure for these purposes, the allegedly defamatory statement must be made within the scope of the particular controversy and must be reasonably related to that controversy.

The proposed definition again attempts to address the various elements of a limited purpose public figure in terms of the standards laid down by the Supreme Court, and the resolution of particular controversies by that Court. Thus, the definition attempts to encompass the notion that certain persons "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Welch*, 418 U.S. at 345, 94 S.Ct. at 3009. It also examines "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352, 94 S.Ct. at 3013. The definition offered here focuses on voluntary and purposeful conduct in order to exclude those cases in which, although a public controversy exists, plaintiff has not sought to intentionally involve himself or herself in the controversy. *See Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. at 166–68, 99 S.Ct. at 2706–2707. *See also Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 583 (8th Cir.), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980). It also attempts to distinguish between essentially private controversies such as marital affairs in which resolution of the dispute will not have an impact on anyone but the participants in the dispute, and controversies which will have an impact on others. *See Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154.

The definition recognizes that neither plaintiff nor defendant may be permitted to characterize the scope of the relevant controversy. Such post hoc characterizations must inevitably be biased by the existence of the litigation. Other objections to such a procedure seem clear. First, the Supreme Court has simply not permitted the scope of the debate to be determined by the alleged defamer (*see Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 and *Hutchinson v. Proxmire*, 443 U.S. at 135, 99 S.Ct. at 2688); nor should the law permit the plaintiff to characterize the scope of the controversy. The latter prohibition is necessary because it is inappropriate to charge those engaged in the debate with the responsibility of "discovering and evaluating the inner beliefs and peculiarities of partic-

ular individuals and thus . . . deprive the media of the very 'breathing space' that New York Times sought to create and protect." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1293–94.

In a very thoughtful opinion, Judge Tamm suggested that delimiting the scope of the controversy is a matter of the court attempting to ascertain "whether persons actually were discussing some specific question," *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1297. Moreover, he suggested that it would be proper if the facts so permitted to specify broad controversies and subcontroversies in a particular case, and thus plaintiff could be characterized as a public figure for the subcontroversy and a private person for the broader controversy. 627 F.2d at 1297 n.27. Though the suggestion is not without merit, this court does not believe such an approach is appropriate. First, it leaves at large the scope of the controversy and accordingly leads to unpredictable and ad hoc results which the Supreme Court has held in *Gertz* to be unacceptable. 418 U.S. at 343–44, 94 S.Ct. at 3008–3009. Second, it fails to recognize that the speaker may have engendered a controversy which did not exist before. Third, and perhaps most importantly, it leaves a very large number of cases in which the scope of the controversy simply cannot be determined. Thus, as an example, during the latter days of the Nixon administration there can be no doubt that there was much public discussion about Watergate. Is that discussion to be defined by asking whether persons were speaking about corruption of the White House staff, the Executive Branch, the National Government, governments in general, the morality of the American people, other abstractions, ad infinitum? Indeed, the answer is, all and none. In any event, there appears to be no principled way to answer the question and thus the parties are left to ad hoc resolution of the question by each trier of fact.

While resolving the scope of the public debate, as I do, in terms of the reasonable perceptions of the intended audience may lead to some uncertain results, it has the virtue of a familiar (if abstract) legal standard, confined by the definition's emphasis on particularity. Moreover, to the degree that it looks to the intended audience, the definition focuses on the historical evidence in terms of the particular effort of this plaintiff—whether by book, speech, T.V. appearance, or whatever means he or she employed.

Finally, the definition addresses the particular controversy and requires that the alleged defamation be within the scope of that controversy. This aspect of the definition accords with the Court's repeated effort to ensure a proper and narrow controversy, *see Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 and *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450; *see also Lerman v. Chuckleberry*, 521 F.Supp. at 234, and avoids the suggestion that even when a person involves himself or herself in a particular controversy, that person's entire life, however irrelevant to the debate, is exposed to defamatory falsehood.

In essence, the proffered definition seeks to confine the scope of limited public figures to those who have "literally or figuratively '[mounted] a rostrum' to advocate a particular view." *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. at 169, 99 S.Ct. at 2708 (Blackmun, J. concurring). It is only such persons who, under present doctrine, have placed themselves in such a position that the first amendment requires some lesser form of protection of their reputation. *See Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir. 1980) ("public figures are 'less deserving of [judicial] protection' . . . [and] have assumed the risk of potentially unfair criticism. . . ."); *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1234–35 (6th Cir.), *cert. dismissed*, 454 U.S. 1095, 102 S.Ct. 667, 70 L.Ed.2d 636 (1981); *but cf. Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1007–08 (4th Cir. 1981) (stating that it is not clear whether one's lack of intent to influence the public is determinative of the issue or merely a significant factor in said determination).

C. *Summary*

This court cannot say with firm conviction that the two definitions proposed above will prove over time satisfactorily to distinguish between those who are public figures and those who are private persons. Nonetheless, I believe they fairly reflect the intent of the Supreme Court, and are consistent with the results of most of the cases which have resolved the issue. Having reached at least a definition which satisfies the court in this case, I turn to an application of the principles enunciated above to the facts before the court.

IV

ARE THE PLAINTIFFS PUBLIC FIGURES?

I now turn to the question of whether either Dr. Thomas Harris or Amy Harris is a public figure within the meaning of the definition set forth above.

A. *Dr. Thomas Harris*

[10] Surprisingly there are many facts drawn from either Dr. Harris' curriculum vitae or his deposition which are uncontested. Certain material concerning the success of his book relative to other books appears to be hearsay, but does not appear to be contested and is not objected to. Accordingly, this material may be considered by the court. *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980), *cert. denied*, 452 U.S. 906, 101 S.Ct. 3033, 69 L.Ed.2d 407 (1981); *United States v. Veon*, 538 F.Supp. 237, 249 (E.D.Cal.1982). Remarkably, this court finds itself in the position of many of the courts which have considered the public figure question, that as to the evidence proffered in support of the motion, there is little dispute. The question is whether the facts proffered are sufficient to support the partial summary judgment which is sought.[30]

Dr. Harris obtained his M.D. from Temple University Medical School in 1940. He completed a one year medical internship at the United States Naval Hospital in Philadelphia and in 1941 was assigned as a ship's medical officer. From 1942 and through 1943 he was a resident in psychiatry at St. Elizabeth's Hospital in Washington, D. C. He took additional training in the Philadelphia Child Guidance Clinic from 1946 to 1957 and had additional training at the Baltimore Washington Psychoanalytic Institute. During his naval duty Dr. Harris was chief of psychiatry services at various United States Naval hospitals. During this period he was also the United States delegate to the organizational meeting of the Mental Health Division of the World Health Organization in Geneva, representing the National Association of Child Psychiatry. In 1952 he retired on a medical disability from the Navy, having attained the rank of Commander.

After leaving the Navy Dr. Harris pursued his profession in both a public and private practice. He was director of children's psychiatric services at the University of Arkansas School of Medicine, worked for the Department of Institutions (Penal, Correctional, Mental) for the State of Washington, and the Department of Professional Education at DeWitt State Hospital in Auburn, California. He also served as a consultant to the Arkansas State Department of Welfare, the Adoption Division of the Sacramento County Department of Welfare, the Bureau of Vocational Rehabilitation of the California State Department of Education, and the Sacramento Family Service Agency. From 1956 through 1974, while a member of the senior staff at Sutter Memorial Hospital and American River Hospital, Dr. Harris conducted his own private psychiatric practice in Sacramento, California.

Dr. Harris has held a number of teaching positions and has been the president and director of education of the Institute of Transactional Analysis in Sacramento, California. He also has held positions as the president and director of education at the

30. The parties hotly contest the facts regarding plaintiff's access to the media, but under the test formulated above, while admissible, these facts are not "material" to the public figure determination.

Harris Institute of Transactional Analysis, also in Sacramento, California.

Dr. Harris is a member of a large number of professional organizations and has held various positions in those organizations. He has published in a variety of professional journals and has presented papers to various professional organizations. Dr. Harris is listed in "Who's Who in America."

In 1965 Dr. Harris founded the International Association of Transactional Analysis which, according to Dr. Harris, is composed of at least "ten thousand members" active in counseling persons concerning mental and emotional problems. According to Dr. Harris, the organization has members "throughout the world." The purpose of this organization is to train and teach members the procedures and doctrine of transactional analysis.

On August 2, 1968, Dr. Harris signed a contract with Harper and Rowe publishers to publish his book "I'm Okay—You're Okay." In connection with the publication of the book, Dr. Harris' publishing company arranged for him to travel across the United States for the purpose of promoting the sale of the book through speaking engagements and other means.

At his deposition Dr. Harris testified that at least ten million copies of his Guide to Transactional Analysis "I'm Okay—You're Okay" had been sold by the end of 1979. The book has been translated into at least seventeen languages. It has also been marketed in three special editions: Braille, Large Print, and Tape Recorded readings of the entire book. Insofar as Dr. Harris knows, the only geographical area of the world that the book has not been sold in is possibly "the Far East, Asian countries." The relative success of the book seems well documented. Thus, the Seattle Times reported it as a top 5 best seller in Seattle in the non-fiction category during the month of September 1971. In November 1971, Publisher's Weekly (a trade journal) listed the book as the third runner up (after the top ten) in the non-fiction best sellers throughout 44 communities in the United States. In April 1972 the same journal listed it as the ninth non-fiction best seller, in June 1972 as the fourth non-fiction best seller, in May as the eighth non-fiction best seller, in August 1972 as the second non-fiction best seller, and in June of 1973 as the third best seller. In January 1973, Time Magazine listed it as its third non-fiction best seller. Finally, the publisher listed the book as one of its four best sellers for the year 1972.

The audience purchasing the book is not addressed in the documents filed, but Dr. Harris has testified that he has received communications from various clergymen and churches indicating the use of his book by them in their ministry.

The book is not of record, thus its full contents are not before the court. Nonetheless, various portions of the book are alluded to or quoted. Thus, in the book's preface Dr. Harris acknowledges that there is a current controversy concerning psychotherapy, its efficacy, methods, and techniques. In at least one place in the book Christianity is referred to in a favorable way.

Dr. Harris has lectured in Mexico, Canada, and Australia. He testified at his deposition that he has "evidence that indicates that all [people who have read the book] felt that the book was a strong factor in improving their life situation, in improving their understanding of themselves, giving them greater options with regard to changes in their life...." Dr. Harris has testified that the book is used as a teaching tool "in practically all of the colleges in the country...." He believes that "hundreds of millions of people" are affected by the book.

Dr. Harris has been referred to in at least 181 publications ranging from professional journals through newspapers and both professional and popular magazines. Finally, in this regard, it appears that Dr. Harris has on various occasions appeared on popular talk shows on television.

Much less appears in the record concerning the facts relating to the alleged defamation. This much at least is known. The

defendant Tomczak, a lay preacher, delivered an address to approximately 8,000 people at Chico, California, at a rally known as "Jesus West Coast '79." During the course of that speech the defendant Tomczak stated that the "author of that book [I'm Okay —You're Okay] committed suicide about two years ago." On October 2, 1979, in Washington, D. C., defendant Tomczak delivered an address before approximately 1,500 people wherein he indicated that the author of the book killed himself six months after he wrote it. One or the other of the speeches was tape recorded and there appears to be no question that the tape recording was played on at least one radio station in Sacramento, California. Whether Dr. Harris' audience and Mr. Tomczak's audience overlap is unknown; however, at the time of the alleged defamation, the defendant had not read "I'm Okay—You're Okay," nor did he know the name of its author.

Having set out above the undisputed facts, I will now analyze them in terms of the definitions developed in Section III of this Opinion.

[11] There can be little doubt that until the publication of "I'm Okay—You're Okay" the only fair characterization of Dr. Harris' status was that used by his attorney —"an obscure but talented psychiatrist." Until the publication of the book there is no question that, despite his success in his profession and his honors, whatever definition of public figures applies, Dr. Harris was a private individual. *See Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411. The first issue presented is whether Dr. Harris was transformed into a general purpose public figure by virtue of the publication and sale of his very successful book and the publicity attendant thereon. In effect, the question that is before the court is—was Dr. Harris a "celebrity" as measured by the relevant population? The answer to that question cannot be ascertained from the evidence before the court. Although it is quite clear that Dr. Harris' book had wide sales, there is simply no evidence before the court which would clearly demonstrate that the author was as well known as the book. Moreover, it cannot be ascertained whether the alleged libel reached persons who knew the book and knew that Dr. Harris was its author. It may well be that both the people attending the two rallies and those hearing the tape on the radio were unfamiliar with the work or the author. Of course, the opposite may be true and the two audiences may have overlapped. The point is, there is simply insufficient evidence bearing on the subject before the court. While it is true that the defendant himself did not know the name of the author of the book and, indeed, had not read the book himself at the time that he made the allegedly defamatory statements, that fact, while ironic and perhaps having some bearing on the issue, is hardly conclusive. Thus the court is satisfied that the facts are simply insufficient to rule that either party is entitled to judgment on the general purpose public figure issue as a matter of law.

[12] The question of whether or not Dr. Harris is a limited purpose public figure is somewhat more complex. Dr. Harris admits that he voluntarily, intentionally, and vigorously sought to directly influence resolution of a particular controversy. He characterizes that controversy as one concerning the source of, and the appropriate method of treating mental and emotional problems. Even conceding plaintiff's characterization of the controversy, however, much of the evidence suggests that he was a limited purpose public figure in terms of that controversy. First, as I noted, Dr. Harris admits voluntary involvement in the particular controversy. Second, resolution of the controversy concerning psychotherapy would have a perceptible impact, not only among psychiatrists and other mental health workers (*i.e.*, those participating in the controversy), but among the populace at large, many of whom seek treatment. All of these facts suggest that plaintiff was a limited purpose public figure in the field of psychotherapy. Even so, disputed issues of fact preclude the court from granting summary judgment. Defendant has simply failed to demonstrate that his remarks were

in any way directed to the field of psychotherapy which the plaintiff characterizes as the controversy.

Perhaps recognizing this problem, defendant characterizes the controversy in a broad fashion relating to what sources are appropriate for a Christian to use in deciding how to lead a happy and satisfying life. Even given this characterization, however, summary judgment must be denied for defendant has failed to demonstrate plaintiff's involvement in such a controversy.

While it appears to be uncontested that various churches have used the book as a text for instructing pastors in counseling parishioners, the significance of this fact is dependent on facts not before the court. In today's world a minister may have a variety of functions—some bearing on his duty as a preacher of the Word, others on his capacity as a comforter of his parishioners. The material of record does not itself indicate for which of these purposes the book was being used.

Under the definition, however, it will be remembered that neither the plaintiff nor the defendant's characterization is significant. Rather, the scope of the controversy must be examined from the perspective of the audience for plaintiff's work. As I have noted, the book is not of record. Thus, the court does not have a primary piece of evidence to enable it to characterize the appropriate scope of the controversy in which Dr. Harris has involved himself. Nor does it appear that the book was the sole means by which Dr. Harris sought to involve himself in a controversy. Evidence of Dr. Harris' speeches, teaching, T.V. appearances and the like might also bear upon the issue. Moreover, it appears there may be additional evidence which might bear upon the question which has not been provided the court.[31]

For all of these reasons, the court determines that there is insufficient evidence to resolve the issue of whether Dr. Thomas Harris is a public figure. Thus, defendant has failed to satisfy his burden on the motion for partial summary judgment.

B. *Amy Harris*

[13] Amy Harris is the wife of the plaintiff and the co-author of the book. She is not listed, however, as co-author on the book itself. Since it cannot be doubted that her name is considerably less known than her husband's, it cannot be reasonably argued that she is a general purpose public figure. Since there are no facts which suggest that she is any more of a limited purpose public figure than Dr. Harris himself, for the reasons that the motion has been denied as to Dr. Harris, it must also be denied as to Amy Harris.

CONCLUSION

For all of the reasons set forth above, the court now denies defendant's motion.

IT IS SO ORDERED.

Joseph LARRY

v.

PENN TRUCK AIDS, INC., Stanley Tamavich, Robert Link, Teamsters Local No. 312, Eastern Conference of Teamsters, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Edward J. Burke, John Diluzio, Domenick Maggi and Charles Gagnon.

Civ. A. No. 80-3875.

United States District Court,
E. D. Pennsylvania.

July 12, 1982.

Action was brought against employer, unions and others by local labor union mem-

31. Mr. Tomczak in his reply brief filed with the court a portion of an article from a religious magazine "A Pastoral Renewal" published in June 1977 concerning the book. It characterizes the book and its approach to life as straying from the biblical picture of how human beings ought to live. While this article suggests that at least some readers may have perceived the book as implicating this issue, such tenuous evidence can hardly be sufficient to determine what the reasonable reader would have concluded the book was about.

EXHIBIT "8"

Governmental Tort Claim and Insurance Reform Act because although "the officers acted pursuant to formulated policy when they unholstered their weapons upon observing a high-powered rifle in a bedroom of plaintiff's home ... the discharge of [one of the officer's] weapon[s] was not the result of implementing such policy." *Id.* at 626, 477 S.E.2d at 535. We explained in *Mallamo* that the phrase "the method of providing police or fire protection"

> 'is aimed at such basic matters as the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of equipment options.'

Id. (*quoting Jackson v. City of Kansas City,* 235 Kan. 278, 680 P.2d 877, 890 (1984)). Based on the above construction of the phrase "the method of providing police or fire protection," this Court concluded that the plaintiff's injuries in *Mallamo* "were not the result of the method of providing police, law enforcement or fire protection, within the meaning of *W. Va.Code,* 29–12A–5(a)(5) [1986][.]" *Id.* Clearly, *Mallamo,* like *Beckley,* does not concern the *failure* to provide police protection.

In that we have concluded that the premise of the appellant's argument is that Deputy Greene "failed to provide police protection" to Angela Holsten by not arresting or incarcerating Massey, we conclude that the County Commission is immune pursuant to the express language of *W. Va.Code,* 29–12A–5(a)(5) [1986] for "fail[ing] to provide ... police ... protection." [17] Accordingly, we hold that the circuit court properly entered summary judgment against the appellant on this issue.

III.

[24] In summary, for reasons stated above, the appellant cannot sustain a cause of action against the appellees pursuant to the public duty doctrine. Moreover, we conclude that the appellees are immune pursuant to the Governmental Tort Claims and Insurance Reform Act.[18] Based on all of the above, we affirm the October 23, 1995 order of the Circuit Court of Boone County.

Affirmed.

200 W.Va. 792

Fred E. HUPP, Appellee,

v.

Emery L. SASSER, Susan Bohna, Defendants Below,

University of West Virginia Board of Trustees, Defendant Below, Appellant.

No. 23346.

Supreme Court of Appeals of West Virginia.

Submitted Jan. 29, 1997.

Decided July 17, 1997.

Former graduate student at state university sued university board of trustees af-

17. Moreover, as noted by the appellees, *W. Va. Code,* 29–12A–5(a)(9) [1986] provides that a political subdivision is immune from liability if a loss or claim results from the failure or refusal to suspend or revoke any license. Thus, to the extent that the appellant's argument is based on Deputy Greene's failure to ensure that Massey's driver's license was suspended or revoked, the County Commission is immune pursuant to *W. Va.Code,* 29–12A–5(a)(9) [1986]. *See also* syl. pt. 4, *Hose v. Berkeley County Planning Comm'n,* 194 W.Va. 515, 460 S.E.2d 761 (1995).

18. We have given effect to the legislature's intent when applying the Governmental Tort Claims and Insurance Reform Act to the facts in the case before us as we recognize that "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States,* 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). *See also* syl. pt. 1, *Consumer Advocate Division of the Public Service Comm'n v. Public Service Comm'n,* 182 W.Va. 152, 386 S.E.2d 650 (1989). We admit, however, that it is difficult to formulate a bright line rule explaining how the public duty doctrine has been incorporated by the legislature into the Act.

ter student's position as graduate assistant was not renewed, asserting claims of defamation, breach of contract, and violation of his due process rights. The Circuit Court, Monongalia County, Larry V. Starcher, J., entered judgment on jury verdict for student and denied university's posttrial motions. University appealed, and the Supreme Court of Appeals held that: (1) statements by university dean regarding student and his performance were not actionable; (2) university had failed to raise point of error regarding contract claim; and (3) student did not have property interest in his position as assistant which was protected by due process clause.

Affirmed in part and reversed in part.

1. Libel and Slander ⇐1

Essential elements for successful defamation action by private individual are (1) defamatory statements, (2) nonprivileged communication to third party, (3) falsity, (4) reference to plaintiff, (5) at least negligence on part of publisher, and (6) resulting injury.

2. Libel and Slander ⇐123(2)

Court must decide initially whether, as matter of law, challenged statements in defamation action are capable of defamatory meaning.

3. Libel and Slander ⇐6(1)

Statement is defamatory if it tends so to harm reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement (Second) of Torts § 559.

4. Libel and Slander ⇐6(1)

Statements are defamatory if they tend to reflect shame, contumely, and disgrace upon plaintiff.

5. Libel and Slander ⇐54

Truth is an absolute defense to allegation of defamation.

6. Constitutional Law ⇐90.1(5)

Statement of opinion which does not contain provably false assertion of fact is entitled to full constitutional protection under First Amendment. U.S.C.A. Const.Amend. 1.

7. Libel and Slander ⇐54

Statement by university dean to professor that there were numerous complaints about graduate student for his alleged abusiveness and unprofessional behavior was true and thus was not actionable as defamation; in context, dean could not be viewed as having described graduate student as abusive or unprofessional, but only to have made statement regarding complaints which had in fact been made.

8. Libel and Slander ⇐19

Defamation law requires that allegedly defamatory statements be considered in context in which they were made.

9. Constitutional Law ⇐90.1(5)
Libel and Slander ⇐6(1)

Statement by university dean that graduate student "is a bully. He tried to bully me" was opinion devoid of provably false assertion of fact, and thus was protected speech under First Amendment which was not actionable as defamation; conclusion that student was a bully was totally subjective, and thus not provably false. U.S.C.A. Const. Amend. 1.

10. Constitutional Law ⇐90.1(5)
Libel and Slander ⇐6(1)

Statements in memoranda prepared by university dean that graduate student had engaged in "unprofessional behavior toward students, faculty, staff, and administrators" and in "unacceptable behavior" were statements of opinion devoid of provably false assertion of fact, and thus were protected speech under First Amendment which were not actionable as defamation. U.S.C.A. Const.Amend. 1.

11. Libel and Slander ⇐54

Statement by university dean that graduate student, whose position as graduate assistant had not been renewed, was not authorized to used school's equipment and was to be prevented from using school's facilities was not actionable as defamation; statement was true, and lacked even a hint of defamatory content.

12. Contracts ⇐275

Even if contract exists, one claiming rights thereunder must be able to demonstrate that they performed their responsibilities thereunder.

13. Appeal and Error ⇐839(1)

Reviewing court will not review or reverse decree or order of circuit court, or any part thereof, which is not appealed from.

14. Constitutional Law ⇐254.1, 277(1)

Threshold question in any inquiry into claim that individual has been denied procedural due process under State Constitution is whether interest asserted by individual rises to level of "property" or "liberty" interest protected by State Constitution. Const. Art. 3, § 10.

15. Constitutional Law ⇐277(2)

For property interest protected by due process clause of State Constitution to arise on part of employee of state institution, there must be rules, understandings, or relationships between employee and institution which give rise to legitimate claim of entitlement. Const. Art. 3, § 10.

16. Constitutional Law ⇐277(1)

Property interest protected by due process clause of State Constitution includes not only traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have legitimate claim of entitlement under existing rules or understandings. Const. Art. 3, § 10.

17. Constitutional Law ⇐277(2)

While there must be some undertaking or position by state institution which gives rise to objective expectation on part of employee in order for property interest protected by due process clause of State Constitution to arise on part of employee, undertaking does not have to be in writing, and may evolve in a de facto fashion. Const. Art. 3, § 10.

18. Constitutional Law ⇐277(2)

Graduate student at state university did not have reasonable objective expectation that his employment as graduate assistant would continue, and thus did not have property interest protected by due process clause of State Constitution in retaining position as assistant; while such positions were generally renewed from semester to semester, positions could be terminated for failure to maintain academic good standing, or for reasons involving assistant's professional behavior. Const. Art. 3, § 10.

19. Constitutional Law ⇐277(2)

Unilateral, subjective expectations on part of employee of public institution, which are developed apart from any action, undertaking, or position of institution, are not sufficient to give rise to protected property interest. Const. Art. 3, § 10.

Syllabus by the Court

1. "The essential elements for a successful defamation action by a private individual are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury." Syl. Pt. 1, *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1983).

2. "A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." Syl. Pt. 6, *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986).

3. "A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection." Syl. Pt. 4, *Maynard v. Daily Gazette Co.*, 191 W.Va. 601, 447 S.E.2d 293 (1994).

4. "This court will not review or reverse a decree or order of the circuit court, or any part thereof, not appealed from." Syl. Pt. 3, *Sulzberger & Sons Co. v. Fairmont Packing Co.*, 86 W.Va. 361, 103 S.E. 121 (1920).

5. "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." Syl. Pt. 3, *Waite v. Civil Service*

Commission, 161 W.Va. 154, 241 S.E.2d 164 (1977).

William C. Garrett, Gassaway, Joyce Morton, Van Nostrand & Morton, Webster Springs, for Appellee.

Bruce A. Kayuha, Rose, Padden & Petty, Morgantown, for Appellant.

PER CURIAM:

The University of West Virginia Board of Trustees ("University") appeals from the Circuit Court of Monongalia County's denial of its motions for directed verdict and for judgment notwithstanding the verdict in a civil suit brought against it by Appellee Fred E. Hupp, a former graduate student, that involved allegations of defamation, breach of contract, and denial of due process. The University assigns as error the trial court's failure to rule that the alleged defamatory statements lacked defamatory content, that it did not publish any communication defaming Mr. Hupp, and that the communications were privileged. Also assigned as error are the trial court's failure to rule that Mr. Hupp had no constitutionally protected property interest in reappointment as a graduate teaching assistant and the trial court's failure to rule that if such a property interest did arise, Mr. Hupp received due process with regard to the complaints against him.[1] Upon a review of the record, we determine that the circuit court erred by failing to direct a verdict in the University's favor on Appellee Hupp's defamation claim based on the lack of defamatory content contained in those statements. Because we determine that Mr. Hupp did not have a constitutionally protected property interest in reappointment, we further find that the lower court erred in not granting the University's motion for directed verdict on the issue of due process. The verdict is upheld on the breach of contract issue as no assignment of error was raised with regard to it.

The University hired Mr. Hupp as a graduate assistant for its school of journalism for the spring semester of 1992. During the course of the semester, Emery Sasser, the dean of the journalism school, received several complaints from undergraduate students regarding Mr. Hupp's alleged unprofessional and intimidating behavior toward them. Additional complaints regarding Mr. Hupp were received by Thomas Sloane, then assistant dean of student life. Susan Bohna, an instructor in the journalism school, both received complaints regarding Mr. Hupp and was the recipient of Mr. Hupp's abusive behavior. Complaints regarding Mr. Hupp's behavior were also submitted in the form of anonymous student evaluations.

Mr. Hupp was confronted with the complaints against him in a meeting with Dean Sasser and Jon Reed, general counsel for the University, on April 21, 1992. Mr. Hupp acknowledges that, during the course of this meeting, he was apprised of the fact that students had complained of his bullying and abusive behavior towards them; that two females had complained of unwanted touching and fear of being alone in the classroom with him; and that students had complained of threats made in connection with their grades, his use of vulgar language, and his acting generally in an unprofessional manner. He was not apprised, however, of the identity of the complaining students.

Despite Dean Sasser's serious reservations regarding Mr. Hupp's continuation as a graduate assistant for the Fall 1992 semester, he was offered such a position[2] upon "the strict condition: [that] [a]ny creditable complaint of vulgarity, acts of intimidation, bullying or unprofessional behavior toward students, faculty or staff of the School of Journalism will result in the immediate termination of your

1. A final assignment of error, which we find unnecessary to address, is that the jury was motivated by passion, prejudice, or a misunderstanding of law, due to the identical award of $50,000 for each of Mr. Hupp's three theories. The University contended that, whereas the $50,000 award on the breach of contract claim could arguably be supported by the damage evidence introduced by Mr. Hupp on this theory, the identical award of damages on the other two theories without additional damage evidence suggests the award was motivated by passion, prejudice, or some misunderstanding of the law.

2. Apparently, the Dean's decision to offer Appellee a position for the Fall semester was influenced by a faculty meeting.

employment as a graduate assistant." Mr. Hupp refused to sign a written offer, dated July 31, 1992, which contained this condition, based on his position that by signing the document he would have been admitting to certain infractions. Mr. Hupp replied to Dean Sasser that he had been advised by his attorneys not to sign the offer, that he had and would continue to "redouble ... [his] efforts to be sensitive to the needs of my students[,]" but that he wanted to be treated similar to every other graduate assistant "with regard to normal critiques and suggestions for improvements." Dean Sasser reworded the terms of the offer to Mr. Hupp in a memorandum dated August 28, 1992, modifying the conditional language to state that "you will give particular attention and effort toward maintaining appropriate and professional behavior and attitude in the performance of your duties and in your dealings with others during the assistantship." Mr. Hupp refused to sign this second written offer of employment and the assistantship was eventually awarded to another individual.

Mr. Hupp filed suit pro se [3] against the University, Dean Sasser,[4] and Susan Bohna [5] on March 11, 1993, alleging defamation, breach of contract, and denial of due process. Following a four-day jury trial in February 1995 and the denial of the University's motions seeking a directed verdict on the defamation and due process claims, the jury awarded Mr. Hupp $150,000—$50,000 on each of Appellee's three theories. The University moved for a judgment notwithstanding the verdict, or alternatively, a new trial. The University appeals from the denial of those motions, as well as the trial court's failure to grant a directed verdict in its favor on Appellee's defamation and due process claims.

3. Mr. Hupp's current counsel filed a notice of appearance with the circuit court on October 21, 1993.

4. Dean Sasser was dismissed from the proceeding in his individual capacity by directed verdict at the close of defendant's case in chief.

I. DEFAMATION

[1] This Court, in syllabus point one of *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1983), held that: "The essential elements for a successful defamation action by a private individual are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury." The assignments of error at issue in this case relate to elements one and two as set forth in *Crump*. Specifically, the University asserts that the trial court erred in concluding that the five statements at issue were defamatory in nature, that these statements were published, and that the statements were not privileged communications, and thus outside the realm of defamation.

Necessary to our discussion is a synopsis of the five [6] allegedly defamatory statements, each of which were made by Dean Sasser. Statement one involved Dean Sasser stating to Professor Schie, a journalism school faculty member, in a local bar in April 1992: "I guess you've heard about the problems we're having with Hupp." After receiving a negative response, Dean Sasser stated that there were numerous complaints against Mr. Hupp for his alleged "abusiveness" and "unprofessional behavior." The second statement concerns remarks made by Dean Sasser to faculty member Dr. Lynn Hinds on April 21, 1992, that "I know he's [Mr. Hupp's] a bully. He tried to bully me." Statement three was contained in a letter from Dean Sasser to Mr. Hupp, as well as several other faculty and administrative personnel and University counsel, dated July 31, 1992, that referenced Mr. Hupp's "unprofessional behavior toward students, faculty, staff, and administrators during spring semester 1992." The fourth allegedly defamatory statement was made by Dean Sasser when he noted Mr. Hupp's "un-

5. Ms. Bohna was dismissed from the case on her motion for a directed verdict at the close of plaintiff's case in chief.

6. At trial, two additional statements made by Susan Bohna were at issue as allegedly defamatory. Given the dismissal of Ms. Bohna from the lawsuit, however, we need not examine those statements.

acceptable behavior" in a writing to Professor Lynn Hinds. The final statement postdates the filing of the complaint and concerns Dean Sasser's letter dated April 22, 1993, to Dr. Lynn Hinds directing that Mr. Hupp "is not authorized to use any equipment or facilities of the School of Journalism" and that Dr. Hinds was to "prevent him from using any facilities of the School."

[2] As we recognized in syllabus point six of *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778 (1986), "A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning." While Appellee argues that the trial court was presented with this issue on three separate occasions (and suggests that the lower court thrice ruled in his favor), our review of the record does not support Appellee's assertion. The University first raised the issue of lack of defamatory character with regard to the statements at issue in its motion for summary judgment. The trial court's denial of the University's summary judgment motion was based solely on the existence of undetermined factual issues pertaining to the contract claim. The lower court did not address the issue of whether the statements contained defamatory content in its summary judgment ruling. The University reasserted the issue of defamatory content in moving for a directed verdict at both the close of plaintiff's case in chief and at the close of defendant's case. While the trial court denied the University's motion for directed verdict on the defamation claim at the close of plaintiff's case in chief, it did not address the issue head-on, stating: "I really question whether this rises to the level of defamation" and "I don't think it's likely I'm going to leave the defamation action in there because I didn't see where it was being published...." When the motion was renewed at the close of the University's case, the trial court observed:

> [O]n the defamation claim although I must say it's, at best, a very weak defamation case. I think it's unlikely a jury will find defamation of character, to be honest with you, but I'm going to let them take a stab at it. I might even, on review, decide that it might even have been privileged, the way it was presented in this courtroom; but I'm going to still let the jury have it on that grounds because I want the plaintiff to have his day in court and I think he'll have his day in court and I think the jury will say that there's no defamation.

Our review of the record reveals that while the University certainly raised the issue of the lack of defamatory content, the trial court failed to make a ruling on this issue. Not only is Appellee's representation that the trial court ruled in his favor on the issue of defamatory content incorrect, the trial court's statements, as quoted above, suggest an inclination towards a ruling that the statements were devoid of defamatory content.

[3–5] Defining what constitutes defamation in *Crump*, we borrowed language from the Second Restatement of Torts: "A statement may be described as defamatory 'if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' " 173 W.Va. at 706, 320 S.E.2d at 77 (quoting Restatement (Second) of Torts § 559 (1977)). We also referred to our earlier recognition in syllabus point one of *Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 211 S.E.2d 674, *cert. denied*, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975), that statements are defamatory if they tend to " 'reflect shame, contumely, and disgrace upon [the plaintiff].' " 173 W.Va. at 706, 320 S.E.2d at 77. It is axiomatic that truth is an absolute defense to an allegation of defamation. *See Crump, id.* at 708, 320 S.E.2d at 79.

[6] The University argues that the five statements of Dean Sasser at issue constitute either criticism of Mr. Hupp's behavior that failed to injure him in his professional capacity or opinions regarding his work performance. In either case, the University argues that the statements are not actionable for failure to constitute defamation. In *Maynard v. Daily Gazette Co.*, 191 W.Va. 601, 447 S.E.2d 293 (1994), we discussed the United States Supreme Court's decision of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), stating:

> the Court refused to recognize "still another First Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact.'" *Milkovich*, 497 U.S. at 17, 110 S.Ct. at 2705. "Rather than recognize a constitutional distinction between 'fact' and 'opinion,' the Court recognized a constitutional distinction between 'fact' and 'non-fact.' The Court thus changed the terminology of constitutional law in *Milkovich*, but not the underlying substance." Rodney A. Smolla, *Law of Defamation* § 6.02[1] (1994).

191 W.Va. at 603–04, 447 S.E.2d at 295–96. This Court in *Maynard* continued its discussion of the *Milkovich* decision, noting that

> the [United States Supreme] Court['s] ... decision in [*Philadelphia Newspapers, Inc. v.*] *Hepps* [475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986)] "stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law.... *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 497 U.S. at 19–20, 110 S.Ct. at 2706.

191 W.Va. at 604, 447 S.E.2d at 296. Adopting the principles stated in *Milkovich*,[7] we held in syllabus point four of *Maynard* that "[a] statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection." *Id.* at 602, 447 S.E.2d at 294.

[7] Against these principles, we examine the five statements at issue in this case to see whether they constitute true statements, which are unactionable, or whether they constitute statements of opinion that do not contain provably false assertions of fact and are entitled to constitutional protection. The first statement involves Dean Sasser's comment to a university professor that there were numerous complaints against Mr. Hupp for his alleged abusiveness and unprofessional behavior. This statement is either true or false. Either there were numerous complaints regarding Mr. Hupp or there weren't. Dean Sasser testified[8] at trial as to his receipt of multiple complaints regarding Mr. Hupp's behavior:

> Q. Did there come a time, Dean Sasser, where you began to hear complaints about Mr. Hupp's behavior?
>
> A. Yes.
>
> Q. When was that?
>
> A. I think in March of that semester...
>
> Q. And who was bringing these complaints to you then?
>
> A. I think the first I heard were from staff members who said students were coming to them with complaints; and my response was tell those students they ought to come see me if they have complaints.
>
> ....
>
> Q. And did there come a time when you began to hear complaints directly from students?
>
> A. Yes.
>
> Q. And when was that?
>
> A. I think in early April, students came to see me.
>
> Q. How many students came to see you, Dean Sasser?
>
> A. Three or four in April.
>
> Q. Do you recall their names?
>
> A. Karen Janisweski; Mr. Korman, Andrew Korman, I believe; a graduate student named Chuck Scatterday and Mark Auber.

7. With regard to the laws of defamation as they affect private individuals, the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), stated "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347, 94 S.Ct. at 3010.

8. In addition to Dean Sasser's testimony, Mr. Hupp introduced a memorandum dated April 20, 1992, from Dean Sasser to Dr. William E. Vehse, the Provost and Vice President for Academic Affairs and Research, that describes in detail the nature of the complaints he was receiving about Mr. Hupp.

Q. Can you tell the jury the nature of the complaints you were receiving about Mr. Hupp's behavior?

A. Well, they were that he used bad language, that is, profane language sometime, abusive, and they thought he was abusive. A couple of them said they were afraid of him. At least one of them said they wouldn't return as a student in the fall if he was still the graduate student....

Q. Did they tell you any of the profane language that he was using?

A. Yes.

Q. And I'm not going to ask you to repeat it but would that include what we comically call the "f" word almost?

A. Yes.

Q. Did there come a time when Susan Bohna told you that she was receiving complaints from students?

A. Yes. About the same time.

Q. Same kind of complaints?

A. Yes.

Q. How about Dr. Tom Sloane ... ?

A. Yes. I had a telephone call from Dr. Sloane in mid April, I believe, and he was reporting to me that one of our undergraduate female majors had come to see him and he thought he needed to share it with me because he thought it might constitute sexual harassment....

[8] Defamation law requires that you consider the alleged defamatory words in the context in which they were made. *See Goldberg v. Coldwell Banker, Inc.*, 159 A.D.2d 684, 553 N.Y.S.2d 432, 433 (N.Y.App. Div.1990); *see also Long*, 176 W.Va. at 637, 346 S.E.2d at 787. Thus, Dean Sasser cannot be viewed as having described Mr. Hupp as "abusive" or "unprofessional," but only to have made a statement regarding the registering of multiple complaints in which he characterized the nature of those complaints concerning Mr. Hupp's behavior as abusive or unprofessional. Since the record demonstrates that these complaints were in fact made and not fictional in nature and because Dean Sasser's testimony regarding their substance bears out his depiction of the complaints, we find this first statement to be outside the realm of defamation law on grounds of truth. *See Crump*, 173 W.Va. at 708, 320 S.E.2d at 79.

[9] The second statement involves Dean Sasser's comment to Professor Hinds that "he is a bully. He tried to bully me." This statement falls within the category of protected speech under our holding in *Maynard* that covers opinion devoid of a provably false assertion of fact. *See* 191 W.Va. at 602, 447 S.E.2d at 294, syl. pt. 4. Dean Sasser's opinion that Mr. Hupp is a bully is not probably false as that conclusion is totally subjective. *See Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1289 (4th Cir.1987) (explaining initial test of statement for defamation purposes as requiring conclusion that "truth or falsity of the statement does not depend upon subjective values or indefinite terms"). The threshold of what constitutes bullyism to one would necessarily not be the same for another individual. *See also* Rodney A. Smolla, *Law of Defamation* § 6.12[10] (1996) (noting that "[n]ame calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable"). This is clearly speech that falls within the ambit of the constitutional protections discussed in *Milkovich*. *See* 497 U.S. at 19–20, 110 S.Ct. at 2706; *accord Maynard*, 191 W.Va. at 607, 447 S.E.2d at 299.

[10] We view the third and fourth statements together as they are similar. In two separate documents, Dean Sasser referenced first Mr. Hupp's unprofessional behavior and second, his unacceptable behavior. Both of these statements were set forth in memoranda that clearly indicated they originated from Dean Sasser and both of these statements constitute statements of non-fact—subjective conclusions that Dean Sasser had reached regarding Mr. Hupp's behavior. These statements, as was the comment regarding Mr. Hupp being a bully, might not reflect the same conclusion that other individuals would reach when considering Mr. Hupp's behavior, but they are clearly not provably false. *See Potomac Valve & Fitting*, 829 F.2d at 1288 (explaining that statements that are "inherently impossible to prove or disprove" are "protected by the First Amendment"). Accordingly, they are protected under syllabus

point four of *Maynard.* 191 W.Va. at 602, 447 S.E.2d at 294.

[11] The final statement is arguably without any defamatory content on its face. This statement was contained in a letter that postdates the filing of this civil action and concerned the lack of Mr. Hupp's authorization to use school-owned equipment. This is clearly a statement that can be proven as true with regard to Mr. Hupp's lack of authority to use school equipment following his non-renewal as a graduate assistant. Of all the statements at issue, this one lacks even a hint of defamatory content.

Having reviewed the statements at issue, we cannot reach the conclusion that any of the statements qualify as containing the requisite defamatory content that would have permitted this issue to go to the jury. *See Sandler v. Marconi Circuit Technology Corp.,* 814 F.Supp. 263, 268 (E.D.N.Y.1993) (holding that statement that plaintiff "screwed up the company and we had to let [him] go" was expression of opinion of dissatisfaction with plaintiff's professional performance and not actionable defamation); *McDowell v. Dart,* 201 A.D.2d 895, 607 N.Y.S.2d 755 (1994) (holding that allegedly defamatory statements made by employer regarding employee's work performance constituted opinions and thus were not actionable); *Goldberg,* 553 N.Y.S.2d at 433 (ruling that statements in interoffice memorandum charging that attorney "has been most uncooperative, abrasive and dilatory in fulfilling his responsibilities in interacting with our customer [sic], client's attorney, client and participating brokers" and further recommending that attorney not be retained in future were expressions of opinion regarding manner in which individual conducted himself and not actionable); *Dong v. Board of Trustees,* 191 Cal.App.3d 1572, 236 Cal.Rptr. 912, 921 (1987), *cert. denied,* 484 U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 680 (1988) (finding letter from medical school professor that criticized colleague's unethical research practices to be statement of opinion and not actionable).

Having determined that the statements at issue do not qualify as defamatory under the law, we conclude that the initial showing necessary for a defamation proceeding was never made in this case. *See Long,* 176 W.Va. at 636, 346 S.E.2d at 787. We further conclude that the lower court erred in failing to rule in the University's favor on the issue of defamation based on lack of defamatory content. Based on our ruling on lack of defamatory content, we find it unnecessary to address the issues of whether the statements were privileged or published outside the University.

II. BREACH OF CONTRACT

It is undisputed that no written contract of employment exists, and the record is somewhat unclear regarding the nature of the contract that Mr. Hupp claims was breached. Whereas the second amended complaint describes the contract as stemming from an oral representation made by Dean Sasser to Mr. Hupp that his graduate assistantship would be renewed for the academic year 1982–83, the trial transcript reflects that Mr. Hupp argued that an implied contract existed based on the past practice of the University to permit graduate assistants to retain their teaching positions until they attained their graduate degrees. As discussed within section III. of this opinion, because there were certain conditions to the continuation of such a contract even if such an implied contract was in effect, the issue of Mr. Hupp being entitled to a contract of continued employment as a graduate assistant at the University was certainly disputed. Those conditions, as testified to by Mr. Hupp's own witnesses,[9] were that in addition to maintaining a grade point average of at least 3.0, graduate assistants had to perform the requirements of their teaching position in a satisfactory manner to be permitted to remain in such positions.

[12, 13] Although this Court finds the evidence on the contract claim to be extremely weak, the University does not raise any assignments of error with regard to this is-

9. *See infra* note 19.

sue.[10] In fact, during oral argument, the University stated "we believe the evidence does support the breach of contract claim." Had the University properly raised this issue by making it the subject of an assignment of error, it appears they would have prevailed in a reversal from this Court. It is difficult to understand why the University chose to waive this issue, as it is hornbook law that even if a contract exists, one claiming rights thereunder must be able to demonstrate that they performed their responsibilities thereunder.[11] Clearly, one holding a position such as Mr. Hupp's cannot be said to have performed his professional obligations satisfactorily in view of the evidence regarding the abusive manner in which he treated students and co-workers. However, as we stated in syllabus point three of *Sulzberger & Sons Co. v. Fairmont Packing Co.*, 86 W.Va. 361, 103 S.E. 121 (1920), "[t]his court will not review or reverse a decree or order of the circuit court, or any part thereof, not appealed from." Based on the University's decision not to appeal on this issue, we are left with no choice but to uphold the verdict on the contract claim.

III. DUE PROCESS

The University argues that Mr. Hupp had no constitutionally protected interest in being reappointed to a graduate assistantship and thus was not entitled to due process protections in connection with his claim predicated on the University's failure to renew his assistantship position under the same terms as the other graduate assistants. With regard to the due process concerns arising in connection with the allegations of Mr. Hupp's unprofessional behavior, the University contends that he received the requisite due process by virtue of the meeting with Dean Sasser and Jon Reed on April 21, 1992.[12]

[14–17] This Court recognized in *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 279 S.E.2d 169 (1981), that "[t]he threshold question in any inquiry into a claim that an individual has been denied procedural due process is whether the interest asserted by the individual rises to the level of a 'property' or 'liberty' interest protected by Article III, Section 10 of our constitution." *Id.* at 709, 279 S.E.2d at 175 (citing *Waite v. Civil Service Comm'n*, 161 W.Va. 154, 241 S.E.2d 164 (1977)). "[F]or a protected 'property interest' to arise, there must be rules, understandings, or relationships between the employee and the institution which give rise to a legitimate claim of entitlement." *West Virginia University v. Sauvageot*, 185 W.Va. 534, 537, 408 S.E.2d 286, 289 (1991). We defined a protected property interest in syllabus point three of *Waite*, stating that "A 'property interest' includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings." 161 W.Va. at 154, 241 S.E.2d at 165. Although Mr. Hupp was clearly not under written contract with the University in connection with his graduate assistantship, we explained in *Sauvageot*, that while "[t]here must be some undertaking, or position by the employer which gives rise to an objective expectation on the part of the employee[,]" this "undertaking, however, does not have to be in writing; it may evolve in a *de facto* fashion." 185 W.Va. at 537, 408 S.E.2d at 289.

[18] Mr. Hupp argued below that, because it was the practice of the University to continue graduate assistantship positions from semester to semester until they completed their degrees barring a grade point average that fell below 3.0, he had an expectation that his position would be continued in similar fashion, as he remained in good academic standing. With regard to the due process protections due him, Mr. Hupp intro-

10. The petition for appeal and the University's appellate brief mention the contract claim only insofar as it relates to the claim of denial of due process. Although the University did raise in post-trial motions the sufficiency of the evidence to support the jury verdict on the contract claim, no assignment of error was raised with this Court that pertains to the contract claim.

11. *See* 4B Michie's Jurisprudence, Contracts § 58 (1986).

12. We do not reach this secondary issue of due process based on our conclusion that Mr. Hupp did not have a protected property interest in continued employment as a graduate assistant.

duced evidence that defined graduate assistants as members of the faculty [13] and maintained that as such a faculty member he was entitled to utilize the grievance system in place for University faculty.[14] In fact, Mr. Hupp wrote to the vice president of academic affairs, Dr. Russell Dean, on August 31, 1992, that he wished to file a grievance [15] in connection with the decision not to extend his assistantship position.[16] Although Mr. Hupp represents on appeal that Dean Sasser responded to this request by informing him that he was not entitled to utilize the grievance procedures, the document that he cites as support for this response is dated three months earlier. That memorandum, dated May 21, 1992, indicates that "[b]ecause you are no longer an employee, I do not believe you are eligible to use the employee grievance systems[,]" but continues, "[i]f you are eligible, and you are attempting to file a grievance, you have not properly identified which grievance system you are trying to use." [17]

The possibility of a property interest arising in a university setting based on the expectation of reemployment has clearly been recognized. *See Siu v. Johnson*, 748 F.2d 238, 244 (4th Cir.1984) (discussing, but rejecting, concept of property interest arising from "the University's procedures and their application over time ... giv[ing] rise to an institutional 'common law of re-employment' under which the interest created by her probationary appointment had been elevated to something firmer than a mere 'unilateral expectation' ") (quoting *Board of Regents v. Roth*, 408 U.S. 564, 578 n. 16, 92 S.Ct. 2701, 2710 n. 16, 33 L.Ed.2d 548 (1972)). In *Sauvageot*, we found that a teacher continuously rehired for almost fourteen years under one-year contracts "had a reasonable objective expectation that her employment would continue" "because of the University's long-term and repeated practice of reappointing ... [her] as her annual contracts expired." 185 W.Va. at 538, 408 S.E.2d at 290.

The question to be resolved then is whether Mr. Hupp had a "reasonable objective expectation that [his] employment would continue." *Id.* Mr. Hupp acknowledged through his testimony that at the time of his meeting with Dean Sasser and Jon Reed in April 1992, there was "certainly [a] threat that my assistantship would certainly be under very serious scrutiny and review." The University relies on this testimony to argue that Mr. Hupp knew his reappointment was uncertain at best. Also introduced at trial was a memorandum from Dean Sasser to Mr. Hupp dated May 15, 1992, which indicated that the issue of whether he would be offered the teaching position for the Fall semester would probably not be resolved until later that summer.[18] This lends further support to the issue that Mr. Hupp was placed on notice as to the possibility of non-renewal.

[19] As we stated in *Sauvageot*, "unilateral, subjective expectations on the part of an employee developed apart from any action,

13. Rule 3.7.3 of "Title 128, Procedural Rules, University System of West Virginia, Board of Trustees, Series 36," which pertains to "Academic Freedom, Promotion, and Tenure," a document introduced by Mr. Hupp at trial, designates graduate assistants as temporary faculty members.

14. The faculty grievance procedures established by the University provide for a four level process that begins at the department level, and if necessary, ultimately proceeds to the University president.

15. In that document, Mr. Hupp indicated that he "wish[ed] to file such formal charges and/or grievances as may be appropriate and available at this time."

16. The record, however, does not indicate whether in fact an actual grievance was filed by Mr. Hupp.

17. That document continued: "Therefore, it is difficult to advise you as to any right you may have to appeal. I would refer to Policy Bulletin No. 36 and to West Virginia Code 18–29 as to your appeal rights. Under the statutory scheme you have five days to appeal this decision to the President."

18. The memorandum stated that Dean Sasser would give the "matter further consideration" following his receipt of an evaluation of Mr. Hupp's summer work and consultation with senior faculty members. In fact, Mr. Hupp was offered the position as a graduate assistant, but refused to accept the position under the conditions of the offer, which merely required him to "give particular attention and effort toward maintaining appropriate and professional behavior and attitude in the performance of your duties and in your dealings with others during the assistantship."

undertaking, or position of the employer are not sufficient to give rise to a protected property interest." *Id.* at 537, 408 S.E.2d at 289. Clearly, the nature of the complaints registered against him would have brought into issue the viability of his continuation in the graduate assistantship position. And in fact, Mr. Hupp's own testimony established that he recognized the possibility that his teaching position was in jeopardy of not being renewed as a result of the complaints. Because a part of the understanding which surrounded the semester to semester continuation of graduate assistantships included academic good standing, we think it only stands to reason that an assistantship could also be terminated for reasons involving an assistant's professional behavior. In fact, four of Mr. Hupp's witnesses at trial [19] testified that in addition to grades and performing your job, there was a minimum level of behavior that was required and absent that level of behavior you would not be reappointed. Were it not so, the University's hands would be figuratively tied to continue in its employ assistants who were not fit to be in the classroom. Thus, any objective expectation on the part of Mr. Hupp had to include that he continue to be in academic good standing, both grade-wise and teaching performance-wise.

Under the facts of this case, we cannot find that Mr. Hupp had an objective expectation of continued employment and thus, a constitutionally protected property interest in being reappointed to a graduate assistantship did not arise. Accordingly, he was not entitled to due process protections in connection with his terminable position. *See Woods v. Milner*, 760 F.Supp. 623, 643 (E.D.Mich. 1991), *aff'd*, 955 F.2d 436 (6th Cir.1992) (holding that temporary terminable-at-will employee lacked legitimate claim of entitlement necessary for constitutional due process cause of action based on lack of "objective basis for believing that [sh]e w[ould] be employed indefinitely") (quoting *Hall v. Ford*, 856 F.2d 255, 265 (D.C.Cir.1988)); *see also Regents of University of Michigan v. Ewing*, 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (reversing appellate court's finding of substantive due process violation and holding that "narrow avenue for judicial review of the substance of academic decisions precludes any conclusion that such decision [not to permit medical student, who had completed four of six-year program, second opportunity to pass examination] was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment"). Given the lack of a constitutionally protected property interest in continued employment as a graduate assistant, the lower court erred in failing to direct a verdict in the University's favor on this claim.

For the foregoing reasons, the decision of the Circuit Court of Monongalia County is reversed as to its failure to direct a verdict on the issues of defamation and due process, but affirmed on the breach of contract claim based on the University's failure to raise this issue on appeal.

Reversed, in part;

Affirmed, in part.

STARCHER, J., deeming himself disqualified, did not participate in the decision of the Court.

200 W.Va. 803

STATE of West Virginia ex rel. Gordon LAMBERT, President, County Commission of McDowell County, and Donald L. Hicks, Sheriff of McDowell County, Relators,

v.

Honorable Booker T. STEPHENS, Judge of the Circuit Court of McDowell County, and William Bowman, Administrator, McDowell County Jail, Respondents.

No. 23931.

Supreme Court of Appeals of West Virginia.

Submitted March 25, 1997.

Decided July 17, 1997.

President of county commission and sheriff filed original proceeding seeking writ

19. Those witnesses were Dr. Boyer, Dr. Schreiber, Professor Schie, and Dr. Seymour.

EXHIBIT "9"

Because I have determined that plaintiff has an available remedy under 29 U.S.C. § 1132(a)(1)(B), plaintiff may not proceed on his claim for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3). *See Foley,* 91 F.Supp.2d at 807 n. 15. Therefore, the claims against the Fund and all individual defendants under § 1132(a)(3) will be denied.

IV. VERDICT

Having concluded that plaintiff Edward J. Foley, Sr., is entitled to a recovery of benefits due to him under the terms of the plan pursuant to ERISA, 29 U.S.C. § 1132(a)(1)(B), and based on the foregoing findings and conclusions, my verdict is in favor of Foley for the amount of monthly pension benefits and an early retirement bonus due as of August 1, 2000, $99,624.65. Furthermore, plaintiff's eligibility for his monthly pension benefit shall be reinstated in a manner consistent with the foregoing and the terms of the Plan.

Marvin A. SMITH,

v.

SCHOOL DISTRICT OF PHILADELPHIA; School District of Philadelphia, Superintendent David Hornbeck; Philadelphia Board of Education; Philadelphia Board of Education, President Floyd Alston; Philadelphia Federation of Teachers Local # 3 Building, Representative Avi Barr; and Assistant Principal of Carver High School of Engineering and Science Steven Miller.

No. C.A.98–6456.

United States District Court,
E.D. Pennsylvania.

Sept. 6, 2000.

Parent sued school district, school board, and high school officials, alleging constitutional violations and various torts were committed following his expression of allegedly racist views. On defendants' motion for judgment on pleadings, the District Court, DuBois, J., held that: (1) district, board, and their employees being sued in their official capacities were immune from liability for alleged infliction of emotional distress, defamation and invasion of privacy; (2) school superintendent and president of school board were "high public officials," entitled to absolute immunity from liability for torts; (3) complaint failed to state claim for violation of § 1985, infliction of emotional distress or defamation; and (4) complaint stated claim for First Amendment retaliation.

Motion granted in part and denied in part.

1. Federal Civil Procedure ⚿1041

Standard of review in motion for judgment on pleadings is identical to that for motion to dismiss for failure to state claim upon which relief can be granted. Fed. Rules Civ.Proc.Rule 12(b)(6), (c), 28 U.S.C.A.

2. Federal Civil Procedure ⚿657.5(1)

Court should broadly construe normal pleading requirements when handling pro se submissions.

3. Schools ⚿62, 63(3), 89

Under Pennsylvania law, city school district, board of education, and their employees being sued in their official capacities were immune from liability to student's parent for alleged infliction of emotional distress, defamation, and invasion of privacy. 42 Pa.C.S.A. § 8541.

4. Officers and Public Employees ⚿119

In suit against government official in his or her official capacity, real party in interest is governmental entity and not named official.

5. Schools ⚿62, 63(3)

Under Pennsylvania law, school superintendent and president of school board were "high public officials," entitled to absolute immunity from liability to student's parent for alleged infliction of emotional distress, defamation, and invasion of privacy; complained-of conduct was all taken within course of defendants' official duties or powers and within scope of their authority. 42 Pa.C.S.A. § 8546.

6. Federal Courts ⚿390

When state's highest court has not addressed precise question presented in diversity action, federal court must predict how state's highest court would resolve issue.

7. Conspiracy ⚿18

Allegation that school district employees conspired to force parent's removal from office as president of high school's home and school association because of letter and petitions that he authored failed to state claim under § 1985; there was no allegation that employees were motivated by class-based invidious discriminatory animus. 42 U.S.C.A. § 1985.

8. Conspiracy ⚿7.5(2)

Section 1985 does not extend to conspiracy to retaliate against individuals based upon exercise of First Amendment rights. 42 U.S.C.A. § 1985.

9. Damages ⚿50.10

Under Pennsylvania law, elements of claim of intentional infliction of emotional distress are conduct that: (1) is extreme and outrageous; (2) is intentional or reckless; and (3) causes severe emotional distress.

10. Damages ⚿50.10

Under Pennsylvania law, allegations that high school officials "leaked" parent's allegedly racist and anti-semitic letter to press and school district, and that they began to pressure home and school association to remove parent from his post as association president, did not rise to level of outrageousness necessary to state claim for intentional infliction of emotional distress.

11. Damages ⚿49.10

Under Pennsylvania law, elements of claim of negligent infliction of emotional distress are: (1) plaintiff was near scene of another's physical injury; (2) shock or distress resulted from direct emotional impact caused by sensory or contemporaneous observance of injury, as opposed to learning of injury from others after its occurrence; and (3) plaintiff is closely related to injured victim.

12. Damages ⚿49.10

Under Pennsylvania law, allegations that high school officials "leaked" parent's allegedly racist and anti-semitic letter to press and school district, and that they began to pressure home and school association to remove parent from his post as association president, failed to state claim for negligent infliction of emotional distress.

13. Libel and Slander ⚿1

Under Pennsylvania law, elements of claim for defamation are: (1) defamatory communication; (2) pertaining to plaintiff; (3) published by defendant to third party; (4) who understands communication to have defamatory meaning with respect to plaintiff; and (5) that results in plaintiff's injury.

14. Libel and Slander ⚿85

Under Pennsylvania law, allegation of defamation is subject to more stringent standard of pleading than is usually the case; complaint on its face must specifically identify what allegedly defamatory statements were made by whom and to whom. 42 Pa.C.S.A. § 8343.

15. Libel and Slander ⚿6(1)

Under Pennsylvania law, school district officials' alleged public statements that high school student's parent was racist and anti-Semitic were expressions of

opinion, and thus could not support claim of defamation.

16. Libel and Slander ⚿25

Under Pennsylvania law, school district officials' alleged leaking of parent's allegedly racist and anti-semitic letter to public officials was not defamatory; parent could not be defamed by use of his own words.

17. Civil Rights ⚿195

Plaintiff with remedy under § 1983 was thereby precluded from asserting direct claims for violation of constitutional rights; where available, § 1983 was exclusive remedy for constitutional violations. 42 U.S.C.A. § 1983.

18. Civil Rights ⚿192, 196.1

In order to state cause of action under § 1983, plaintiff must show that (1) defendants acted under color of law; and (2) their actions deprived plaintiff of rights secured by Constitution or federal statutes. 42 U.S.C.A. § 1983.

19. Constitutional Law ⚿82(3), 90.1(1)

To establish claim that public official retaliated against private citizen in violation of First Amendment, citizen must establish that: (1) he or she engaged in conduct or speech protected by First Amendment, (2) that public official took adverse action against citizen, and (3) that adverse action was prompted or caused by citizen's exercise of First Amendment rights. U.S.C.A. Const. Amend. 1.

20. Schools ⚿53(5)

Parent's letter to high school principal, complaining of school district's and board of education's policies regarding hiring of African-American teachers, concerned matters of public interest, for purpose of determining whether district and board officials unconstitutionally retaliated against parent when they subsequently terminated his appointment on school's advisory panel. U.S.C.A. Const.Amend. 1.

21. Schools ⚿89.3

School district and board officials did not unconstitutionally retaliate against parent who had allegedly expressed racist views when they urged his removal as president of high school's home and school association; determination to remove parent rested exclusively with other parents, who had elected him, and officials were merely exercising their own protected right to free speech. U.S.C.A. Const. Amend. 1.

22. Schools ⚿53(5)

Allegation that school district and board officials terminated parent's appointment on high school's advisory panel after learning of his allegedly racist views was sufficient to state First Amendment retaliation claim. U.S.C.A. Const.Amend. 1.

23. Constitutional Law ⚿82(3)

Plaintiff need not establish underlying constitutionally-protected property or liberty interest in order to pursue First Amendment retaliation claim. U.S.C.A. Const.Amend. 1.

24. Schools ⚿53(5)

City school district and its employees being sued in their official capacities could be held liable for First Amendment retaliation, based on single act of terminating parent's appointment on high school's advisory panel after learning of his allegedly racist views. U.S.C.A. Const.Amend. 1.

25. Civil Rights ⚿204.1, 205(1)

To state claim against individual under § 1983, plaintiff must allege participation, personal direction of complained-of conduct or knowledge of and acquiescence in complained-of conduct; supervisory relationship with someone who allegedly violated plaintiff's constitutional rights, without more, is insufficient. 42 U.S.C.A. § 1983.

26. Civil Rights ⚿235(2)

Allegation that city school district employees, in their individual capacities,

urged district's termination of parent's appointment on high school's advisory panel after learning of his allegedly racist views was sufficient to state § 1983 claim for First Amendment retaliation. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

27. Torts ⇐8.5(2, 5.1)

Under Pennsylvania law, claim of invasion of privacy can be based on any one of four theories: (1) intrusion upon seclusion; (2) appropriation of name and likeness; (3) publicity given to private life; and (4) publicity placing person in false light.

28. Torts ⇐8.5(5.1, 7)

Under Pennsylvania law, alleged public disclosure, by high school assistant principal and teacher, of parent's letter to principal did not cause invasion of privacy under theory that private facts were disclosed, as letter, which addressed issues of public concern, was not private.

29. Torts ⇐8.5(5.1)

Under Pennsylvania law, high school employees' alleged public disclosure of parent's letter to principal did not cause invasion of privacy under theory that they placed parent in false light, absent allegation that any false statements had been published.

30. Civil Rights ⇐275(2)

Punitive damages for violations of § 1983 are not available against municipality or individuals in their official capacity as municipal employees. 42 U.S.C.A. § 1983.

31. Civil Rights ⇐275(1)

Punitive damages may be awarded where individual § 1983 defendants have acted wilfully and in gross disregard for rights of complaining party, or where they have behaved in bad faith or for improper motive. 42 U.S.C.A. § 1983.

MEMORANDUM

DuBOIS, District Judge.

I. FACTS

Marvin A. Smith ("plaintiff") is the father of two children who in the fall of 1997 were enrolled at George Washington Carver High School of Engineering and Science ("Carver"), a "magnet" public high school located at 17th and Norris Streets in North Philadelphia. *See* Complaint at ¶¶ 24, 36. Plaintiff was concerned that racism at Carver was affecting his children and other African American students at the school. As a result, on January 1, 1998, he wrote a letter to Carver's Principal, Ella Travis, calling for certain changes to be made at Carver.[1] *See* Complaint at ¶¶ 37–38; Appendix, Exhibit A.

The focus of plaintiff's letter was his view that "the white/Jewish teachers" at Carver were racist and discriminated against African–American students, who constituted the majority of pupils at the school. The following excerpt is provided as representative of the letter's content:

> Dear Mrs. Travis:
>
> * * * * * *
>
> The white/Jewish teachers at [Carver] are generally guilty of the following offenses:
>
> (1) Failing to motivate our African–American children to be the best they can be. Too many white/Jewish teachers have low expectations of our children. Racial Discrimination! Racism!
>
> (2) Failing miserably to provide the kind of high quality, interesting and stimulating learning experiences

1. Although plaintiff s letter of January 1, 1998 and several petitions that were circulated by plaintiff are integral to the Complaint, copies were not attached to the pleadings. Nevertheless, the Court will consider in their entirety the letter and one of the petitions, both of which were appended to the motion papers. *See In re Rockefeller Center Properties, Inc. Sec. Litig.,* 184 F.3d 280, 287 (3d Cir.1999) (citing *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410 (3d Cir.1997)). Copies of the letter and the petition are attached to this Memorandum in an Appendix, as Exhibits A and B, respectively.

which would assist students in being successful. Racism!

(3) Failing miserably to and honor the cultural and ethnic value of African–American History Month by assigning the majority African–American student body the task of reporting on the movie Shindler's List, instead of an African–American assignment. That was blatant disrespect and insensitivity! Racism!

(4) Failing miserably to recognize the majority African–American student body by allowing a teacher to tell African–American students that affirmative action should be eliminated! This is another blatant example of white/Jewish teachers misleading our children. Racism!

(5) Failing miserable to regularly and effectively inform the students of the many false representations of this racist country, and the many, many violations of its own [C]onstitution. Acute racial discrimination, rampant violations of its citizens' human rights are also issues neglected in the curricula and the classroom. Why aren't African–American students taught to protest, boycott, and demonstrate against these American atrocities?

* * * * * *

We want these uncaring racist white/Jewish people to take their flawed and ineffective show back to the suburbs where they live! They are systematically destroying our children's spirit and killing their will. This racist system must be stopped by whatever means necessary and possible before additional generations of our children are lost.

* * * * * *

Since these white/Jewish people have been our traditional enemy, why are they so eager to accept the "teaching positions" at schools where African–Americans are predominantly enrolled? They are not there because they love or care about our children! They are there because oppressors need to oppress! We must stop the oppressors and the oppression!

* * * * * *

We—African–Americans—must control the educational institutions that are ours! If we fail to effectively control OUR INSTITUTIONS OF LEARNING we are surely doomed to continue our lives depending on white/Jewish people and following their directions. We must be the master of our fate and absolutely must be the captain of our soul!

I am amenable to meeting with you, at your earliest convenience, to discuss the contents [of] this letter,

MARVIN A. SMITH (signed)

In June, 1998, nearly six months after plaintiff wrote the letter, plaintiff was elected by a vote of parents of Carver students as president of Carver's Home and School Association. *See* Complaint at ¶ 40. At or about the same time, plaintiff was appointed to serve on the Advisory Panel at Carver; plaintiff does not specify in the Complaint his role on the Advisory Panel, when he was appointed to that position, or who made the appointment. *See* Complaint at ¶ 44.

Soon after plaintiff assumed these roles, he began advocating for the removal of certain Carver staff members. Plaintiff circulated petitions calling for the termination of selected administrators and teachers at the school, including defendant Steven Miller, Carver's Assistant Principal, and defendant Avi Barr, a teacher at Carver and the building representative for the Philadelphia Federation of Teachers Local # 3. *See* Complaint at ¶ 41. One such petition, dated December 1, 1998, was written in the form of a letter. *See supra* note 1; Appendix, Exhibit B. Following is an excerpt from that document:

Dear Mrs. Travis:

We, the parents, Guardians and Friends of students enrolled at [Carver] hereby

demand the termination, resignation or transfer of Steven Miller from his position as the assistant principal at Carver. He is a major divisive and negative force at Carver.

* * * * * *

We, the Parents, Guardians and Friends of students of Carver have regularly observed Steven Miller's acute inhospitality. He walks through Carver—where Our Precious Children are enrolled—and acts like Parents, Guardians and Friends of Carver are invisible. He simply ignores us! That is completely and absolutely unacceptable! Steven Miller is extremely uncomfortable around Parents, Guardians and Friends of Carver. He is hostile, mean spirited, and downright disrespectful of Parents, Guardians and Friends of students enrolled at Carver.

* * * * * *

We, the Parents, Guardians and Friends of students enrolled at Carver also very strongly demand the termination, resignation or transfer of ... Avi Barr....

We, the Parents, Guardians and Friends of students enrolled at Carver demand that Steven Miller, the Carver [A]ssistant [P]rincipal, be terminated, transferred or asked to resign ...

In or about December, 1998 the Philadelphia Board of Education, chaired by President Floyd Alston, unanimously passed a resolution condemning plaintiff and calling upon Carver's Home and School Association to remove him from his post as its president.[2] The Board's resolution, reproduced in its entirety, was as follows:

The Philadelphia Board of Education and Superintendent deplore and condemn the actions of Mr. Marvin Smith, President of the Home and School Association at George Washington Carver High School. Mr. Smith has chosen to express his concerns about Carver High School through a most inflammatory letter to the principal. This letter contained not only prejudicial statements but, was clearly racist and anti-Semitic. In both spirit and word it offends us personally, the entire School District community and all those we serve. In light of these facts, the Board calls upon the Home and School Council to act swiftly and appropriately by removing Mr. Smith as President of the Carver Home and School Association. Furthermore, the Board and the Superintendent are resolved that Mr. Smith shall have no official standing in the School District of Philadelphia from this point forward.

At or about the time this resolution was passed, plaintiff was removed from his position on Carver's Advisory Panel. *See* Complaint at ¶ 44. In addition, on December 9, 1998, Carver's Home and School Association sent a letter to Carver's parents informing them that they had removed plaintiff as its president. *See* Complaint at ¶ 46.

II. PROCEDURAL HISTORY

On December 11, 1998 plaintiff filed a Complaint (Doc. 1) demanding compensatory damages, punitive damages, attorney's fees and costs in excess of $10 million. The Complaint asserts seven causes of action. The School District of Philadelphia, School District Superintendent David Hornbeck ("Hornbeck"), the Philadelphia Board of Education, Board President Floyd Alston ("Alston"), Avi Barr ("Barr"), and Steven Miller ("Miller") (collectively the "School District defendants") are named in all seven counts.[3] Plaintiff sues

2. Although plaintiff explicitly relies upon the resolution in the Complaint, the text was not included in the pleadings. Nevertheless, the Court will consider the text of the resolution, which was set forth in the motion papers. *See In re Rockefeller Center,* 184 F.3d at 287.

3. Plaintiff originally filed his lawsuit against fourteen defendants. By agreement of the parties, the following originally named defendants were dismissed by this Court s Order dated May 10, 1999 (Doc. 25): National Association for the Advancement of Colored Peo-

all non-institutional defendants in their individual and official capacities. *See* Complaint, at ¶¶ 1; 47–53.

On February 4, 1999 the School District defendants filed an Answer to plaintiff's Complaint (Doc. 11). The Answer contained several affirmative defenses, including the defense of failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Also on February 4, 1999, the School District defendants filed a joint motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The School District defendants argue in their motion that plaintiff has failed to state a claim upon which relief can be granted. Plaintiff filed a response to the School District defendants' joint motion. It is this motion that is presently before the Court.

III. STANDARD OF REVIEW

[1] The standard of review in a motion for judgment on the pleadings filed pursuant to Federal Rule of Civil Procedure 12(c) is identical to that for a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).[4] *See Byrd v. Robison, et al.*, 1997 WL 14495, at *3 n. 1 (Jan. 14, 1997 E.D.Pa.) (citing *Turbe v. Government of the Virgin Islands*, 938 F.2d 427, 428 (3d Cir.1991).

In considering such motions, the court must accept as true all well-pleaded material facts alleged by the non-moving party as well as all reasonable inferences that may be derived from those facts. *See Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (applying standard in connection with Fed. R.Civ.P. 12(b)(6)); *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980) (applying standard in connection with Fed.R.Civ.P. 12(c)). If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to the Court and not excluded, the motion is treated as a motion for summary judgment under Federal Rule of Civil Procedure 56, and all parties are given an opportunity to present relevant evidence. *See ALA v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994); Fed.R.Civ.P. 12(c). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

[2] Plaintiff is proceeding *pro se* in this case. The Court is mindful of the instruction that it should broadly construe normal pleading requirements when handling *pro se* submissions. *See Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (holding *pro se* complaint "to less stringent standards than formal pleadings drafted by lawyers").

IV. DISCUSSION

Plaintiff contends that defendants Barr and Miller "leaked" his January 1, 1998 letter addressed to Principal Travis. *See* Complaint at ¶ 42. Thereafter, according to plaintiff, defendants Barr and Miller and others "began to pressure" defendants School District of Philadelphia and School District Superintendent David Hornbeck to "terminate[ ] plaintiff's appointment on [Carver's] Advisory Panel," and plaintiff was so terminated. *See* Complaint at ¶¶ 43, 44. Also according to plaintiff, defendants Philadelphia Board of Education

ple (NAACP); Jerry Mondesire, President of NAACP; Philadelphia Federation of Teachers Local # 3 (PFT); Jerry Jordan, PFT Vice President; Jewish Community Relations Council (JCRC); Burt Siegal, Executive Director of JCRC; Anti Defamation League of B Nai B rith (ADL); Barry Morrison, Regional Director of ADL.

4. Fed.R.Civ.P. 12(h)(2) provides that the Fed. R.Civ.P. 12(b)(6) defense of failure to state a claim upon which relief may be granted can be raised after an answer has been filed by motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c).

and Board President Floyd Alston reacted to pressure and engaged in their own conspiracy to remove plaintiff from his post as president of Carver's Home and School Association, and plaintiff was so removed. *See* Complaint at ¶ 45.

Plaintiff alleges seven causes of action, summarized as follows: Count 1—an unlawful conspiracy pursuant to § 1985 of the Civil Rights Act of 1871; Count 2—intentional infliction of emotional distress under Pennsylvania law; Count 3—negligent infliction of emotional distress under Pennsylvania law; Count 4—defamation of character under Pennsylvania law; Count 5—deprivation of constitutional rights guaranteed by the First and Fourteenth Amendments of the United States Constitution; Count 6—violations of § 1983 of the Civil Rights Act of 1871; and Count 7—invasion of privacy under Pennsylvania law.

A. *Counts 2, 3, 4 & 7 Municipal Liability for State Law Claims*

[3] Plaintiff alleges several state law claims in Counts 2 (intentional infliction of emotional distress), 3 (negligent infliction of emotional distress), 4 (defamation of character) & 7 (invasion of privacy) against two municipal entities—the School District of Philadelphia and the Philadelphia Board of Education. These claims for intentional torts against municipal entities are barred by Pennsylvania law. Plaintiff asserts the same state law claims against defendants Hornbeck, Alston, Barr and Miller in their official capacities as municipal employees. All such claims are treated as claims against municipal entities and are barred under Pennsylvania law.

The Political Subdivision Tort Claims Act (the "Tort Claims Act") grants to municipal agencies immunity from liability for all state law tort claims. *See* 42 Pa.C.S.A. § 8541 et. seq. (Purdon's 1998 and Supp. 2000); *Martin v. City of Philadelphia, et al.,* No. 99–543, 2000 WL 1052150 (E.D.Pa. July 24, 2000); *Wakshul v. City of Philadelphia,* 998 F.Supp. 585 (E.D.Pa.1998). The Tort Claims Act provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S.A. § 8541. While the Tort Claims Act provides eight exceptions to this grant of immunity, *see* 42 Pa.C.S.A. § 8542, none are applicable to this case.[5]

The School District of Philadelphia and the Philadelphia Board of Education are local agencies within the meaning of the Tort Claims Act. *See Kessler v. Monsour et. al.,* 865 F.Supp. 234, 241 (M.D.Pa.1994) (School District is municipal entity); *Carlino v. Gloucester City High School, et. al.,* 57 F.Supp.2d 1, 33 (D.N.J.1999) (Board of Education is municipal entity). Accordingly, they are immune from liability for the intentional torts alleged in Counts 2, 3, 4 & 7 of the Complaint.

[4] In a suit against a government official in his official capacity, "the real party in interest ... is the governmental entity and not the named official...." *Hafer v.*

5. In connection with the intentional torts alleged by plaintiff in Counts 2, 4 and 7 against defendants Barr and Miller in their individual capacities, the Court notes that plaintiff failed to plead willful misconduct with respect to such defendants. Absent such allegations, defendants are entitled to the same immunity as their employer the School District of Philadelphia. *See* 42 Pa.C.S.A. §§ 8545, 8550 (Purdon s 2000).

Notwithstanding this immunity, the Court analyzed plaintiff s claims for intentional infliction of emotional distress, defamation of character and invasion of privacy against defendants Barr and Miller on the merits and determined that they must be dismissed on grounds unrelated to the issue of willful misconduct. *See infra,* Sections IV.D (Count 2 intentional infliction of emotional distress), IV.F (Count 4 defamation of character), and IV.I (Count 7 invasion of privacy) of this Memorandum. In light of that analysis, the Court concludes that it need not grant plaintiff leave to amend the Complaint so as to allege willful misconduct on their part because such an amendment would be futile. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

Melo, 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991). Accordingly, to the extent that in Counts 2, 3, 4 & 7 plaintiff assert state law claims against defendants Hornbeck, Alston, Barr and Miller in their official capacities, they are treated as claims against the municipal entities that employ these individuals—that is, the School District of Philadelphia and the Philadelphia Board of Education. Because plaintiff's state law claims against the School District of Philadelphia and the Philadelphia Board of Education are barred as a matter of law, the claims against defendants Hornbeck, Alston, Barr and Miller in their official capacities are also barred.

B. *Counts 2, 4 & 7 Intentional Tort Claims v. Defendants Hornbeck and Alston in their Individual Capacities*

In Counts 2 (intentional infliction of emotional distress), 4 (defamation of character) & 7 (invasion of privacy) plaintiff asserts claims for intentional torts against defendants Hornbeck and Alston in their individual capacities. As with plaintiffs state law claims against the School District of Philadelphia, the Philadelphia School Board and defendants Hornbeck, Alston, Barr and Miller in their official capacities, these claims must be dismissed as a matter of law.

The Tort Claims Act provides in pertinent part:

> In any action brought against an employee of a local agency for damages on account of an injury to a person or property based upon claims arising from, or reasonably related to, the office or the performance of the duties of the employee, the employee may assert on his own behalf, or the local agency may assert on his behalf: (1) defenses which are available at common law to the employee . . .

42 Pa.C.S.A. § 8546.

[5] Pennsylvania common law recognizes the doctrine of absolute immunity for "high public officials." *See Lindner v. Mollan,* 544 Pa. 487, 490–91, 677 A.2d 1194, 1195–96 (1996) (holding that the Tort Claims Act does not abrogate high public official's absolute immunity from civil suits arising out of false defamatory statements). Moreover, Pennsylvania courts have recognized that school superintendents, such as defendant Hornbeck, and presidents of school boards, such as defendant Alston, qualify as high public officials for purposes of this common law doctrine. *See, e.g., Petula v. Mellody,* 158 Pa. Cmwlth. 212, 631 A.2d 762 (1993); *Matta v. Burton,* 721 A.2d 1164, 1166 (Pa. Cmwlth.1998).[6]

In *Lindner,* the Supreme Court of Pennsylvania held that high public official immunity is an unlimited privilege that exempts high public officials from lawsuits for defamation, provided the statements made by the official are made in the course of his official duties and within the scope of his authority. Although ordinary local agency employees can be held liable if they have engaged in crime, actual fraud, actual malice or willful misconduct, *see* 42 Pa. C.S.A. § 8550; *Mascaro v. Youth Study Center,* 514 Pa. 351, 523 A.2d 1118 (1987), high public officials accused of defamation enjoy absolute immunity even when willful misconduct is alleged, *see Lindner,* 544 Pa. 487, 677 A.2d 1194 (1996); *Kuzel v. Krause,* 658 A.2d 856 (Pa.Cmwlth.1995).

In the instant case, plaintiff has alleged defamation as well as two other intentional torts—intentional infliction of emotional distress and invasion of privacy—against defendants Hornbeck and Alston. Those defendants argue that the common law doctrine of absolute immunity for high

6. Defendant Avi Barr, as a teacher at Carver, and defendant Steven Miller, as an Assistant Principal at Carver, do not qualify as high public officials for purposes of this common law immunity doctrine. Claims against defendants Miller and Barr in their individual capacities are therefore addressed separately in this Memorandum.

public officials immunizes them from individual liability for all of these intentional torts. However, the Supreme Court of Pennsylvania's holding in *Lindner* involved the tort of defamation, and that Court has yet to decide whether the immunity for high public officials extends to other intentional torts.

[6] When a state's highest court has not addressed the precise question presented in a diversity action, a federal court must predict how the state's highest court would resolve the issue. *See Paolella v. Browning Ferris, Inc.,* 158 F.3d 183, 189 (3d Cir.1998). In doing so a district court may consider the decisions of state intermediate appellate courts in order to facilitate its prediction. *See id.*

This Court predicts that the Supreme Court of Pennsylvania would hold that the Tort Claims Act does not abrogate high public official's absolute immunity from civil suits for intentional infliction of emotional distress and invasion of privacy. In making this prediction, the Court relies primarily on the *Lindner* court's explanation that the Pennsylvania common law doctrine of absolute immunity for high public officials "rests upon the idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." Also significant is the *Lindner* court's statement that "this sweeping immunity is not for the benefit of high public officials, but for the benefit of the public." *Lindner,* 544 Pa. at 490, 677 A.2d at 1195 (citations omitted).

Finally, one Pennsylvania Commonwealth Court relied on *Lindner* in holding that the doctrine of absolute immunity for high public officials extends to suits against municipal officials for intentional torts other than defamation, specifically tortious interference with employment relationship and intentional infliction of emotional distress. *See Holt v. Northwest Pa. Trng. Prtshp. Consrtm., Inc.,* 694 A.2d 1134, 1140 (Pa.Commw.1997).

According to plaintiff's Complaint, the actions allegedly taken by defendants Hornbeck and Alston—passing a resolution condemning plaintiff's letter to Principal Travis as racist and anti-Semitic, terminating plaintiff's appointment to the Advisory Panel for Carver, and urging the Home and School Council to remove plaintiff as president of Carver's Home and School Association, *see* Complaint at ¶¶ 44–45,—were all taken within the course of their official duties or powers and within the scope of their authority. In light of those allegations, defendants Hornbeck and Alston are entitled to invoke the doctrine of absolute immunity for high public officials pursuant to 42 Pa. C.S.A. § 8546, and plaintiff's claims against them in their individual capacities in Counts 2, 4 & 7 must be dismissed.

C. *Count 1 Section 1985 Claims v. all School District Defendants*

[7] In Count 1 of the Complaint plaintiff asserts that the School District defendants conspired to violate his rights by "attempting to force his removal from office without due process of law for exercising his rights under the First Amendment ... causing plaintiff's removal from his duly elected office," in violation of § 1985 of the Civil Rights Act of 1871.[7] *See* 42 U.S.C.A. § 1985(3) (West Supp.1999). The Court concludes that these claims must be dismissed.

Section 1985(3) creates a cause of action against any two or more persons who "conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of

7. Plaintiff cites 42 U.S.C.A. § 1985(2) in his Complaint. However, that section relates to obstructing justice; intimidating party, witness or juror. Plaintiff was not a witness, juror, or litigant in a proceeding in federal court; thus there is no cause of action under § 1985(2). Plaintiff obviously meant to refer to 42 U.S.C.A. § 1985(3).

the laws, or of equal privileges and immunities under the laws. . . ." 42 U.S.C.A. § 1985(3) (West Supp.1999). In the context of a motion for judgment on the pleadings, to establish a claim under § 1985(3) plaintiff must allege that the School District defendants' actions were motivated by a "racial or . . . otherwise class-based invidiously discriminatory animus. . . ." *Griffin v. Breckenridge,* 403 U.S. 88, 102–03, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Lake v. Arnold,* 112 F.3d 682, 685 (3d Cir.1997).

[8] As the School District defendants argue, nowhere in the Complaint does plaintiff allege that defendants were motivated by class-based invidious discriminatory animus. Plaintiff claims that the School District defendants conspired against him by attempting to force his removal from office as president of Carver's Home and School Association for exercising his First amendment rights. *See* Complaint at ¶ 47. Those allegations—even if construed to include plaintiff's alleged termination from his position as a member of Carver's Advisory Panel—do not state a claim under § 1985 because that statute does not extend to a conspiracy to retaliate against individuals based upon the exercise of First Amendment rights. *See Herhold v. City of Chicago,* 723 F.Supp. 20, 33–37 (N.D.Ill.1989); *Bedford v. Southeastern Pennsylvania Transp. Authority,* 867 F.Supp. 288, 294 n. 5 (E.D.Pa.1994).

Because the Complaint does not allege that the School District defendants' actions were motivated by racial or otherwise class based invidious discriminatory animus the claims in Count 1 must be dismissed. Leave to amend will not be granted on the ground that the Complaint, taken as a whole, makes it absolutely clear that plaintiff alleges the complained-about actions of the School District defendants were taken because of the letter and petitions plaintiff authored, not racial animus or anything else covered by § 1985.

D. *Count 2 Claim for Intentional Infliction of Emotional Distress v. Defendants Barr and Miller in their Individual Capacities*

Although Count 2 asserts claims for intentional infliction of emotional distress against all School District defendants, the Court has already ruled, *supra* Section IV.A., that the Torts Claims Act prevents such state law claims against the School District of Philadelphia, the Philadelphia Board of Education and defendants Hornbeck, Alston, Barr and Miller in their official capacities. The Court has also ruled, *supra* Section IV.B, that plaintiff's intentional tort claims against defendants Hornbeck and Alston in their individual capacities must be dismissed pursuant to Pennsylvania's common law doctrine of absolute immunity for high public officials. Accordingly, in connection with Count 2 the Court need only consider plaintiff's claims for intentional infliction of emotional distress against defendants Miller and Barr in their individual capacities. The Court concludes that these claims must be dismissed.

[9] In the context of a motion for judgment on the pleadings, under Pennsylvania law to support a claim of intentional infliction of emotional distress a plaintiff must allege conduct that: (1) is extreme and outrageous; (2) is intentional or reckless; and, (3) causes severe emotional distress.[8] *See Williams v. Guzzardi,* 875 F.2d 46 (3d Cir.1989); *Hoy v. Angelone,* 456 Pa.Super. 596, 610, 691 A.2d 476 (1997). It is for this Court to decide as an initial matter whether the conduct at issue can reasonably be regarded as sufficiently extreme to constitute "outrageousness" as a matter of law. *See Kuzel v. Krause,* 658 A.2d 856, 860

8. The School District defendants argue that it is unclear whether the Pennsylvania Supreme Court would recognize a cause of action for the intentional infliction of emotional distress. In light of Third Circuit authority, *see, e.g. Guzzardi,* this Court need not address that issue.

(Pa.Commw.1995); *Corbett v. Morgenstern,* 934 F.Supp. 680, 684 (E.D.Pa.1996).

Liability for intentional infliction of emotional distress "has been found only where . . . the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'outrageous.' " *Hunger v. Grand Central Sanitation,* 447 Pa.Super. 575, 584, 670 A.2d 173 (1996) (applying the Restatement (Second) of Torts § 46, Comment d (1965)). Pennsylvania courts have found intentional infliction of emotional distress only where the conduct at issue has been "atrocious" and "utterly intolerable in a civilized community." *Banyas v. Lower Bucks Hosp.,* 293 Pa.Super. 122, 437 A.2d 1236 (1981)). They have recognized that tort, for example, where hospital employees gave false reports so that a person was indicted for homicide, *see Banyas,* 437 A.2d at 1239, where the defendant sexually harassed his employee and also forbade her from speaking with others, followed her at work, and withheld necessary information from her, *Bowersox v. P.H. Glatfelter Co.,* 677 F.Supp. 307, 311 (M.D.Pa. 1988), and where the defendant's car hit a child, defendant buried him on the side of the road, and the parents discovered the body only months afterwards, *see Papieves v. Kelly,* 437 Pa. 373, 263 A.2d 118 (1970).

[10] The allegations against defendants Miller and Barr fall well short of the foregoing standard for outrageousness. Plaintiff claims that these defendants "leaked the letter to the press, to the district and to certain Jewish group [sic]," and that they "began to pressure Carver's Home and School Association Leadership and the School District of Philadelphia . . . to remove plaintiff from his duly elected post." Complaint at ¶¶ 42–43. Even if true, such conduct could never rise to the level of outrageousness required to sustain a claim for intentional infliction of emotional distress as a matter of law. Accordingly, the claims in Count 2 must be dismissed.

E. *Count 3 Claim for Negligent Infliction of Emotional Distress v. Defendants Hornbeck, Alston, Barr and Miller in their Individual Capacities*

In Count 3 plaintiff asserts claims against all of the School District defendants for negligent infliction of emotional distress. In connection with this count, the Court need only consider plaintiff's claims against defendants Hornbeck, Alston, Barr and Miller in their individual capacities. *See supra* Section IV.A. (ruling that state law claims against the School District of Philadelphia, the Philadelphia Board of Education, and defendants Hornbeck, Alston, Barr and Miller in their official capacities are barred by the Tort Claims Act) and IV.B (ruling that state law claims against defendants Hornbeck and Alston in their individual capacities must be dismissed pursuant to Pennsylvania's common law doctrine of absolute immunity for high public officials). The Court concludes that these claims for negligent infliction of emotional distress must be dismissed.

[11] In the context of a motion for judgment on the pleadings, under Pennsylvania law to establish a claim of negligent infliction of emotional distress plaintiff must allege that: (1) he was near the scene of an accident; (2) shock or distress resulted from a direct emotional impact caused by the sensory or contemporaneous observance of the accident, as opposed to learning of the accident from others after its occurrence; and (3) he is closely related to the injured victim. *Sinn v. Burd,* 486 Pa. 146, 170–71, 404 A.2d 672, 685 (1979); *Frempong Atuahene v. Redevelopment Auth. of Phila.,* No. 98–0285, 1999 WL 167726, *7 (E.D.Pa. Mar. 25, 1999).

[12] Plaintiff's Complaint fails to allege any facts that even remotely satisfy the foregoing requirements. Plaintiff does not allege in the Complaint that there was any accident or physical injury suffered by anyone as a result of the conduct of defen-

dants Barr and Miller. *See Wall v. Fisher,* 388 Pa.Super. 305, 313, 565 A.2d 498, 502 (1989) (noting that physical injury is a necessary element on a claim for negligent infliction of emotional distress). In short, plaintiff's allegations of wrongful conduct on the part of defendants Barr and Miller—leaking plaintiff's letter dated January 1, 1998, and pressuring to have plaintiff terminated as a member of Carver's Advisory Panel and removed as president of Carver's Home and School association—do not constitute negligent intentional infliction of emotional distress. Accordingly, the claims in Count 3 must be dismissed.

F. *Count 4 Claims for Defamation of Character v. Defendants Barr and Miller in their Individual Capacities*

Count 4 asserts claims for defamation of character against all School District defendants. In connection with this count, the Court need only consider plaintiff's claims against defendants Barr and Miller in their individual capacities. *See supra* Section IV.A. and IV.B of this Memorandum. The Court concludes that these claims must be dismissed.

[13, 14] In the context of a motion for judgment on the pleadings, under Pennsylvania law to support a claim for defamation plaintiff must allege: (1) a defamatory communication; (2) pertaining to the plaintiff; (3) published by the defendant to a third party; (4) who understands the communication to have defamatory meaning with respect to plaintiff; and (5) that results in plaintiff's injury. *See Mansmann v. Tuman,* 970 F.Supp. 389, 396 (E.D.Pa. 1997) (citing *Petula,* 588 A.2d at 106). An allegation of defamation is subject to a more stringent standard of pleading than is usually the case. *See Manns v. Leather Shop Inc.,* 960 F.Supp. 925, 929 (D.V.I. 1997). The complaint on its face must "specifically identify what allegedly defamatory statements were made by whom and to whom." *Id.* (quoting *Ersek v. Township of Springfield,* 822 F.Supp. 218, 223 (E.D.Pa.1993), *aff'd* 102 F.3d 79 (3d Cir. 1996)); see also 42 Pa.C.S.A. § 8343. It is for the court to determine whether statements complained of by the plaintiff are capable of defamatory meaning. *See Wilson v. Slatalla,* 970 F.Supp. 405 (E.D.Pa. 1997); *Maier v. Maretti,* 448 Pa.Super. 276, 671 A.2d 701 (1995).

[15] According to the Complaint, defendants Barr and Miller "made public statements that plaintiff is racist and anti-Semitic which were false and malicious [and] which proximately caused injury to plaintiff's reputation. . . ." *See* Complaint at ¶ 50. There are no other allegations of statements made by those defendants. Such statements, if made, were expressions of opinions. Under Pennsylvania law, only statements of fact can afford a basis for a defamation action; expressions of opinion cannot. *See Parano v. O'Connor,* 433 Pa.Super. 570, 574, 641 A.2d 607, 609 (1994). While the Court acknowledges that a statement that plaintiff is "racist and anti-Semitic," if it was made, would be unflattering, annoying and embarrassing, such a statement does not rise to the level of defamation as a matter of law because it is merely non-fact based rhetoric. *See id.*

[16] To the extent plaintiff purports to ground his defamation claim on defendants Barr and Miller's alleged "leak" of plaintiff's letter to Principal Travis, the Court does not find such conduct actionable. Generally, a plaintiff can not be defamed by the use of his own words. *See Johnson v. Overnite Transp. Co.,* 19 F.3d 392, 392 n. 1 (8th Cir.1994) (noting that as a general rule "a defamation claim arises only from a communication by someone other than the person defamed"). That rule is particularly apposite in this case because this aspect of plaintiff's defamation claim is based on a letter he voluntarily wrote to Carver's Principal in which he asked the Principal to take certain action. Implicit in that conduct was the likelihood that the contents of the letter would be published to other persons in an effort to convince them

to adopt plaintiff's views. Under those circumstances, the author's own words can not be defamatory.

Mansmann v. Tuman, 970 F.Supp. at 397, is also instructive in connection with plaintiff's defamation claim. In *Mansmann*, the district court dismissed a defamation claim against lawyers for lack of publication where the allegedly defamatory statements were attributable to the lawyers' clients and repeated by the lawyers. With respect to the claim that the "leaking" of the letter by defendant's Barr and Miller in the instant case constitutes defamation, the alleged defamatory statements were made by plaintiff, not the defendants, and thus, under *Mansmann*, they are not actionable because there was no publication.

For the foregoing reasons, plaintiff has failed to state a claim for defamation of character upon which relief can be granted against defendants Barr and Miller in their individual capacities. Thus, the claims against them in Count 4 must be dismissed.

G. *Count 5 Claims under the First and Fourteenth Amendments v. All School District Defendants*

[17] In Count 5 of the Complaint plaintiff purports to bring a direct cause of action under the United States Constitution. However, such claims are impermissible because § 1983 provides an adequate, alternative remedial scheme for plaintiff's alleged constitutional violations. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (noting that when a plaintiff has a remedy under § 1983, it is the exclusive remedy for alleged constitutional violations); *Scott v. Rieht*, 690 F.Supp. 368 (E.D.Pa.1988). Because a direct constitutional action under the First and Fourteenth Amendments is precluded, plaintiff's claims in Count 5 must be dismissed.

H. *Count 6 Section 1983 Claims v. all School District Defendants*

In Count 6 of the Complaint plaintiff asserts that the School District defendants deprived him of a number of privileges and immunities secured by the Constitution including, but not limited to, "the right to free speech and expression and the right to petition the government for redress of grievances secured by the First Amendment," in violation of § 1983 of the Civil Rights Act of 1871. *See* 42 U.S.C.A. § 1983 (West Supp.1999). The Court has reviewed the pleadings and concludes that one of plaintiff's claims in Count 6 will be allowed to proceed—the claim against the School District defendants on the ground that they retaliated against him for the exercise of his First Amendment right to free speech when they terminated his appointment on Carver's Advisory Panel; the claim of retaliation based on plaintiff's termination as president of Carver's Home and School Association must be dismissed.

[18] Section 1983 creates a cause of action against anyone who, acting under color of state law, deprives an individual of rights secured by the Constitution or by federal statute. *See* 42 U.S.C.A. § 1983 (West Supp.1999). In order to state a cause of action under § 1983, a plaintiff must show that "(1) the defendants acted under color of [state] law; and (2) their actions deprived [the plaintiff] of rights secured by the Constitution or federal statutes." *Anderson v. Davila*, 125 F.3d 148, 159 (3d Cir.1997).

The first step to any § 1983 claim "is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). In his Complaint, plaintiff alleges that he was deprived of two constitutionally protected rights—his right to "petition the government for redress of grievances" and his "right to free speech and expression." *See* Complaint at ¶ 52. Plaintiff makes reference to both such rights in the Complaint. However, under the facts of this case the Court concludes

that the claimed retaliation in violation of plaintiff's First Amendment right to petition is subsumed in the claimed retaliation in violation of plaintiff's First Amendment right to free speech.

[19] Although plaintiff had a quasi employee-employer relationship with the School District of Philadelphia and the Philadelphia Board of Education as a member of Carver's Advisory Panel [9], he at all times remained a private citizen. To establish a claim that a public official retaliated against a private citizen in violation of the First Amendment, the citizen must establish that: (1) he engaged in conduct or speech protected by First Amendment, (2) that public official took adverse action against citizen, and (3) that the adverse action was prompted or caused by citizen's exercise of First Amendment rights. *See Suarez Corp. Indus. v. McGraw,* 202 F.3d 676, 685 (4th Cir.2000); *Arrington v. Dickerson,* 915 F.Supp. 1516, 1525 (M.D.Ala. 1996).

[20] In connection with the first prong of this test, the Court notes at the outset that it does not condone the viewpoints expressed in plaintiff's letter to Principal Travis and in the petitions calling for the removal of certain Carver staff members. Nevertheless, the Court finds that these documents concerned matters of public interest—e.g., the School District and Board of Education's policies regarding the hiring of African–American teachers. As such, these documents were protected by the First Amendment. *See, e.g., Haverkamp v. Unified School Dist. # 380,* 689 F.Supp. 1055, 1058–59 (D.Kan.1986); *Reichert v. Draud,* 511 F.Supp. 679, 682 (E.D.Ky.1981); *Gorham v. Jewett,* 392 F.Supp. 22, 26 (D.Mass.1975). With respect to the second prong of this test, plaintiff contends that the School District defendants unconstitutionally retaliated against him when they: (1) urged his removal as president of Carver's Home and School association and (2) terminated his appointment on Carver's Advisory Panel.

[21] The Court concludes that the first alleged incident of retaliation is not actionable. As the School District defendants argue, they did not possess the authority to remove plaintiff from his position as president of the Home and School Association. Rather, as plaintiff acknowledges, he was "elected [to that position] by a vote of parents," Complaint at ¶ 40, and the determination to remove him rested exclusively with the Home and School Association. In urging plaintiff's removal the School District defendants, particularly the Philadelphia Board of Education, Board President Alston, and School Superintendent Hornbeck, were exercising their own protected right to free speech. *See Northeast Women s Center, Inc. v. McMonagle,* 670 F.Supp. 1300, 1308 (E.D.Pa.1987) (noting that "attempts to persuade another to action are clearly within the scope of the First Amendment").

[22] The second alleged incident of retaliation, however, is actionable. The Court is mindful that "[l]ocal school boards have broad discretion in the management

9. The School District defendants did not argue that plaintiff, as a quasi employee of the School District of Philadelphia, was terminated as a member of the Carver Advisory Panel because his views prevented him from performing his duties as a member of that body. Nevertheless, the Court notes that the determination whether a public employer has properly discharged an employee for engaging in speech requires a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *See Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

Arguably, the rationale in *Rankin* is applicable to the letter and petitions at issue in this case. While the Court expresses no opinion on that issue, those documents raise the question whether what was said by plaintiff gave the School District defendants cause to terminate him as a member of the Carver Advisory Panel on the ground, *inter alia,* that the positions advocated by plaintiff potentially exposed the School District defendants to liability.

of school affairs. Federal courts should not ordinarily intervene in the resolution of conflicts which arise in the daily operation of school systems." *See Haverkamp,* 689 F.Supp. at 1058 (D.Kan.1986) (citing *Board of Education v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982)). "However, the discretion of local school boards in matters of education must be exercised in a manner consistent with the transcendent imperatives of the First Amendment." *Id.*

The School District defendants do not dispute that they terminated plaintiff as a member of Carver's Advisory Panel. Thus, plaintiff has established that a public official took an adverse action against him.

Finally, the third prong of a First Amendment retaliation claim requires the Court to assess whether plaintiff has established that the adverse action by the public was prompted or caused by his exercise of his First Amendment rights. In this connection, the Court notes the language of the resolution unanimously passed by defendant Philadelphia Board of Education, which states in relevant part:

> Mr. Smith has chosen to express his concerns about Carver High School through a most inflammatory letter to the principal. This letter contained not only prejudicial statements but, was clearly racist and anti-Semitic. In both spirit and word it offends us personally, the entire School District community and all those we serve. In light of these facts, the Board calls upon the Home and School Council to act swiftly and appropriately by removing Mr. Smith as President of the Carver Home and School Association. Furthermore, the Board and the Superintendent are resolved that Mr. Smith shall have no official standing in the School District of Philadelphia from this point forward.

This document links plaintiff's protected speech with the School District defendants' decision to terminate plaintiff's appointment to the Advisory Panel, and plaintiff has adequately attributed this link to all the School District defendants. *See* Complaint at ¶¶ 43–45.

[23] The School District defendants incorrectly argue that plaintiff "cannot establish that removal from the [Advisory Panel] was an unconstitutional act .... [because] when there exists no property right in a position, the appointing body may remove incumbents at will." To the contrary, a plaintiff "need not establish an underlying constitutionally-protected property or liberty interest ... in order to pursue [a] First Amendment retaliation claim." *See id.* (citing *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (noting that an underlying property interest, while required for a procedural due process claim, is irrelevant to a free speech claim)).

Having determined the specific constitutional right at issue in the case—a retaliation claim based on plaintiff's termination as a member of Carver's Advisory Panel because of the exercise of his First Amendment rights—the Court will now turn to issues regarding the liability of individual School District defendants.

1. *The Municipal Defendants and the Individual Defendants in their Official Capacities*

The municipal defendants in the case—that is, the School District of Philadelphia, the Philadelphia Board of Education, and defendants Hornbeck, Alston, Barr and Miller in their official capacities as municipal employees—may only be liable under § 1983 if they caused the complained of constitutional violation. *See Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Baker v. Monroe Twp.,* 50 F.3d 1186, 1191 (3d Cir.1995).

In the context of a motion for judgment on the pleadings, to establish municipal liability under *Monell,* a plaintiff ordinarily must " 'identify the challenged policy, [practice or custom], attribute it to the city itself, and [allege] a causal link between the execution of the policy, [practice or

custom] and the injury suffered.' " *City of Canton, Ohio v. Harris,* 489 U.S. 378, 388–89, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989); *Fullman v. Philadelphia Int l Airport,* 49 F.Supp.2d 434, 445 (E.D.Pa.1999) (quoting *Losch v. Borough of Parkesburg,* 736 F.2d 903, 910 (3d Cir.1984)). "In order to establish a claim based on a policy of inaction ... plaintiffs must allege facts tending to establish a prior pattern of similar violations, contemporaneous knowledge of improper conduct, or failure to remedy continuing constitutional deprivations." *Boemer v. Patterson,* No. Civ.A. 86–2902, 1987 WL 13741, at *4 (E.D.Pa. July 14, 1987).

In rare instances, the Supreme Court has recognized municipal liability under § 1983 based on a single decision attributable to a municipality. *See, e.g., Owen v. Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980); *Newport v. Fact Concerts Inc.,* 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). The Supreme Court has noted, however, that in such cases, "the evidence that the municipality had acted and that the plaintiff suffered a deprivation of federal rights also proved fault and causation." *Bryan County,* 520 U.S. at 405, 117 S.Ct. 1382.

[24] Because plaintiff alleges only a single incident of retaliation to support his § 1983 claims—his termination as a member of Carver's Advisory Panel—the Court must determine whether plaintiff has made sufficient allegations of fault and causation. The Court concludes that the pleadings contain such allegations. The allegations relating to the unanimous resolution passed by the Philadelphia Board of Education link plaintiff's protected speech to the School District defendants' decision to terminate him as a member of Carver's Advisory Panel.

For the foregoing reasons, plaintiff's § 1983 claim of retaliation for the exercise of his First Amendment rights against the School District of Philadelphia, the Philadelphia Board of Education, and defendants Hornbeck, Alston, Barr and Miller in their official capacities as municipal employees, survives the motion for judgment on the pleadings, but only to the extent that it is based on plaintiff's termination as a member of Carver's Advisory Panel.

2. *The Individual Defendants in their Individual Capacities*

[25] In the context of a motion for judgment on the pleadings, for individual capacity suits under § 1983 against defendants Hornbeck, Alston, Barr and Miller plaintiff must allege that each had "personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of respondeat superior." *Rode v. Dellarciprete,* 845 F.2d 1195, 1207 (3d Cir.1988); *see Parratt v. Taylor,* 451 U.S. 527, 537 n. 3, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Personal involvement requires participation in, personal direction of, or knowledge of and acquiescence in the alleged constitutional violation. *See Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1293 (3d Cir.1997); *Baker v. Monroe Twp.,* 50 F.3d 1186, 1190–91 (3d Cir.1995). Thus, to state a claim against any of the individual School District defendants in their individual capacities under § 1983 plaintiff must allege participation, personal direction of the complained-of conduct or knowledge of and acquiescence in the complained-of conduct for each defendant; a supervisory relationship with someone who allegedly violated plaintiff's constitutional rights, without more, is insufficient.

[26] Plaintiff has alleged that the School District defendants in their individual capacities "pressured" the School District of Philadelphia to terminate his appointment to Carver's Advisory Panel. *See* Complaint at ¶¶ 43–45. This constitutes an allegation involving some affirmative conduct on the part of defendants Hornbeck, Alston, Barr and Miller. Therefore, the Court concludes that plaintiff has adequately pled a claim under § 1983 for First Amendment retaliation against defendants Hornbeck, Alston, Barr and Miller in their individual capacities.

I. *Count 7 Claims for Invasion of Privacy v. Defendants Barr and Miller in their Individual Capacities*

In Count 7 plaintiff asserts a claim for invasion of privacy against all School District defendants. In connection with this count, the Court need only consider plaintiff's claims for invasion of privacy against defendants Barr and Miller in their individual capacities. *See supra* Sections IV.A. (ruling that state law claims against the School District of Philadelphia, the Philadelphia Board of Education, and defendants Hornbeck, Alston, Barr and Miller in their official capacities are barred by the Tort Claims Act) and IV.B (ruling that state law claims against defendants Hornbeck and Alston in their individual capacities must be dismissed pursuant to Pennsylvania's common law doctrine of absolute immunity for high public officials). The Court concludes that these claims must be dismissed.

[27] Under Pennsylvania law, a claim of invasion of privacy can be based on any one of four theories: (1) intrusion upon seclusion; (2) appropriation of name and likeness; (3) publicity given to private life; and (4) publicity placing a person in false light. *See Marks v. Bell Telephone Co. of Pa.,* 460 Pa. 73, 331 A.2d 424 (1975). Plaintiff does not specify the theory of invasion of privacy under which he seeks relief.

The Complaint asserts that "defendants publicized plaintiff's private letter to Carver's principal which created a highly offensive and false impression of plaintiff in the minds of reasonable people, proximately causing damage to plaintiff's reputation and earning power and severe emotional distress to plaintiff." *See* Complaint at ¶ 53. In light of this allegation, the School District defendants contend that plaintiff is claiming invasion of privacy under the theories of "public disclosure of private facts" and "false light." The Court agrees, but concludes that plaintiff failed to state a claim upon which relief can be granted under those theories.

[28, 29] With respect to the first theory, the disclosure of plaintiff's letter can not constitute "public disclosure of private facts" because plaintiff's letter was not private. *See Avins v. Moll,* 610 F.Supp. 308, 325 (E.D.Pa.1984), *aff'd* 774 F.2d 1150 (3d Cir.1985). Plaintiff voluntarily sent his letter to Principal Travis, and the contents of the letter addressed issue of public concern—namely, Carver's hiring policies with respect to its teachers and staff. With respect to the second theory, in the context of a motion for judgment on the pleadings to establish a claim of false light plaintiff must allege that the defendant published a false statement and "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed." *Seale v. Gramercy,* 964 F.Supp. 918 (E.D.Pa.1997). Plaintiff has not so alleged with respect to either defendant Barr or defendant Miller.

Moreover, the facts on which plaintiffs claims in Count 7 are based—the publication of plaintiff's own words in his letter—lead the Court to conclude that plaintiff could never state a claim for invasion of privacy upon which relief can be granted. Accordingly, the Court will not grant plaintiff leave to amend the Complaint.

J. *Punitive Damages*

[30] The final issue the Court must consider relates to plaintiff's claims for punitive damages. *See* Complaint at ¶ 1; *see also* prayer for relief. Because the Court has concluded that only some of plaintiff's § 1983 claims for First Amendment retaliation in Count 6 survive the School District defendants motion for judgment on the pleadings, its discussion of punitive damages is limited to those remaining claims in Count 6. Punitive damages for violations of § 1983 are not available against a municipality or individuals in their official capacity as municipal employees. *See Newport v. Fact Concerts,*

Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *Agresta v. Goode,* 797 F.Supp. 399, 410 (E.D.Pa.1992). Accordingly, plaintiff's claim for punitive damages from the School District of Philadelphia, the Philadelphia School Board and defendants Hornbeck, Alston, Barr and Miller in their official capacities, must be dismissed.

[31] With respect to plaintiff's claim for punitive damages against defendants Hornbeck, Alston, Barr and Miller in their individual capacities, such damages may be awarded where the defendants have acted wilfully and in gross disregard for the rights of the complaining party, *see Lee v. Southern Home Sites Corp.,* 429 F.2d 290 (5th Cir.1970), or where they have behaved in bad faith or for an improper motive, *see Caperci v. Huntoon,* 397 F.2d 799 (1st Cir.1968). "Since such damages are punitory and are assessed as an example and warning to others, they are not a favorite in law and are to be allowed only with caution and within narrow limits. The allowance of such damages inherently involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent. Therefore, the infliction of such damages, and the amount thereof when inflicted, are of necessity within the discretion of the trier of the fact." *Lee,* 429 F.2d at 294

Plaintiff has alleged unconstitutional conduct by defendants Hornbeck, Alston, Barr and Miller that was "willful, wanton, and reckless." *See* Complaint at ¶¶ 49, 52. As a result, the Court can not dismiss plaintiff's claim for punitive damages against these defendants at this stage of the proceedings, but such claim is limited to plaintiff's only remaining cause of action—his alleged unconstitutional termination as a member of Carver's Advisory Panel in retaliation for the exercise of his First Amendment rights, in violation of § 1983 (Count 6).

V. CONCLUSION

The Court does not condone the statements contained in plaintiff's letter to Principal Travis, dated January 1, 1998, or in the petitions he circulated calling for the removal of "the white/Jewish teachers" at Carver and their replacement by African–American teachers. That having been said, the issue in the case is not whether the Court or anyone else liked what plaintiff said in the letter and the petitions, or what plaintiff did as President of Carver's Home and School Association and as a member of Carver's Advisory Panel. The issue is whether the conduct of the School District defendants violated any of plaintiff's constitutional rights.

Although the Court granted the School District Defendants' Joint Motion for Judgment on the Pleadings with respect to most of the claims in plaintiff's Complaint, one allegation—and it is just that, an allegation—remains. That is the allegation in the Complaint that the School District defendants unconstitutionally retaliated against plaintiff by terminating his position on the Carver Advisory Panel for exercising his First Amendment right to free speech. Plaintiff will be given an opportunity to prove that allegation, and defendants will be given an opportunity after the completion of relevant discovery to again challenge the claim by motion for summary judgment.

An appropriate Order follows.

ORDER

AND NOW, to wit, this 5th day of September, 2000, upon consideration of Defendants' [10] Joint Motion for Judgment on the

10. Plaintiff originally filed his lawsuit against fourteen defendants. By agreement of the parties, the following originally named defendants were dismissed by this Court s Order dated May 10, 1999 (Doc. 25): National Association for the Advancement of Colored People (NAACP); Jerry Mondesire, President of NAACP; Philadelphia Federation of Teachers Local # 3 (PFT); Jerry Jordan, PFT Vice President; Jewish Community Relations

Pleadings pursuant to F.R.C.P. 12(c) and 12(h)(2) (Doc. 12, filed Feb. 4, 1999), and Plaintiff's Response to said motion (Doc. 29, filed June 15, 1999), **IT IS ORDERED** that Defendants' Joint Motion for Judgment on the Pleadings is **GRANTED IN PART,** as follows:

1. Plaintiff's state law claims in Counts 2 (intentional infliction of emotional distress), 3 (negligent infliction of emotional distress), 4 (defamation of character) and 7 (invasion of privacy) against the School District of Philadelphia, the Philadelphia Board of Education, and defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their official capacities are **DISMISSED;**

2. Plaintiff's state law claims for intentional torts in Counts 2 (intentional infliction of emotional distress), 4 (defamation of character) and 7 (invasion of privacy) against Defendant School District Superintendent David Hornbeck and Board of Education President Floyd Alston in their individual capacities are **DISMISSED;**

3. Plaintiff's § 1985 claims in Count 1 against defendants School District of Philadelphia, the Philadelphia Board of Education, and defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their individual and official capacities are **DISMISSED;**

4. Plaintiff's claims in Count 2 for intentional infliction of emotional distress against defendants PFT Building Representative Avi Barr and Assistant Principal Steven Miller in their individual capacities are **DISMISSED;**

5. Plaintiff's claims in Count 3 for negligent infliction of emotional distress against defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their individual capacities are **DISMISSED;**

6. Plaintiff's claims in Count 4 for defamation of character against defendants PFT Building Representative Avi Barr and Assistant Principal Steven Miller in their individual capacities are **DISMISSED;**

7. Plaintiff's claims in Count 5, under the First and Fourteenth Amendments, against defendants School District of Philadelphia, School District Superintendent David Hornbeck, Philadelphia Board of Education, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller are **DISMISSED;**

8. Plaintiff's § 1983 claims in Count 6 against defendants School District of Philadelphia, the Philadelphia Board of Education, and defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their individual and official capacities are **DISMISSED** with respect to claims grounded on the following allegations: (a) due process violations; (b) equal protection violations; (c) denial of plaintiff's First Amendment right to petition the government for grievances; and (d) First Amendment retaliation based on plaintiff's removal as president of the Home and School Association;

9. Plaintiff's claims in Count 7 for invasion of privacy against defendants PFT Building Representative Avi Barr and Assistant Principal Steven Miller in their individual capacities are **DISMISSED;** and

10. Plaintiff's claims for punitive damages against the School District of Phila-

Council (JCRC); Burt Siegal, Executive Director of JCRC; Anti Defamation League of B Nai B rith (ADL); Barry Morrison, Regional Director of ADL. The remaining defendants are referred to collectively as the School District defendants.

delphia, the Philadelphia Board of Education, and defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their official capacities are **DISMISSED.**

IT IS FURTHER ORDERED that the School District defendants' Joint Motion for Judgment on the Pleadings is **DENIED** with respect to plaintiff's § 1983 claims in Count 6—against defendants School District of Philadelphia, the Philadelphia Board of Education, and defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their individual and official capacities—that plaintiff was unconstitutionally retaliated against when he was terminated as a member of Carver's Advisory Panel for exercising his First Amendment rights.

IT IS FURTHER ORDERED that the School District defendants' Joint Motion for Judgment on the Pleadings is **DENIED** with respect to plaintiff's claims for punitive damages—against defendants School District Superintendent David Hornbeck, Board of Education President Floyd Alston, PFT Building Representative Avi Barr, and Assistant Principal Steven Miller in their individual capacities—on the ground that plaintiff was unconstitutionally retaliated against when he was terminated as a member of Carver's Advisory Panel for exercising his First Amendment rights.

IT IS FURTHER ORDERED that the Court's rulings are based on the allegations in the Complaint, and are **WITHOUT PREJUDICE** to the School District defendants' right to challenge plaintiff's § 1983 claims and his claims for punitive damages after completion of relevant discovery and/or at trial.

IT IS FURTHER ORDERED that a status conference in Chambers will be scheduled in due course.

McNEIL REAL ESTATE FUND XXVI, L.P., Plaintiff,

v.

MATTHEW'S, INC. OF DELAWARE, Defendant.

No. Civ.A. 99–1426.

United States District Court,
W.D. Pennsylvania.

June 8, 2000.

Landlord sought rent due and lost rent from bankrupt tenant's sister company/alleged guarantor, following tenant's rejection of lease. Landlord moved for summary judgment. The District Court, Standish, J., adopted the opinion of United States Magistrate Judge Mitchell, which held that: (1) companies' chief financial officer (CFO) had apparent authority to enter into guaranty agreement, and (2) even absent CFO's apparent authority, companies' owner's signature on lease which incorporated guaranty estopped sister company from contending that CFO lacked authority to execute guaranty.

Motion granted.

1. Principal and Agent ⚿99

Under apparent authority doctrine of Pennsylvania law, "apparent authority" exists where principal, by word or conduct, leads people with whom alleged agent deals to believe that principal has granted

EXHIBIT "10"

Dorothy STEVENS, Plaintiff-Appellant,

v.

Dorothy Wright TILLMAN, et al., Defendants-Appellees.

Nos. 87-1031, 87-1200.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 9, 1987.

Decided Aug. 18, 1988.

Elementary school principal brought action against president of parent teacher association and her supporters, asserting federal claim for conspiracy to violate principal's civil rights and state law claims for defamation and inducement to breach of contract. The United States District Court for the Northern District of Illinois, Eastern Division, Ann C. Williams, District Judge, granted judgment for defendants on inducement count, dismissed civil rights claim and entered judgment on jury verdict awarding principal one dollar in damages on defamation claim, and principal appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) action of president of parent teacher association in calling elementary school principal "racist" was not defamatory under Illinois law, and (2) principal had no federal civil rights claim arising out of allegedly racially-motivated crusade, which allegedly resulted in her transfer to another school.

Affirmed.

1. Libel and Slander ⇐21

Under Illinois law, statement that logically refers to particular person may be subject of defamation action, even though statement does not refer to such person by name. U.S.C.A. Const.Amend. 1.

2. Libel and Slander ⇐9(5), 51(5)

Although statements that there were quite a few problems at elementary school, that only one student at school was doing math at sixth grade level, that children were endangered and that children were not doing math could be read as slights on principal, they were not defamatory under Illinois law; first statement was empty commentary, rather than statement of fact, second and fourth statements were false, but not intentionally or recklessly so, and third statement was true. U.S.C.A. Const. Amend. 1.

3. Libel and Slander ⇐9(5)

Action of president of parent teacher association in calling elementary school principal "racist" was not defamation under Illinois law, even though comment implied professional wrongdoing. U.S.C.A. Const.Amend. 1.

4. Libel and Slander ⇐51(5)

Elementary school principal's performance as public official was open to public comment and, thus, comments about her performance were not defamatory unless they were false and uttered with knowledge of their falsity or with recklessness toward the truth. U.S.C.A. Const.Amend. 1.

5. Libel and Slander ⇐51(5)

Statements made about elementary school principal's performance by president of parent teacher association at meetings of Board of Education or as part of campaign to gain public support in order to put pressure on Board to remove principal were not defamatory unless false and uttered with knowledge of their falsity or with recklessness toward the truth. U.S.C.A. Const.Amend. 1.

6. Conspiracy ⇐7.5

Elementary school principal had no federal claim against president of parent teacher association for conspiracy to violate principal's civil rights, arising out of allegedly racist crusade to remove principal, which included illegal "sit in" at principal's office, illegal boycott, picketing and delivery of tirades against principal, and which allegedly resulted in Board of Education transferring principal to another school; Board of Education was free to transfer principal and principal had no independent federal right in having especially desirable public job. 42 U.S.C.A. § 1985(3).

Ronald H. Balson, Law Office of Ronald H. Balson, Chicago, for plaintiff-appellant.

Edward W. Feldman, Northwestern University Law Clinic, Chicago, for defendants-appellees.

Before CUMMINGS, COFFEY, and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Dorothy Stevens was the principal of Mollison Elementary School in Chicago between 1962, when it opened, and 1981. Her career at Mollison ended unpleasantly. In December 1980 Dorothy Tillman was elected president of the Mollison School Local Advisory Council, a parent-teacher association sponsored by Chicago's Board of Education. Tillman launched the Council on a crusade to remove Stevens as principal. Tillman and supporters occupied Stevens's office at the school for three days running and served her with an "eviction notice"; they organized a boycott that (they claimed) kept more than 80% of the students out of school; they distributed handbills, picketed the school, and delivered tirades against Stevens at meetings of the Board of Education. In the spring of 1981 Stevens took five months' paid leave and was replaced as principal by Edith Dervin, whereupon the Local Advisory Council declared victory. When she returned to Chicago from her recuperation in Florida, Stevens was posted to another elementary school as principal. Tillman, by then a well-known figure, was elected to Chicago's City Council; Stevens retired at age 65 in 1985.

This case presents a claim under 42 U.S.C. § 1985(3) and two pendent claims under state law, defamation being the leading one. We shall need to decide some difficult questions concerning the difference between "facts" and "opinions" in the law of defamation and the scope of liability under § 1985(3) for conspiracies that violate state but not federal law.

I

The sit-in was illegal as trespass, and the boycott was a violation of the state's mandatory-attendance laws. Although the police arrested the parents for trespass in order to clear Stevens's office, the state's attorney chose not to prosecute them, and Stevens is not entitled to enforce these laws herself. The sit-in, during which Stevens was placed in fear for her person, was most likely an assault under Illinois law. An episode in which Tillman, backed by a crowd, shouted "Get her out of here or we are going to come and get her. We are going to come and get her ourselves" would put many a person in fear. For reasons she has kept to herself, Stevens chose not to complain about this; instead she filed suit under 42 U.S.C. § 1985(3). Stevens is white. Tillman and her aides, like almost all of the students at Mollison, are black, as is Edith Dervin. Stevens contends that Tillman campaigned to get rid of her on the basis of race, which Stevens believes violates § 1985(3) because in the process Tillman violated rights secured by state law. Tillman insists, to the contrary, that Stevens was dictatorial, condescending, and ineffectual; defects in her performance, and not her race, were the basis of the campaign against her. This attack on Stevens's fitness for her position led Stevens to present two state-law claims under the court's pendant jurisdiction: defamation and inducement to breach of contract.

During the pretrial proceedings, the district court held that all three claims presented triable issues. 568 F.Supp. 289 (N.D.Ill.1983), modified in part by order of November 2, 1984. The § 1985(3) claim is sufficient, the court believed, because it alleges that the defendants (Tillman and other members of the Local Advisory Council) conspired on racial grounds to influence the Board of Education, a governmental body. The libel and inducement claims, the court thought, depend on factual issues that only a jury may resolve. Before the trial got under way, the case was assigned to another judge, who took a different view of things.

After Stevens had presented her case to the jury, the court granted judgment for the defendants on the inducement count

under Fed.R.Civ.P. 50(a), finding that the Board of Education had not broken its contract with Stevens, so that the defendants could not be liable for inducing a breach. 661 F.Supp. 702, 712–13 (N.D.Ill.1986). The court pared back the number of statements the jury would be allowed to consider under the defamation claim, holding that some were not clearly "of and concerning" Stevens and that most of the others to which Stevens objected are constitutionally protected as opinion. *Id.* at 708–11. And although the court allowed the trial of the § 1985(3) claim to continue, *id.* at 705–07, it concluded that only proof of violent or unlawful acts would be sufficient to make out a case; to the extent the § 1985(3) claim rested on public statements and lobbying, the constitutional right to petition the government for redress of grievances prevented liability. Even this allowance was withdrawn at the end of the defendants' case, when the court dismissed the § 1985(3) claim after concluding that Stevens had not been deprived of a federally-protected right.

Nine potentially-defamatory statements went to the jury, which was instructed that it could return a verdict for Stevens only if it concluded that the statement is false and that clear and convincing evidence shows that the speaker knew the statement to be false or acted with reckless disregard for the truth. The jury returned special verdicts answering, statement-by-statement, whether the speech is false; if it is, whether clear and convincing evidence showed that the defendant knew of its falsity or was reckless; if it is false and the speaker acted with the necessary scienter, whether Stevens suffered damages; and, if so, the damages attributable to that statement.

The jury found that at a public meeting of the Board of Education, Tillman made these false statements:

> [O]ne child [in the entire school, covering grades K–8] was doing math at a sixth grade level and he was an eighth grade student, and the rest was below.
>
> She [Stevens] called all the parents a bunch of welfare mothers, a bunch of welfare children.
>
> [O]ne reason we were able to have an eighty-five to ninety percent effective boycott is because nine out of ten mothers in that school have been told by Miss Stevens that their child needs psychological, not to mention some of the other things that she told them.
>
> We have teachers put in the wrong places. That's one of the reason our children are not learning.

The jury also found that Tillman and six other members of the Local Advisory Council prepared and circulated a handbill containing these false statements:

> Her testing system was not working, yet she would not change it.
>
> The results are: only one child doing math on sixth grade level; and the majority of students are reading below grade level.

The evidence showed that 93% of Mollison's students were reading below their expected level—worse than the norm in Chicago for schools in poor neighborhoods—but not that only one student in the school was up to 6th grade level in math. Although the jury found that these six statements are false, it also answered the question "do you find that there is clear and convincing evidence that the defendant knew the statement to be false when made or acted with reckless disregard for the truth when making that statement?" with "No" for all six.

The judge gave the jury two other statements from the handbill:

> As of today, only half of the students have been tested this year for their levels.
>
> Miss Stevens told several reporters that most of Mollison's parents are on ADC.

The jury found that these statements are true. This left one statement, which Tillman made at the Board of Education's meeting:

> The teachers are afraid of her.... They are afraid of Miss Stevens. They have called me one by one and said, "You're absolutely right. We know what's going on, but if we speak up, she will write us up and we will be—then we'll get dismissed from the school."

The jury found that this statement is false and that Tillman either knew it is false or acted with reckless disregard for the truth when making it. (Perhaps the jury deemed it significant that not a single teacher at Mollison testified on the defendants' behalf at trial.) The jury also found that Stevens "suffered damages as a direct and proximate result of" the statement. It fixed these damages at $1.00.

Stevens contends on appeal that the jury, having found liability, was required to set damages at $1 million rather than $1.00. This is fanciful. It may be, as Stevens says, that she was humiliated by the campaign, suffered illness as a result of the vilification, and was led to retire earlier than she had planned to do because no other school held for her the attraction of Mollison, which she had helped to found. Still, a single statement in the course of an organized protest movement has almost no effect; a jury trying to value the damages attributable to this statement, on the assumption that everything else that transpired is lawful, had little choice but to return the customary figure of $1.00 as nominal damages. Stevens fares no better on the claim of tortious interference with contract. We agree with the district court that the Board did not break its contract with Stevens, see 661 F.Supp. at 712–13, which dooms this claim; we discuss it no further. Stevens argues weakly that the district judge erred by granting a two-month continuance in mid-trial during the illness of one of defendants' lawyers; such matters are committed to the court's discretion. This leaves several contentions, however, each entailing multiple legal issues. Stevens insists that all of the statements should have been submitted to the jury; that she did not have to prove scienter by clear-and-convincing evidence (or at all); and that the defendants violated § 1985(3).

Stevens has filed two notices of appeal. No. 87–1031 was filed in mid-trial and challenges the grant of judgment on the interference-with-contract claim at the end of plaintiff's case. No. 87–1200 was filed on entry of the final judgment. We dismiss No. 87–1031 as premature; No. 87–1200, however, brings up the entire case.

II

The district court granted judgment for defendants as a matter of law on two categories of statements: those that did not mention Stevens by name, and those that the court characterized as opinion.

A

[1] Under Illinois law statements that reasonably may be read as referring to someone other than the plaintiff are not actionable. *Chapski v. Copley Press*, 92 Ill.2d 344, 65 Ill.Dec. 884, 442 N.E.2d 195 (1982). The district court apparently believed that under Chapski only statements referring to the plaintiff by name are actionable. No Illinois case supports that proposition; insinuation can be as devastating as name-calling. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 267 (7th Cir.1983) (Illinois law). A statement that logically refers to a particular person may be actionable; *Chapski* held that "the words and the implications therefrom [should be] given their natural and obvious meaning" (442 N.E.2d at 200, 65 Ill. Dec. at 889), not that every possible inference is to be indulged in the speaker's favor. The first amendment does not contain a direct-reference requirement, *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1313–17 (7th Cir.1988), so it is unnecessary to read Illinois law that way to avoid unconstitutionality.

[2] Any error in this respect is harmless, however. Stevens's brief on appeal presses, as her best case of defamation by innuendo, statements Tillman made on December 17, 1980.

> We are having quite a few problems at Mollison.
>
> Only one student at Mollison was doing math at a sixth grade level. The rest are below.
>
> The children are endangered.
>
> Our children are not doing math.

Statements of this sort naturally may be read as slights on the principal. But the

first is an empty commentary rather than a statement of fact. (We discuss the "opinion" question more fully below.) The third is true: it refers to Mollison's practice of sending pupils home for lunch, even though the school's neighborhood is a rough one. Stevens contended that the collective bargaining agreement with the teachers' union required the school to be closed for lunch, while Tillman disagreed; in either case, no one doubted that the children were in more danger walking back and forth in the neighborhood than they would have been eating lunch at school. (Edith Dervin, who replaced Stevens, promptly instituted a "modified closed campus" system over the teachers' objection; other elementary schools in Chicago, operating under the same collective bargaining agreement, used a "closed campus" system.) The second statement in this group is essentially identical to one that the jury found false but not intentionally or recklessly so; another statement of the same character would have fetched the same result. The fourth is along the lines of the second but less specific; if the second is not actionable, neither is the fourth.

B

[3] Another, much larger, category of statements was removed from the jury's purview as "opinion". *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40, 94 S.Ct. 2997, 3006–07, 41 L.Ed.2d 789 (1974), holds that the first amendment prohibits attaching civil liability to statements of opinion. Ever since, courts have wrestled with the question "what's an opinion?" and have come up with buckets full of factors to consider but no useful guidance on what to do when they look in opposite directions, as they always do. E.g., *Fudge v. Penthouse International, Ltd.*, 840 F.2d 1012, 1015–17 (1st Cir.1988); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452–55 (3d Cir.1987); *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1286–90 (4th Cir.1987); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986) (en banc); *Ollman v. Evans*, 750 F.2d 970, 979–84 (D.C.Cir.1983) (en banc) (plurality opinion). This is hardly a satisfactory state of affairs. See Note, *The Fact–Opinion Determination in Defamation*, 1988 Colum.L.Rev. 809 (1988).

Gertz requires a court to separate "fact" from "opinion", a task we have carried out when necessary, see *Quilici v. Second Amendment Foundation*, 769 F.2d 414, 418–21 (7th Cir.1985); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1129 (7th Cir.1987), without producing a useful definition of "opinion". The parties press different views on us, but we resist the temptation to come up with a new and "better" definition, in part because fact cannot be separated from opinion by ever-more-elaborate definitions. Every statement of opinion contains or implies some proposition of fact, just as every statement of fact has or implies an evaluative component. Even the statement "I don't like the color blue" implies a proposition about the speaker's sensibilities; he could be lying about his own dislikes or mistaken in the sense that on further reflection he would say something different about the color blue. The statement "mauve is a lousy color" implies "I don't like mauve", with the same difficulties. The statement "socialism is better than capitalism", seemingly an opinion dependent on the speaker's preferences about control of productive assets, could be false in the sense that the speaker, who holds certain values, might conclude after reflection (and access to data) that capitalism serves his own values better than socialism does. Much modern political and ethical philosophy consists in efforts to demonstrate that statements about justice and other hard-to-pin-down terms may be reduced to less contentious statements that will be accepted (with their logical implications) in a way that produces agreement. Statements of "pure" opinion also may imply or depend on facts. One may say "Jones has a tin ear", implying something about his behavior that may be false. One may say "George Stigler did not deserve the Nobel Prize" because one believes that Frank Knight should have received it; but Knight died before Stigler received the prize, and on learning that there are no posthumous

Nobel Prizes this person too might favor Stigler. The statement "no one will ever build a heavier-than-air flying machine" is opinion in 1900 and false in 1905. The statement "Paul Morphy was a better composer than Wolfgang Amadeus Mozart" appears to be an egregiously erroneous statement of either opinion or fact—until you realize that the speaker must have meant "composer of chess puzzles". The statement "2 + 3 = 5", apparently one of "fact", implies something about the speaker's use of "+", particularly that he thinks "+" signifies addition, in base six (or higher). See Saul A. Kripke, **Wittgenstein on Rules and Private Language** 8–24 (1982), for a brief description of the many opinions and related beliefs underlying something as simple as the use of "+". It could be a statement about a very different kind of math—or maybe not a statement about any kind of math. Even axiomatic math cannot yield "factual" (logically true) statements about all interesting arithmetical relations, as Gödel and Turing established. See Ernest Nagel and James R. Newman, **Gödel's Proof** (1958); Gregory J. Chaitin, *Randomness in Arithmetic*, 259 Scientific American 80 (July 1988). The reason Fermat's Last Theorem remains unproven (and unrefuted) may be that it is neither true nor false—just an "opinion" about numbers.

Most efforts to separate "fact" from "opinion" start with the belief that a "fact" is something verifiable, while an opinion is not. The branch of philosophy known as logical positivism is built on the proposition than only what is verifiable is worth debating (more rigorously, that "there are no synthetic *a priori* statements except this one"), but it has fallen on hard times not only because no one can separate the "verifiable" from the "non-verifiable" (was the statement "there are craters on the other side of the moon" an opinion that turned to fact when we gained the ability to put satellites in orbit around the moon?), but also because most philosophers believe that there are useful ways to debate even non-verifiable statements. They may be derived from axioms (or from axiomatic arguments about the "state of nature"); if this treatment is impossible, their implied factual bases may be tested. Courts trying to find one formula to separate "fact" from "opinion" therefore are engaged in a snipe hunt, paralleling the debates between positivist and deontological thinkers in philosophy. Perhaps the Constitution requires the search for this endangered species, but more likely the difference between "fact" and "opinion" in constitutional law responds to the pressure the threat of civil liability would place on kinds of speech that are harmless or useful, not on the ability to draw a line that has vexed philosophers for centuries. See *Ollman*, 750 F.2d at 995–1001 (Bork, J., concurring). It is the cost of searching for "truth"—including the cost of error in condemning speech that is either harmless or in retrospect turns out to be useful, a cost both inevitable and high in our imprecise legal system—that justifies the constitutional rule. Like other attempts to compare things that can be neither quantified nor reduced to a common metric (how much does the value of free speech "weigh" compared with the value of reputational injury?), this will never yield a rule.

The potential for erroneous condemnation of harmless or beneficial speech should make courts reluctant to embrace unstructured, multi-factor "tests". For the first amendment is valuable only when the speech is threatening and unpopular—for only then would juries condemn speech in the absence of a constitutional rule. If the Constitution protects only moderate speech, it protects nothing. Supercharged rhetoric is part of many political debates, as is the careless and inaccurate accusation; these inevitably injure, yet speech must be protected even when it injures, lest the scope of debate be curtailed. *Hustler Magazine v. Falwell*, — U.S. ——, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). A "balancing test" readily yields to the impulse to stamp out speech "just this one time" in order to punish a particularly crude and unjustified sally; the felt necessities of the day overwhelm the general principle, and a balancing test has no resource to prevent it. The case seems the exceptional one; and the jury—drawn from throughout

northern Illinois—may bring to the case sensibilities about "acceptable" speech very different from those prevailing in the Mollison school zone. The prospect of exceptions "for this day and train only" destroys the value of the rule, however. Before adopting a multi-factor approach we should consider, too, a powerful structural objection: the first amendment says that "Congress shall make no law ... abridging the freedom of speech", not that "Congress shall make no *unwise* law ...". The State of Illinois is not Congress, but the first amendment applies (through the fourteenth) just the same, and so far as the federal courts are concerned a rule of common law is no different from a statute. Our court has so far refrained from deciding how to go about identifying protected "opinions", see *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1129 n. 3 (7th Cir.1987), and we are not anxious to settle that question now, unless that is essential.

Before attempting to compare the incomparable, we need to ask whether Illinois would treat the statements in question as defamatory. The first inquiry in any "constitutional case" is whether there is any need to declaim on the meaning of the Constitution. Unless Illinois would treat Tillman's statements as actionable, there is no constitutional defense to consider. The district court assumed that only the first amendment stood between Tillman (and friends) and civil liability. Our reading of Illinois law is different; we do not think the statements characterized as "opinions" are actionable independent of the factual propositions they imply—propositions that were in fact submitted to the jury.

Here is a sample of the statements that the district court found constitutionally-protected as "opinions".

> We found in our investigation that our principal must be removed.... Our principal is very insensitive to the needs of our community, which happens to be totally black. She made very racist statements during the boycott. She is a racist. She must go. We cannot have racist people around our children.... She made numbers of very racist statements, so many that I would use all of my time to explain to you some of the statements that were made.
>
> Our children are afraid of her. I think discipline is fine. The child must respect the principal; he or she must respect the teachers. But I mean there is no sense —and our children feel as though they are on a plantation. And there is no reason in 1981 why we should have a principal making such racist statements.
>
> The teachers of the school have brought to most of our attention that it has been run as a dictatorship, and we do not need a dictatorship in our children's school.... They're being degraded and put down, and it's all because of a dictatorship with Miss Stevens.
>
> We have exposed the Mollison pollution.... Since 1975, the quality of education has gone down at Mollison School and Miss Stevens has sat and watched it. She did nothing about it.... Miss Stevens is insensitive to the children, the parents and the community. We can no longer allow her to destroy our children's minds.

The common law in Illinois follows the **Restatement (Second) of Torts** § 566 (1977), which provides:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

When a statement in the form of an opinion discloses the defamatory facts (or refers to facts in the public record), it is not actionable apart from those facts. See *Horowitz v. Baker*, 168 Ill.App.3d 603, 119 Ill.Dec. 711, 523 N.E.2d 179 (3d Dist.1988); *Stewart v. Chicago Title Insurance Co.*, 151 Ill.App.3d 888, 104 Ill.Dec. 865, 503 N.E.2d 580 (4th Dist.1987), both building on dicta in *Owen v. Carr*, 113 Ill.2d 273, 277–81, 100 Ill.Dec. 783, 787–88, 497 N.E.2d 1145, 1148–49 (1986). (In *Costello v. Capital Cities Communications, Inc.*, 153 Ill.App.3d 956, 966–67, 106 Ill.Dec. 154, 160–62, 505 N.E.2d 701, 707–09 (5th Dist.1987), a divided panel concluded that *Stewart* had misinterpreted

Owen; Horowitz followed *Stewart* without further discussion, and we are convinced that these cases are on solid ground.) *Horowitz* is particularly instructive, because the speech in question there made a number of derogatory statements ("sleazy", "cheap", "pull a fast one", "secret", and "rip-off") about the plaintiff's purchase of bricks from a city. These statements readily could have been read to imply the speaker's knowledge of bribery, extortion, or some other crime. The court nonetheless held them not actionable under state law, because a newspaper earlier had published the facts on which these characterizations had been based.

Tillman and her confederates disclosed the principal bases of their condemnations. The students were doing poorly at math; Stevens employed a method of testing that her witnesses at trial conceded was improper; the students were forced to walk home and back again at lunch; Stevens was a strict disciplinarian; Stevens thought poorly of the pupils ("welfare children") and their prospects (they needed "psychologicals"); and on and on. Most of these factual averments were submitted to the jury, which found several false but not intentionally so; others were found true (or were not pressed by Stevens). All that remained was the characterization, which under Illinois law is not actionable apart from the underlying statements of fact.

One subject was removed from the jury's purview without any (evident) submission of underlying fact: the repeated claim that Stevens is a "racist". This was offered as a body blow, an attack on fitness and integrity. Stevens argues that it is libel *per se* under Illinois law. Tillman also declared that Stevens "made numbers of very racist statements, so many that I would use all of my time to explain to you some of the statements that were made." Stevens either did or did not make repugnant statements; Tillman said that she had, yet offered no examples. One is entitled to wonder how such an assertion can be "opinion." Perhaps Tillman meant only to characterize statements of the "welfare-mother" variety; this interpretation would be an opinion rather than a declaration of fact. The words also might have implied something like: "Stevens made to me statements similar to those that Gov. Ross Barnett made while standing in the schoolhouse door, and she holds the same views about black people that Barnett did." That would be a statement of fact, and could be quite wrong.

Curiously, Stevens does not contend that the jury should have been allowed to consider whether Tillman's oratory implied to listeners that Stevens had made the kind of statements that all ears find repellant. Stevens contends that the epithet "racist" is itself actionable because it marks her as unfit to be principal of a public school and because Tillman used the term (in conjunction with the claim that she had conducted an "investigation") to imply possession of derogatory information. The results of the "investigation", such as it was, were spread before the jury. We do not think a court of Illinois would agree that the term itself is actionable, so again we do not consider any constitutional argument.

Illinois has competing doctrines: first, that statements impugning one's professional competence are actionable without further proof of injury; second, that "mere name-calling" is not actionable. Compare *Costello v. Capital Cities Media, Inc.*, 111 Ill.App.3d 1009, 67 Ill.Dec. 721, 445 N.E.2d 13 (5th Dist.1982) ("lying leadership" is actionable per se), affirmed in relevant part after later appeal, 153 Ill.App.3d 956, 106 Ill.Dec. 154, 505 N.E.2d 701, 708 (1987); *Erickson v. Aetna Life & Casualty Co.*, 127 Ill.App.3d 753, 83 Ill.Dec. 72, 469 N.E. 2d 679 (2d Dist.1984) (calling chiropractor's treatment "unreasonable & unnecessary" is actionable per se); with, e.g., *Horowitz* ("sleazy" and "rip-off" are name-calling); *Valentine v. North American Co. for Life & Health Insurance.*, 60 Ill.2d 168, 328 N.E.2d 265 (1974) ("lousy agent" is name-calling); and *Skolnick v. Nudelman*, 95 Ill.App.2d 293, 305, 237 N.E.2d 804, 810 (1st Dist.1968) ("nut", "mishuginer", and "screwball" are name-calling). We shall not pretend to be able to harmonize these cases. "Liar" and "unnecessary medical treatment" imply a greater degree of cer-

tainty than does "lousy agent" or "rip-off" and therefore, we suppose, imply access to additional supporting facts, but there is hardly a bright line. We do not think it necessary to wrestle with the subject in light of *Owen v. Carr*, the most recent word from the Supreme Court of Illinois, which held that "[l]anguage to be considered defamatory must be so obviously and naturally harmful to the person to whom it refers that a showing of special damages is unnecessary." 497 N.E.2d at 1147, 100 Ill.Dec. at 785. *Owen* ruled that, as a matter of law, an accusation that an attorney filed a complaint "deliberately to intimidate" the defendants was not actionable, although the comment implied professional wrongdoing.

Accusations of "racism" no longer are "obviously and naturally harmful". The word has been watered down by overuse, becoming common coin in political discourse. Tillman called Stevens a racist; Stevens issued a press release calling Tillman a "racist" and her supporters "bigots". Formerly a "racist" was a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races. Stevens, the principal of a largely-black school in a large city, obviously does not believe that blacks should be enslaved or that Jim Crow should come to Illinois; no one would have inferred these things from the accusation. Politicians sometimes use the term much more loosely, as referring to anyone (not of the speaker's race) who opposes the speaker's political goals—on the "rationale" that the speaker espouses only what is good for the jurisdiction (or the audience), and since one's opponents have no cause to oppose what is beneficial, their opposition must be based on race. The term used this way means only: "He is neither for me nor of our race; and I invite you to vote your race." When Stevens called Tillman a "racist", Stevens was accusing Tillman of playing racial politics in this way rather than of believing in segregation or racial superiority. That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. The term has acquired intermediate meanings too. The speaker may use "she is a racist" to mean "she is condescending to me, which must be because of my race because there is no other reason to condescend"—a reaction that attaches racial connotations to what may be an inflated opinion of one's self—or to mean "she thinks all black mothers are on welfare, which is stereotypical". Meanings of this sort fit comfortably within the immunity for name-calling.

Language is subject to levelling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared "segregation now, segregation forever", everyone knew what a "racist" was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life "racist" is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back (as Stevens did). It is not actionable unless it implies the existence of undisclosed, defamatory facts, and Stevens has not relied on any such implication.

III

[4, 5] The district court instructed the jury that it could return a verdict for Stevens only if it found by clear and convincing evidence that any falsehood had been uttered with knowledge of the lie or recklessness toward the truth. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–86, 84 S.Ct. 710, 725–29, 11 L.Ed.2d 686 (1964). It did so on two grounds: that

Stevens is a public official, and that the speakers were exercising their right to petition the government for redress of grievances.

Stevens relies on *Hutchinson v. Proxmire*, 443 U.S. 111, 133–36, 99 S.Ct. 2675, 2687–89, 61 L.Ed.2d 411 (1979), for the proposition that public criticism does not transmute the target into a "public figure". Granted. But Stevens was a public *official*—just like the commissioner who supervised the police department in *New York Times v. Sullivan*—whether or not she was a public figure. Her performance as a public official was open to public comment. *Rosenblatt v. Baer*, 383 U.S. 75, 85–86, 86 S.Ct. 669, 675–76, 15 L.Ed.2d 597 (1966). Stevens was not an elected public official, but as principal she possessed great discretion over the operation of Mollison School. How she used that discretion was the subject of legitimate public debate. Perhaps there should be a "limited-purpose public official" just as there is a "limited-purpose public figure", see *O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1417 (7th Cir.1986), for even senior bureaucrats such as Stevens should not be required to forego all privacy interests in order to render public service just because those running for public office do. If there be such a doctrine, however, it would not assist Stevens. The statements at issue here dealt with the way Stevens ran Mollison School, not with her private life.

Too, as the district court held, the statements in question either were made at meetings of the Board of Education or were part of a campaign to influence the Board. The statements made directly to the Board are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985). Those made as part of the campaign to whip up public support in order to put pressure on the Board to remove Stevens are equally protected. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–12, 102 S.Ct. 3409, 3422–25, 73 L.Ed.2d 1215 (1982); cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n, Inc.*, 814 F.2d 358, 371–76 (7th Cir.1987). The first amendment prohibits efforts to ensure "laboratory conditions" in politics; speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence the Board of Education is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account. The district court did not err in instructing the jury that only evidence satisfying the *New York Times* standard would permit an award of damages.

IV

[6] We come at last to the claim under § 1985(3), which was the basis of federal jurisdiction in this case. The statute provides:

> If two or more persons ... conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities ... from giving or securing to all persons ... the equal protection of the laws; ... the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

This statute addresses private acts—going "in disguise on the highway" is a reference to the M.O. of the Ku Klux Klan—yet condemns only deeds that "deprive" the victim of "the equal protection of the laws, or of equal privileges and immunities under the laws", something within the domain of government exclusively. This admixture of private and public action has befuddled courts ever since. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *Great American Federal Savings & Loan Ass'n v. Novot-*

ny, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); and *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983), the principal modern cases in a long chain that has included declarations of unconstitutionality, revivals, and reinterpretations. It is hard to come up with an enduring interpretation of such an opaque statute, when the Court tries on the one hand to avoid turning all state torts into federal offenses and on the other to give some content to a statute that if read naturally speaks only to state action and therefore duplicates § 1983.

As we understand the Supreme Court's contemporary cases, § 1985(3) reaches three kinds of conduct:

1. Racially-motivated private conspiracies to deprive persons of rights secured to all by federal law. (Whether any other motivation is covered, and whether federal "law" for this purpose is limited to the Constitution itself, are open questions.) *Griffin* is an example to the extent the conspiracy deprived the plaintiffs of their constitutional right to engage in interstate travel.
2. Racially-motivated private conspiracies to deprive persons of rights secured to all by state law, where the deprivation interferes with the exercise of a federally-protected right. A cross-burning (trespass and assault) by the Klan is an example to the extent the threat of violence induces the targets to refrain from exercising federally-assured rights, such as the rights to travel, to associate or speak, and to vote.
3. Racially-motivated conspiracies to deprive persons of rights secured only against governmental action (such as the right of free speech), provided the defendants are either "state actors" or seeking to influence the state to act in a prohibited way. *Scott*, 463 U.S. at 831–34, 103 S.Ct. at 3357–59; *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 828–30 (7th Cir.1975) (Stevens, J.).

The statute does not, however, create any of the rights at issue. *Novotny*, 442 U.S. at 372, 99 S.Ct. at 2349; *Scott*, 463 U.S. at 833, 103 S.Ct. at 3358. The plaintiff must locate a right independently secured by state or federal law and then show (if only state law is at issue) that the offense deprives him of a right secured by a federal rule designed for the protection of all. See also *Griffin*, 403 U.S. at 102–03, 91 S.Ct. at 1798–99, for other elements of the § 1985(3) tort.

Stevens does not argue that the defendants' efforts to induce the Board to get rid of her "aim[ed] at a deprivation of the equal enjoyment of rights secured by the law to all" (*Griffin*, 403 U.S. at 102, 91 S.Ct. at 1798). The standard federally-secured rights—to speak, worship, travel, and so on—are not at stake. Stevens' position as principal was put at risk, but neither state nor federal law creates a "property" interest in a principalship. The Board of Education was free to transfer Stevens if it chose, and under *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir.1985), there is no independent federal right in having an especially desirable public job. There may well be a federal right in ability to practice the common occupations of the community, see *Truax v. Raich*, 239 U.S. 33, 38–42, 36 S.Ct. 7, 9–11, 60 L.Ed. 131 (1915); *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir.1986), but that right was not in jeopardy. Moreover, Stevens does not contend that Tillman violated any of her rights under state law (such as the right to be free from assault) for the purpose or with the effect of inducing her to surrender or refrain from exercising rights secured by federal law.

The claim under method (3) is more plausible: Stevens argues that Tillman and supporters plotted to get rid of her on racial grounds; and although this is a right secured against state rather than private action, Stevens was trying to influence the Board of Education, a state actor. We very much doubt that § 1985(3) properly may be used to penalize racially-motivated political campaigns, any more than the antitrust laws may be used to penalize deceitful campaigns to obtain protection from competition. See *Noerr* and related cases

discussed in *Premier*. We need not pursue this, however, because the Board of Education took no action; Stevens did not suffer injury at official hands; since she was not "deprived" by the Board of any entitlement, she may not recover on the line of reasoning approved in *Scott*.

In the end, Stevens's injury was imposed directly by the private conduct of Tillman and associates—the sit-in, the verbal threats, the slander, and so on. Her argument is that § 1985(3) supplies a remedy for abuse heaped on someone on racial grounds, even if there is neither state action nor a deprivation of any federally-secured entitlement (other than the entitlement, employed here in a perfectly circular way, to be free of racially-motivated abuse). We must assume, given the posture of the case (judgment at the close of the evidence), that the jury would have inferred that Tillman had race on her mind when trying to get rid of Stevens. Still, no case in the Supreme Court has used § 1985(3) in this way, and only one appellate decision, *Life Insurance Co. of North America v. Reichardt*, 591 F.2d 499 (9th Cir.1979), has done so. *Reichardt* preceded both *Novotny* and *Scott* and is inconsistent with them, as well as with *Cohen* in this circuit. Among cases from the Supreme Court see, e.g., *Ex parte Yarborough*, 110 U.S. 651, 657, 4 S.Ct. 152, 154, 28 L.Ed. 274 (1884) (parallel criminal statute properly used to penalize private terror that affected the right to vote for a member of Congress); *United States v. Waddell*, 112 U.S. 76, 5 S.Ct. 35, 28 L.Ed. 673 (1884) (same statute used to penalize deprivation of homestead interest secured by federal law); *Logan v. United States*, 144 U.S. 263, 285, 12 S.Ct. 617, 623, 36 L.Ed. 429 (1892) (federal right of persons in federal custody to be free from attack); *United States v. Guest*, 383 U.S. 745, 755–60, 86 S.Ct. 1170, 1176–79, 16 L.Ed.2d 239 (1966) (federal statutory right to use public accommodations, plus constitutional right to travel); *Griffin* (right to travel). Many cases—all before *Griffin*, to be sure—say that without the federal "hook" § 1985(3) and cognate criminal laws do not provide relief for ordinary criminal assaults and batteries, even if the aggressor acted with a racial motive. E.g., *Waddell*, 112 U.S. at 79–80, 5 S.Ct. at 86–87. *Reichardt*, the only modern departure from this understanding, has been ignored even in the Ninth Circuit. *Havas v. Thornton*, 609 F.2d 372, 374 (9th Cir.1979) (the plaintiff must show a deprivation of rights secured by the Constitution or federal law). But cf. *Abrams v. 11 Cornwell Co.*, 695 F.2d 34, 41–42 (2d Cir.1982) (pre-*Scott* case suggesting willingness to treat violation of state law alone as an adequate basis of a § 1985(3) claim).

This wheel will continue to turn. Changing interpretation has been the only constant about § 1985(3). See *Grimes v. Smith*, 776 F.2d 1359, 1363–1366 (7th Cir. 1985) (tracing the history); *Volk v. Coler*, 845 F.2d 1422, 1435 (7th Cir.1988) (as if to prove the point, disagreeing with *Grimes*, without discussing it, on the statute's coverage of non-racial, political conspiracies). Which way it will turn is anyone's guess. Strong arguments may be made for making all racially-motivated harms actionable—though whether this should be a federal tort is a legislative question. If Congress spoke to the subject through § 1985(3), it disguised its meaning well. We follow the accepted understanding of § 1985(3) without pretending to certainty that the understanding is right—either as an interpretation of the law or as a wise rule.

No doubt Stevens suffered injury at Tillman's hands. No doubt Tillman's methods were crude. Perhaps Stevens had lingered beyond her time at Mollison School. Public officials (Tillman was then only aspiring to office) should live by high standards rather than asking "what can I get away with?". Civilized discourse should be the aspiration of us all. The jury found that Tillman uttered quite a few falsehoods, and the discourse was neither dispassionate nor reasoned. To the extent Tillman followed the precept that "nothing succeeds like excess" she was within her rights under the first amendment and the Illinois law of libel, save for the $1.00 the jury found she owes. To the extent Tillman and associ-

ates put Stevens in fear for her safety, causing physical and mental distress, the right avenue was a suit for assault under state law. That would have been a straightforward claim. Stevens chose to bring a federal suit under a statute that required her to jump through more hoops than she could manage. She may take comfort from the dollar, for certainly the verdict and this opinion do not vindicate Tillman's methods. They show, however, the limited reach of federal law.

AFFIRMED

SECON SERVICE SYSTEM, INC., a/k/a Yale Transport Corporation, Plaintiff–Appellant,

v.

ST. JOSEPH BANK AND TRUST COMPANY and Jay Chodock, Defendants–Appellees.

No. 87–2561.

United States Court of Appeals, Seventh Circuit.

Argued May 16, 1988.

Decided Aug. 18, 1988.

In action predicated on alleged violations of federal securities law and Racketeering Influence and Corrupt Organizations Act, the United States District Court for the Northern District of Indiana, South Bend Division, Allen Sharp, Chief Judge, granted summary judgment to bank and an individual defendant, and plaintiff appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) bankruptcy court's final judgment on the merits barred relitigation of fraudulent conveyance claim; (2) Interstate Commerce Commission operating authorities, in exchange for which plaintiff was to receive payments partially dependent on carrier's gross revenues for six years, were not "securities" subject to Securities Exchange Act; (3) plaintiff was not entitled to pierce carrier's corporate veil to reach the bank; and (4) carrier was not vested with apparent authority to bargain on behalf of bank.

Affirmed.

1. Judgment ⇐636

Plaintiff, as a member of creditors' committee, was a bona fide creditor and a party to the bankruptcy proceeding, and therefore, bankruptcy court's final judgment on the merits barred relitigation of fraudulent conveyance claim.

2. Securities Regulation ⇐5.11

Interstate Commerce Commission operating authorities, in exchange for which plaintiff was to receive payments partially dependent on carrier's gross revenues for six years, were not "securities" subject to Securities Exchange Act. Securities Exchange Act of 1934, § 3(a)(10), 15 U.S.C.A. § 78c(a)(10).

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Courts ⇐414

Indiana substantive law applied to requests that district court pierce carrier's corporate veil, where, except for plaintiff's place of incorporation, every factor, including places of contracting, negotiating and performance, location of contract's subject matter and locations of the parties, pointed to Indiana.

4. Corporations ⇐1.6(3)

Creditor claiming that corporation's primary creditor, a bank, tricked it into selling its Interstate Commerce Commission operating authorities to corporation was not entitled, under Indiana law, to pierce corporation's veil to reach the bank, absent evidence that bank ever controlled the corporation.

5. Joint Adventures ⇐1.12

Carrier and its primary creditor were not "joint adventurers," liable for each oth-

EXHIBIT "11"

after the fact, this discharge cannot be sustained.[9]

As the Supreme Court has reaffirmed since *Pickering*, public employees do not forswear the protections of the Constitution simply by swearing to uphold the Constitution. Public employers are fully justified in protecting the integrity of their work force and in maintaining the efficiency of individual employees; but such legitimate missions cannot be used as an excuse to rid their work force of an employee simply because he has exercised the rights guaranteed by fundamental law. In each case, reviewing courts must set what was done in the context of contemporaneous events and reasons, to make sure that a true balance is struck between the responsibilities of public employers and the rights of their employees. Applied to this case, that process clearly precludes judicial sanction of the action taken against Tygrett.

The judgment is reversed and the case remanded to the district court to fashion such relief as in its discretion is appropriate.

It is so ordered.

9. Because the evidence is clear that the only blemish on Tygrett's record at the time of his firing was his advocacy of the "blue flu," the Department could not, and does not, claim that it would have fired him anyway for some other reason. That being so, the principles set down by the Supreme Court in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and reaffirmed in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), do not apply to the present case. In *Mt. Healthy*, a non-tenured teacher was denied renewal of his contract on the basis of two distinct incidents. One involved conduct clearly protected by the First Amendment; the other, clearly not. In that situation, the Court held that the school board's action was to be sustained if the board could show by a preponderance of the evidence that "it would have reached the same decision . . . even in the absence of the protected conduct." 429 U.S. at 287, 97 S.Ct. at 576. This contrasts sharply with the present case, for the Department's decision to fire Tygrett was based on protected conduct, and nothing else. There is therefore not the slightest possibility that the Department "would have reached the same decision . . . even in the absence of the protected conduct."

Eric WALDBAUM, Appellant,

v.

FAIRCHILD PUBLICATIONS, INC.

No. 79-1407.

United States Court of Appeals,
District of Columbia Circuit.

Argued Jan. 9, 1980.

Decided March 31, 1980.

Certiorari Denied Oct. 14, 1980.
See 101 S.Ct. 266.

United States District Court for the District of Columbia, Howard F. Corcoran, J., entered summary judgment for defendant in libel action, and plaintiff appealed. The Court of Appeals, Tamm, Circuit Judge, held that plaintiff was a limited purpose public figure where he was president of second largest cooperative in the country, was known as a leading advocate of certain precedent-breaking policies, was mover and shaper of many of the cooperative's controversial actions and made it a leader in unit pricing and open dating, and public controversies existed over viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that the cooperative of which plaintiff was president was pioneering, and thus comment on the innovation policies of plaintiff and of the cooperative and article on plaintiff's termination as president fell within the range of reporting protected under the *New York Times* doctrine, so that recovery for libel was precluded in absence of "actual malice."

Affirmed.

1. Libel and Slander ⇐48(1)

Person can be a general public figure for purposes of defamation suit only if he is a "celebrity" whose ideas and actions the public in fact follows with great interest, while person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. U.S.C.A.Const. Amend. 1.

2. Libel and Slander ⇐48(1)

Court, in analyzing whether a given plaintiff in a defamation suit is a public figure, must look at the facts, taken as a whole, through the eyes of a reasonable person.

3. Libel and Slander ⇐48(1)

In determining whether plaintiff in defamation suit is a public figure, court must examine the relevant factors as they existed before the defamation was published.

4. Libel and Slander ⇐48(1)

Relevant factors in determining whether plaintiff in defamation suit has become a public figure in all contexts may include statistical surveys concerning name recognition, previous press coverage, whether others in fact alter or reevaluate their conduct or ideas in light of plaintiff's action, whether plaintiff has shunned attention that public has given him, whether plaintiff has assumed the risk of reputational injury, and whether he has access to the media.

5. Libel and Slander ⇐48(1)

For purposes of plaintiff in a defamation action being a general public figure, "general fame or notoriety" does not necessarily mean that majority or more of the public must know of plaintiff; rather, general fame means being known to a large percentage of the well-informed citizenry.

See publication Words and Phrases for other judicial constructions and definitions.

6. Libel and Slander ⇐48(1)

If one has become a public figure for purposes of defamation suit, simply announcing that one no longer desires press coverage and refusing to grant interviews may not be enough to cease being a public figure.

7. Libel and Slander ⇐48(1)

Nationwide fame is not required to be a public figure for purposes of defamation suit; rather, question is whether plaintiff had achieved necessary degree of notoriety where the defamation was published.

8. Libel and Slander ⇐48(1)

"Public controversy" such that participation therein may render an individual a public figure for limited purposes in connection with defamation suit is not simply a matter of interest to the public, nor do matters essentially of a private nature become public controversy solely because members of the public find them appealing to their morbid or prurient curiosity; rather, the controversy must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way.

See publication Words and Phrases for other judicial constructions and definitions.

9. Libel and Slander ⇐48(1)

Publicity surrounding litigation does not by itself elevate the parties to public figures for purposes of a defamation suit, even if they could anticipate the publicity, unless they are using the court as a forum for espousing their views in other controversies; nevertheless, litigation itself can become controversial.

10. Libel and Slander ⇐48(1)

In determining what is a public controversy for purposes of defamation suit brought by participant therein, newsworthiness alone will not suffice, but court may not question legitimacy of the public's concern, and controversy need not concern political matters.

11. Libel and Slander ⇐48(1)

Trivial or tangential participation in the public controversy is not enough to cause such a participant to become a limited public figure, for purposes of standard to be applied in any defamation suit brought by him; plaintiff either must have been purposely trying to influence the outcome or must realistically have expected, because of his position in the controversy, to have an impact on its resolution.

12. Libel and Slander ⇐48(1)

Even if plaintiff in defamation suit is a public figure for limited purpose, misstatements wholly unrelated to the controversy in which he has participated do not receive *New York Times* protection; the alleged defamation must have been germane to plaintiff's participation in the controversy, but his talents, education, experience and motives may be relevant.

13. Libel and Slander ⇐48(1)

One who is caught up in a public controversy involuntarily and against his will, but assumes a prominent position in its outcome, has "invited comment" relating to the issue at hand so as to become a limited public figure for purposes of defamation suit, unless he rejects any role in the debate.

14. Libel and Slander ⇐48(1), 51(5)

Plaintiff in defamation suit was a limited purpose public figure where he was president of second largest cooperative in the country, was known as a leading advocate of certain precedent-breaking policies, was mover and shaper of many of the cooperative's controversial actions and made it a leader in unit pricing and open dating, and public controversies existed over viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that the cooperative of which plaintiff was president was pioneering, and thus comment on the innovation policies of plaintiff and of the cooperative and article on plaintiff's termination as president fell within the range of reporting protected under the *New York Times* doctrine, so that recovery for libel was precluded in absence of "actual malice."

15. Libel and Slander ⇐48(1)

Sometimes position alone can make one a public figure, but being an executive within a prominent and influential company does not by itself make one a public figure for purposes of defamation suit.

Appeal from the United States District Court for the District of Columbia. (D.C. Civil Action No. 76–1810).

Lowell D. Turnbull, with whom Richard P. Shlakman, Washington, D. C., was on brief, for appellant.

Henry J. Formon, Jr., New York City, for appellee.

Before TAMM and MacKINNON, Circuit Judges, and HAROLD H. GREENE,* United States District Judge for the District of Columbia.

Opinion for the court filed by Circuit Judge TAMM.

TAMM, Circuit Judge:

In this action we must determine when an individual not a public official has left the relatively safe harbor that the law of defamation provides for private persons and has become a public figure within the meaning of the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). After examining affidavits and exhibits submitted by the parties, Judge Howard F. Corcoran of the United States District Court for the District of Columbia concluded that the plaintiff was a limited public figure under *Gertz*. Because the plaintiff admitted that he could not prove "actual malice" on the part of the defendant, which *Gertz* requires public figures to do, Judge Corcoran entered summary judgment for the defendant. Having reviewed the facts in light of the criteria that govern the status of a defamation plaintiff, we agree with Judge Corcoran's decision and affirm.

* Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

I.

Although the parties in this case differ over how to classify the plaintiff, they fundamentally agree on the underlying facts. Eric Waldbaum, the plaintiff, became president and chief executive officer of Greenbelt Consumer Services, Inc. (Greenbelt) in January of 1971. Greenbelt is a diversified consumer cooperative that, during Waldbaum's tenure, ranked as the second largest cooperative in the country.[1]

While serving as Greenbelt's president, Waldbaum played an active role not only in the management of the cooperative but also in setting policies and standards within the supermarket industry. He battled the traditional practices in the industry and fought particularly hard for the introduction of unit pricing and open dating in supermarkets.[2] He held several meetings, to which press and public were invited, on topics varying from supermarket practices to energy legislation and fuel allocation. He pursued a vigorous policy of consolidating Greenbelt's operations to eliminate unprofitable outlets. These actions generated considerable comment on both Greenbelt and Waldbaum in trade journals and general-interest publications.[3]

On March 16, 1976, Greenbelt's board of directors dismissed Waldbaum as the cooperative's president and chief executive officer. *Supermarket News*, a trade publication owned by the defendant, Fairchild Publications, Inc. (Fairchild),[4] ran an item on Waldbaum's ouster on page 35 of its March 22 issue. The five-sentence article stated at one point that Greenbelt "has been losing money the last year and retrenching." Supplemental Appendix (Supp. App.) at 328.[5]

On September 27, 1976, Waldbaum filed a libel action in the district court based upon this comment in the article.[6] He contended that in fact Greenbelt had not been losing money or retrenching and that this allegedly false report damaged his reputation as a businessman. Waldbaum sought actual and exemplary damages totalling $75,000.

After discovery, Fairchild moved for summary judgment. It argued that Waldbaum was a public figure and, because he had admitted the absence of "actual malice," he could not recover damages for defamation. Waldbaum countered that he was

1. When Waldbaum left as Greenbelt's president, the cooperative had approximately 38,500 members. The company owns retail supermarkets (Co-op Supermarkets), furniture and gift outlets (SCAN stores), and automobile service stations (Exval stations).

2. Waldbaum had been a leading advocate of unit pricing when he was a vice-president of Hill's Supermarkets in New York. *See* Supplemental Appendix (Supp.App.) at 320.

3. The defendant, Fairchild Publications, Inc., appended 31 newspaper clippings from its trade publication, *Supermarket News*, and from *The Washington Post* to its motion for summary judgment. Of these, 22 appeared while Waldbaum was president (or in conjunction with his hiring and termination); 10 of them mentioned Waldbaum by name in connection with his becoming and leaving as president, Greenbelt's financial status, the cooperative's criticisms of competitors in advertising, and its effort to enter into oil exploration. *See* Appendix (App.) at 83–126; Supp.App. at 316–31.

4. Capital Cities Media, Inc., a wholly owned subsidiary of Capital Cities Communications, Inc., succeeded Fairchild by merger in 1976. For convenience, however, we shall refer to the defendant as "Fairchild."

5. The story in its entirety read:

GREENBELT OUSTS ERIC WALDBAUM

WASHINGTON (FNS)—Eric Waldbaum has been replaced as president of Greenbelt Consumer Services.

Rowland Burnstan will serve as acting chief executive office[r] until a new president is named. Burnstan, an independent management consultant and economist, has worked for various Government agencies and businesses.

Greenbelt said part of his interim job will be to locate a new president for the co-op, which has been losing money the past year and retrenching.

Waldbaum had served as president since 1971. His plans are not known.

Supp.App. at 328.

6. Waldbaum originally included Greenbelt and one of its directors, Bruce D. Patner, as defendants. At Waldbaum's request, however, the district court dismissed with prejudice the counts against Greenbelt and Patner on March 28, 1977.

not a public figure and thus would have to prove only negligence on the part of Fairchild in researching and publishing the article. On February 15, 1979, Judge Corcoran granted Fairchild's motion. He concluded that although Waldbaum could not be considered a public figure for all purposes, he was a public figure for the limited range of issues concerning "Greenbelt's unique position within the supermarket industry and Waldbaum's efforts to advance that position." *Waldbaum v. Greenbelt Consumer Services, Inc.*, Civ.No. 76–1810, at 15 (D.D.C. Feb. 15, 1979) (memorandum and order granting Fairchild's motion for summary judgment), *reprinted in* Appendix (App.) at 150, 164. Waldbaum now appeals.[7]

II.

In the landmark case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court held that certain rules of law historically applied in defamation cases impinge upon the first amendment's guarantee of freedom of the press. Specifically, the Court announced that a public official may not recover in a defamation action absent a showing "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80, 84 S.Ct. at 726. Subsequently, the Court applied the same standard to public figures. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

These rulings balance the competing interests of the public, the press, and the individual. From its earliest days, the law of defamation made the individual's interest in his reputation supreme. Beginning with *New York Times*, however, the Court recognized the hard reality that society must afford a certain amount of "strategic protection" to defamatory statements to avoid chilling the dissemination of truth and opinions. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342, 94 S.Ct. at 3008. Thus, these decisions do not insulate the defamer because of the value of his message as such. Rather, they give the media "breathing space" to ensure "that debate on public issues [is] uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. at 270, 272, 84 S.Ct. at 721, while accommodating the conflicting need of the individual to redress wrongful injury to his reputation. *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 2687, 61 L.Ed.2d 411 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. at 342, 94 S.Ct. at 3008.

In *Gertz*, decided in 1974, the Court focused on the public or private status of the plaintiff in determining how to protect simultaneously individual reputation, freedom of the press, and public debate. It found that a private individual has little means of redressing a defamatory statement except by legal action. *See id.* at 344, 94 S.Ct. at 3009. It therefore held that a state may allow a private person to recover for defamation under any standard, as long as that standard does not impose liability without fault. *Id.* at 347, 94 S.Ct. at 3010.

This balance shifts, however, when one turns from private persons to public officials or figures. First, those who enter the public spotlight have greater access to the media to correct misstatements about them, as shown by their preexisting media exposure. *Id.* at 344, 94 S.Ct. at 3009.[8] More important, in "assum[ing] special prominence in the resolution of public questions," *id.* at 351, 94 S.Ct. at 3013, public figures

7. Fairchild concedes that Judge Corcoran was correct in ruling that Waldbaum was not a public figure for all purposes. It argues before us that Waldbaum was a public figure for limited purposes that include the statements made in the March 22, 1976, article.

8. Having access to the press does not always alleviate the injury caused by defamation. The Court in *Gertz* stated:

> Of course, an opportunity for rebuttal seldom suffices to undo the harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

418 U.S. at 344 n.9, 94 S.Ct. at 3009 n.9.

"invite attention and comment," *id.* at 345, 94 S.Ct. at 3009. They thus accept the risk that the press, in fulfilling its role of reporting, analyzing, and commenting on well-known persons and public controversies, will focus on them and, perhaps, cast them in an unfavorable light. *See id.* at 344–45, 94 S.Ct. at 3009.[9] Although these generalities may not fit every situation exactly, they draw a relatively clear line for the press to follow. *See id.* at 345, 94 S.Ct. at 3009.[10]

In trying to define who is a public figure, the Court in *Gertz* created two subclassifications, persons who are public figures for all purposes and those who are public figures for particular public controversies. An individual may have attained a position "of such persuasive power and influence," *id.*, and of "such pervasive fame or notoriety," *id.* at 351, 94 S.Ct. at 3013, that he has become a public figure in all situations. This test is a strict one. The Court stated flatly that "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* at 352, 94 S.Ct. at 3013. *Accord, Wolston v. Reader's Digest Association*, 443 U.S. 157, 165, 99 S.Ct. 2701, 2706, 61 L.Ed.2d 450 (1979).

The Court in *Gertz* acknowledged freely that under this definition the general public figure is a rare creature. More common are persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345, 94 S.Ct. at 3009. Put slightly differently, this limited-purpose public figure is "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues." *Id.* at 351, 94 S.Ct. at 3013. The relevant examination turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352, 94 S.Ct. at 3013.

9. The Court in *Gertz* stated that, at least in theory, a person can become a public figure involuntarily. Such instances, the Court nevertheless noted, are rare. *See id.* at 345, 94 S.Ct. at 3009. For a discussion of involuntary public figures, see note 18 *infra*.

10. For a discussion of the importance of how clearly this line is drawn, see pp. 1292–1293 *infra*.

III.

[1] Unfortunately, the Supreme Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*. The very purpose of the rule announced in *New York Times*, however, requires courts to articulate clear standards that can guide both the press and the public. From analyzing *Gertz* and more recent defamation cases, we believe that a person can be a general public figure only if he is a "celebrity"—his name a "household word"—whose ideas and actions the public in fact follows with great interest. We also conclude that a person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants. In undertaking this examination, a court must look through the eyes of a reasonable person at the facts taken as a whole.

A.

The Supreme Court acknowledged in *Gertz* that the peculiar circumstances of each case affect the balance between freedom of the press and an individual's interest in his reputation. *See* 418 U.S. at 343, 94 S.Ct. at 3008. The Justices nevertheless eschewed analyzing a person's status as a public figure case by case: a purely ad hoc approach, though perhaps more accurate in its final outcome, "would lead to unpredictable results and uncertain expectations . . . ." *Id.* Instead, courts should formulate "broad rules of general application" that accommodate the competing interests

of press and personal reputation. *Id.* at 343–44, 94 S.Ct. at 3008–3009. Of course, litmus tests that define what is and is not protected and that the press, the public, and the courts could apply with perfect consistency and accuracy would reduce the need for the "breathing space" that *New York Times* creates. Unfortunately, we do not have such tests. Until we find them, we must search for more precise articulations of all aspects of the *New York Times* rules, realizing that the more certain our determinations become the less need there is to extend first amendment safeguards to matters that do not merit those safeguards on their own account.

Clear guidelines are important, first, for the press. As noted above, the entire scheme of "strategic protection" for certain defamatory statements rests not on the inherent value of those statements but instead on the need to avoid chilling the dissemination of information and ideas that are constitutionally protected for their own sake. *See* p. 1291 *supra*. Because the outcome of future litigation is never certain, members of the press might choose to err on the side of suppression when trying to predict how a court would analyze a news story's first amendment status. Questionable areas thus receive prophylactic protection to ensure that the press will not refrain from publishing material that has value under the first amendment due to its own content.

Precision also is important to members of the public generally, any one of whom might become the subject of a press defamation. Our society always has encouraged citizen involvement in public affairs. The fear of no redress for injury to reputation may deter an individual from engaging in some course of conduct that a court later might find to have altered his status.[11] Similarly, a person desiring to voice his views on public issues may not wish to have some aspects of his private life exposed and therefore may refrain from entering the public arena. To guard against these possibilities, society must provide the individual with clear rules that govern the potential consequences of his participation in public life. Clarity allows him to calculate correctly, and not overestimate or underestimate, the effect that undertaking some activity will have on the legal recourse available to him should he suffer injury due to defamation by the press.

B.

[2] Given these considerations, a court [12] analyzing whether a given plaintiff is a public figure must look at the facts, taken as a whole, through the eyes of a reasonable person. This objective approach should enable both the press and the individual in question to assess the individual's status, in advance, against the same yardstick. Focusing on what a reporter, editor, or publisher actually knew or believed could introduce subjective elements that are difficult to prove and even more difficult to predict. Such a perspective would give the individual little opportunity to alter his conduct or lifestyle to preserve his anonymity. Similarly, looking only to what the individual thought would charge the press with discovering and evaluating the inner beliefs and peculiarities of particular individuals

11. As the Supreme Court observed in *Gertz*, "We [should] not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." 418 U.S. at 352, 94 S.Ct. at 3013. Democracies should avoid deterring citizen involvement in public affairs. *Gertz* implicitly furthers this policy by making public figures only those who are extraordinarily prominent and pervasively involved in public matters or who, in particular instances, have become integrally involved in the disposition of particular public controversies—and then only for purposes related to those controversies. *See generally* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S.Cal.L.Rev. 1131, 1199–200 (1976); 48 Temp.L.Q. 450, 460 (1975).

12. Whether the plaintiff is a public figure is a question of law for the court to resolve. *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427, 429 (D.C.Cir.1978), *rev'd on other grounds*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979). *See Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S.Ct. 669, 677, 15 L.Ed.2d 597 (1966).

and thus would deprive the media of the very "breathing space" that *New York Times* sought to create and protect. Resolving these questions based upon what a reasonable person, looking at the entire situation, would conclude allows the press and the individual to evaluate public-figure status against a single, discoverable norm and from there to act as they see fit, understanding the consequences of their conduct under *New York Times*.[13]

C.

With this background, we turn to the standards themselves for determining when a person is a public figure. A court first must ask whether the plaintiff is a public figure for all purposes. *Gertz*, as noted above, held that a plaintiff could be found to be a general public figure only after a clear showing "of general fame or notoriety in the community, and pervasive involvement in the affairs of society . . . ." 418 U.S. at 352, 94 S.Ct. at 3013. He must have assumed a "role of especial prominence in the affairs of society. . . ." *Time, Inc. v. Firestone*, 424 U.S. 448, 453, 96 S.Ct. 958, 965, 47 L.Ed.2d 154 (1976). *Accord, Wolston v. Reader's Digest Association*, 443 U.S. 157, 165, 99 S.Ct. 2701, 2706, 61 L.Ed.2d 450 (1979). In other words, a general public figure is a well-known "celebrity," his name a "household word."[14] The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.[15]

As a general rule, a person who meets this test has access to the media if defamed. The public's proven preoccupation with him indicates that the media would cover such an individual's response to statements he believes are inaccurate or unsupported.[16] In general, too, the person has assumed the risk that public exposure might lead to misstatements about him. Famous persons may not have submitted voluntarily to a loss of reputation as such. Nevertheless, their renouncement of anonymity or tolerance of publicity unavoidably carries with it the possibility that the press, in fulfilling its role of reporting and critiquing matters of public concern, may investigate their talents, character, and motives. The media serve as a check on the power of the famous, and that check must be strongest when the subject's influence is strongest.[17] Fame often brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast

13. *Cf.* Note, *supra* note 11, at 1204–05 (plaintiff is a public figure when he *appears* prominent). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. at 3010 ("media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk").

14. *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 Tex.L.Rev. 199, 222–23 (1976); Note, *supra* note 11, at 1209.

15. In many instances, of course, the public may accord a person a degree of respect that a reasonable person—or judge—might believe is undeserved. This assessment, however, is not material to the issue before the court. Instead, the proper question is whether a reasonable person would conclude that, in fact, the public pays him heed.

In this vein, we note that many well-known athletes, entertainers, and other personages endorse commercial products, publicly support political candidates, or take open stands on public issues. This phenomenon, regardless of whether it is justified, indicates that famous persons may be able to transfer their recognition and influence from one field to another. At the very least, businessmen and politicians are willing to stake substantial funds on the effectiveness of this form of advertising. A person's power to capitalize on his general fame by lending his name to products, candidates, and causes indicates the broad influence he has. The ability to affect a variety of areas makes close scrutiny in the press especially appropriate, in particular to educate the public on the famous person's actual expertise with reference to whom or what he is promoting.

16. Note, *supra* note 11, at 1210.

17. *See* Robertson, *supra* note 14, at 225–26.

into it, he must take the bad with the good.[18]

[3–7] In determining whether a plaintiff has achieved the degree of notoriety and influence necessary to become a public figure in all contexts, a court may look to several factors.[19] The judge can examine statistical surveys, if presented, that concern the plaintiff's name recognition.[20] Previous coverage of the plaintiff in the press also is relevant. The judge can check whether others in fact alter or reevaluate their conduct or ideas in light of the plaintiff's actions. He also can see if the plaintiff has shunned the attention that the public has given him and determine if those efforts have been successful.[21] At all times, the judge should keep in mind the voluntariness of the plaintiff's prominence and the availability of self-help through press coverage of responses—in other words, whether the plaintiff has assumed the risk of reputational injury and whether he has access to the media. No one parameter is dispositive; the decision still involves an element of judgment. Nevertheless, the weighing of these and other relevant factors can lead to a more accurate—and a more predictable—assessment of a person's overall fame and notoriety in the community.[22]

18. In rare instances, a celebrity may decide to abandon his prominent position in society to return to anonymity, but persistent press attention, most likely fueled by continuing public interest, may thwart his quest for privacy. In such a case, he still may be a public figure. Although he no longer is accepting the risk of defamation voluntarily, he remains able to reply to attacks through the press, which is continuing to cover him. Because he irretrievably has lost his anonymity, potential damage to reputation poses a small incremental danger. *See* Note, *supra* note 11, at 1210, 1219. Moreover, his power and influence, due to his prominence, may continue despite his efforts to renounce publicity. Thus, his actions still, as *Gertz* put it, "invite attention and comment." 418 U.S. at 345, 94 S.Ct. at 3009. Media scrutiny remains appropriate and necessary to balance his undesired but nonetheless real impact on the affairs of society. *Gertz* itself acknowledged that such a situation might arise. *See id.* (recognizing the existence, at least in theory, of "involuntary public figures").

19. The court must examine these factors as they existed before the defamation was published. Otherwise, the press could convert a private individual into a general public figure simply by publicizing the defamation itself and creating a controversy surrounding it and, perhaps, litigation arising out of it. *See Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411 (1979) ("those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure"). This perspective also ensures that the press and the individual can analyze the latter's status before the defamation, thereby enabling them to take steps they deem appropriate to investigate further (in the case of the media) or to renounce public involvement (in the case of the individual). *See* pp. 1292–1293 *supra*.

20. *E. g.* Robertson, *supra* note 14, at 224. We do not believe that the Supreme Court, in employing the phrase "*general* fame or notoriety" in *Gertz*, 418 U.S. at 352, 94 S.Ct. at 3013 (emphasis added), necessarily meant that a majority or more of the public must know of the plaintiff. Rather, we conclude that "general" fame means being known to a large percentage of the well-informed citizenry.

In *Gertz* the Court remarked, "None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population." *Id.* We do not believe that this passing observation was intended to encourage polling jurors or veniremen to gauge a plaintiff's general fame or anonymity. Because of its small size and the non-random elements that go into its selection, we doubt that in most cases a jury would be a statistically reliable sample representative of the general population. The question is whether such a poll would be relevant—*i. e.*, probative—evidence admissible on this issue.

21. Simply announcing that one no longer desires press coverage and then refusing to grant interviews may not be enough. A person who takes these steps may be continuing in a career that captivates the public, be it in politics, business, the arts, sports, or entertainment. Because public interest in him persists and because he has chosen to occupy a position that places him in the spotlight and thereby may make him influential, he retains his access to the media and has invited continued attention and comment. *See Chuy v. Philadelphia Eagles Football Club*, 431 F.Supp. 254, 267 (E.D. Pa.1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). *See also* note 18 *supra* (involuntary public figures); note 36 *infra* (position conferring public-figure status).

22. In examining the status of the plaintiff in *Gertz*, the Court noted that he had "no general fame and notoriety *in the community*" and that he was not generally known to "the *local*

D.

Few people, of course, attain the general notoriety that would make them public figures for all purposes. Nevertheless, many persons "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345, 94 S.Ct. at 3009. Thus, even if a court finds that a plaintiff is not a general public figure, it still must examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352, 94 S.Ct. at 3013.

[8, 9] As the first step in its inquiry, the court must isolate the public controversy. A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. The Supreme Court has made clear that essentially private concerns or disagreements do not become public controversies simply because they attract attention. *Time, Inc. v. Firestone*, 424 U.S. 448, 454–55, 96 S.Ct. 958, 965–66, 47 L.Ed.2d 154 (1976).[23] Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.

[10] Courts must exercise care in deciding what is a public controversy. Newsworthiness alone will not suffice, for the alleged defamation itself indicates that someone in the press believed the matter deserved media coverage.[24] Moreover, a

population." 418 U.S. at 351–52, 94 S.Ct. at 3012–3013 (emphasis added). We therefore conclude that nationwide fame is not required. Rather, the question is whether the individual had achieved the necessary degree of notoriety where he was defamed—*i. e.*, where the defamation was published.

Dissemination to a wide audience creates special problems. For example, an individual may be well known in a small community, but the publication covers a larger area. In such a situation, it might be appropriate to treat the plaintiff as a public figure for the segment of the audience to which he is well known and as a private individual for the rest. In any event, the defamation's audience may be relevant in assessing damages, for injury may be less if the audience does not know of the victim and will have no occasion to interact with him in the future.

23. *Firestone* involved a national newsmagazine's allegedly defamatory report of divorce proceedings between the heir to the Firestone tire fortune and his socially prominent wife. The Court first rejected the contention that Mrs. Firestone was a general public figure. 424 U.S. at 453, 96 S.Ct. at 964. It then stated:

> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did [Mrs. Firestone] freely choose to publicize issues as to the propriety of her married life.

Id. at 454, 96 S.Ct. at 965. We read these remarks as meaning that matters essentially of a private nature do not become public controversies solely because members of the public find them appealing to their "morbid or prurient curiosity." Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va. L.Rev. 1349, 1446 (1975). Disputes of this nature, in addition, generally do not have appreciable consequences for nonparticipants. *See* pp. 1296–1298, *infra*.

Likewise, publicity surrounding litigation does not by itself elevate the parties to public figures, even if they could anticipate the publicity, unless they are using the court as a forum for espousing their views in other controversies. *Wolston v. Reader's Digest Association*, 443 U.S. 157, 167–69, 99 S.Ct. 2701, 2707–08, 61 L.Ed.2d 450 (1979); *Time, Inc. v. Firestone*, 424 U.S. at 455–57, 96 S.Ct. at 965–66. Nevertheless, litigation itself can become controversial. For example, the public might debate the prosecutor's use of his discretion in bringing particular criminal charges or the judge's conduct of the proceedings. In these instances, however, the controversy is not the matter being litigated. Parties to the original court action could become embroiled in the public controversy so much that they become public figures for that controversy; it is also possible that they will take no part in that debate. Refusing to make participation in publicized litigation a sufficient condition for becoming a public figure has salutary policy effects, for it avoids deterring either resort to the courts to settle disputes when one believes he has been wronged or active defense when he believes he has been accused of some civil or criminal misconduct unjustifiably.

24. Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup.Ct.Rev. 267, 284. *See Wolston v. Reader's Digest Association*, 443 U.S. 157, 167, 99 S.Ct. 2701, 2708, 61 L.Ed.2d 450 (1979).

court may not question the legitimacy of the public's concern; such an approach would turn courts into censors of " 'what information is relevant to self-government.' " *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346, 94 S.Ct. at 3010 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79, 91 S.Ct. 1811, 1837, 29 L.Ed.2d 296 (1971) (Marshall, J., dissenting)). *Accord, Time, Inc. v. Firestone*, 424 U.S. 448, 454, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976).[25] A vital part of open public debate is deciding what should be debated. No arm of the government, including the judiciary, should be able to set society's agenda.[26] Thus, courts must look to what already were disputes. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411 (1979).

To determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question.[27] A general concern or interest will not suffice. *Id.* The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.[28] It should ask whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution.[29] If the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.

[11] Once the court has defined the controversy, it must analyze the plaintiff's role in it. Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiffs must have "thrust themselves to the forefront" of the controversies so as to become factors in their ultimate resolution. 418 U.S. at 345, 94 S.Ct. at 3009. They must have achieved a "special prominence" in the debate. *Id.* at 351, 94 S.Ct. at 3012. The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.[30] In undertaking this analysis, a court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements. *See* pp.

25. As the Supreme Court wrote 40 years ago, "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940). The controversy need not concern political matters. In a case that involved a defamation action brought by a professional athlete, one court observed:

> We obviously cannot say that the public's interest in professional football is important to the commonweal or to the operation of a democratic society in the same sense as are political and ideological matters. However, the fabric of our society is rich and variegated. . . . [I]nterest in professional football must be deemed an important incident among many incidents, of a society founded upon a high regard for free expression.

Chuy v. Philadelphia Eagles Football Club, 431 F.Supp. 254, 267 (E.D.Pa.1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). *Cf.* Ingber, *Defamation: A Contest Between Reason and Decency*, 65 Va.L.Rev. 785, 841–42 (1979) (fearing that *Gertz* leaves little room for debate of matters other than "mainstream issues").

26. Ingber, *supra* note 25, at 836–42.

27. We do not believe it necessary to state that a court should define the controversy "narrowly" or "broadly." A narrow controversy will have fewer participants overall and thus fewer who meet the required level of involvement. A broad controversy will have more participants, but few can have the necessary impact. Indeed, a narrow controversy may be a phase of another, broader one, and a person playing a major role in the "subcontroversy" may have little influence on the larger questions or on other subcontroversies. In such an instance, the plaintiff would be a public figure if the defamation pertains to the subcontroversy in which he is involved but would remain a private person for the overall controversy and its other phases.

28. The public need not be the immediate decisionmaker, for in a democracy the people should be well informed on issues to be decided, at least directly, by their representatives. *See also* note 25 *supra*.

29. Note, *supra* note 11, at 1215.

30. *Id.* at 1210–11.

1295–1296 *supra*.[31] *See generally Rosanova v. Playboy Enterprises, Inc.*, 411 F.Supp. 440, 445 (S.D.Ga.1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).[32]

[12] Finally, the alleged defamation must have been germane to the plaintiff's participation in the controversy. His talents, education, experience, and motives could have been relevant to the public's decision whether to listen to him.[33] Misstatements wholly unrelated to the controversy, however, do not receive the *New York Times* protection.

[13] Those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye. Occasionally, someone is caught up in the controversy involuntarily and, against his will, assumes a prominent position in its outcome. Unless he rejects any role in the debate, he too has "invited comment" relating to the issue at hand. In any event, media coverage of the controversy can be expected to include reports on a major participant's reply to misstatements made about him.[34] In short, the court must ask whether a reasonable person would have concluded that this individual would play or was seeking to play a major role in determining the outcome of the controversy and whether the alleged defamation related to that controversy.

IV.

[14] With the foregoing analysis in mind, we now must determine whether Judge Corcoran correctly concluded that Waldbaum was a public figure. As noted above, Fairchild concedes that he was not a general-purpose public figure, and Waldbaum concedes that he cannot prove "actual malice" within the meaning of *New York Times*. Thus, if we agree with Judge Corcoran that Waldbaum was a limited-purpose public figure and that Fairchild's alleged defamation fell within the relevant range of issues, we must affirm the grant of summary judgment. After examining the facts, we do agree and, therefore, affirm.

Evidence submitted with Fairchild's motion for summary judgment indicates clear-

31. Responding to press inquiries or attempting to reply to comments on oneself through the media does not necessarily mean that a person is attempting to play a significant role in resolving a controversy. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454 n.3, 96 S.Ct. 958, 965 n.3, 47 L.Ed.2d 154 (1976).

32. At first glance, it may seem anomalous that a person who falls slightly short of the general fame required to be a general public figure but who is not involved in any particular public controversy is a private person, while a citizen who becomes influential in a single issue is a limited-purpose public figure. We believe that this result is correct and consistent with the principles underlying *New York Times* and *Gertz*. The limited public figure by definition is playing or attempting to play a major role in influencing one aspect of society. A well-known celebrity becomes a public figure because the press must be entitled to presume that persons to whom the general public pays close attention have substantial influence over a multitude of areas, *see* note 15 *supra*, and thus may play some role in their outcome. The person who lacks the level of recognition to be classified as a general public figure no longer can be assumed to have pervasive influence in society. Thus, we must return to a more particularized inquiry into the circumstances of his case. If in fact he is shaping or is trying to shape the outcome of a specific public controversy, he is a public figure for that controversy; if not, he remains a private individual.

33. *See* Restatement (Second) of Torts § 580A (1977) (public figure's "conduct, fitness or role"). In *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), decided shortly after *New York Times*, the Supreme Court remarked:

> The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Id. at 77, 85 S.Ct. at 217, *quoted in part in Gertz v. Robert Welch, Inc.*, 418 U.S. at 344–45, 94 S.Ct. at 3009.

34. *See* Note, *supra* note 11, at 1219. Correcting inaccurate media reports about oneself does not by itself prove access or public-figure status. *See* note 31 *supra*.

ly that Greenbelt was an innovative company often the subject of news reports. As the second largest cooperative in the nation it attracted attention, and its pathbreaking marketing policies—*e. g.*, unit pricing, open dating, and highly competitive advertising—became the subject of public debate within the supermarket industry and beyond, debate that would affect consumers and retailers in the Washington area and, perhaps, elsewhere. We therefore believe that, before *Supermarket News* published its story about Waldbaum's dismissal, public controversies existed over the viability of cooperatives as a form of commercial enterprise and over the wisdom of various policies that Greenbelt in particular was pioneering.

With some admittedly overlapping controversies identified, we now must examine Waldbaum's role in them. Waldbaum was known as a leading advocate of certain precedent-breaking policies before coming to Greenbelt. *See, e. g., Eric Waldbaum New Head at Greenbelt*, Supermarket News, Jan. 4, 1971, at 4, col. 1, *reprinted in* Supp.App. at 320. He has admitted that as president and chief executive officer, he pursued these policies and other consumer-oriented activities. App. at 58–59 (deposition of Waldbaum). He felt that educating the community at large was one function of a cooperative such as Greenbelt. *Id.* at 56.[35] Greenbelt published its own monthly newspaper, *Co-op Consumer*, and Waldbaum "insisted" that he, as president, approve all information placed in it for the shareholders. *Id.* at 48.

[15] Being an executive within a prominent and influential company does not by itself make one a public figure. In many cases, a corporate official is simply a conduit for announcing and administering company policies made by others. Similarly, many executives who do make corporate policy do not thereby take stands in public controversies.[36] These descriptions, how-

35. We quote from Waldbaum's deposition:

> I spent a great deal of my time at the Cooperative in dealing with the membership, its Congress, its area councils, on questions of how they could make input into the Cooperative consistent with managing the business in a way which would inure to the benefit of all its shareholders. *I went out of my way to solicit and promote involvement of its membership.* I don't know how you weigh what a statement means, that it is the most important aspect.

App. at 55 (emphasis added).

> Well, in a typical organization that is involved solely with—its shareholders are concerned only with the performance of the corporation for its shareholder interests, the consumer cooperative, *and particularly Greenbelt, has considered itself as having an obligation to education in the community at large*; witness the involvements of its member relations department. So that much of my time was spent—much of the time of members of my staff would be spent—on things that might not inure to the earnings or to shareholder equity but were done to teach and educate people about consumers and cooperatives and their rights—a very, very different kind of approach—so that *I really had two full time jobs, not only managing a corporation in all of its aspects but also this tremendous social outreach.*

Id. at 56–57 (emphasis added).

> . . . I was hired as the chief executive officer of the Coop to do a job that included a broad scope of things. That is why I couldn't answer your first question, what does it mean to—what do you do when you are the president? You do everything. You are responsible for the day-to-day management of a company. *You are responsible for its public image.* To me, *I felt as strongly about the consumer aspects of Greenbelt, and I think that the Coop's livelihood depended on the promulgation of the consumer aspects*, which is why I spent so much time on it.
>
> I think that they went hand in hand. I don't know what commercial aspects might be, but I considered myself performing all of the duties for which I was hired, capable of performing them and capable of serving as a chief executive officer *in today's climate when questions about the social commitment of corporations are prime issues and prime concerns*, and not just looking at questions of the balance sheet.

Id. at 58 (emphasis added).

36. Sometimes position alone can make one a public figure. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.Ed.2d 1094 (1967) (plurality opinion of Harlan, J.); *Chuy v. Philadelphia Eagles Football Club*, 431 F.Supp. 254, 267 (E.D.Pa.1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979) (en banc). The position itself may be so prominent that any occupant unavoidably enters the limelight and thus becomes generally known in the community—a general public figure. Similarly, the

ever, do not fit Eric Waldbaum at Greenbelt. His own deposition indicates that he was the mover and shaper of many of the cooperative's controversial actions. He made it a leader in unit pricing and open dating. He supervised, or at least approved, the consumer-oriented views that appeared in *Co-op Consumer*. In short, as Judge Corcoran so aptly put it, "he did not become merely a boardroom president whose vision was limited to the balance sheet. He became an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing." *Waldbaum v. Greenbelt Consumer Services, Inc.*, Civ. No. 76–1810, at 12 (D.D.C. Feb. 15, 1979) (memorandum and order granting Fairchild's motion for summary judgment), *reprinted in* App. at 150, 161. Given Greenbelt's prominence, his activities certainly extended beyond those of a profit-maximizing manager of a single firm.

Thus, it would appear to a reasonable person that Waldbaum had thrust himself into the public controversies concerning unit pricing, open dating, the cooperative form of business, and other issues. He did so in an attempt to influence the policies of firms in the supermarket industry and merchandising generally. In the process, he assumed the risk that comment in the press might turn to the successfulness or profitability of enterprises under his management, for the commercial success or failure of the actions he was advocating certainly is strong evidence in the public debate over whether other firms should adopt them. Furthermore, Waldbaum had prior dealings with the media. *See* App. at 44–46, 62–67 (deposition of Waldbaum) (descriptions of dealings with the press). Although he personally was not frequently the subject of articles, he was somewhat familiar with press operations and had held press conferences to discuss Greenbelt's policies and operations. Looking at the overall picture, we conclude that Waldbaum was a public figure for the limited purpose of comment on Greenbelt's—and his own—innovation policies and that the article giving rise to this action was within the protected sphere of reporting. Because Fairchild concededly did not act with "actual malice," it was entitled to summary judgment.

V.

Not everyone who participates in activities that affect the public becomes a public figure. Nevertheless, when one assumes a position of great influence within a specific area and uses that influence to advocate and practice controversial policies that substantially affect others, he becomes a public figure for that debate. Waldbaum was such a person, and comment on his termination as president and chief executive officer of Greenbelt falls within the range of reports protected under *New York Times*. Therefore, the judgment of the district court is

Affirmed.

UNITED STATES of America

v.

Beachey L. WRIGHT, Appellant.

No. 79–1124.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 14, 1980.

Decided April 22, 1980.

Defendant was convicted before the United States District Court for the District

responsibilities of a position may include decisionmaking that affects significantly one or more public controversies, in which case the occupant becomes a limited public figure for those controversies. Courts should avoid generalizing, however, for labelling certain positions as always being public is tantamount to making subject-matter classifications, forbidden under the case law. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 456, 96 S.Ct. 958, 966, 47 L.Ed.2d 154 (1976). Courts therefore must undertake the analysis outlined above in each case.

EXHIBIT "12"

appropriate administrative costs incurred in the prosecution of this matter.

1

136 N.J. 515

|515In the Matter of Bruce A. THOMPSON, an Attorney at Law.

Supreme Court of New Jersey.

June 9, 1994.

ORDER

BRUCE A. THOMPSON of **FAIR HAVEN**, who was admitted to the bar of this State in 1970, having tendered his consent to disbarment as an attorney at law of the State of New Jersey, and good cause appearing;

It is ORDERED that **BRUCE A. THOMPSON** is disbarred by consent, effective immediately; and it is further

ORDERED that respondent's name be stricken from the roll of attorneys and that he be permanently restrained and enjoined from practicing law; and it is further

ORDERED that all funds, if any, currently existing in any New Jersey financial institution maintained by **BRUCE A. THOMPSON**, pursuant to *Rule* 1:21-6, which were restrained from disbursement|516 by Order of this Court dated March 30, 1994, shall be transferred by the financial institution to the Clerk of the Superior Court, who is directed to deposit the funds in the Superior Court Trust Fund, pending further Order of this Court; and it is further

ORDERED that respondent comply with Administrative Guideline No. 23 of the Office of Attorney Ethics dealing with disbarred attorneys.

2

136 N.J. 516

|516Charles C. WARD and Mary B. Ward, Plaintiffs-Respondents,

v.

Johanan ZELIKOVSKY, Defendant-Appellant.

Supreme Court of New Jersey.

Argued Jan. 5, 1994.

Decided June 20, 1994.

Suit was filed against neighbor alleging slander as result of neighbor's allegations at condominium association meeting that plaintiff was "bitch" and that plaintiffs hated or did not like Jews and seeking special, compensatory and punitive damages. The Superior Court, Law Division, Atlantic County, entered judgment on jury verdict in favor of plaintiffs for special, general, and punitive damages and denied defendant's motion for new trial. Defendant appealed. The Superior Court, Appellate Division, Antell, J., 263 N.J.Super. 497, 623 A.2d 285, affirmed. Defendant appealed. The Supreme Court, Garibaldi, J., held that: (1) defendant's characterization of plaintiff as "bitch," although extremely offensive, was simply personal invective and was not actionable as defamation; (2) defendant's statement that plaintiffs hated or did not like Jews was nonactionable name-calling; (3) allegations of bigotry were not slander per se and plaintiffs were required to |517prove special damages; and (4) plaintiffs failed to prove special damages so as to be entitled to recover for defamation.

Reversed and remanded.

Stein, J., concurred and filed opinion.

1. Libel and Slander ⇐6(1)

Defamation case concerning verbal dispute between neighbors is considerably different from libel case involving media defendant; jury can generally assume that measure of thought preceded words printed in newspaper or magazine, whereas, in contrast, spoken words often do not evidence that

similar level of deliberation preceded them; distinction is significant because apparent deliberation of speaker or writer will influence how reasonable audience perceives speech. Restatement (Second) of Torts § 568(3).

2. Libel and Slander ⇐1, 19

Law of defamation exists to achieve proper balance between protecting reputation and protecting free speech; threshold inquiry in slander lawsuit is whether language used is reasonably susceptible of defamatory meaning.

3. Libel and Slander ⇐123(2)

Whether meaning of statement is susceptible of defamatory meaning is question of law for court.

4. Libel and Slander ⇐6(1), 19

In determining whether statements are defamatory, Supreme Court must consider content, verifiability, and context of challenged statement. Restatement (Second) of Torts § 559.

5. Libel and Slander ⇐19

Courts begin their review to determine whether statement is susceptible of defamatory meaning by looking to fair and natural meaning which will be given it by reasonable persons of ordinary intelligence.

[518] **6. Libel and Slander ⇐6(1)**

Although perhaps directly injurious to person, name-calling does not have defamatory content such that harm to reputation can be shown. Restatement (Second) of Torts § 566 comment; U.S.C.A. Const.Amend. 1.

7. Constitutional Law ⇐90.1(5)

True statements are absolutely protected under First Amendment. U.S.C.A. Const. Amend. 1.

8. Libel and Slander ⇐6(1)

Factual statements, unlike nonfactual statements, are uniquely capable of objective proof of truth or falsity; opinion statements, in contrast, are generally not capable of proof of truth or falsity because they reflect person's state of mind; hence, opinion statements generally receive substantial protection under law. U.S.C.A. Const.Amend. 1.

9. Libel and Slander ⇐30

Harm from defamatory opinion statement is redressable when statement implies underlying objective facts that are false; only if reasonable fact finder would conclude that statements imply reasonably specific assertions of fact will harm be redressable.

10. Constitutional Law ⇐90.1(5)

Requiring that statement be verifiable to be defamatory insures that defendants are not punished for exercising their First Amendment right to express their thoughts. U.S.C.A. Const.Amend. 1.

11. Libel and Slander ⇐6(1), 30

Unless statement explicitly or impliedly rests on false facts that damage reputation of another, alleged defamatory statement will not be actionable.

[519] **12. Libel and Slander ⇐6(1)**

Only if statement referring to plaintiff as "bitch" suggested specific factual assertions that could be proven true or false could statement qualify as actionable defamation.

13. Libel and Slander ⇐6(1), 54

The higher the fact content of statement, more likely that statement will be actionable as defamatory; however, plaintiff prevails only if underlying or implied facts are untrue.

14. Libel and Slander ⇐6(1)

Loose, figurative or hyperbolic language will be less likely to imply specific facts and, thus, more likely to be deemed nonactionable as rhetorical hyperbole or vigorous epithet.

15. Libel and Slander ⇐19

Courts do not automatically decide defamation case on literal words of challenged statement; rather, courts must consider impression created by words used as well as general tenor of expression, as experienced by reasonable person.

16. Libel and Slander ⇐19

When considering allegedly defamatory statement's fair and actual meaning, courts permit context in which statement appears to inform its determination of whether statement was capable of defamatory meaning.

17. Libel and Slander ⇐19

Listener's reasonable interpretation, which will be based in part on context in which allegedly defamatory statement appears, is proper measure for whether statement is actionable; for example, if statement occurred during argument or is outburst unrelated to general topic of discussion, reasonable listener is less likely to accord to challenged statement its literal meaning. Restatement (Second) of Torts § 566 comment.

[520] 18. Libel and Slander ⇐6(1)

Defendant's description of plaintiff as "bitch" was simply personal invective and was not actionable as defamatory, even though extremely offensive to plaintiff and perhaps understood by those who heard it to express negative opinion of her; term "bitch" in its common, every day use was nonactionable name-calling that was incapable of objective truth or falsity and reasonable listener hearing word would interpret term to indicate merely that speaker disliked plaintiff and was otherwise inarticulate. U.S.C.A. Const.Amend. 1.

19. Libel and Slander ⇐6(1)

Defendant's statement that plaintiffs "hate" or "don't like" Jews was not actionable as slander; defendant made no factual statement and did not appear to rely on factual statements known to audience that would transform claim of anti-Semitism into actionable statement and statement followed classification of plaintiff as "bitch" and was part of unsolicited emotional outburst.

20. Libel and Slander ⇐19

Proper analysis of alleged slanderous statement requires examination of content of defendant's entire statement and context in which it was made.

21. Libel and Slander ⇐6(1)

Not all accusations of bigotry are automatically nondefamatory; instances may arise in which claiming someone is bigot will become more than nonactionable insult.

22. Libel and Slander ⇐6(1)

Whether accusation of bigotry is actionable as slander depends on whether statement appeared to be supported by reasonably specific facts that are capable of objective proof of truth or falsity; statement might explicitly refer to those specific facts or be made in such a manner or under such circumstances as would fairly lead reasonable listener to conclude that he or she had knowledge of specific facts supporting conclusory accusation.

[521] 23. Libel and Slander ⇐6(1)

Claim of bigotry could include claims that selected person had engaged in specific acts such as making racist statements, failing to associate with or to act with courtesy toward people of particular race, denying another employment or advancement because of race or religion, or posting signs that carried racist message; even under those facts, court would need to examine context in which statements were made before determining whether statements could properly form basis for lawsuit for slander and court would also have to find that plaintiff sustained special damages.

24. Libel and Slander ⇐6(1)

Defendant's statement that plaintiffs "hate" or "don't like" Jews did not fall within four traditional categories of slander per se for which plaintiffs were not required to prove special damages.

25. Libel and Slander ⇐6(1)

Although scathing characterizations can be hurtful, law of defamation does not provide redress whenever feelings and sensibilities are offended; rather, recovery for slander exists to redress solely harm to reputation.

26. Libel and Slander ⇐32

To succeed in action for slander, plaintiff must demonstrate actual harm to reputation through production of concrete proof.

27. Libel and Slander ⇐32

Proof that existing relationship has been seriously disrupted or testimony of third parties detailing diminished reputation will be necessary to satisfy requirement that "special damages" exist before jury may award

any other type of damages in action for slander.

See publication Words and Phrases for other judicial constructions and definitions.

28. Libel and Slander ⇐32

"Special damages" necessary in action for slander are defined as harm of material or pecuniary nature.

[522] **29. Libel and Slander ⇐33**

Damages element is waived under four traditional categories of slander per se because damage to reputation is presumed to flow from such statements.

30. Libel and Slander ⇐6(1)

Court would not expand four traditional categories of slander per se to include allegations of bigotry; because goal of defamation law should be to compensate individuals for harm to reputation, trend should be toward elimination not expansion of per se categories.

31. Libel and Slander ⇐32

Requiring proof of "special damages" requires plaintiff to demonstrate harm to reputation from allegedly defamatory statement.

32. Libel and Slander ⇐112(1)

Plaintiffs failed to establish "special damages" as result of defendant's allegations of anti-Semitism at condominium association meeting, and thus, plaintiffs were not entitled to recover for defamation; plaintiffs did not offer sufficient proof that "chill" they felt, feeling of not being wanted at condominium affairs, and alleged decline in one plaintiff's real estate business actually existed and were caused by defendant's statement at condominium board meeting and no witnesses testified to thinking less of plaintiffs because of defendant's statements. Restatement (Second) of Torts § 575 comment.

33. Libel and Slander ⇐32

"Special damages," required for recovery for slander, are defined as loss of something having economic or pecuniary value. Restatement (Second) of Torts § 575 comment.

34. Libel and Slander ⇐32

Lowered social standing in its purely social consequences are not sufficient to support finding of "special damages" for purposes [523] of recovery in defamation action. Restatement (Second) of Torts § 575 comment.

35. Libel and Slander ⇐120(1)

Plaintiffs were not entitled to punitive damages awards in defamation action due to their failure to establish special damages resulting from defendant's allegation that plaintiffs were anti-Semitic.

Gerard W. Quinn, Atlantic City, argued the cause for appellant (Cooper, Perskie, April, Niedelman, Wagenheim & Levenson, attorneys; Mr. Quinn and Russell L. Lichtenstein, on the briefs).

Arthur L. Shanker, Montvale, argued the cause for respondents (Weiner & Shanker, attorneys).

The opinion of the Court was delivered by

GARIBALDI, J.

This appeal concerns whether words spoken between two condominium owners at a board meeting of their condominium association constitute slander, and if so, whether plaintiffs have proven sufficient damages to permit a punitive-damages award.

I

Defendant, Johanan Zelikovsky, and plaintiffs, Mary and Charles Ward, own condominiums in the Ocean Club condominium association, a complex of 725 units. They, together with approximately one hundred other condominium residents, attended a July 30, 1989, Board meeting of the condominium association. During the meeting, Mr. Ward addressed the Board on a topic relating to the business of the condominium. While Mr. Ward was speaking, Mrs. Ward stood to add her comments. Mrs. Ward testified that at that moment Zelikovsky, who was seated a few rows in front of her, "jumped up and said, 'Don't listen to these people. They [524] don't like Jews. She's a bitch. I remember her. She's a bitch.'" Mr. Ward described Zelikovsky's behavior as follows,

> [Zelikovsky] leaped up and turned around and screamed, "I know her. She's a bitch. These people, they hate Jews. These people hate Jews." And he was addressing his remarks to the board, but he was pointing and going on and on and start[ed] flailing his arms again. At that point the chairman or the president of the board, who has a microphone, said, "Sit down, John. Sit down, John."

The security guard standing at the door to the conference room testified that he heard Zelikovsky's comments and became concerned that a fight might ensue. Zelikovsky's comments were wholly unrelated to the subject on which Mr. and Mrs. Ward had been speaking.

The Wards filed suit against Zelikovsky for slandering them at the condominium association meeting and sought special, compensatory and punitive damages. In addition, the lawsuit charged Zelikovsky with assault and battery for an incident that had occurred the prior year. The Wards and friends visiting from Connecticut were going to dinner and a racetrack. While Mrs. Ward and some of the guests were waiting for Mr. Ward to bring his car to the front of the condominium, one of the guests was handing out sheets with his recommended picks for that evening at the racetrack. Zelikovsky testified that he mistook the sheets for advertisements encouraging time-sharing at the condominium, a practice to which he was vehemently opposed. He demanded a copy but the guest stated that the sheets were only for his friends. Mrs. Ward walked over to the two men and then Zelikovsky began yelling at Mrs. Ward and poked or pushed her during the argument. The jury found in favor of Mrs. Ward on her assault and battery claim against Zelikovsky but found no damages. The assault and battery claim is no longer at issue; this appeal solely addresses Zelikovsky's alleged slander.

At trial, Mrs. Ward testified that Zelikovsky's outburst caused her legs to start shaking. She testified that she "sat down; and [ ] was going to cry; and then I thought, 'I'm not going to do this in front of people' because everybody was turning around and was [525]looking at us ... and I was embarrassed—terribly embarrassed." Mr. Ward testified that he felt "upset, frustrated, embarrassed."

After the meeting, people came up to Mrs. Ward and commented on the incident. Mrs. Ward stated, "In the elevator on up to our place, people commented on it; and I was very embarrassed because how do you stand up and say, 'That's not true. That's not true.'" Although Mrs. Ward would not introduce the topic herself, when others mentioned it, she would say, "I'm not. Really I'm not." or "Haven't I always been nice to you?"

During her tenure as head of the condominium's "Sunshine Committee," Mrs. Ward's duties included sending a large number of cards to Ocean Club residents for Jewish holidays and bar mitzvahs, from which she concluded that the Ocean Club had a large Jewish population. Mr. Ward explained that it was not only a "Jewish issue," however, because "[i]f people think ... you don't like Jews, non-Jews may not like you or want to do business with you either." Following Zelikovsky's comments, Mrs. Ward stated that she was embarrassed and hesitant to participate in activities at the condominium.

As a realtor in Margate, Mrs. Ward also feared that her co-workers, many of whom were Jewish, might learn of Zelikovsky's statement and ask her about it. Mr. Ward had sold his business and was in the process of going into real estate himself. He stated that "just the rumor that you, quote, 'Don't like Jews,' is probably enough not to do business in Margate." Mr. Ward testified that his plan to buy a real estate company at the Ocean Club had not been consummated, perhaps in part because of Zelikovsky's statement.

On cross-examination, Mrs. Ward testified that she had "no idea" whether the statements had caused her to lose business, but [that they] did affect her life at the Ocean Club. After the incident, she felt that "[a] very important part of our lives was taken away from us which was the joy of being at Ocean Club." She stated that the difference after the comment was that she felt a "coolness" that had not existed prior to the statement. She [526]stated that "we weren't invited

to things that we had been invited to before; and several people did mention it to me."

Mr. Ward also testified that he found less enjoyment living at the Ocean Club after the incident. He testified that he "absolutely felt a chill and a coolness of many relationships that he had" at the Ocean Club and that he had avoided certain functions that he knew Zelikovsky frequented. He noted that the other owners had excluded him and his wife from a celebration party following an owners-board election. Zelikovsky had been the principal financier for the newly-elected board's campaign. On cross-examination, Mr. Ward admitted that nobody had actually said, "Hey, we're having this celebration; but we don't want you to go to it."

Defendant did not deny making the critical statement about the Wards but claimed that he was merely speaking to a friend seated beside him. He testified that Sheila Polin, another resident at Ocean Club, had told him that she had heard Mr. Ward make an anti-Semitic remark. Polin testified that Mr. Ward had in fact made a comment to her about Jews that she considered derogatory (although she could not remember the substance of the comment) and that she had told Zelikovsky about that exchange.

Plaintiffs sought admission of Zelikovsky's tax returns to assist the jury if it decided to award punitive damages. The court admitted the returns into evidence over Zelikovsky's objection that the returns should not be admissible because debts and other liabilities were not represented in the returns.

The trial court determined that plaintiffs were required to show special damages because the offensive remarks were not within the four recognized categories of slander *per se*, namely, statements that impute (1) commission of a crime, (2) contraction of a loathsome disease, (3) occupational incompetence or misconduct, and (4) unchastity of a woman. *Gnapinsky v. Goldyn*, 23 *N.J.* 243, 250–51, 128 *A.*2d 697 (1957). The jury instruction sheet therefore noted that special damages were a prerequisite to recovery, and it required deliberations to cease as to each plaintiff if the jury found no special damages for that plaintiff.

[527]The jury found that defendant had slandered Mary Ward but that she had sustained no special damages. Ignoring the court's instructions that deliberations should then cease concerning that plaintiff, the jury also determined that Mrs. Ward had sustained general damages, but it awarded no compensatory damages. Finally, the jury awarded Mrs. Ward punitive damages of $25,000. The jury also found that defendant had slandered Mr. Ward and that the plaintiff had sustained special and general damages, but that the amount of such damages was zero. The jury awarded Mr. Ward, too, punitive damages in the amount of $25,000.

The trial court then reminded the jury that only if special damages were found could other damages be awarded. The court suggested that the jury might wish to achieve its purpose by awarding nominal special damages to support the punitive-damages award and sent the jury back for reconsideration of its verdict. Not surprisingly, the jury's second verdict found that Mr. and Mrs. Ward had each sustained special damages of $1, general damages of $1, and again awarded each plaintiff punitive damages of $25,000.

Zelikovsky moved for a new trial on the slander claim, which the court denied. He then appealed. The Appellate Division affirmed the trial court's judgment, with one judge dissenting. 263 *N.J.Super.* 497, 623 *A.*2d 285 (1993). The majority of the Appellate Division expanded the four traditional categories of slander *per se* to include imputations of racial or ethnic bigotry, thus determining that proof of special damages was not necessary. *Id.* at 511–12, 623 *A.*2d 285. The Appellate Division also upheld the punitive damage awards. *Id.* at 513, 623 *A.*2d 285.

The dissent rejected the majority's view that defendant's characterization of plaintiffs as anti-Semitic was defamatory as a matter of law and that the statements qualified as slander *per se*, which did not require proof of special damages. *Id.* at 513, 623 *A.*2d 285. Moreover, the dissent concluded that even if the statements were defamatory, plaintiffs had failed to prove special damages. *Id.* at 526, 623 *A.*2d 285. Thus, the members of the [528]Appellate Division panel unanimously agreed that defendant's statement was not

slanderous under any of the traditional four categories of slander *per se*, and that plaintiffs had not proven any special damages. They disagreed, however, over whether defendant's statement was defamatory, and over whether they should expand the four traditional categories of slander *per se* to include statements of religious and ethnic bigotry.

Zelikovsky appealed as of right pursuant to *Rule* 2:2–1(a). We also granted defendant's petition for certification, 134 *N.J.* 476 (1993), which seeks a review of the punitive-damage awards.

II.

[1] The outcome of this case is the same whether we rely on Mr. Ward's or Mrs. Ward's version of the colloquy. We must determine whether the characterization of Mrs. Ward as a "bitch" and the claim that the Wards "don't like" or "hate" Jews are slanderous. In essence, this case concerns a verbal dispute between neighbors and thus is considerably different from libel cases involving media defendants. *See Milkovich v. Lorain Journal Co.*, 497 *U.S.* 1, 110 *S.Ct.* 2695, 111 *L.Ed.*2d 1 (1990); *Gertz v. Robert Welch, Inc.*, 418 *U.S.* 323, 94 *S.Ct.* 2997, 41 *L.Ed.*2d 789 (1974); *Sisler v. Gannett Co., Inc.*, 104 *N.J.* 256, 516 *A.*2d 1083 (1986); *Kotlikoff v. The Community News*, 89 *N.J.* 62, 444 *A.*2d 1086 (1982). A jury can generally assume that a measure of thought preceded the words printed in a newspaper or magazine. In contrast, spoken words often do not evidence that a similar level of deliberation preceded them. *See Restatement (Second) of Torts* § 568(3) (1977). This distinction is significant because the apparent deliberation of the speaker or writer will influence how a reasonable audience perceives the speech.

[2] The law of defamation exists to achieve the proper balance between protecting reputation and protecting free speech. The threshold inquiry in a slander lawsuit is "whether the language used is reasonably susceptible of a defamatory meaning." *Kotlikoff, supra*, 89 *N.J.* at 67, 444 *A.*2d 1086.

[529] The *Restatement (Second) of Torts* § 559 defines a defamatory statement as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 111, at 773 (5th ed. 1984), defines defamation as "that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." (Footnotes omitted.)

[3, 4] Whether the meaning of a statement is susceptible of a defamatory meaning is a question of law for the court. *Kotlikoff, supra*, 89 *N.J.* at 67, 444 *A.*2d 1086. In determining whether the statements are defamatory, we must consider the content, verifiability, and context of the challenged statements.

A. Content

[5] Courts begin their review to determine whether a statement is susceptible of a defamatory meaning by looking " 'to the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence.' " *Romaine v. Kallinger*, 109 *N.J.* 282, 290, 537 *A.*2d 284 (1988) (quoting *Herrmann v. Newark Morning Ledger Co.*, 48 *N.J.Super.* 420, 431, 138 *A.*2d 61 (App.Div.), *aff'd on reh'g*, 49 *N.J.Super.* 551, 140 *A.*2d 529 (App.Div.1958)).

[6] Although perhaps directly injurious to a person, name-calling does not have a defamatory content such that harm to reputation can be shown. The First Amendment "does not embrace the trite wallflower politeness of the cliche that 'if you can't say anything good about a person you should say nothing at all.' " Rodney A. Smolla, *Law of Defamation*, § 6.09[2], at 6–37 (1986). Indeed, "name calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable." *Id.* at § 6.12[9], at 6–54. "No matter how obnoxious, insulting or tasteless such name-calling, [530] it is regarded as a part of life for which the law of defamation affords no remedy." *Id.* at § 4.03, at 4–11.

The *Restatement (Second) of Torts* succinctly differentiates between actionable de-

famatory statements and non-defamatory name-calling:

> There are some statements that are in form statements of opinion, or even of fact, which cannot reasonably be understood to be meant literally and seriously and are obviously mere vituperation and abuse. A certain amount of vulgar name-calling is frequently resorted to by angry people without any real intent to make a defamatory assertion, and it is properly understood by reasonable listeners to amount to nothing more. This is true particularly when it is obvious that the speaker has lost his temper and is merely giving vent to insult. Thus when, in the course of an altercation, the defendant loudly and angrily calls the plaintiff a bastard in the presence of others, he is ordinarily not reasonably to be understood as asserting the fact that the plaintiff is of illegitimate birth but only to be abusing him to his face. No action for defamation will lie in this case.
>
> [§ 566 comment e.]

Courts thus distinguish "between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse." Smolla, *supra*, § 4.03, at 4–10. Likewise, courts differentiate between defamatory statements and statements of rhetorical hyperbole. *Id.* at § 4.04[1], at 4–12.

B. Verifiability

Courts have used two tests to determine if a statement is capable of a defamatory meaning: (1) was the statement one of opinion or fact, or (2) was it one of fact or non-fact. Smolla, *supra*, § 6.01[1], at 6–3; § 6.01[2], at 6–5. Those distinctions have generally proven unsatisfactory and unreliable.

[7, 8] At the core of those tests, however, are certain fairly well-established principles. True statements are absolutely protected under the First Amendment. 2 Fowler V. Harper et al., *The Law of Torts* § 5.1, at 42 (2d ed. 1986) (stating "[T]he law makes truth a defense ... because the utterance of truth is in all circumstances an interest paramount to reputation."). Factual statements, unlike non-factual statements, are uniquely capable of objective proof of truth or falsity.

[5, 6] Opinion statements, in contrast, are generally not capable of proof of truth or falsity because they reflect a person's state of mind. Hence, opinion statements generally have received substantial protection under the law. As the United States Supreme Court stated in oft-quoted dicta, "Under the First Amendment there is no such thing as a false idea." *Gertz*, *supra*, 418 *U.S.* at 339, 94 *S.Ct.* at 3007, 41 *L.Ed.*2d at 805.

[9] The Supreme Court recently clarified its statement in *Gertz* by explaining that it had not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich*, *supra*, 497 *U.S.* at 18, 110 *S.Ct.* at 2705, 111 *L.Ed.*2d at 17 (1990). Harm from a defamatory opinion statement is redressable when the statement implies underlying objective facts that are false. *See id.* at 18–20, 110 *S.Ct.* at 2705–06, 111 *L.Ed.*2d at 17–18. Only if a reasonable factfinder would conclude that the statements imply reasonably specific assertions of fact will the harm be redressable. *Ibid.*

[10, 11] The significance of opinion/fact and non-fact/fact distinctions centers on the concept of verifiability. Requiring that a statement be verifiable ensures that defendants are not punished for exercising their First Amendment right to express their thoughts. Unless a statement explicitly or impliedly rests on false facts that damage the reputation of another, the alleged defamatory statement will not be actionable. We require verifiability because "[i]nsofar as a statement lacks a plausible method of verification," the trier of fact who is charged with assessing a statement's truth "will have considerable difficulty returning a verdict based upon anything but speculation." *Ollman v. Evans*, 750 *F.*2d 970, 979 (D.C.Cir.1984), *cert. denied*, 471 *U.S.* 1127, 105 *S.Ct.* 2662, 86 *L.Ed.*2d 278 (1985).

[12–14] Thus, only if Zelikovsky's statement suggested specific factual assertions that could be proven true or false could the statement qualify as actionable defamation. The higher the "fact content" of a statement, the more likely that the statement will be

actionable. Smolla, *supra*, § 6.06[3], at 6–24. Plaintiff prevails, however, only if the underlying or implied facts are untrue. "[L]oose, figurative or hyperbolic language" will be less likely to imply specific facts, and thus more likely to be deemed non-actionable as rhetorical hyperbole or a vigorous epithet. *Milkovich, supra*, 497 *U.S.* at 17, 21, 110 *S.Ct.* at 2705, 2707, 111 *L.Ed.*2d at 16, 19.

C. Context

[15] Courts do not automatically decide a case on "[t]he literal words of the challenged statement." Smolla, *supra*, § 6.03[8][a], at 6–16.16. Rather, courts must "consider the impression created by the words used as well as the general tenor of the expression," as experienced by a reasonable person. *Ibid.*; *see Immuno AG. v. Moor–Jankowski*, 77 *N.Y.*2d 235, 566 *N.Y.S.*2d 906, 909–107, 567 *N.E.*2d 1270, 1273–74, *cert. denied*, 500 *U.S.* 954, 111 *S.Ct.* 2261, 114 *L.Ed.*2d 713 (1991).

[16] When considering the statement's "fair and natural" meaning, therefore, courts permit the context in which the statement appears to inform its determination of whether the statement was capable of a defamatory meaning. *See Cibenko v. Worth Publishers, Inc.*, 510 *F.Supp.* 761, 764 (D.N.J.1981) (applying New Jersey law); *Romaine, supra*, 109 *N.J.* at 290, 537 *A.*2d 284.

[17] The listener's reasonable interpretation, which will be based in part on the context in which the statement appears, is the proper measure for whether the statement is actionable. *Restatement (Second) of Torts, supra*, § 566 comment c. If the comment occurred during an argument or is an outburst unrelated to the general topic of discussion, for example, a reasonable listener is less likely to accord to the challenged statement its literal meaning. Indeed, "[t]he ordinary reasonable recipient of a communication naturally discounts to some degree statements made in the heat of vitriolic battle, because the recipient understands and anticipates the human tendency to exaggerate positions during the passions and prejudices of the moment." Smolla, *supra*, § 6.08[4][b][ii], at 6–35.

The *Restatement (Second) of Torts* effectively illustrates how circumstances may affect a recipient's interpretation of a communication:

> The circumstances under which verbal abuse is uttered affect the determination of how it is reasonably to be understood. Words uttered face to face during an altercation may well be understood merely as abuse or insult, while words written after time for thought or published in a newspaper may be taken to express the defamatory charge and to be intended to be taken seriously.
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> [§ 566 comment e.]

III

Most courts that have considered whether allegations of racism, ethnic hatred or bigotry are defamatory have concluded for a variety of reasons that they are not. The most important reason is the chilling effect such a holding would cast over a person's freedom of expression. In *Stevens v. Tillman*, 855 *F.*2d 394 (1988), *cert. denied*, 489 *U.S.* 1065, 109 *S.Ct.* 1339, 103 *L.Ed.*2d 809 (1989), the Seventh Circuit held that an accusation of bigotry is not actionable unless the statement suggests the existence of defamatory facts. An elementary-school principal sued the president of the local parent teacher association for calling the principal a "racist." Judge Easterbrook, writing for a unanimous panel, reasoned that

> [a]ccusations of "racism" no longer are "obviously and naturally harmful." The word has been watered down by overuse, becoming common coin in political discourse.... Formerly a "racist" was a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races.... Politicians sometimes use the term much more loosely, as referring to anyone (not of the speaker's race) who opposes the speaker's political goals—on the "rationale" that the speaker espouses only what is good for the jurisdiction (or the audience), and since one's opponents have no cause to oppose what is beneficial, their opposition must be based on race. The term used this way means only: "He

is neither for me nor of our race; and I invite you to vote your race." ... That may be an unfortunate brand of politics, but it also drains the term of its former, decidedly opprobrious, meaning. The term has acquired intermediate meanings too. The speaker may use "she is a racist" to mean "she is condescending to me, which must be because of my race because there is no other reason to condescend"[534]—a reaction that attaches racial connotations to what may be an inflated opinion of one's self—or to mean "she thinks all black mothers are on welfare, which is stereotypical." Meanings of this sort fit comfortably within the immunity for name-calling.

[*Id.* at 402.]

Thus, the Seventh Circuit held that under Illinois law bald accusations of bigotry, unsupported by specific factual allegations, constitute mere personal invective, which is not actionable. *Ibid.; see also Buckley v. Littell*, 539 *F.*2d 882 (2d Cir.1976) (holding that the terms "fascist," "fellow traveler," and "radical right" directed against William F. Buckley, Jr., although strong and hate-filled, constituted expressions on matters of opinion, such as what constitutes a "fascist," and therefore did not necessarily imply defamatory facts), *cert. denied*, 429 *U.S.* 1062, 97 *S.Ct.* 785–86, 50 *L.Ed.*2d 777 (1977); *Rutherford v. Dougherty*, 91 *F.*2d 707 (3d Cir.1937) (holding that clergyman's accusation in letter to department store that operated radio station that radio broadcaster fomented religious hatred and bigotry was not libelous); *Sall v. Barber*, 782 *P.*2d 1216, 1218–19 (Colo.Ct.App. 1989) (holding term "bigot," in context that plaintiff "was not fit to shine [another person's] shoes," and should be exiled with "other coyotes and skunks," would be perceived as "rhetorical hyperbole" and was not defamatory); *Rambo v. Cohen*, 587 *N.E.*2d 140, 147 (Ind.Ct.App.1992) (holding that statements that plaintiff was "anti-Semit[e]" and a "horse's butt" were not defamatory *per se*, because "obnoxious remarks, even remarks much more obnoxious than those Cohn is alleged to have made here, are not defamatory *per se*, and will not lead to liability without proof of special damages").

In *Raible v. Newsweek, Inc.*, 341 *F.Supp.* 804, 806–07 (W.D.Pa.1972), the magazine placed plaintiff's picture next to an article that accuses the "white majority" of being "racially prejudiced," "angry, uncultured, crude," and "violence prone." Accepting that the article could be found to refer to the plaintiff, the court nevertheless concluded that the statements were not capable of a defamatory meaning, holding that "to call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for [535]libel." *Id.* at 807. The court noted our nation's long history of robust public expression, including the use of abusive rhetoric:

Americans have been hurling epithets at each other for generations. From charging "Copperhead" during the Civil War, we have come down to "Racist", "Pig", "Fascist", "Red", "Pinko", "Nigger Lover", "Uncle Tom" and such. Certainly such name calling, either expressed or implied, does not always give rise to an action for libel.

[*Id.* at 808–09.]

In *Rybas v. Wapner*, 311 *Pa.Super.* 50, 457 *A.*2d 108 (1983), a landlord sued a tenant and the tenant's attorney for libel because the tenant's attorney had written a letter to the landlord's attorney stating that the landlord should make some effort "to demonstrate that he is not as an [sic] anti-Semitic as he appears to be." *Id.*, 457 *A.*2d at 109. The court held that the statement, although personally offensive, was not actionable.

We note that to restrict too severely the right to express such opinions, no matter how annoying or disagreeable, would be [sic] dangerous curtailment of a First Amendment right. Individuals should be able to express their views about the prejudices of others without the chilling effect of a possible lawsuit in defamation resulting from their words.

[*Id.* at 110.]

In *Cibenko, supra*, 510 *F.Supp.* 761, a federal court interpreted New Jersey defamation law in a libel action brought by a white transit-police officer against the publisher of a sociology textbook. The textbook con-

tained a photograph of the officer prodding a black man with a night-stick. The caption referred to the social status of the offender as the most significant determinant in applying criminal sanctions and questioned whether the officer would have acted the same way if the "offender" had been white. The court granted summary judgment in favor of the publisher because the allegedly libelous statement was not of or concerning the plaintiff when considered as a whole. *Id.* at 765. The court continued, however, that even if it considered the statement to be "of or concerning the plaintiff," no action would stand. The court reasoned as follows:

> Even if innuendo implying that plaintiff is racially prejudiced were drawn [from the photograph and caption], it would be insufficient to constitute actionable libel
>
> * * * * * *
>
> [536][T]he innuendo ... is simply the author's commentary on undisputed facts. As such, it is editorial opinion, safeguarded by the First Amendment.
>
> [*Ibid.*]

Thus, the court determined that under federal constitutional law, that accusation of racism was non-actionable opinion. *Id.* at 766.

These cases demonstrate that most states do not consider words of bigotry or racism to constitute actionable defamation, thus protecting the freedom to express even unpopular, ugly and hateful, political, religious, and social opinions. *But see Sweeney v. Schenectady Union Pub. Co.*, 122 *F.*2d 288 (2d Cir. 1941), (reversing dismissal of complaint involving newspaper article that falsely accused congressman of opposing the appointment of a certain person as a federal judge because that person was Jewish and holding that the statement could be actionable libel under a statute that made libelous *per se* the publication of "words which tend to expose one to public hatred, shame ... or [ ] induce an evil opinion of one in the minds of right-thinking persons"), *aff'd*, 316 *U.S.* 642, 62 *S.Ct.* 1031, 86 *L.Ed.* 1727, *reh'g denied*, 316 *U.S.* 710, 62 *S.Ct.* 1266, 86 *L.Ed.* 1776 (1942); *City of Brownsville v. Pena*, 716 *S.W.*2d 677 (Tex.Ct.App.1986) (upholding jury verdict finding libelous supervisor's comment in newspaper interview that plaintiff employee was "a person with racist attitudes against Mexicans legally residing in the United States" who had "threatened to fire them as soon as he takes over"). *Pena* and *Sweeney* are distinguishable from our case because the court in those cases deemed the statements libelous *per se* and the statements in those cases rested on specific facts. Interestingly, the Second Circuit's decision in *Sweeney* was the only one of eight published opinions that held the article to be defamatory. The other courts all ruled that the alleged statement was not actionable. *Ward, supra*, 263 *N.J.Super.* at 519 n. 4, 623 *A.*2d 285 (Skillman, J., dissenting).

IV

[18] Because this case implicates First Amendment freedoms, we must " 'make an independent examination of the whole record,' " to ensure that " ' "the judgment does not constitute a [537]forbidden intrusion on the field of free expression." ' " *Milkovich, supra*, 497 *U.S.* at 17, 110 *S.Ct.* at 2705, 111 *L.Ed.*2d at 17 (quoting *Bose Corp. v. Consumers Union, Inc.*, 466 *U.S.* 485, 499, 104 *S.Ct.* 1949, 1958, 80 *L.Ed.*2d 502, 515 (1984) (quoting *New York Times v. Sullivan*, 376 *U.S.* 254, 284–86, 84 *S.Ct.* 710, 728, 11 *L.Ed.*2d 686, 709 (1964))). We begin with Zelikovsky's characterization of Mrs. Ward as a "bitch." Although extremely offensive to Mrs. Ward and perhaps understood by those who heard it to express a negative opinion of her, defendant's description of Mrs. Ward as a "bitch" was "simply personal invective." *Ward, supra*, 263 *N.J.Super.* at 515, 623 *A.*2d 285 (Skillman, J., dissenting).

The term "bitch" is undoubtedly disparaging. But to hold that calling someone a "bitch" is actionable would require us to imbue the term with a meaning it does not have. Such a holding would, in effect, say that some objective facts exist to justify characterizing someone as a bitch. If calling someone a bitch is actionable, defendants must be able to raise the defense of truth. "Bitch" in its common everyday use is vulgar but non-actionable name-calling that is incapable of objective truth or falsity. A reasonable listener hearing the word "bitch" would

interpret the term to indicate merely that the speaker disliked Mrs. Ward and is otherwise inarticulate. Although Zelikovsky's manner of expression was very offensive, our slander laws do not redress offensive ideas. Because the term "bitch" has no ascertainable content, is not verifiable and the context does not imbue the term with a fact intensive meaning, the trial court should have ruled the "bitch" statement non-actionable.

[19, 20] Likewise, the trial court should have rejected the claim for slander based on the statement that the Wards "hate" or "don't like" Jews because that statement is also non-actionable. The Appellate Division found that defendant's statement did not fall within the four traditional categories of slander *per se*, and that plaintiffs had not proven special damages. 263 *N.J.Super.* at 510, 512, 623 *A.*2d 285. Nevertheless, the Appellate Division concluded that plaintiffs had an actionable claim by expanding the [538]scope of the categories of slander *per se* to include imputations of racial or ethnic bigotry such as occurred in this case. *Id.* at 512, 623 *A.*2d 285. We disagree with the Appellate Division's holding that defendant's "anti-Semitic" statement falls within slander *per se*.

[21] A proper analysis of the alleged slanderous statement requires examination of the content of defendant's entire statement and the context in which it was made. Defendant's statement suggested no specific facts. As such, the statement cannot be distinguished from characterizations that a person is a "racist," "bigot," "Nazi," or "fascist." The statement claiming that the Wards are anti-Semitic could be slanderous only if reasonable listeners would interpret the statement to impute supporting facts. At trial, Zelikovsky claimed that his allegation of anti-Semitism was supported by the fact that his neighbor, Sheila Polin, had overheard Mr. Ward make an anti-Semitic statement. But that basis for the claim of anti-Semitism was not generally known to those who overheard Zelikovsky's statement, nor did Zelikovsky advise the listeners that this was the basis for his claim that the Wards "hate Jews." Thus, Zelikovsky made no factual statements and did not appear to rely on factual statements known to the audience that would transform his claim of anti-Semitism into an actionable statement.

The statement followed the classification of Mrs. Ward as a "bitch" and was part of an unsolicited emotional outburst. That context places the claim that the Wards "hate" or "don't like" Jews in the non-actionable category of name-calling that although hurtful to the target is not redressable under slander laws. Name-calling is not actionable under defamation law because "[a] certain amount of vulgar name-calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more." Keeton, *supra*, § 111, at 776. As Judge Skillman's dissenting opinion observes,

> defendant was in a highly agitated state when he called Mrs. Ward a "bitch" and Mr. and Mrs. Ward "Jew haters." Under these circumstances, any reasonable [539]listener would have understood defendant's tirade to have been "merely giving vent to insult."
>
> [263 *N.J.Super.* at 520, 623 *A.*2d 285 (quoting *Restatement (Second) of Torts, supra*, § 566 comment e).]

Defendant's statement was non-actionable and any claim based thereon should have been dismissed as a matter of law.

[22–24] Not all accusations of bigotry are automatically non-defamatory, however. Instances may arise in which claiming someone is a bigot will become more than non-actionable insult. Whether an accusation of bigotry is actionable depends on whether the statement appeared to be supported by reasonably specific facts that are capable of objective proof of truth or falsity. The statement might explicitly refer to those specific facts or be made in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that he or she had knowledge of specific facts supporting the conclusory accusation. For example, a claim of bigotry could include claims that the selected person had engaged in specific acts such as making racist statements, failing to associate with or to act with courtesy toward people of a particular race, denying another employment or advancement because of race or religion, or posting signs that carried a

racist message. Even under those facts, a court would need to examine the context in which the statements were made before it determined that the statements could properly form the basis of a lawsuit for slander. And, of course, the court would have to find that plaintiffs had sustained special damages which we discuss in Section V.

V

[25] In addition, even if the statements had been found defamatory rather than merely insulting, plaintiffs would still have to prove special damages. Although scathing characterizations can be hurtful, the law of defamation does not provide redress whenever feelings and sensibilities are offended. Harper, *supra*, 2 *The Law of Torts* § 5.1, at 24. Rather, recovery for slander exists to redress solely harm to reputation. *See Printing Mart–Morristown*[540] *v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 765, 563 *A.*2d 31 (1989) (stating, "Defamation imposes liability for publication of false statements that injure the reputation of another.").

[26–28] To succeed in an action for slander, the plaintiff must demonstrate actual harm to reputation through the production of concrete proof. *See Sisler, supra*, 104 *N.J.* at 261, 516 *A.*2d 1083 (1986) (describing identical requirement of proving injury to reputation in libel cases). "Awards based on a plaintiff's testimony alone or on 'inferred' damages are unacceptable." *Id.* at 281, 516 *A.*2d 1083. Rather, proof that an existing relationship has been seriously disrupted or testimony of third parties detailing a diminished reputation will be necessary to satisfy the requirement that special damages exist before a jury may award any other type of damages. *Ibid.* Special damages are defined as harm of a material or pecuniary nature. *Arturi v. Tiebie*, 73 *N.J.Super.* 217, 222, 179 *A.*2d 539 (App.Div.1962).

[29, 30] The damages element is waived under the four traditional categories of slander *per se* because damage to reputation is presumed to flow from such statements. *Gnapinsky, supra*, 23 *N.J.* at 250, 128 *A.*2d 697; Keeton, *supra*, § 112, at 788. The "anti-Semitic" statement does not come within any of the four traditional categories of slander *per se*. We do not adopt the Appellate Division's holding that expanded the four slander *per se* categories to include allegations of bigotry, and we caution against further expansion of the highly-criticized *per se* categories.

The slander *per se* categories exist because historically, some types of statements were held to " 'clearly "sound to the disreputation" of the plaintiff,' " making them "defamatory on their face and actionable *per se*." *Hall v. Heavey*, 195 *N.J.Super.* 590, 595, 481 *A.*2d 294 (App.Div.1984) (quoting *Shaw v. Bender*, 90 *N.J.L.* 147, 149, 100 *A.* 196 (E. & A.1917) (quoting *Odg. L. & S.* *18)). Because courts assumed such statements were injurious, the court would " 'presume without proof, that plaintiff's reputation has been thereby impaired.' " *Ibid.* (quoting *Shaw, supra*, 90 *N.J.L.* at 149, 100 *A.* 196).

[541][31] Commentators discourage the continued existence of slander *per se* categories and specifically disagree with the rule that parties need prove no special damages for those types of slander. *E.g.*, David A. Anderson, *Reputation, Compensation, and Proof*, 25 *Wm. & Mary L.Rev.* 747, 748 (1984) (hereinafter "Anderson"). Requiring proof of special damages requires a plaintiff to demonstrate harm to reputation from an alleged defamatory statement. *See Arturi, supra*, 73 *N.J.Super.* at 223, 179 *A.*2d 539 (observing that direct harm, i.e., emotional distress caused by plaintiff's knowledge that he was defamed, is not special harm because only harm to reputation is compensable). The trend of modern tort law is to focus on the injury not the wrong and the slander *per se* categories are a relic from tort law's previous age. Anderson, *supra*, 25 *Wm. & Mary L.Rev.* at 747–48. Because the goal of defamation law should be to "compensat[e] individuals for harm to reputation," the trend should be toward elimination not expansion of the *per se* categories. Harper, *supra*, 2 *The Law of Torts* § 5.14, at 116; Keeton, *supra*, § 112, at 794; Smolla, *supra*, § 7.09, at 7–16; Anderson, *supra*, 25 *Wm. & Mary L.Rev.* at 749, 751.

We leave for another time whether we should eliminate slander *per se*. Today we

decide only that we will not expand the four slander *per se* categories and that defendant's "anti-Semitic" statement does not come within any of the four traditional categories of slander *per se*.

[32–34] Because we reject the Appellate Division's determination that allegations of bigotry qualify as slander *per se*, the law requires specific proof that plaintiffs suffered special damages as a prerequisite to any recovery. Special damages are defined as "the loss of something having economic or pecuniary value." *Restatement (Second) of Torts, supra*, § 575 comment b; *See* Anderson, *supra*, 25 *Wm. & Mary L.Rev.* at 760 (advocating substitution of term "actual injury" for "special damages"). The Wards' proofs in this case were inadequate to meet the causation and damages elements necessary to a successful tort action. Both the majority [542] and dissent in the Appellate Division found that plaintiffs' claimed loss did not constitute "harm of a material or pecuniary nature". *Ward, supra*, 263 *N.J.Super.* at 503, 526, 623 *A.*2d 285. The Wards did not offer sufficient proof that the "chill" they felt, the feeling of not being wanted at condominium affairs, and the alleged decline in Mrs. Ward's real-estate business actually existed and were caused by Zelikovsky's statement at the condominium board meeting. Significantly, no witness testified to thinking less of the Wards because of Zelikovsky's statements. *See* Anderson, *supra*, 25 *Wm. & Mary L.Rev.* at 770 n. 94 (noting that "a defamation plaintiff always must choose whether to suffer in silence or risk further harm to his reputation" by being forced to repeat defamation when seeking witnesses to testify about their perception of plaintiffs after statement). Indeed, the witness presented by the Wards testified that the Wards did not drop in their esteem as a result of Zelikovsky's statements. Moreover, "lowered social standing and its purely social consequences are not sufficient" to support a finding of special damages. *Restatement (Second) of Torts, supra*, § 575 comment b. Even the jury did not find special damages on its first review of the case. *Ward, supra*, 263 *N.J.Super.* at 526, 623 *A.*2d 285.

[35] Because special damages are a prerequisite to recovery in a slander action, the punitive damage awards were also improper. Accordingly we do not reach the questions posed in defendant's petition for certification of whether adequate evidence was presented to justify the punitive damage awards.

VI.

We sympathize with the Wards. Defendant's language was extremely repulsive and hateful and undoubtedly caused the Wards great embarrassment. It was not, however, defamatory, nor did the Wards prove that the statements caused ascertainable damage to their reputation. There is a regrettable rudeness in our society today. Social and public discourse is marked by uncivility and boorishness. Nonetheless, as society has evolved, [543] social attitudes toward judicial review of speech have changed. As a society we have made a determination that the best way to combat bias and prejudice is through the exchange of ideas and speech, not through lawsuits.

We continue to seek a balance between freedom of speech and protection of a person's reputation. In recognizing that important balance, we determine that the content of defendant's hateful statement, the context in which he said it, its lack of verifiability, and the lack of any special damages establish that Zelikovsky's conduct, although hateful and despicable, was not actionable under the law of slander.

We reverse the judgment of the Appellate Division and remand to the Law Division for entry there of an Order dismissing plaintiffs' claims for failing to state a cause of action on which relief may be granted. No costs.

STEIN, J., concurring.

I concur in the Court's judgment, but only because I agree with the holding that allegations of bigotry do not constitute slander *per se, ante* at 541–42, 643 *A.*2d at 984–85, and with the Court's determination that plaintiffs' evidence was insufficient to satisfy the requirement of proof of special damages. *Ante* at 542, 643 *A.*2d at 985. I cannot agree, however, with the Court's conclusion that

plaintiffs' proofs did not establish a cause of action for defamation. *Ante* at 538–40, 643 *A.*2d at 983–84.

No one could find fault with the Court's observation that "the best way to combat bias and prejudice is through the exchange of ideas and speech, not through lawsuits." *Ante* at 543, 643 *A.*2d at 985. But the critical issue presented by this appeal is not whether litigation is the ideal vehicle to combat prejudice, but rather whether plaintiffs presented sufficient evidence of defamation to warrant submission of the issue to the jury. The Court's explanation of the applicable legal principles is virtually flawless, but in my view it errs grievously in applying the law to the facts.

[544]The Court acknowledges that content and context determine whether an accusation of bigotry is defamatory:

> Whether an accusation of bigotry is actionable depends on whether the statement appeared to be supported by reasonably specific facts that are capable of objective proof of truth or falsity. The statement might explicitly refer to those specific facts or be made in such manner or under such circumstances as would fairly lead a reasonable listener to conclude that he or she had knowledge of specific facts supporting the conclusory accusation.
>
> [*Ante* at 539, 643 *A.*2d at 983.]

In that respect, the Court's observations track the analysis in the Restatement of Torts on which the Court relies:

> The second kind of expression of opinion, or the mixed type, is one which, while an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. Here the expression of the opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant. To say of a person that he is a thief without explaining why, may, depending upon the circumstances, be found to imply the assertion that he has committed acts that come within the common connotation of thievery.
>
> [*Restatement (Second) of Torts* § 566 comment b (1977).]

The United States Supreme Court recently expressed similar views in assessing the potentially defamatory nature of expressions of opinion:

> [E]xpressions of "opinion" may often imply an assertion of objective fact.
>
> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."
>
> [*Milkovich v. Lorain Journal Co.*, 497 *U.S.* 1, 18–19, 110 *S.Ct.* 2695, 2705–06, 111 *L.Ed.*2d 1, 17–18 (1990).]

The record informs us that Zelikovsky was the "principal financier" for the slate of directors elected to the board of the Ocean Club condominium association in 1988, a fact that suggests that he was a reasonably influential figure in the association. Apparently, a substantial portion of the association's membership was Jewish. Zelikovsky's statements were made at a meeting of the association [545]attended by approximately one hundred residents. While Mrs. Ward was speaking about an unrelated matter, Zelikovsky stood up and shouted the offending words. Depending on whether Mrs. Ward's or Mr. Ward's testimony concerning the event is more accurate, Zelikovsky either said "Don't listen to these people. They don't like Jews. She's a bitch. I remember her. She's a bitch," or he said "I know her. She's a bitch. These people, they hate Jews. These people hate Jews."

The Court goes astray when it concludes that Zelikovsky's allegations could not be defamatory because "Zelikovsky made no factual statements and did not appear to rely on factual statements known to the audience that would transform his claim of anti-Semitism into an actionable statement." *Ante* at 538, 643 *A.*2d at 983. As the *Restatement*

makes clear, "[T]he expression of the opinion gives rise to the inference that there are undisclosed facts that justify the forming of the opinion expressed by the defendant." *Restatement (Second) of Torts, supra*, § 566 comment b. Assuming, as the record suggests, that Zelikovsky was a respected member of the association, the audience was extremely likely to infer that his characterization of the Wards as "Jew haters" was supported by facts, especially when accompanied by the declarations "I know these people" or "I know her." Those statements imply that Zelikovsky possessed specific information supporting that allegation, the truth or falsity of which would have been verifiable at trial. Although the Court acknowledges that "only if Zelikovsky's statement suggested specific factual assertions that could be proven true or false could the statement qualify as actionable defamation," *ante* at 531, 643 A.2d at 979, the Court appears to be disinclined to recognize that Zelikovsky's characterization of the Wards strongly implied the existence of underlying facts. If the condominium-association members understood Zelikovsky's statements to be based on undisclosed facts, their defamatory potential was devastating.

In concluding that Zelikovsky's statements fall into "the non-actionable category of name-calling * * * not redressable under [546] slander laws," *ante* at 538, 643 A.2d at 983, the Court usurps the jury's function. The *Restatement* correctly allocates the responsibility of the court and the jury: a court's duty is "to determine whether an expression of opinion is *capable of bearing a defamatory meaning* because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion," and the jury's function is "to determine whether that meaning was attributed to it by the recipient of the communication." *Restatement (Second) of Torts, supra*, § 566 comment c (emphasis added).

Because Zelikovsky's statements were "capable of bearing a defamatory meaning," the Court errs in concluding as a matter of law that the issue should not have been submitted to the jury.

For the reasons stated, I concur in the judgment.

For reversal and remandment—Chief Justice WILENTZ and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN and GARIBALDI—7.

Concurring in result—Justice STEIN.

136 N.J. 546

[546] **NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, Plaintiff-Appellant,**

v.

K.M., Sr., Defendant-Respondent.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, Plaintiff-Appellant,

v.

R.M., Defendant-Respondent,

In the Matter of: S.W., K.M., Jr., and R.M., Minors-Appellants. (Two Cases)

Supreme Court of New Jersey.

Argued Feb. 28, 1994.

Decided March 11, 1994.

New Jersey Division of Youth and Family Services (DYFS) brought abuse-or-neglect proceeding against parents seeking temporary [547] custody of children. The Superior Court awarded DYFS custody, and parents appealed. The Superior Court, Appellate Division, affirmed in part, reversed in part, and remanded. On certification, 135 N.J. 300, 639 A.2d 301, and 135 N.J. 301, 639 A.2d 301, the Supreme Court, Garibaldi, J., held that: (1) DYFS could bring concurrent, but separate, abuse-or-neglect proceedings and proceedings to terminate parental rights involving same family, and (2) Appellate Division could not address decision terminating pa-

EXHIBIT "13"

Comicsgate

From Wikipedia, the free encyclopedia

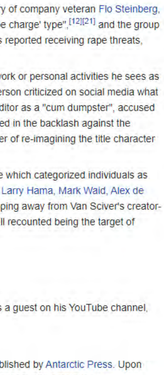
Comicsgate is a campaign in opposition to diversity and progressivism in North American superhero comic book industry—targeting the creators hired, the characters depicted, and the stories told—which proponents argue has led to a decline in both quality and sales.[1][2][3] The name is derived from Gamergate, a similar movement related to video games.[4][5] Its members present it as a consumer protest, primarily advocating their views on social media; some have produced books intended to reflect the group's values. It is part of the alt-right movement,[6][7][8][9] and has been described by commentators as a harassment campaign[10][11] which "targets women, people of color, and LGBT folk in the comic book industry".[12] It has been blamed by critics for the vandalism of one store[3] and threats of violence.[13]

Views [edit]

While Comicsgate has no official hierarchy, commentator Richard C. Meyer (posting under the banner *Diversity & Comics*)[4][12][14] and former DC illustrator Ethan Van Sciver[4][12] have been prominent advocates for the campaign.

Members of the movement object to diversification of comics, especially the increasing inclusion of women as writers and characters.[8][5][15][12] The storylines objected to include those such as the "All New, All Different" campaign undertaken by Marvel Comics in the later 2010s, in which various white male characters that have traditionally had the superhero identities of Wolverine, Thor, Hulk, Captain America, and Spider-Man were temporarily replaced by female and/or racial-minority characters.[16][17] Comicsgate adherents have also complained about stories dealing with current social issues, and the depiction of women with less sexualized figures.[18]

They argue that the increasing diversity of comics, both among creators and in terms of characters, have led to declining quality and sales.[4][5][12] While it is true that comic sales declined in the late 2010s, this decline was across the board and not limited to, or particular worse for, the diverse comics that Comicsgate targets; some such comics have been notably successful.[4][12][2]



Comics artist Ethan Van Sciver has been a central figure in Comicsgate.

Activities [edit]

Social media [edit]

In 2016, female superhero Mockingbird was depicted on a comic book cover wearing a t-shirt that read "Ask Me About My Feminist Agenda". This was followed by harassment on Twitter of series writer Chelsea Cain, including a posted illustration of Mockingbird depicted apparently dead after a brutal attack with her costume torn off, with the t-shirt phrase as a caption.[17]

A July 2017 social media post by Marvel Comics assistant editor Heather Antos, featuring several young female coworkers getting milkshakes in memory of company veteran Flo Steinberg, drew attention from members of the movement.[6][12][19] Antos was described by them as a "diversity hire", "an unqualified bimbo",[20] and "the 'false rape charge' type".[12][21] and the group in general as "fake geek girls", "tumblr-virtue signalers", and "the creepiest collection of stereotypical SJWs anyone could possibly imagine".[12][21] Antos reported receiving rape threats, being doxxed, and—with her friends and coworkers—being the target of a prolonged campaign of online harassment.[17][12][20][22]

Richard C. Meyer has made the campaign a common subject on his YouTube channel and Twitter account, in which he identifies professionals whose work or personal activities he sees as detrimental to the comics industry.[6] He took credit for the firing of writer Aubrey Sitterson from the IDW comic *G.I. Joe: Scarlett's Strike Force* after Sitterson criticized on social media what he saw as "performative grief" about the September 11 attacks.[19] In a 2017 video titled "The Dark Roast", Meyer referred to a female Marvel Comics editor as a "cum dumpster", accused various female professionals of "sucking their way into the industry", and described a transgender female writer as a "man in a wig".[12] Meyer participated in the backlash against the character designs of Netflix adaptation *She-Ra and the Princesses of Power*; he called showrunner Noelle Stevenson a "boyish lesbian" and accused her of re-imagining the title character as herself, describing it as "utter selfishness and egotism".[23]

Members of Comicsgate have responded to professionals criticizing the movement by circulating blacklists of such creators to boycott,[4][5] including one which categorized individuals as members of the "Pravda Press", "SJW vipers", and other derogatory labels.[4] Among those placed on such lists and criticized for their views have been Larry Hama, Mark Waid, Alex de Campi, Kelly Sue DeConnick, Matt Fraction, and Ta-Nehisi Coates.[4] Colorist Moose Baumann recounted that he received threats of violence after stepping away from Van Sciver's creator-owned book *Cyberfrog*.[24] Media critic Kaylyn Saucedo, artist Tim Doyle, comic writer Kwanza Osajyefo, and cosplayer/comic writer Renfamous have all recounted being the target of harassment and doxxing.[25][26]

Publishing [edit]

A few creators involved with Comicsgate have profited from the controversy it has produced, as with Meyer's *No Enemy But Peace*.[12]

Alt-right activist Vox Day wrote and published the series *Alt-Hero*[27] and hired Chuck Dixon to write for him.[28] Although Van Sciver has had Vox Day as a guest on his YouTube channel, both he and Meyer have disavowed any association with him.[11][27]

Jawbreakers

In early 2018, Meyer announced that his crowdfunded comic book *Jawbreakers: Lost Souls*, a collaboration with freelance artist Jon Malin, would be published by Antarctic Press. Upon learning that some store owners had discussed their decisions not to stock it, he encouraged his followers to publicly post and circulate their names, locations, and employee information.[13][29][30] He accused Edmonton, Alberta store Variant Edition of "bullying and intimidating their own customers" after the female co-owner tweeted that they would not stock the publication; the store was subsequently vandalized and robbed.[3] Dublin, Ireland, store *Big Bang Comics*, which was not stocking the book, received threats of violence on social media.[13]

On May 13, Antarctic Press announced that they were ending their relationship with Meyer, citing shock over his behavior. Meyer blamed freelance writer Mark Waid for contacting Antarctic's owner to talk about the controversy, accusing him of pressuring Antarctic not to publish the book.[29] Both Antarctic and Waid issued statements denying that any threats or bullying had taken place.[29][31][32] In October 2018, Meyer sued Waid for "tortious interference with contract and defamation".[33] In a motion to dismiss, Waid's attorney Mark Zaid asserted that Meyer's own public attacks against industry professionals were responsible, pointing to comments on Twitter calling writer Ta-Nehisi Coates "a race hustler", accusing a number of female professionals of being hired solely based on gender, and referring to trans and non-binary DC writers as "a modern day carnival".[34] As of April 2020, the case was pending.

Reception [edit]

Although many comics professionals have chosen to ignore Comicsgate to avoid giving it publicity,[5] it has been met with widespread criticism from readers, comics creators, and industry journalists.[35][10]

In mid 2018, Marsha Cooke, widow of writer-artist Darwyn Cooke, denied a claim by Comicsgate participants that her husband would have supported the campaign.[36][37] After she became the subject of online attacks on Twitter for this, industry veterans including Bill Sienkiewicz, Van Jenson, Tony Bedard, Jeff Lemire, and Magdalene Visaggio wrote rebukes to the movement.[36][38] In a social media post, writer Scott Snyder, who teaches writing in college and DC Comics' talent development program, said the movement launched "cruel, personal attacks" on his students that "were (and still are) especially repugnant for their sexism, racism, homophobia, and transphobia".[39] After Comicsgate participants claimed that writer Donny Cates supported them, he publicly denounced the movement, saying, "[N]o one is going to use my art to promote something that has attacked my friends."[40][41]

Writer Tom Taylor posted a brief message on social media rejecting the tenets of Comicsgate, stating "I believe comics are for everyone. There is no excuse for harassment. There is no place for homophobia, transphobia, racism or misogyny in comics criticism." The social media post was retweeted by creators including Kelly Thompson, Tim Seeley, Margaret Stohl, Jason Latour, Greg Pak, Fabian Nicieza, Benjamin Percy, and Jeff Lemire.[1] In an unsigned editorial, *Paste* magazine took issue with the phrasing of Taylor's statement, arguing that Comicsgate's activities should not be equated with critical commentary.[37]

Greg Hatcher, former administrator of the Comic Book Resources forums, compared the movement to the harassment that drove actresses Kelly Marie Tran and Millie Bobby Brown from social media, and noted that comic creators in earlier decades such as Jack Kirby and Stan Lee had also faced fan backlash for including political themes in comic books.[42]

Both Meyer and Van Sciver have come under criticism for their public comments. Van Sciver has faced backlash from other comic professionals for joking about suicide by Democrats,[43] comments on Reddit about a "queer globalist mess", and hosting alt-right leader Vox Day in an episode on his YouTube channel.[11][27] Van Sciver faced criticism over an announced collaboration with cartoonist Dave Sim, whose views about women have been widely criticized as misogynist; Van Sciver defended Sim's past relationship with a 14-year-old girl, likening it to that of Elvis and Priscilla Presley, before cancelling the collaboration with no further comment.[44]

See also [edit]

- Portrayal of women in American comics

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