IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1992 Term

No. 20489

RAYMOND A. HINERMAN
Plaintiff Below, Appellee

v.

THE DAILY GAZETTE COMPANY, INC.
Defendant Below, Appellant

Appeal from the Circuit Court of Brooke County
Honorable Larry Starcher, Judge
Civil Action No. 84-C-137

AFFIRMED

Submitted: June 2, 1992
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JUSTICE NEELY delivered the Opinion of the Court.

CHIEF JUSTICE McHUGH, deeming himself disqualified, did not participate in the consideration or decision of this case.

SENIOR JUSTICE CAPLAN participated in the decision of this case.

MILLER and BROTHERTON, J.J., dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. In order for a public official or a candidate for public office to recover in a libel action, the plaintiff must prove that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

2. Egregious deviation from generally accepted standards of journalism, partisanship, animus towards the subject of a libel, or "malicious" motives, standing alone, are not conclusive evidence of "actual malice" as that term is used in New York Times v. Sullivan, 376 U.S. 254 (1964); however, egregious deviation from generally accepted standards of journalism, partisanship, ill will towards the subject of a libel, and "malicious" motives may be considered by the jury as circumstantial evidence on the issue of whether the publisher of a libel had a subjective realization that what he was publishing was false or that he was behaving with reckless disregard of whether what he was publishing was false.

3. In libel cases involving public officials or candidates for public office there is no objective, reasonable person

standard that holds everyone alike to a uniform level of due diligence or reasonable care.

4. In a libel case it is the obligation of a reviewing court to make an independent evaluation of the facts to determine whether the jury's verdict was correct and liability can properly be imposed upon a media defendant. In determining whether the constitutional standard of actual malice has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, the reviewing court must examine for itself the statements in issue and the circumstances under which they were made to determine whether those statements are of a character that the principles of the First Amendment protect.

5. "Evidence that a media defendant intentionally 'avoided' the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel." Syllabus Point 5, Dixon v. Ogden, ___ W. Va. ___ , 416 S.E.2d 237 (1992).

6. The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement

of the occurrence reported. However, not only must the report be accurate but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it. An example would be a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence or the use of a defamatory headline in a newspaper report, the qualification of which is found only in the text of the article. The reporter is not privileged to make additions of his own that would convey a defamatory impression nor to impute corrupt motives to anyone, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

7. Under the First Amendment to the Constitution of the United States, it is the obligation of the courts to protect the free flow of information and to encourage robust, unfettered debate; therefore, reviewing courts must be circumspect about sustaining large punitive damages awards against media defendants based upon the knowing, intentional, and spiteful conduct of employees; however, in the courts' efforts to promote free speech and discourage self-censorship, there can be no tolerance for media arrogance. Therefore, once a victim has been knowingly and intentionally libeled, a media defendant exacerbates its liability for punitive damages on

every day that it fails to make a prompt, prominent and abject apology to rectify the harm that it has done.

8. Although a prompt, prominent and abject apology, combined with an offer of reasonable compensation will not shield a media defendant from paying appropriate actual damages, under Syllabus Point 3 of Garnes v. Fleming Landfill, 186 W. Va. 656, 413 S.E.2d 897, (1992), the trial court and this Court, in the process of independently examining all issues that were before the jury as required by New York Times v. Sullivan, 376 U.S. 254 (1964), may reduce punitive damages to zero in deference to free speech imperatives when actual damages are substantial and the offending media organization has made a prompt, prominent and abject apology along with an offer of reasonable compensation.

9. Jurisdiction implies or imports the power of the Court, venue the place of the action.

10. In defamation cases, three types of plaintiffs exist: (1) public officials and candidates for public office; (2) public figures; and, (3) private individuals. Public officials are those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs; however, the public official category cannot be thought to include all public employees.

11. Although it is not necessary to identify a president, governor, U. S. senator, congressman, or other well-known public official as serving in a particular office, a private person who is a "public official" only by virtue of his holding a low-level government or quasi-government position, must be identified in his public capacity before a media defendant in a libel action may shield itself behind the special rules of the libel law that apply to public officials.

Neely, Justice:

This is a libel case against The Charleston Gazette in which the plaintiff, Raymond Hinerman, recovered $75,000 in actual damages and $300,000 in punitive damages. We affirm.

BACKGROUND

Sam Levin is a Russian immigrant who came to the United States in 1975 and moved to Wheeling in 1977. Mr. Levin was trained as a mining engineer in Russia and he found work in West Virginia as a miner. While working, Mr. Levin suffered a heart attack. Mr. Levin filed a Workers' Compensation claim and was represented by legal counsel for District 6 of The United Mine Workers (UMW) free of charge. At that time, the UMW's lawyer was Raymond Hinerman, the appellee in the case before us.

Mr. Levin's Workers' Compensation claim was contested on several grounds. There was some question concerning whether: (1) Mr. Levin had a preexisting heart condition; (2) the heart condition arose from and in the course of Mr. Levin's employment; and (3) the condition produced permanent total disability. The initial determination was that a 20 percent award would fully compensate Mr. Levin for his work-related injury.

Mr. Levin protested the initial 20 percent award, and while his appeal was being processed, District 6 of the UMW replaced Raymond Hinerman with Craig Broadwater as their lawyer. Mr. Broadwater suggested to Mr. Levin that he retain Mr. Hinerman privately because of Mr. Hinerman's experience with complex Workers' Compensation cases.

Mr. Broadwater made clear to Mr. Levin that private representation by Mr. Hinerman would not be free, and in fact, Mr. Broadwater showed Mr. Levin a copy of the West Virginia statute on lawyers' fees in Workers' Compensation cases. Mr. Levin then requested the services of Mr. Hinerman as his private lawyer. There followed conversations and a signed, written contract setting forth the terms under which Mr. Hinerman agreed to act as Mr. Levin's lawyer. The contract into which the two parties entered was a standard contingent fee contract that called for Mr. Hinerman to receive 20 percent of all compensation awarded Mr. Levin for a period of 208 weeks. This was the maximum fee allowed by statute.

While the appeal of Mr. Levin's case to the Workers' Compensation Appeal Board was being prepared, Mr. Levin moved to Florida. Mr. Levin remained in constant communication with Mr. Hinerman through collect telephone calls to him. After Mr. Hinerman had presented his oral argument before the Workers' Compensation Appeal Board, the appeal board increased Mr. Levin's award to total permanent disability. Mr. Levin's employer did not appeal. On 8

June 1982, the commissioner directed payment to Mr. Levin of $19,782.38 in back benefits and a monthly stipend of $1,162.38.

Without informing Mr. Hinerman, Mr. Levin telephoned and sent a telegram to the Workers' Compensation commissioner revoking the commissioner's authority to honor Mr. Hinerman's demand for attorneys' fees. When Mr. Hinerman learned of this, he sent a letter demanding 20 percent of the award to date. After six weeks of repeated demands for payment pursuant to his contract, Mr. Hinerman sued Mr. Levin.

When Mr. Levin failed to answer, Mr. Hinerman moved for a default judgment, with notice to Mr. Levin that a hearing would be held on that motion on 14 October 1982. On 8 October 1982, the circuit court received a letter from David Gold, Esq., requesting a continuance and stating that he had just been contacted by Mr. Levin but had not yet agreed to act as counsel. At the 14 October 1982 hearing, Mr. Hinerman's motion was granted, but Mr. Levin was given an additional ten days to assert bona fide defenses. When Mr. Levin did not avail himself of that opportunity, a default judgment as to liability was entered on 27 October 1982. On 29 October 1982, Mr. Gold, who agreed finally to represent Mr. Levin, sent a letter to the Circuit Court of Hancock County seeking another continuance while he conferred with Mr. Levin's Florida counsel. Meanwhile, Mr. Hinerman gave notice to all the parties of a hearing set for 16 November 1982 for an attachment. On 4 November 1982, the clerk of the circuit

court received a letter of general denial from Mr. Levin but neither the circuit judge nor Mr. Hinerman saw a copy of that letter. On 8 November 1982, Mr. Levin's counsel, Mr. Gold, advised the court by letter that he had not yet concluded arrangements with Mr. Levin concerning his employment. At the 16 November 1982 hearing, Mr. Levin's written motion to set aside the default judgment was delivered by another lawyer, Arch Riley, Jr., Esq., and the motion was denied by the circuit court. Finally, on 3 December 1982, Mr. Gold filed another motion to vacate the default judgment giving notice of a hearing to be held on 16 December 1982. On that date, the trial court conducted a full hearing and issued findings of fact and conclusions of law in a memorandum of opinion, and entered an order denying the motion.

Mr. Levin, through his lawyer Mr. Gold, then filed a petition in this Court appealing the 17 May 1983 circuit court order. The libelous editorial in The Charleston Gazette that is the subject of this appeal arose from the allegations in the petition filed by Mr. Gold. We granted Mr. Levin's appeal, and on 13 December 1983 entered an order affirming the circuit court in all matters except that we allowed Mr. Levin a $600 credit against his fee with Mr. Hinerman, based upon monies paid to Mr. Hinerman while Mr. Hinerman was employed by District 6 of the United Mine Workers. See, Hinerman v. Levin, 172 W. Va. 777, 310 S.E.2d 843 (1983).

On 20 May 1983, The Charleston Gazette published the following editorial:

LAWYER ETHICS

The State Bar ethics committee which guards against lawyer misconduct -- and also the Judicial Inquiry Commission which watches over judges -- should keep an eye on a current state Supreme Court case.

It involves a sick immigrant miner who won disability payments, but his lawyer took every penny, getting $12,000 for one day's work. (The lawyer said the old man was lucky because $1,000 of the miner's legal expense was billed to a different client). A judge allowed it to happen because a letter from the immigrant didn't meet proper legal form.

Allegations before the high court:

Sam Levin, a Russia native, moved to Wheeling and worked for Consolidation Coal Co. until he suffered a heart attack. UMW attorney Ray Hinerman, paid by the union, represented Levin free before the Workers' Compensation Fund. The miner was granted 20 percent disability.

Hinerman quit the UMW and represented Levin privately in an appeal. After a one-day hearing, Levin was granted 100 percent disability. Hinerman sent the ex-miner a bill for $4,202. Levin didn't pay. The lawyer sued in Hancock County Circuit Court, demanding $12,088.

Levin wrote a letter to Judge Callie Tsapis saying he couldn't afford to hire another lawyer to answer the suit, but felt he owed Hinerman nothing. "I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage." Ms. Tsapis ruled that the letter didn't constitute a legal reply. She gave Hinerman a default judgment and allowed him to seize 100 percent of Levin's Workers' Compensation benefits.

A different lawyer came to Levin's aid and appealed to the Supreme Court. The petition says Hinerman, incredibly, testified that he did the old miner a favor by billing $1,000 worth of Levin's expenses to another client.

The case hasn't been decided, but it implies that another helpless client has suffered at the hands of a lawyer. The legal ethics committee should monitor the case

> closely. Unfortunately, the committee usually won't act unless an official complaint is filed in proper legal form -- and then the committee focuses on tedious technicalities rather than basic morality, right and wrong.
>
> As for Judge Tsapis, nothing she might do would be surprising. She once hosted a party at which crooked lawyers under prison sentence or indictment were hailed as heroes. The Judicial Inquiry Commission found nothing wrong with her conduct then. Still, the commission should ask why she allowed a lawyer to take all the public money granted to an impoverished ex-miner too sick to work.

THE FACTS SURROUNDING THE LIBEL

The 20 May 1983 Gazette editorial was written at the insistence of the late W. E. Chilton, III, then the Gazette's publisher and chief executive officer, by James Haught, a senior Gazette employee. Mr. Hinerman sued The Charleston Gazette on the grounds that the editorial falsely asserted as fact that Mr. Hinerman took "every penny" of the Workers' Compensation benefits awarded to a former client, and omitted any reference to such balancing facts as were contained in the Gazette's own news article on the subject (published a few days before the editorial) that would have disclosed that Mr. Levin had received a permanent total disability award rather than just $12,000, and that Mr. Levin's future benefits were subject to attachment only "until the bill [for fees] was paid."[1]

[1] "Immigrant appeals lawyer's fee to court," The Charleston Gazette, 18 May 1983 (Defendant's Exhibit 19) (herinafter News Article).

As part of Mr. Levin's fee arrangement with Mr. Hinerman, it was agreed that Mr. Levin would authorize Mr. Hinerman to receive Mr. Levin's checks so that Mr. Hinerman could deduct his fees as Mr. Levin was paid. Mr. Levin secretly revoked that authorization to avoid paying Mr. Hinerman the standard fee of 20 percent of the first 208 weeks worth of total permanent disability. Mr. Gold's petition on Mr. Levin's behalf in this Court contained a number of statements that represented an extreme of advocacy and, taken selectively, failed to convey the facts of the order that was appealed. Taken as a whole, however, the petition accurately related what the circuit court had ordered and, although the petition stated that "[t]he effect of this ruling is to give to the plaintiff, a practicing attorney, all of petitioner's income," it also revealed that the lien against 100 percent of the benefits was to continue only until the amount already overdue had been recovered. The petition also made it clear that the judgment granted, and that Mr. Hinerman had sought, only 20 percent of 208 weeks of benefits plus costs.

The Gazette editorial not only misstated the facts, but failed even to report those aspects of the petition just related that would have given some balance to the editorial. Furthermore, the evidence at trial revealed that the editorial was run only at the insistence of the Gazette's publisher, Mr. Chilton, who tightly controlled the paper's editorial policy.[2] Mr. Chilton had run

[2]Direct examination of Mr. Haught by Mr. Waddell, attorney for Mr. Hinerman:

Q: Were you the sole author of the editorial?

numerous editorials critical of lawyers,[3] and Mr. Chilton expressly required Mr. Haught to restate allegations the Gazette had made in another context concerning a link between Judge Callie Tsapis, the

(..continued)

A: Ned Chilton, the publisher, discussed it with me, but I did the writing.

Q: As I understand it, back in May of 1983 Mr. Chilton, Ned Chilton, was the publisher of the Gazette; am I correct?

A: Correct.

Q: And he was your immediate boss --

A: Right.

Q: -- for lack of a better word. And he was a dominating and forceful personality; was he not?

A: Very forceful.

Q: And he dictated the editorial page by the force of his will; did he not?

A: Yes.

Transcript, 1 October 1990, at 106.

[3]Direct examination of Mr. Haught by Mr. Waddell:

Q: Would you agree with me that one of the things Mr. Chilton had strong feelings about was lawyers and the legal profession?

A: Abuses by lawyers.

Q: He was generally negative with regard to lawyers and the legal profession; was he not?

A: He was touchy on the topic of corruption among lawyers, and we had just been through the Wally Baron scandals in which ten different lawyers went to prison, and he was very concerned about legal ethics, and had me write a series on legal ethics at one point.

Transcript, 1 October 1990, at 107.

local circuit judge who had entered the order against Mr. Levin, and certain lawyers convicted in federal court of corruption in the Hancock County area.[4]

[4]Direct examination of Mr. Haught by Mr. Waddell:

Q: Why is this last paragraph in the editorial about Judge Tsapis?

A: Because Ned had a special concern about her.

Q: Special dislike for her?

A: He was very upset that a judge hadn't been discharged for her involvement with the Altomare group and having a party, hosting for -- actually it wasn't the party. It was for Altomare because he was a guest there and hailed and celebrated at that party, and he felt that was a wrongful position for a judge to be in.

Q: I see. Why put it in this editorial about Ray Hinerman's problems with Sam Levin?

A: Because she's the one who took Sam Levin's checks and gave them to Hinerman.

Q: Were you trying to suggest that she was doing a favor for Mr. Hinerman?

A: No.

Q: What were you trying to suggest by that?

A: Just that her actions were not necessarily always correct.

Q: What crooked lawyers do [sic] you have in mind when you wrote the editorial?

A: Altomare and the others who were convicted in that scandal.

Q: You weren't contending that Mr. Hinerman's a crooked lawyer, were you?

A: No.

Q: Would you agree with me that the average reader of this editorial reading that last paragraph would be under the impression that Ray Hinerman was somehow a crooked lawyer receiving a favor from Judge Tsapis?

The evidence conclusively reveals, however, that Mr. Haught was aware that Mr. Hinerman had testified against the lawyer who led the group of corrupt lawyers in Hancock County, and that Mr. Hinerman had no connection whatsoever to any lawyer-related corruption in Hancock County.[5] Further, Mr. Haught was aware that Mr. Hinerman had

(..continued)

A: That was not our intention at all, and I don't think that anybody would read it that way. At least I didn't mean it that way.

Q: You didn't personally write that last paragraph; did you?

A: I wrote it all, but Ned had personally made that point.

Q: Well, Ned instructed you to put that particular paragraph in; did he not?

A: Yeah. He didn't dictate the whole paragraph, he said, don't forget when she held that party in which everybody was cheering and applauding Altomare.

Transcript, 1 October 1990, at 122-123.

[5]Direct examination of Mr. Fred Risovich, II, (see note 9) by Mr. Waddell:

Q: [Mr. Haught] didn't make a statement to that effect that he felt it didn't sound like the Ray Hinerman that he knows or knew?

A: He did, and that was real significant to me at the time.

Q: Why was that?

A: Well, Ray Hinerman is the tupe [sic] of guy that if you're doing something illegal, unethical, he'll call you on it. And we had a prosecuting attorney in Hancock County named Mr. Altomare, and Mr. Altomare got indicted by a Federal Grand Jury. No attorney wanted to go in and tell the truth about Mr. Altomare, and his reputation for truth. Mr. Hinerman went into Federal Court with the FBI and the United States Attorney and testified to the truth. Thereafter, the Charleston Gazette said -- and I followed it closely at the time, little bits of information that Haught had written. Some of these articles and this

not been at the party where the crooked lawyers were allegedly "hailed" as heroes by Judge Tsapis.[6] The editorial nevertheless discusses the supposed link between Judge Tsapis and crooked lawyers (implying, of course, a further link through Judge Tsapis between Mr. Hinerman and the crooked lawyers), and concludes by stating that the Judicial Inquiry Commission should "ask why [Judge Tsapis] allowed a lawyer to take all the public money granted to an impoverished ex-miner."

Mr. Haught sent a reporter to double-check the allegations against Mr. Hinerman contained in Mr. Levin's petition in this Court.[7]

(..continued)

> information was coming from an attorney in Hancock County, and in the Bar -- we have a small Bar Association. We all speculated it was Hinerman or Fahey, because Fahey had worked in Charleston and Hinerman knew a lot of people in the State. He was a past president of the Bar Association. And, so, when Haught said; I don't think that that's -- it doesn't sound like the Ray Hinerman I know, it just -- like a light went on. It's Ray who's been telling him. I know how honest Ray is, and they'll clear it up and it didn't happen. They never cleared it up.

Transcript, 1 October 1990, at 235-236.

[6]Direct examination of Mr. Haught by Mr. Waddell:

Q: Were you aware, were you not, that when you wrote the editorial that Mr. Hinerman wasn't even at the party held by Judge Tsapis; weren't you?

A: Oh, sure but nothing that's in there implies that.

Transcript, 1 October 1990, at 123.

[7]Direct examination of Mr. Fahey (see note 9) by Mr. Waddell, describing the conversation between Mr. Fahey and Mr. Haught on May 26, 1983:

Q: During that conversation, did [Mr. Haught] indicate to you any doubt, that he had had any doubt concerning the

Yet despite that "double-checking," Mr. Haught's editorial reported none of the facts apparent in the court file that would suggest that the innuendos concerning fraudulent, unethical and reprehensible conduct in the editorial inaccurate. Further, the editorial omitted a fact that had appeared in the Gazette's own story, namely that the 100 percent levy of benefits was to continue "only until the [fee] bill was paid."[8]

Immediately after publication of the editorial, both Mr. Chilton and Mr. Haught received outraged calls from associates and acquaintances of Mr. Hinerman pointing out the inaccuracies in the Gazette editorial.[9] In his conversation with these people, Mr. Haught

(..continued)

> truth of the allegations that were contained in this editorial prior to it being published?
>
> A: Yes. He had, again, told me that he knew of Ray Hinerman, knew that he wouldn't be involved in that. It must be a different Ray Hinerman. That as soon as he saw the story of what was alleged to have been filed in the Supreme Court, because Ray Hinerman's name was mentioned, he sent the reporter back to doublecheck his source and his information and tried to take those precautions but did not intend to contact Mr. Hinerman or our office to see if there was any other position. [Emphasis added]

Transcript, 2 October 1990, at 29-30.

[8]"Hinerman sued Levin for the fees last August and, after Levin neglected to answer the suit, received permission from Ohio County Circuit Judge Callie Tsapis to take 100 percent of Levin's monthly Worker's Compensation benefits until his fees are paid." [Emphasis added] News Article, supra note 1.

[9]On 20 May 1983, the day the editorial was published, several members of Mr. Hinerman's law firm contacted the Gazette. William T. Fahey, Esq., one such lawyer, arranged for speaker-phone conversations with W. E. Chilton, III (publisher of the Gazette), as well as Mr. Haught. Michael Nogay, Esq., and Fred Risovich, II, Esq., as well as other members of the firm joined Mr. Fahey for at

expressed surprise at the charges made against Mr. Hinerman and, at first, Mr. Haught was apologetic in tone.[10] In various conversations with associates of Mr. Hinerman, particularly William Fahey, Esq., Mr. Haught stated that the charges against Mr. Hinerman surprised him,[11] and he wondered whether those charges could relate to the same Ray Hinerman he knew, because that Ray Hinerman "wouldn't be involved" in something like that.[12] Mr. Haught repeated similar statements to
(..continued)
least part of the conversations.

[10]Mr. Nogay, reading from a memorandum he prepared at the time right after the article was published:

> Mike Nogay phoned [Jim Haught] and put him on the speaker with Bill Fahey present. Mr. Haught told Mike Nogay that 'I knew Ray Hinerman would not do something like this. In fact, I thought this was a different Ray Hinerman than the one in Weirton.' He was also very apologetic and said that the Gazette would print a retraction editorial on Monday.

Transcript, 1 October 1990, at 194.

[11]Direct Examination of Mr. Haught by Mr. Waddell:

Q: Do you remember making a statement [to Mr. Fahey], that didn't sound like the Ray Hinerman that you know, or you thought it was another Ray Hinerman, something of that nature?

A: Well, I never thought it was a different Ray Hinerman.

Q: You thought you knew who you were writing about then; correct?

A: Yes, and I was surprised to see that about him.

Transcript, 1 October 1990, at 122-123.

[12]Cross-examination of Mr. Fahey by Mr. DiTrapano, attorney for the Gazette:

Q: Well, what is your best recollection as to what Mr. Haught told you about his relationship with Mr. Hinerman?

A: I know Ray Hinerman, and the Ray Hinerman I know would not

another Hinerman associate, Michael Nogay, Esq., to whom Mr. Haught also conceded that the paper "might have goofed."[13] However, Mr. Haught never admitted to these callers that he, in fact, was the author of the offending editorial.

Mr. Haught admitted at trial that he considered Mr. Hinerman trustworthy.[14] Mr. Haught also conceded that he expressly promised (..continued)

> be involved in something like that, and that's why I sent the reporter back to double-check the record.

Transcript, 2 October 1990, at 97.

[13]Mr. Nogay reading the memo of conversation he had with Mr. Haught on 20 May 1983:

> I told Mr. Haught that due to ethical considerations he would have to refer to the reply that we would file in the Supreme Court on Monday for our version of the facts. Bill Fahey spoke with Mr. Haught and told him the same thing. Haught again sounded very apologetic over the speaker and it is my recollection that he said 'We might have goofed here.'

Transcript, 1 October 1990, at 194-195.

[14]Direct Examination of Mr. Haught by Mr. Waddell:

Q: Mr. Haught, did you form an opinion as to Mr. Hinerman's reputation during the course of these conversations [during Mr. Haught's investigation of the Altomare scandal] with him?

A: Well, I trusted him to be telling me the truth about the other side.

Q: Did you consider him to be an honorable and straight forward [sic] individual at that time?

A: As far as I knew.

Q: You had no information to suggest otherwise; did you?

A: No.

to print a retraction of the editorial.[15] Mr. Haught first requested that Mr. Hinerman write a letter to the editor, but was told that doing so was prohibited by this Court's ethical rules governing lawyer-client relations.[16] Mr. Haught was, however, informed that
(..continued)
Transcript, 1 October 1990, at 104-105.

[15]Cross-examination of Mr. Haught by Mr. DiTrapano:

Q: No. 1, you mentioned that you did have conversations with the lawyers who had called you and making inquiries about the story; is that correct?

A: I can remember at least one phone call from Bill Fahey. And he surprised me by immediately starting out that everything was wrong and that it was all false, all of the allegations in the Supreme Court case had been a distortion, and they were not true. And that confounded me some. I thought, uh-oh, good grief. If something's wrong, we'll correct it, and we'll get it straight, and we'll get it right, and we'll start going back and taking another look at that.

Transcript, 1 October 1990, at 165-166.

[16]Direct examination of Mr. Fahey by Mr. Waddell:

Q: When was your next conversation?

A: I believe it was the afternoon of the 20th. Mr. Haught indicated in the initial conversation that we may want to consider writing a letter to the editor and set forth our position with respect to the inaccuracies contained in the reports and in the editorial. We were of the opinion that that caused some ethical concern, because lawyers aren't supposed to try their cases in the newspapers. We phoned the West Virginia State Bar Ethics Council [sic] who, at that time, I believe was Bob Davis, and he reinforced our interpretation of the ethics of the situation, that we should not reduce ourselves to writing those type of letters, but that we should seek to file a response to the petition in the Supreme Court, and then any newspaper that wanted to cover the countervailing position would have the opportunity to go to official records to learn of our opposition.

Transcript, 2 October 1990, at 27.

a reply to the petition would be submitted to the Supreme Court on an expedited basis, and that Mr. Haught could examine that reply to ascertain Mr. Hinerman's position for purposes of a retraction. The expedited reply was filed on the Monday after the publication of the Gazette's editorial.

The Gazette never printed a retraction. Two weeks after the publication of the initial defamatory editorial, the Gazette published a second editorial on the matter, entitled "Another Look." The full text of the second editorial is as follows:

ANOTHER LOOK

Last month, when a petition to the state Supreme Court said a lawyer seized "100 percent" of the Workers' Compensation benefits of a "destitute" Russian immigrant coal miner, this newspaper urged the State Bar ethics committee to keep an eye on the case.

Later, however, the lawyer filed a special rebuttal saying the "alleged pauper" ex-miner pocketed more than $30,000 benefits, stood to gain perhaps $400,000 from the state fund, and employed a "deceitful plan" to avoid paying the lawyer's $12,088 of the bonanza.

Thus the case of Sam Levin, the immigrant who suffered a heart attack seven months after moving to Wheeling, and Weirton lawyer Ray Hinerman, who got a court order to seize Levin's Workers' Compensation checks, has become a tangle of contradictions. The Supreme Court file contains this crossfire:

The petition said Levin is penniless, living on charity, and that Hinerman took 100 percent of his compensation. The lawyer's reply said Levin got $12,640 temporary total disability benefits, $20,895 lump-sum benefits and $1,162 a month for the rest of his life -- a potential $350,000 to $400,000, of which the attorney's share constitutes only 3 percent. The reply attacked "the deliberate distortion that the effect of the ruling by the circuit court gave Raymond A. Hinerman 100 percent of Sam Levin's Workers' Compensation benefits."

The petition said Levin barely understands English, is ignorant of law, and didn't realize he was signing papers to allow Hinerman a huge fee. The lawyer's reply said the Russian is a college-educated engineer who schemed to "bamboozle" Hinerman.

The petition said Hinerman, as UMW lawyer, was paid by the union to handle Levin's claim; that 20 percent disability was granted, which Hinerman appealed, and "a one-day appearance was all that remained" to finish the case. Hinerman left the UMW and Levin retained him privately. The petition says it was unconscionable for the lawyer to take $12,088, the highest allowable share, "for a one-day court appearance" when the UMW had paid him to handle most of the case. But Workers' Compensation records say different UMW lawyers handled the case, and Hinerman said he "diligently pursued the appeal."

> The outcome of this sorry affair probably won't be known for months. Meanwhile, it seems that heart attacks have become commercial commodities to be exploited for maximum profit. If a sufferer's attorney can attribute the attack to job strain, rather than life's other strains, both patient and lawyer are enriched.
>
> What's the difference between one heart attack and another? Up to $400,000, this case demonstrates.

We granted the defendant the Charleston Gazette's appeal to determine whether the judgment below for $75,000 in actual damages and $300,000 in punitive damages contravenes First Amendment, freedom of the press principles as articulated in New York Times Co. v. Sullivan, 376 U. S. 254 (1964) and its progeny. We find that the judgment does not.

I.

The Court below ruled that Mr. Hinerman was a public official at the time he was libeled, based upon the fact that Mr. Hinerman was an appointed municipal judge, a member of the State Racing Commission, and a member of the Board of Governors of the West Virginia State Bar (and subsequently vice president of the State Bar). Although we disagree with the lower court's ruling that Mr. Hinerman was a public official, (see, infra, at VI) we will assume for the purposes of reviewing the lower court's judgment that Mr. Hinerman was a public official. Thus, even under the stringent standards applicable to a public official, Mr. Hinerman is still entitled to recover.

In order for a public official or a candidate for public office to recover in a libel action, he must prove by clear and convincing evidence that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false. See, Restatement (Second) of Torts, §§ 565, 566 (1977); Harte-Hanks Communications, Inc., v. Connaughton, 491 U.S. 657 (1989); Masson v. New Yorker Magazine, Inc., 501 U. S. ___, 111 S.Ct. 2419 (1991).

The greatest obstacle that a public official libel plaintiff must overcome is the First Amendment requirement that the publisher of a libel against a public official have a subjective appreciation at the time of publication that either (1) the defamatory statement is false or (2) the defamatory statement is being published in reckless disregard of whether it is false. This strict requirement is then reinforced by the New York Times v. Sullivan requirement that trial and appellate courts make independent reviews of the facts, although the standard of review has become less stringent than New York Times at first appeared to require. See, infra Part II.

A reading of U. S. Supreme Court libel cases in the last eight years demonstrates that there have been subtle but important

shifts in our libel law that reflect an ebbing tolerance for irresponsible media behavior. Among these changes, perhaps the most important is the U. S. Supreme Court's waning enthusiasm for reviewing libel judgments against media defendants.[17] Other important changes

[17]Although the public official defamation opinions of the U. S. Supreme Court usually begin by citing the New York Times v. Sullivan standard of "actual malice" (see Masson v. New Yorker Magazine, supra; Harte-Hanks, supra; Hustler Magazine v. Falwell, 485 U.S. 46, 49 (1988)), there are indications that these approvals of New York Times v. Sullivan are mere genuflections as each year the Court moves farther away from the broad holdings of New York Times v. Sullivan and Gertz v. Robert Welsh, Inc., 418 U.S. 323 (1974). In the recent decisions of Philadelphia Newspapers, Inc. v. Hepps, 475 U. S. 767 (1986) (a private figure plaintiff cannot recover without the statements in question being proven false), Anderson v. Liberty Lobby, Inc., 477 U. S. 242 (1986) (vacating a D.C. Circuit reversal of a grant of a summary judgment on the grounds that the Court of Appeals applied an incorrect standard for reviewing summary judgment), and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U. S. 749 (1985) (credit reports are not a matter of public concern, thus eliminating the need for applying New York Times v. Sullivan standard), the U. S. Supreme Court used painstaking care to articulate as narrow a holding as possible. Even after the recent changes in Justices, the narrowly drawn holdings have continued in Masson and Harte-Hanks.

In addition to the narrow holdings, the Court has denied certiorari in several cases that presented important defamation issues. See Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U. S. 1127 (1985) (presenting a question of opinion versus fact); DiSalle v. P. G. Publishing Co., 375 Pa. Super. 510, 544 A.2d 1345 (1988), app. denied, 557 A.2d 724 (Pa. 1989), cert. denied, 492 U. S. 906 (1989) (presenting a question on neutral reporting and upholding a jury verdict of $210,000 in compensatory damages and $2,000,000 in punitive damages); Brown & Williamson Tobacco Corp. v. CBS, Inc., 827 F.2d 1119 (7th Cir. 1987), cert. denied, 485 U. S. 993 (1988) (presenting a question of damage limits and upholding $2,000,000 in punitive damages against CBS, $1,000,000 in presumed damages against CBS and $50,000 against the reporter).

Since Harte-Hanks, the only case on defamation decided by the U. S. Supreme Court is Masson v. New Yorker Magazine, even though numerous petitions for certiorari were submitted. See Loricchio v. Evening News Association, 438 Mich. 84, 476 N.W.2d 112 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 51 (1992); Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir., 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 192 (1991); Ward v. Roy H. Park Broadcasting Co., 403 S.E.2d 522 (N.C. App., 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 190 (1991); McCoy v. Hearst Corp., 227 Cal. App. 3d 1657, 278

include the express endorsement of a "clearly erroneous" standard for reviewing jury findings of fact, and recognition that egregious deviation from accepted journalistic standards and ill will toward the victim are admissible circumstantial evidence of actual malice.[18]

(..continued)
Cal. Rptr 596 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 939 (1992); Mosesian v. McClatchy Newspapers, Inc., 233 Cal. App. 3d 1685, 285 Cal. Rptr 430 (1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1946 (1992); Worldwide Church of God v. McNair, cert. denied, ___ U.S. ___, 112 S.Ct. 380 (1991); Flynt v. Spence, 816 P.2d. 771 (Wyo., 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1668 (1992); Birsner v. Sivalingham, cert. denied, ___ U.S. ___, 112 S.Ct. 1671 (1992); Netzley v. Celebrezze, 51 Ohio St.3d 89, 554 N.E.2d 1292 (1990), reh'g denied, 52 Ohio St.3d 710, 557 N.E.2d 1217 (1990), and cert. denied ___ U.S. ___, 111 S.Ct. 428 (1990); Reuber v. Food Chemical News, 925 F.2d 203 (4th Cir. 1991), cert. denied, ___ U.S. ___, 111 S.Ct. 2814 (1991); Diesen v. Hessburg, 455 N.W.2d 446 (Minn., 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1071 (1991); Dale v. Ohio Civil Service Employees Ass'n, 57 Ohio St.3d 112, 567 N.E.2d 253 (1991), cert. denied sub nom, Dale v. American Federation of State, County and Mun. Employees, Intern., AFL-CIO, ___ U.S. ___, 111 S.Ct. 2853 (1991); Fletcher v. San Jose Mercury News, 216 Cal.App.3d 172, 264 Cal.Rptr 699 (1990), cert. denied, ___ U.S. ___, 111 S.Ct. 51 (1990); Ball v. E. W. Scripps Co., 801 S.W.2d 684 (Ky., 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1622 (1991); Barber v. Perdue, 194 Ga.App. 287, 390 S.E.2d 234 (1989), cert. denied, ___ U.S. ___, 111 S.Ct. 430 (1990); Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1586 (1991); Smith v. McDonald, 895 F.2d 147 (4th Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 53 (1990); Villarreal v. Harte-Hanks Communications, Inc., 787 S.W.2d 131 (Tex.App., 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1316 (1991); Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky., 1990), cert. denied, Lexington Herald-Leader Co. v. Warford, ___ U.S. ___, 111 S.Ct. 754 (1991); Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (1991), cert. denied, ___ U.S. ___, 111 S.Ct. 2261 (1991).

[18]In Harte-Hanks, supra, Justice Stevens, a liberal writing for the majority, said:

> Certain statements in the Court of Appeals' opinion, when read in isolation, appear to indicate that the court at times substituted the professional standards rule for the actual malice requirement and at other times inferred actual malice from the newspaper's motive in publishing Thompson's story. Nevertheless, when the opinion is read as a whole, it is clear that the conclusion concerning the newspaper's departure from accepted standards and the evidence of motive were merely supportive of the court's ultimate

Although egregious deviation from accepted standards of journalism standing alone will not carry the day for a public official libel plaintiff, egregious deviation is one important piece of circumstantial evidence which, when combined with other evidence, can lead a jury properly to find that subjective appreciation of falsity or recklessness existed at the time of publication. Similarly, although partisanship, animus toward the subject of a libel, or other "malicious" motives are not, alone, conclusive evidence of "actual malice" as that term is defined in New York Times v. Sullivan, supra, and subsequent cases, partisanship, ill will towards the subject of a libel, and other "malicious" motives may be considered by the jury in their determination of whether a subjective realization that the statement was false or a subjective realization that the statement was being published recklessly, existed at the time the statement was published.

(..continued)

> conclusion that the record "demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of "actual malice" as found by the jury. 842 F2d, at 847. Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, see Herbert v Lando, 441 US 153, 160, 60 L Ed 2d 115, 99 S Ct 1635 (1979); Tavoulareas v Piro, 260 US App DC 39, 66, 817 F2d 762, 789 (en banc), cert denied, 484 US 870, 98 L Ed 2d 151, 108 S Ct 200 (1987), and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry. Thus, we are satisfied that the Court of Appeals judged the case by the correct substantive standard. [Emphasis added]

491 U.S., at 667-668.

In light of the subtle but important changes occurring in the national law of libel,[19] we shall attempt today to clarify both the media's privileges and the media's obligations as we see them in the State of West Virginia. First, however, it is necessary to explain why libel law is slowly shifting to become more solicitous of the rights of injured victims. Only by understanding the reasons for the pro-victim shift can the bar help their media clients to conform to the law with negligible self-censorship side effects.

The reason for the law's new concern for victims is probably best explained by S. Robert Lichter, Stanley Rothman and Linda S. Lichter, in their study The Media Elite:[20]

[19] Indeed, the U. S. Supreme Court appears to be weary of the defamation issue. During the oral argument in Anderson v. Liberty Lobby, Inc., supra note 17, after questioning the plaintiff's lawyer on the libel suit's chilling effect on the media, Chief Justice Rehnquist (then Justice Rehnquist) remarked that after reading the record in the case "one might truthfully say a chill on both your houses." News Notes, 12 Media L. Rep. (BNA) 1344 (Dec. 10, 1985).

A mere two years after dissenting in Anderson, Chief Justice Rehnquist, writing for the majority, affirmed "our considered judgment that such a [New York Times v. Sullivan] standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." Hustler, supra note 17, 485 U.S. at 56. In Hustler, Chief Justice Rehnquist quoted from two opinions to which he had previously dissented: Bose Corp v. Consumers Union, Inc., 466 U.S. 485, 515 (1984)(Rehnquist, J., dissenting); and Philadelphia Newspapers, Inc. v. Hepps, supra note 17 (Stevens, J., dissenting, joined by Justice Rehnquist). Hustler, 485 U. S. at 51-52. Chief Justice Rehnquist concurred in Harte-Hanks (1989) and Masson v. New Yorker Magazine, supra (1991). This shift by Chief Justice Rehnquist may signal that the majority position has moved sufficiently to accommodate the concerns of at least one of the dissenters.

[20] Adler and Adler (Bethesda, Md., 1986). This study was sponsored by the Center for the Study of Social and Political Change at Smith College, the Center for Media and Public Affairs, the Research

In the early 1970's, even as America's Vietnam involvement wound down, a third front appeared in the now ongoing media-government conflict. Watergate became the next major long-running story in a decade to pit the national media against political authority. This time the Washington Post took the lead, though The New York Times and television also played major roles. In fact, the public image of a more adversarial media probably owes less to Bob Woodward and Carl Bernstein's investigations than to the celebrated confrontation between President Nixon and CBS White House correspondent Dan Rather.

In the years that followed Watergate, the national media rode a wave of popularity and perceived power. They appeared to have chosen the "right" side of the critical conflicts of a turbulent decade. Moreover, they had consistently picked the winning side. They prevailed in conflicts with such seemingly entrenched forces as southern segregationists, Vietnam hawks, and two once-popular presidents. They were courted by politicians and revered on college campuses. Investigative journalism inherited the cachet young activists had earlier conferred on the Peace Corps and Nader's Raiders. Bright and idealistic young people flocked to the profession, lured by the prospect of exercising both personal creativity and social influence, not to mention the chance for fame and fortune.

Inevitably, this wave of popularity crested and broke. By the early 1980's, public confidence in the press had dropped sharply from its Watergate high point. Public criticism of media negativism and lack of fairness also began to emerge. A series of scandals and libel suits also seemed to cast doubt on the credibility of several major media outlets. At one point three of the most important and prestigious news organizations simultaneously faced embarrassing and financially threatening lawsuits--CBS from General William Westmoreland, Time from Israeli Defense Minister Ariel Sharon, and the Washington Post from Mobil Oil's Chief Executive Officer.

Public disenchantment with the media may simply reflect changes in the social agenda. After Watergate, the great issues of the day offered less opportunity for the media to play the role of public tribune. Issues like

(..continued)
Institute on International Change at Columbia University, and George Washington University.

> inflation and energy could neither be explained nor solved by public morality plays. Television played a major role in the Iranian hostage crisis, but the cameras proved impotent in resolving the events they conveyed. Thus, in the 1980's, an upsurge of national pride, almost in reaction against a decade of bad news, seemed to catch the media by surprise. For the first time in two decades, the critical and reformist strain of national journalism seemed to go against the grain of a changing Zeitgeist.

The Media Elite, supra note **Error! Bookmark not defined.**, at 15-16.

Although the above passage is an excellent analysis of what is going on at the most abstract, philosophical level, there are also more sinister, self-serving forces at work in both the print and broadcast media that evoke a widespread demand among the public for greater media accountability. Thus, there is a rediscovery that the popular media are in the entertainment business far more than they are in the information business.[21] Although in the age of "yellow journalism" when William Randolph Hearst actually started wars[22] to create entertaining (and therefore profitable) headlines, the American public understood that sensationalism is the sine qua non of successful publishing (and now news broadcasting), the euphoria surrounding the press' advocacy of civil rights, disengagement from

[21] See, Niel Postman, Amusing Ourselves to Death: Public Discourse in the Age of Show Business, Viking Penguin (New York, 1985).

[22] During the "ferment" before the Spanish-American War, Mr. Hearst's reporter in Cuba, noted artist Frederick Remington, telegraphed Mr. Hearst: "EVERYTHING IS QUIET. THERE IS NO TROUBLE HERE. THERE WILL BE NO WAR. I WISH TO RETURN." Mr. Hearst immediately wired back: "PLEASE REMAIN. YOU FURNISH THE PICTURES AND I'LL FURNISH THE WAR." Ferdinand Lundberg, Imperial Hearst, A Social Biography, Greenwood Press (Westport, Conn., 1970), at 68-69.

Vietnam, and honest government in the Watergate era obscured temporarily this previously well-known fact.[23]

> Unfortunately, a large measure of the economic success of any newspaper or broadcast news department is dependent upon sensational or "entertaining" scandal.[24] As Tennyson points out in Idylls of the King, "Merlin and Vivian,"[25] mankind has an inveterate predilection to rejoice in the suffering and degradation of others:

[23]The excesses of "yellow journalism" prompted Charles Warren and Louis Brandeis to write their famous Harvard Law Review article on the right to privacy. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[24]Of course, one can entertain to a fare-thee-well with the truth, and with regard to a public official, one can even entertain negligently. However, the courts now seem serious about refusing to allow entertainment, even at the expense of a public official, through the use of known, straight-up, boldfaced lies. See, e.g., Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 465 U.S. 1014 (1984). The Enquirer wrote:

> In a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of dessert. But Carol really raised eyebrows when she accidently knocked over a glass of wine and started giggling instead of apologizing. The guy wasn't amused and "accidently" spilled a glass of wine over Carol's dress.

Despite the fact that the Enquirer printed a retraction of the story (admitting it was false), the jury awarded $300,000 compensatory damages and $1,300,000 in punitive damages. The award was ultimately reduced to $50,000 compensatory damages and $150,000 in punitive damages.

[25]New American Library Edition, p. 135

. . . Tho' harlots paint their talk as well as face With colors
of the heart that are not theirs.
I will not let her know; **nine tithes of times**
Face-flatterer and backbiter are the same,
And they, sweet soul, that most impute a crime
Are pronest to it, and impute themselves,
Wanting the mental range, or low desire
Not to feel lowest makes them level all;
Yea, they would pare the mountain to the plain,
To leave an equal baseness; and in this
Are harlots like the crowd that if they find
Some stain or blemish in a name of note,
Not grieving that their greatest are so small,
Inflate themselves with some insane delight,
And judge all nature from her feet of clay,
Without the will to lift their eyes, and see
Her godlike head crown'd with spiritual fire,
And touching other worlds. [Bold type added]

There is, nonetheless, no vehicle other than the commercial media for the transmission of information. A tightening of the libel laws, therefore, inevitably implies higher levels of self-censorship, which jeopardizes full, robust, and untrammeled political debate. It is for that reason, then, that trial and appellate courts, notwithstanding the pronounced pro-victim shift, are still more solicitous of the media than of any other class of business defendants in our tort system, and why courts continue to protect the media whenever a plaintiff has not proven his case by clear and convincing evidence. See, Dixon v. Ogden, ___ W.Va. ___, _416 S.E.2d 237 (1992).

In libel cases involving public officials or candidates for public office, there is no objective, reasonable person standard that holds everyone alike to a uniform level of due diligence or reasonable care. A ninth-grade school newspaper cannot be held to

the same standard as The Charleston Gazette, and The Charleston Gazette cannot be held to the same standard as The New York Times. When, however, the evidence clearly demonstrates subjective appreciation of either falsity or recklessness, it is appropriate for courts to require accountability.[26]

II.

Under New York Times v. Sullivan, supra, it is the obligation of a reviewing court to make an independent evaluation of the facts to determine whether the jury's verdict was correct and liability can properly be imposed upon a media defendant. The standard of

[26]Certainly, in seeking greater media accountability courts are not holding the media to any higher standard than we hold ourselves. Indeed, both the media and the courts have a difficult time coping with principles of "accountability" because of possible "chilling effects." Like the media, the courts have a favored status, (i.e., judicial immunity) for mistakes-- even serious mistakes. Stump v. Sparkman, 435 U.S. 349 (1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' Bradley [v. Fisher], 13 Wall. [335,] 351 [(1872)]"). However, the U. S. Supreme Court has placed some limits even on the courts, which are not allowed total immunity when a judge's conduct is both willful and outrageous. Pulliam v. Allen, 466 U.S. 522 (1984) (No judicial immunity bar to prospective injunctive relief under 42 U.S.C. § 1983; attorneys' fees may be awarded to plaintiff suing a judge and winning under § 1983 due to the Civil Rights Attorney's Fees Awards Act of 1976).

Unlike the media, the courts have strict and enforceable canons of ethics, and a litigant aggrieved by the abusive conduct of a judge is provided a forum where serious sanctions may be imposed upon the judge. See West Virginia Judicial Code of Ethics [1973, as amended]; W. Va. Const., art. VIII, § 8. This system may not be perfect, but it is better than anything the media have.

independent review is appropriately set out in Harte-Hanks, as follows:

> "In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses." Bose, 466 US, at 499-500, 80 L Ed 2d 502, 104 S Ct 1949, the reviewing 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 . . . protect,'" New York Times Co. 376 US, at 285, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (quoting Pennekamp v Florida, 328 US 331, 335, 90 L Ed 1295, 66 S Ct 1029 (1946)).

Harte-Hanks, supra, at 688-689.

We have independently reviewed the factual record and conclude that the jury was correct in determining that there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false, or that Mr. Haught published the editorial with a subjective appreciation that, at least, he was recklessly disregarding the truth. Although there is direct evidence on subjective appreciation from Mr. Haught and those who talked with Mr. Haught soon after the libelous editorial was written, there is also strong circumstantial evidence emerging from gross deviations from generally accepted standards of journalism. For example, before the editorial was published, no effort was made to contact Mr. Hinerman

to determine whether he had anything to say for himself that might make him look less reprehensible or might refute the facts alleged in the editorial.

In addition to egregious deviation from generally accepted standards of journalism, the record is also replete with evidence that the Gazette's publisher, Mr. Chilton, bore strong animus towards lawyers in general and that he regularly wrote editorials highly critical of lawyers and the legal profession. Moreover, the evidence is overwhelming that Mr. Haught had serious misgivings about the appropriateness of the editorial,[27] and the jury was more than entitled to infer from Mr. Haught's own testimony that the editorial would not have been composed or published but for the explicit direction of the Gazette's publisher, and that Mr. Haught conveyed his misgivings to his publisher at the time the editorial was written.

The petition filed on behalf of Mr. Levin in this Court contained the following paragraph:

> On November 16, 1982, the Court granted plaintiff's Motion that 100 percent of petitioner's Workmen's Compensation benefits be paid directly to plaintiff until the amount of 20 percent of benefits already awarded, plus costs, had been taken by plaintiff. Only after plaintiff had been paid these sums will petitioner receive any of his award. **The effect of the ruling is to give the plaintiff, a practicing attorney, all of petitioner's income while the petitioner, who is totally disabled, has no source of income whatsoever.**

[27] See supra notes **Error! Bookmark not defined.-Error! Bookmark not defined..**

Nonetheless, only the part that we have set forth in bold in the quote above was reproduced as an allegation in the defendant's editorial.

As we said in Syllabus Point 5 of Dixon v. Ogden, supra in text:

> Evidence that a media defendant intentionally "avoided" the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel.

An earlier Gazette news story faithfully incorporated the distinction between 20 percent of benefits already awarded and all of Mr. Levin's Workers' Compensation award. Indeed, although under the requirement for subjective appreciation, one employee's knowledge that a story is false cannot be imputed to the employee writing the story under agency principles, the fact that in this case the truth was both generally known and generally available is further circumstantial evidence of "actual malice."

III.

The Gazette's most important argument on appeal is that even though its editorial was both false and defamatory, the Gazette enjoyed two privileges that make the paper immune from liability. The first privilege the Gazette asserts is the privilege of "fair comment," which protects editorial opinion. Milkovich v. Lorain Journal Co., 497 U.S. ___, 110 S.Ct. 2695 (1990). Indeed, this Court has expressly recognized the privilege of "fair comment," and has accorded the media wide latitude for editorial opinion, Havalunch v. Mazza, 170 W. Va. 268, 294 S.E.2d 70 (1981). Unless an opinion, no matter how scurrilous, implies undisclosed defamatory facts, we protect it. Hustler, supra note 17. Sharp, vituperative and biting criticism are at the heart of free debate. Thus, if the editorial at issue in the case before us were simply a recitation of the defendant's opinion that all lawyers are low-life and Mr. Hinerman, by membership in the legal profession, must on that account be low-life as well, the editorial would be privileged as fair comment.

The second privilege the Gazette asserts is the privilege to report official proceedings or public meetings. The details of this privilege are best summarized in § 611, Restatement (Second) of Torts (1977), which provides as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Consequently, if the Gazette had simply published the allegations against Mr. Hinerman set forth in Mr. Levin's petition, or a fair abridgement of those allegations, then that publication, notwithstanding that it would have been damning, would also have been privileged.

Although we recognize the privilege of fair comment and the privilege to report official proceedings, we do not accept the Gazette's argument that it may shuffle the two privileges to create an editorial that is primarily a recitation of alleged facts where the reader is led to believe that the editorial writer believes the reported unsubstantiated facts, which are indeed untruths or half-truths. A regular news account that sets forth pleadings--notwithstanding that they are entirely one-sided--gives at least some notice to the reader that unsubstantiated allegations are being reported. Similarly, an article appearing on the editorial page that is derogatory, derisive or generally abusive, without alleging or implying any supporting facts, gives fair warning that the article is simply the editorial writer's opinion. However, when unsubstantiated allegations are so combined with strongly partisan opinion that the reader is led to believe that the editorial writer has access to undisclosed defamatory facts that lead him to believe the allegations he is reporting from a court proceeding are correct, the bounds of permissible behavior are overstepped.

Indeed, this very problem has been addressed by the learnéd restaters in Comment F to § 611, Restatement (Second) of Torts (1977) which says:

> Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article. The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties. [Emphasis added]

Thus, to parallel the language of Comment F, the plaintiff in this case is entitled to recover because the Gazette made additions of its own to what would otherwise be a privileged report of a court proceeding that conveyed a defamatory impression, imputed corrupt motives to the plaintiff, and indicted the integrity of the plaintiff.

When damning allegations from a court proceeding are combined with caustic and vituperative editorial opinion, the defamatory impression fairly conveyed enjoys a strength that is some exponential function of the defamatory impression that either unsubstantiated allegations or naked opinion would convey standing alone. This type of conduct enjoys no privilege.

IV.

The Gazette asks that even if we sustain the compensatory damages in this case, we strike the punitive damages because such damages exert a chilling effect upon First Amendment rights. However, we see no error in the award of $300,000 in punitive damages under Fleming Landfill, Inc. v. Garnes, 186 W. Va. 656, 418 S.E.2d 897 (1991) and TXO Production Corp., v. Alliance Resources, Corp., No. 20281 (W. Va. filed May 14, 1992).[28] Certainly, the punitive damages in this case bear a reasonable relationship to the compensatory damages and are lower than the five to one ratio that we indicated in TXO, supra, are presumptively valid in situations where people are simply "really stupid." TXO, slip op. at 35. However, in this case far greater punitive damages could be sustained on appeal because the evidence indicates that the defendant moved from the "really stupid" category discussed in TXO to the "really mean" category. TXO, slip op. at 37.

[28]Recently in Browning-Ferris Industries, Inc. v. Kelco, 492 U.S. 257, 280 (1989), the U. S. Supreme Court declined to disturb "the jury's punitive damages award" of $6 million on the grounds that it violated the Excessive Fines Clause of the Eighth Amendment. A year earlier, in Bankers Life & Casualty Co. v. Crenshaw, 486 U. S. 71 (1988), the Court refused to disturb a punitive damage award of $1.6 million based on the insurer's bad-faith refusal to pay on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. See DiSalle v. P. G. Publishing Co., supra note 17 (upholding a jury verdict of $210,000 in compensatory damages and $2,000,000 in punitive damages); Brown & Williamson Tobacco Corp. v. CBS, Inc., supra note 17 (upholding $2,000,000 in punitive damages against CBS, $1,000,000 in presumed damages against CBS and $50,000 against the reporter).

Because this case was tried on the theory that Mr. Hinerman was a public official, no recovery whatsoever could have been had unless the jury were convinced by clear and convincing evidence that the defendant acted from actual malice--i.e., that the defendant published false and defamatory material either knowing that it was false or with reckless disregard of whether it was false, and with an intent to injure the plaintiff.[29] No case could be stronger for punitive damages, and in light of the defendant's failure to retract its statement, its failure to offer an apology, and its failure to offer amends in any way for its defamatory statement, we see no just grounds for a remittitur. Simon v. Shearson Lehman Bros., Inc., 895 F.2d 1304 (11th Cir. 1990) (holding a $5,000,000 punitive damage award to be excessive and finding the maximum amount of punitive damages in that case to be $1,000,000); Schiavone Const. Co. v. Time, Inc., 847 F.2d 1069 (3rd Cir. 1988) (holding that punitive damages could be awarded if after a retraction was demanded by the plaintiff, no retraction was published).[30]

[29] See Curtis Publishing Co. v. Butts, 388 U. S. 130, 170 (1967)(Warren, C.J., concurring)("Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers."); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), cert. denied 429 U. S. 1041 (1977) (holding that the prevention of a chilling effect on the First Amendment has little application where actual malice, the New York Times v. Sullivan standard, has been shown); Maheu v. Hughes Toolco, 569 F.2d 459, 480 (9th Cir. 1977), (holding that "punitive damages are permissible once actual malice as defined in New York Times has been established").

[30] Furthermore, assuming that the Gazette believed that its statements were privileged and thus not actionable in a court of law, what conceivable motive other than surpassing ego and unbridled arrogance could have prevented the Gazette from making amends through a prompt, prominent and abject apology? In the long run, law and

Nonetheless, for the benefit of future litigants, we would point out that the anxiety we expressed in Sprouse v. Clay Communications, Inc., 158 W. Va. 427, 211 S.E.2d 674, cert. denied, 423 U.S. 882 (1975) about the propriety of punitive damages still persists, and in appropriate circumstances we remain willing to craft special rules governing punitive damages against media defendants in deference to First Amendment considerations. However, in the punitive damages area there is a yet unresolved tension among: (1) the public's demand for accountability; (2) the surpassing arrogance of the media; and, (3) the courts' justified concerns that punitive

(..continued)
morality are not separate spheres, See, H. Berman, Law and Revolution, Harvard University Press (Cambridge, MA., 1983), which is why we observe the pro-victim shifts in the libel law that are discussed in part I in the text. Furthermore, appropriate apologies are easy to do. For example, in the 16 January 1992 issue of The New York Review of Books, the following apology appeared in a box 4.75 inches by 2.375 inches at the upper right hand corner of p. 15:

MR. RANDOLL COATE: AN APOLOGY

> In a review of The Polk Conspiracy by Kati Marton which appeared in our issue of September 26, 1991, the reviewer reported certain allegations concerning Mr. Randoll Coate which we accept are entirely unfounded. We wish to make it abundantly clear that we accept without qualifications Mr. Coate's statement that he was not:
>
> (a) connected in any way with a plot leading to the death of Mr. George Polk in Greece in 1948 or with any attempt to cover it up; and
>
> (b) at any time in possession of information concerning the identity of those responsible.
>
> We greatly regret the distress this has caused Mr. Coate and offer him our sincere apologies.

damages will lead to excessive self-censorship. It is this tension that we hope to resolve today.

In Garnes v. Fleming Landfill, supra, we discussed the constitutional limits on punitive damages and set forth criteria for reviewing punitive damages awards. Among the factors set forth for determining whether, in a particular case, punitive damages are excessive is the criterion of whether the defendant made a timely offer to compensate the victim once liability became clear. Syllabus Point 3, Garnes.[31] Consequently, under this criterion of Garnes, the Gazette is entitled to no favorable consideration because the Gazette never apologized or attempted to make amends even when it became abundantly clear to all concerned that a serious injustice had been

[31]One of the proposals for defamation reform would bar litigation if a retraction is published or broadcast before the institution of the suit. See The Gannett Center for Media Studies, Conference Report, The Cost of Libel: Economic and Policy Implications (1986), at 19. Some states have long taken retraction into account in reducing potential defamation liability. For example, the law in California is:

> In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

Cal. Civ. Code § 48a(1) (West 1982).

done.[32] If anything, the follow-up editorial quoted earlier that allegedly gave the matter "another look" actually added insult to injury.

We accept with enthusiasm the First Amendment obligation of the courts to protect robust and untrammeled discussion, but we fail to see how untrammeled media arrogance in any way furthers the legitimate ends of free speech. First Amendment, free speech considerations compel that we grant substantial privileges to the media, but we are also entitled to impose corresponding obligations when the media's fulfillment of those obligations will not compromise free speech one iota or lead to self-censorship. Obviously, when a media organization libels someone, that media organization exacerbates the harm it has done on every day that it permits the defamatory impression it has conveyed to persist in the mind of the reading or listening public.

Consequently, the media defendant who makes a prompt, prominent and abject apology calculated to reach as many people with the same or greater intensity as the original libel may reasonably ask to be treated differently for the purposes of punitive damages from the media defendant who persists in allowing the victim's

[32]A reading of the record in this case, particularly the testimony of friends and associates of Mr. Hinerman who telephoned the Gazette to prompt a correction or retraction, leads almost ineluctably to the inference that this entire matter could have been settled for an apology. Nothing in the record before us leads us to believe that Mr. Hinerman welcomed this libel as an opportunity to begin a lawsuit against a well-heeled corporate defendant.

reputation to suffer. Therefore, although a prompt, prominent and abject apology combined with an offer to pay reasonable damages will not shield a media defendant from paying actual damages, such offers to make amends may shield a media defendant from punitive damages under Syllabus Point 3 of Garnes, supra, as applied under New York Times v. Sullivan, supra, and Sprouse v. Clay Communications, supra.[33] However, when no appropriate apology or offer of reasonable compensation has been made, free speech considerations are not implicated when punitive damages similar to those that would be awarded in any other tort matter involving willful injury are awarded in a libel case.

In all American manufacturing, we impose liability for defective products. "Libel" is the peculiar name given to the product liability law that applies to the media. We have not given the media favored status over automobile, stepladder and lawn mower manufacturers because we want arrogant, abusive, and irresponsible media companies; rather, we have given favored status to the media because we do not want to chill robust and untrammeled debate about public issues.[34]

[33]As is usual in these matters, slightly different rules apply when the actual damages are negligible. See Hayseeds v. State Farm Fire & Cas., 177 W. Va. 323, 352 S.E.2d 73 (1986); TXO, supra.

[34]See, Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 432 (1975)(noting that the products liability analogy to media is limited because of the media's ability to decrease the risk "by increasing their self-censorship").

Today's media organizations are even bigger than they were at the time New York Times v. Sullivan was written, and increasingly both local newspapers and local broadcast stations are owned by distant conglomerates. See, The Media Elite, supra note **Error! Bookmark not defined.**. At the moment large media corporations give substantial control over editorial content to local management who live and work in the area served, but these management employees are also human beings with passions and flaws. Wide-open liability for punitive damages, therefore, is likely to induce profit-maximizing media conglomerates to impose standard corporate operating procedures requiring local management to be unreasonably conservative. See note **Error! Bookmark not defined.**. Papers that produce nothing but AP bear stories, pictures of children eating ice cream cones on the Fourth of July, and food store advertisements are not what the public needs every morning over coffee.

The tenure of the late W. E. Chilton, III, as the Gazette's long-time publisher, demonstrates why tempering punitive damages against a corporate defendant when one or two employees has or have behaved improperly is entirely proper. Mr. Chilton was a corporate employee who owned substantially less than a controlling interest in the defendant corporation. Although Mr. Chilton was a man and not a saint, the broad license that his fellow stockholders accorded him to manage the Gazette's editorial policy inured enormously to the benefit of the people of this State.

The record before us demonstrates that Mr. Chilton's editorial policy of strictly scrutinizing the behavior of lawyers led to one of the towering modern law reforms in this State, namely the abolition of the old "commissioners of account" system under which political appointees received enormous fees for precious little effort in the administration of decedents' estates. Mr. Chilton's premature death was a tragedy that has become progressively more obvious even to Mr. Chilton's detractors as the specter becomes prominent of "The State's Newspaper" being bought by an anonymous national McMedia corporation with little understanding and even less affection for the State, its peculiar traditions, and its people. Although this is a strange context in which to say it, ave atque vale W. E. Chilton, III.

Consequently, we recognize that society is better served if some latitude for "human error" is accorded both our impecunious mom and pop papers and the great media conglomerates with regard to punitive damages. However, none of these policy considerations persists when punitive damages are sustained against a company that has refused to make a prompt, prominent and abject apology for a known mistake and failed to make a reasonable offer of settlement. Under those circumstances, tempering punitive damages nurtures arrogance and unaccountability rather than full and robust debate. Therefore, failure to extend a prompt, prominent and abject apology along with a prompt offer of reasonable damages when it has become clear that an injustice has been done removes any obstacle to the imposition

of TXO-type[35] punitive damages once the high burden of proof for public official libel has been met.

Consequently, in libel cases we expressly endorse the "offer of fair settlement" criterion articulated in Garnes, supra, and, henceforth, that criterion will be the cynosure in determining the "reasonableness" of punitive damages in libel cases whenever the media, as in the case before us, requests special treatment not accorded to automobile, stepladder and lawn mower manufacturers because of First Amendment considerations.

V.

The Gazette assigns error to some of the court's instructions and objects to the court's failure to give some of the Gazette's instructions. We have reviewed these assignments and find them sufficiently without merit not to be fairly raised.[36]

[35]In TXO, this court sustained a judgment for $19,000 in actual damages and $10,000,000 in punitive damages under circumstances where an enormous national company, proceeding from the most malicious of motives, used consummate cunning combined with elaborate premeditation to attempt to steal thousands of acres of oil and gas belonging to a group of unsophisticated, hardworking country oil and gas producers.

[36]Typical of these assignments is the following:
The circuit court's instructions stated:

> The Court instructs the jury that a communication is defamatory if it tends so to harm the reputation of another or to lower him in the estimation of the community, such as by reflecting upon his personal morality or integrity, or if the communication deters third persons from associating or dealing with him.

The Gazette also assigns error to the trial of this case in Brooke County. The Gazette maintains that at trial there was no proof that The Charleston Gazette was distributed in Brooke County by the Gazette on the day the libelous editorial appeared. Therefore, the Gazette argues, the Circuit Court of Brooke County did not have jurisdiction.

The Gazette confuses jurisdiction with venue. The pretrial order in this case, which was agreed to by both plaintiff's and defendant's counsel, provided that both jurisdiction and venue were proper in Brooke County. Although lack of subject matter jurisdiction cannot be waived, lack of proper venue certainly can. "Jurisdiction implies or imports the power of the court, venue the place of the action." State ex rel. Chemical Tank Lines, Inc., v. Davis, 141 W. Va. 488, 494, 93 S.E.2d 28, 32 (1956) (quoting Arganbright v. Good, 46 Cal. App. 2d Supp. 877, 116 P.2d 186). See also, Sidney C. Smith Corp. v. Dailey, 136 W. Va. 380, 67 S.E.2d 523 (1951); W. Va. Const., art. VIII, § 6.[37]

(..continued)
The Gazette maintains that the circuit court should have included the following sentence in the instruction:

> A statement about a public official such as Mr. Hinerman cannot be considered defamatory unless it would reflect shame, contumely and disgrace upon him or unless it falsely charges him with a crime or personal dishonesty.

We fail to see how the defendant's language differs in purport from the instruction actually given by the circuit court.

[37]If, indeed, the lower court had ordered that Mr. Haught be hanged by the neck until he was dead, the court would have lacked jurisdiction

VI.

Finally, the plaintiff cross-assigns error to the circuit court's determination that by virtue of his position as an appointed municipal judge, his membership on the West Virginia Racing Commission, and his membership on the Board of Governors of West Virginia State Bar, the plaintiff is a "public official." Although resolution of this issue is not necessary for our decision in this appeal, should a retrial become necessary, a resolution of this issue will be important. Consequently, we hold that under applicable First Amendment principles, Mr. Hinerman is not a public official or public figure for the purposes of this defamation action.

In defamation cases, three types of plaintiffs exist: (1) public officials and candidates for public office; (2) public figures; and, (3) private individuals. Gertz, supra note 17. Public officials are "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Rosenblatt v. Baer, 383 U. S. 75, 85 (1966). Publicly elected officials, of course, are "public officials" for purposes of defamation law. Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778 (1986). However, the public

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to impose that penalty, and this court would have looked favorably on an assignment alleging that penalty as error, even if during the trial Mr. Haught had been so contrite as to waive all objection.

official category "cannot be thought to include all public employees." Hutchinson v. Proxmire, 443 U. S. 111, 119 n.8 (1979).

Mr. Hinerman does not qualify as an elected public official by virtue of any of the positions relied upon by the Gazette. He was appointed to the municipal judgeship, he was appointed to a position on the racing commission, and he was elected by lawyers, not the public, to the Board of Governors of the West Virginia State Bar. Having failed the "elected public official" test, Mr. Hinerman can be designated a public official only if he has "substantial responsibility for or control over the conduct of governmental affairs." Gertz, supra note 17, 418 U. S. at 335, n.6 (quoting Rosenblatt, supra, 383 U.S. at 85). In this regard, the Gazette relies principally on Mr. Hinerman's state bar vice-presidency as proof of public official status. Yet, as an officer of the state bar, Mr. Hinerman exerted no control over government affairs. The state bar is merely an advisory body to the West Virginia Supreme Court of Appeals. The bar has no authority of its own. As requested by this Court, the state bar can propose changes to the various rules of the Court, but its role is never more than that of an assistant or advisor to this Court. A second vice-president in such a body hardly has "substantial responsibility" or control over government affairs.

In Gertz, supra note 17, the Supreme Court found Mr. Gertz to be a private individual rather than a public official even though he was a lawyer who had been a member and officer of the National

Lawyers' Guild. Then, in Lawrence v. Moss, 639 F.2d 634 (10th Cir. 1981), cert. denied, 451 U. S. 1031 (1981), the plaintiff was considered to be a private figure, notwithstanding that he had served in numerous governmental capacities, including service as a member of Vice-President Agnew's staff, a deputy director of administration in the committee for reelection of the President, and as a "special assistant to the Assistant Administrator of the General Services Administration" in Washington, D. C.

Furthermore, even if circumstances could be imagined in which Mr. Hinerman would qualify as a public official for libel law purposes, this is not such a case because the editorial at issue in this case failed to identify Mr. Hinerman as a public official. When a defendant's defamatory statements "do not directly or impliedly identify the plaintiff as a public official," the public official doctrine is not available as a defense. Bufalino v. Associated Press, 692 F.2d 266, 273 (2d Cir. 1982), cert. denied, 462 U. S. 1111 (1983). Although it is not necessary to identify a president, governor, U. S. senator, congressman, or other well-known public official as serving in a particular office, a private person like Mr. Hinerman who is only arguably a "public official" by virtue of his holding a low-level government or quasi-government position, must at least be identified in his public capacity before a media defendant may shield itself behind the special public official provisions of the libel law.

In Bufalino, supra, the plaintiff, a member of the Pennsylvania Bar who lived and practiced law in a community of approximately 7,000 people, was employed part-time by the community as borough solicitor at an annual salary of $3,500. Following the Pennsylvania gubernatorial election of 1978, then governor-elect Richard L. Thornburgh released to the press a list of campaign contributors. The plaintiff was identified on that list as having contributed $120. A news report appearing in the Associated Press stated that governor-elect Thornburgh had received campaign contributions from "several individuals with alleged mob ties." Among those persons named in the AP article was the plaintiff, who was described as "Charles Bufalino, Jr., an attorney who was related to Russell Bufalino, described by the Crime Commission as a Mafia boss."

On appeal from the district court's grant of summary judgment, the Associated Press argued, analogous to the Gazette's argument here, that the appellant's performance of his duties as borough solicitor made him a public official and that "a town attorney's alleged mob ties 'touch on' his fitness for office and hence are covered by the public official doctrine." The Second Circuit, however, found it unnecessary to rule on whether the AP allegation "touched on" the appellant's fitness for office, and found that the AP stories did not identify the appellant as the holder of any public office:

> The stories described appellant merely as "an attorney." A reader without prior knowledge of appellant's status

> as Borough Solicitor would most likely, and correctly, assume from the description that appellant is engaged in the private practice of law. The description would not directly or impliedly inform the reader that appellant holds any public office.

Bufalino at 273. The Second Circuit held that because there was no showing that readers of the AP article would recognize appellant as a public official, the public official doctrine was inapplicable. See also, Foster v. Larendo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U. S. 1123 (1977); Ocala Star-Banner Co. v. Damron, 221 So.2d 459 (Fla. App. 1969), appeal dismissed, 231 So.2d 822 (Fla. 1970), rev'd. on other grounds, 401 U. S. 295 (1971) (defamatory article nowhere mentioned the plaintiff's status as mayor or as candidate for public office); Guinn v. Texas Newspapers, Inc., 738 S.W.2d 303 (1987), cert. denied, 488 U. S. 1041 (1989) (defamatory article made no reference to plaintiff's official capacity, and there was no proof that plaintiff, an elected justice of the peace, was known as a public official beyond the confines of his region, the actual malice standard did not apply).

In the present case, Mr. Hinerman, at the time of the libelous editorial, was a lawyer who worked and resided in Weirton, an area remote from the principal places of the Gazette's circulation. The Gazette did not proffer any evidence that any member of the general public, on reading the editorial, would know that Mr. Hinerman held any public office. In particular, there was no evidence that a reader in Hancock or Brooke Counties would know of Mr. Hinerman's status as a second vice-president in the state bar (or any other office).

The Gazette editorial itself makes absolutely no reference to Mr. Hinerman as anything other than a "lawyer" or "UMW attorney." Consequently, should this case be retried, we hold that it must be retried under the negligence standard that applies to the libel of a private individual.

Accordingly, for the reasons set forth above, the judgment of the Circuit Court of Brooke County is affirmed.

Affirmed.