No. 20489 - Raymond A. Hinerman v. The Daily Gazette Company, Inc., a corporation, d/b/a The Charleston Gazette

Miller, J., dissenting:

In my more than thirty-five years as a trial lawyer and as a Judge on this Court, I have never seen a major case so badly botched. It contains a virtual Augean stables' worth of error and surplusage.[1] These errors range from irrelevant denigrations of the Gazette to important omissions, e.g., the majority's failure to quote the Gazette's newspaper article. This article was admitted by the parties to be accurate, and it was the basis for the editorial at issue. The reason for this omission is obvious. If the two documents are compared, as is required by the First Amendment, there can be no finding of any substantial inaccuracy. As a consequence, there could be no libel, and, thus, the $375,000 verdict for compensatory and punitive damages would have to be set aside.

Though the majority takes pains to offer voluminous social commentary, it fails to address the controlling issue in the case -- whether the Gazette is privileged against a libel suit because of its right to fairly and accurately report on official proceedings. The majority must manufacture legal authority to reach its stunning

[1]The problem with the Augean stables is briefly outlined in Bulfinch's Mythology 118 (Modern Library Edition): "Another labour (of Hercules) was the cleaning of the Augean stables. Augeas, King of Elis, had a herd of three thousand oxen, whose stalls had not been cleaned for thirty years."

conclusion that the current United States Supreme Court has a diminished interest in media libel cases. For this proposition, the majority relies on twenty denials of certiorari by the United States Supreme Court. See ___ W. Va. at ___ n.17, ___ S.E.2d at ___ n.17 (Slip op. at 21). However, in fourteen of these cases the media defendant won below, and the plaintiff or another defendant sought certiorari.[2] In three other cases, the media defendant had sought certiorari because it felt it deserved a summary judgment on liability.[3] Two of the cases are unpublished and it is impossible to determine their status.[4] In only one of the reported cases did the media defendant have a monetary judgment rendered against it.[5]

The majority errs again in its discussion of the role of a retraction in a libel case. It proceeds without citing any relevant law, and, as might be expected, ends up with an erroneous conclusion. Finally, I cannot help but note the majority's wolf-in-sheep's-clothing patronizing of the press. It assures the Gazette of its high regard, while simultaneously battering the paper with various low blows supplied by the most implacable media critics. Were it not for judicial immunity, I suspect the Gazette would have a good libel suit against the majority.

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[2]See footnote 17, infra.

[3]See footnote 18, infra.

[4]See footnote 19, infra.

[5]See footnote 16, infra.

Libel cases against a media defendant inevitably concern the Freedom of the Press Clause of the First Amendment.[6] The freedom of the press is one of the most hallowed protections contained in our Constitution. It allows the press to act as the watchdog for our citizens and to report on, criticize, and otherwise bring to public attention the actions and conduct of the government.[7] Through the diligence of the press, we have the power to insist that our government

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[6]The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[7]The United States Supreme Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92, 95 S.Ct. 1029, 1044-45, 43 L.Ed.2d 328, 347 (1975), outlined the role of the press in these terms:

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

remain true to Lincoln's ideal: "A government of the people, by the people, [and] for the people[.]"

I.

The Facts

This libel action is based on the Gazette editorial of May 20, 1983, which is quoted in the majority's opinion. ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 4-6). As the majority acknowledges, the plaintiff's sole claim of libel rests on the editorial's statement that Levin asserted that "his lawyer took every penny, getting $12,000 for one day's work," and an alleged further defamation caused by the editorial's omission of the phrase "until the [fee] bill was paid." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 6). This latter phrase was contained in an earlier news article that was written by a Gazette staff reporter and published on May 18, 1983. The editorial's assertion about the lawyer taking every penny and getting $12,000 for one day's work was a substantially accurate rendition of the information contained in the Gazette's news article.

No claim was made in the libel suit that the news article was inaccurate or in any manner false.[8] The parties agree that the

[8]The majority refuses to set out the newspaper article in its opinion because the article demonstrates the substantial accuracy of the editorial. The contents of the article, including its headline, are:

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**"Immigrant appeals lawyer's fee to court**

**By Mark Ward**
**Staff Writer**

"A Russian immigrant who was assessed more than $12,000 in legal fees for a one-day hearing on a Workers' Compensation appeal won a review of his case by the state Supreme Court Tuesday.

"Sam Levin, a native of the Soviet Union who emigrated to Israel and then to the United States, is appealing a default judgment that Wheeling lawyer Raymond A. Hinerman received against him for the fees.

"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 Workers' Compensation benefits until his fees are paid.

"Lawyer David Gold told the high court Tuesday that the fees appear to be excessive and said he was appalled that Levin, who is now staying with friends and family in Miami Beach, Fla. and has no source of income, is compelled to deliver his benefit checks to Hinerman.

"Levin emigrated from the Soviet Union to Israel in 1973, then traveled to the United States in 1975, the appeal petition states. He first came to Massachusetts, but because he was trained as a coal miner in the Soviet Union, decided to move to Wheeling where he got a job with Consolidated Coal Co. in April 1977.

"In October 1977 he suffered a heart attack and was unable to work.

"According to the petition, Hinerman, a former staff counsel for United Mine Workers District 6, represented Levin in the Workers' Compensation claim for free at first as a benefit of union membership.

"However, Levin was granted only 20 percent disability. Hinerman, meanwhile, quit the union but convinced Levin to retain him as a

editorial was based on this news article. Moreover, it is not disputed that the article was derived from the contents of a petition for appeal filed in this Court by Mr. Levin's appellate lawyer, Mr. Gold. No

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> private attorney to bring the appeal. After a one-day hearing, the petition states, Levin was granted permanent total disability.
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> "Last July Hinerman sent Levin a bill for $4,201.88 for representing him in the hearing. When Levin neglected to pay, Hinerman brought suit against Levin, Consolidation Coal Co., Employment Services Corp and Workers' Compensation Commissioner Gretchen Lewis for $12,088.54.
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> "In November, Levin wrote a letter to Judge Tsapis, saying that he could not afford to hire a lawyer, but felt that he owed Hinerman nothing. 'I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage,' he wrote.
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> "Hinerman asked for a default judgment against Levin, and Judge Tsapis, ruling that Levin's request did not comply with court rules, approved it. The judge also ruled that Hinerman could attach 100 percent of Levin's Workers' Compensation benefits until the bill was paid.
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> "The petition also noted that Hinerman stated in a hearing that when Levin was flown from Florida for the appeal hearing that 'the costs in this case, to try to save Mr. Levin money, were charged to another client. . . . So he probably saved a good $1,000 in costs.'
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> "The petition asked that Levin be given an opportunity to defend himself, saying, 'An immigrant who must have all correspondence translated, who is in ill health, living on the charity of friends an [sic] family and ignorant of the legal process should be excused his neglect in not timely answering (the) complaint.'"

claim is made that the news article did not accurately reflect the contents of the petition for appeal.[9]

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[9]The petition for appeal filed by Attorney Gold contained these factual assertions, which were summarized in the Gazette's news article and its editorial:

> "A default judgment was granted to the plaintiff on November 9, 1982, against petitioner in the amount of Twelve Thousand Eighty-Eight Dollars and Fifty-Four Cents ($12,088.54) by the Circuit Court of Hancock County, the Honorable Callie Tsapis presiding, and your petitioner unsuccessfully sought to have that judgment vacated. Pursuant to said default judgment, said Court Ordered the attachment of 100% of petitioner's Workmen's Compensation benefits in favor of the plaintiff, a practicing attorney in Hancock County, West Virginia.
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> * * *
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> "Petitioner is a native-born Russian who emigrated to Israel in 1973, and on to the United States in 1975. He first resided in Massachusetts, but because his training in Russia and Israel was in underground mining, he moved to Wheeling, West Virginia, in April, 1977, to work in the coal mines. In October, 1977, he was disabled by a heart attack which occurred in the course of his employment.
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> "As a member of The United Mine Workers of America (UMWA), petitioner's Workmen's Compensation claim was handled, without charge to him, by UMWA District 6 counsel. During the times pertinent hereto (March, 1981, to January, 1982), plaintiff served as District 6 counsel. During that time, petitioner was awarded a 20% disability rating for his injury; plaintiff, in his capacity as UMWA counsel, filed an appeal in July, 1981.
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> "In January, 1982, plaintiff resigned as District 6 counsel. The incoming counsel recommended to your petitioner that he retain plaintiff as his private attorney before the Workmen's Compensation Appeal Board. Plaintiff sent petitioner a letter which authorized the

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> Workmen's Compensation Commissioner to send any award checks to plaintiff. Petitioner signed the 'authorization' on January 28, 1982, after moving to Miami Beach, Florida.
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> "According to defendant's testimony, when his landlord explained to him the consequences of the 'authorization' he had signed, petitioner revoked the authorization. On July 8, 1982, plaintiff sent petitioner a bill for Four Thousand Two Hundred One Dollars and Eighty-Eight Cents ($4,201.88) for services rendered on his one-day appeal.
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> "Plaintiff instituted the instant suit when petitioner failed to pay the bill. In his complaint, however, plaintiff sought payment of the statutory limit of twenty percent (20%) of benefits paid during a period of two hundred eight (208) weeks ($12,088.54) plus interest and costs. This amount was in addition to fees paid to plaintiff for work done on petitioner's case while plaintiff was employed by the UMWA.
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> "Petitioner testified that he was uncertain of the legal consequences of the suit against him and was unable to hire an attorney because of his financial condition. He did file pro se pleadings in an attempt to respond to the case against him, and following the entry of said judgment, persuaded instant counsel to move for the vacation of that judgment. These efforts were unsuccessful, leading to the prosecution of this appeal.
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> * * *
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> "On November 1, 1982, petitioner, who apparently has no knowledge of the legal process, mailed a letter to the Circuit Court Judge of Hancock County outlining what he felt to be his defenses to the instant suit. He wrote that, 'There are no legal obligations between him and me.' Additionally, petitioner offered to appear before the Court and ask the Judge for her 'opinion' on the matter, apparently believing that his actions would suffice to delay or end any action against him.
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> "The Judge refused to recognize this and other

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> pro se attempts to answer because they 'failed to comply with the Rules.'. . .
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> "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 has been paid these sums will petitioner receive any of his award. The effect of this ruling is to give to the plaintiff, a practicing attorney, all of petitioner's income while the petitioner, who is totally disabled, has no source of income whatsoever."

The attorney's petition for appeal then reached several legal conclusions:

> "The West Virginia Legislature has set a limit on the fee received by an attorney for his work in a Workmen's Compensation case. West Virginia Code §23-5-5 reads, in pertinent part:
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> In no case shall the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks.
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> "In providing a sanction for charging or receiving a fee in excess of the set maximum, the statute states that any contract entered into for more than 20 percent of the benefits to be paid during a period of two hundred eight (208) weeks 'shall be unlawful and unenforceable as contrary to the public policy of this state.' Furthermore, any fee charged or received by an attorney in violation thereof shall be deemed 'an unlawful practice and render the attorney subject to disciplinary action.' (Emphasis Added). Thus, in the instant case, the fee received by the plaintiff, although not charged under a contract with petitioner, nevertheless falls within the statutory prohibition. According to the explicit statutory language,

There is no question in my mind that the Gazette editorial accurately summarized its earlier news article. The thrust of the editorial was correct -- that for one day's work Hinerman had charged Levin a legal fee in excess of $12,000. When Levin failed to properly answer the fee suit, Hinerman obtained a default judgment and was able to seize 100 percent of Levin's workers' compensation benefits. Although the editorial did not use the phrase "until the [fee] bill was paid," there is no doubt that 100 percent of Levin's workers' compensation benefits were subjected to Hinerman's attachment. Thus, from Levin's viewpoint, he was not receiving a single penny of his workers' compensation benefits because every penny was going to the lawyer.

The gist or "sting" of the Gazette editorial was accurate. Whether the $12,000 default judgment would absorb the entire award is a matter that was never revealed. The majority expects, indeed

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> then, the plaintiff's receipt of payment from the United Mine Workers of America, in addition to 20 percent of the petitioner's benefits during a period of two hundred eight (208) weeks exceeds the statutory maximum and is an 'unlawful practice' which should not be tolerated."

The petition further asserted:

"An immigrant who must have all correspondence translated,

> who is in ill health, living on the charity of his friends and family and ignorant of the legal process should be excused of his neglect in not timely answering plaintiff's complaint."

requires, either the editorial writer or the Gazette's reporter to make this calculation, though it would require the legal ability to understand the complicated law surrounding our workers' compensation program.

II.

First Amendment Law

In this case, the plaintiff was found by the trial court to be a public official because he held a variety of public offices. At the time the editorial was published, Mr. Hinerman was the municipal judge for the City of Weirton; a second vice-president of the West Virginia State Bar, an organization legislatively created and subject to the supervision of this Court;[10] and, finally, a member of the West Virginia Racing Commission. As a public official, Mr. Hinerman is prohibited from recovering damages for a defamatory falsehood, unless he can prove the statement was made with actual malice. Recently, the United States Supreme Court reaffirmed this standard in Milkovich v. Lorain Journal Co., 497 U.S. 1, ___, 110 S.Ct. 2695, 2703, 111 L.Ed.2d 1, 14 (1990):

> "In 1964, we decided in New York Times Co. v. Sullivan, 376 U.S. 254 [84 S. Ct. 710, 11 L.Ed. 2d 686, 95 A.L.R.2d 1412 (1964)], that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for 'a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was

[10]See W. Va. Code, 51-1-4a.

> made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' . . ." (Citation omitted).

Milkovich also recognized a vital procedural requirement of First Amendment libel law: An appellate court has an obligation to make an independent examination of the evidentiary record to determine if there were sufficient facts to constitute libel.[11] Thus, a jury verdict is not conclusive in a First Amendment libel case.

More recently in Masson v. New Yorker Magazine, Inc., ___ U.S. ___, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991), the United States Supreme Court acknowledged again that when a public figure or official is a plaintiff in a libel action, the plaintiff must prove the libel by clear and convincing evidence.[12] More importantly, Masson

[11]The applicable language in Milkovich, 497 U.S. at ___, 110 S. Ct. at 2705, 111 L.Ed.2d at 16-17, is:

> "The Court has also determined 'that in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 [104 S. Ct. 1949, 80 L. Ed. 2d 502] (1984) (quoting New York Times, 376 U.S., at 284-286 [84 S. Ct. 728-29, 11 L. Ed. 2d 686]. 'The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.' Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 [109 S. Ct. 2678, 2694, 105 L. Ed. 2d 562, 587] (1989)."

[12]Masson addressed whether summary judgment should have been

explained in detail how the falsity of a publication was to be determined:

> "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts § 563, Comment c (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 776 (5th ed. 1984). It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth, and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' B. Witkin, Summary of California Law, § 495 (9th ed. 1988) (citing cases). In this case, of course, the burden is upon petitioner to prove falsity. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 [106 S.Ct. 1558, 1563, 89 L.Ed.2d 783, 792] (1986). The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' Heuer v. Kee, 15 Cal.App.2d 710, 714, 59 P.2d 1063, 1064 (1936); see also Alioto v. Cowles Communications, Inc., 623 F.2d 616, 619 (CA9 1980); Maheu v. Hughes Tool Co., 569 F.2d 459,

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granted for the defendant magazine, but the same burden applies at trial:

> "The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to conclude that respondents published a defamatory statement with actual malice as defined by our cases. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-256 [106 S. Ct. 2505, 2513-2514, 91 L. Ed. 2d 202, 216] (1986)." ___ U.S. at ___, 111 S. Ct. at 2428, 115 L. Ed. 2d at 467.

> 465-466 (CA 9 1978). Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' R. Sack, Libel, Slander, and Related Problems 138 (1980); see, e.g., Wheling v. Columbia Broadcasting System, Inc., 721 F.2d 506, 509 (CA 5 1983); see generally R. Smolla, Law of Defamation § 5.08 (1991). Our definition of actual malice relies upon this historical understanding." ___ U.S. at ___, 111 S. Ct. at 2432-33, 115 L. Ed. 2d at 472-73.

These constitutional commands are made obligatory on states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Until today's opinion, we have followed these commands with commendable fidelity, as reflected by Syllabus Points 1 through 4 of Dixon v. Ogden Newspapers, Inc., ___ W. Va. ___, 416 S.E.2d 237 (1992):

> "1. ' "[A] public official . . . can sustain an action for libel only if he can prove that (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syllabus Point 1, in part, Sprouse v. Clay Communication, Inc., 158 W. Va. 427, 211 S.E.2d 674, 95 A.L.R.3d 622, cert. denied, 423 U.S. 882, 96 S.Ct. 145, 46 L.Ed.2d 107 (1975).' Syllabus point 4, Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778 (1986).

> "2. 'Under New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1969), whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law . . . .' Syllabus point 2, in part, Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981).
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> "3. 'A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.' Syllabus point 6, Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778 (1986).
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> "4. In order to sustain an action for libel, a public official must present clear and convincing evidence that the media defendant acted with actual malice. Actual malice must be proven with convincing clarity."

See also Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778 (1986); Mauck v. City of Martinsburg, 167 W. Va. 332, 280 S.E.2d 216 (1981).

Thus, under First Amendment law, the plaintiff had to prove by clear and convincing evidence each of the following elements to recover damages against the Gazette. First, the plaintiff had to prove that the editorial's statements were, in the language of Masson, false or misleading to the extent that the true facts would have produced a "'different effect on the mind of the reader'" because "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" ___ U.S. at ___, 111 S. Ct. at 2433, 115 L. Ed. 2d at 472. (Citations omitted).

Second, the editorial must be shown to have defamed the plaintiff. Third, it must be shown that the statements were published with the knowledge that they were false, misleading, or published with reckless and willful disregard of the truth. Finally, the plaintiff must show that the publisher of the editorial intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material. See Syllabus Point 1, Dixon v. Ogden Newspapers, Inc., supra.

As outlined above, it is at the time of the publication of the alleged libel that the knowledge of falsity and recklessness and willful disregard of the truth is tested. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989); St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Thus, the majority's attempt to impute falsity and reckless disregard by reciting conversations and events that colleagues of Mr. Hinerman had with employees of the Gazette after the editorial was published are not relevant.[13] Nor is its reliance on the supposed bias of Mr. Chilton, the Gazette editor, against lawyers of any legal consequence. As the Supreme Court made clear in Masson v. New Yorker Magazine, Inc., ___ U.S. at ___, 111

[13]The most egregious fact left out of the petition for appeal was that Mr. Levin was subsequently awarded a permanent total disability award. Under our workers' compensation statute, Mr. Hinerman was then entitled to a greater legal fee. For this reason, Mr. Levin lost his appeal. See Hinerman v. Levin, 172 W. Va. 777, 310 S.E.2d 843 (1983).

S. Ct. at 2429, 115 L. Ed. 2d at 468, ill will is not equivalent to actual malice for First Amendment purposes: "Actual malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970)."

Another critical piece of First Amendment libel law comes into play in this case because the editorial was based on facts that had initially been obtained by a news reporter from a petition for appeal filed in this Court. There is a privilege under the First Amendment for fair and accurate reporting on official proceedings. Though some of the facts asserted in an official proceeding may be untrue, the media is not liable for reporting them.[14]

For example, in Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971), Time Magazine was sued for libel by a police

[14]Incredibly, the majority's entire discussion of this important privilege to report official proceedings is contained in three paragraphs. ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 32-34). As its only authority, the majority cites Section 611 of the Restatement (Second) of Torts and comment f under this section. The majority makes no attempt to analyze any of the First Amendment cases discussing this privilege. This lapse is understandable because to intelligently discuss this law would require a conclusion that the libel verdict cannot be sustained. In this unbridled ignorance, the majority writer, a devotee of Tennyson's Idylls of the King, "Merlin and Vivian," see ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 27), might take heed of this thought from the same work by Tennyson: "Blind and naked ignorance delivers brawling judgments unashamed, on all things all day long."

officer. He claimed that Time's article had defamed him because it failed to inform the reader that the facts surrounding an episode of police brutality were obtained from allegations in a civil action filed against the plaintiff. Time's article was based on a report issued by the United States Commission on Civil Rights which dealt, in part, with police brutality. In that report, the Commission outlined what it said were the alleged facts in eleven typical cases of police brutality. The Commission's report stated that in none of the cases could it be determined conclusively whether the complainants or the police were correct in their statements.

The Supreme Court refused to find that Time's omission of this information by its failure to use the term "allegation" in the news article made the article false:

> "In light of the totality of what was said in Justice, we cannot agree that, when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to the allegations of a complaint, Time engaged in a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice.' " 401 U.S. at 289, 91 S.Ct. at 639, 28 L.Ed.2d at 53.

Subsequently, in Cox Broadcasting Corp. v. Cohn, 420 U.S. at 492-93, 95 S. Ct. at 1045, 43 L. Ed. 2d at 348, the Supreme Court further explained the purpose of this First Amendment privilege:

> "The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized. This Court, in an opinion written by Mr. Justice Douglas, has said:

'A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. . . .' Craig v. Harney, 331 U.S. 367, 374 [67 S. Ct. 1249, 1253, 91 L. Ed. 1546, 1551] (1947). (emphasis added)."

In Lavin v. New York News, Inc., 757 F.2d 1416 (3rd Cir. 1985), the newspaper published a summary of a 165-page F.B.I. agent's affidavit filed with a federal court in order to obtain search warrants. According to the news article, F.B.I. informants indicated that several police officials were involved in taking bribes from the mob. The article's headline stated, "The Mob: Best Cops Money Can Buy." The article included the plaintiff's picture and that of another police officer and both were identified by their names and titles. The news article did contain a statement by the plaintiff saying that he had not accepted bribes.

The central controversy in the libel action was whether the article together with its headline and photograph wrongly accused the plaintiff of committing a crime, when there was no specific statement in the affidavit that Lavin had accepted a bribe. The Court of Appeals for the Third Circuit disposed of the issue by finding the article not libelous because it was substantially accurate, and

the newspaper could not be held accountable for factual inaccuracies in the affidavit itself:

> "In the final analysis, the issue is not whether the affidavit included direct evidence of the payment of money to plaintiff, but whether, fairly read, the affidavit asserts that the FBI had concluded that plaintiff was corrupt. In our view, the affidavit undoubtedly amounts to an assertion that plaintiff was directly involved in a corrupt relationship with members of organized crime in the Bayonne, New Jersey, area.
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> "We hasten to add that, given the present procedural posture of the case, we must assume that the FBI affidavit was false in every particular, and that plaintiff was and is entirely innocent, and was merely carrying out appropriately his duties as head of the Internal Affairs Department. But whether the FBI agents misinterpreted the situation, had incorrect information, or even consciously misstated the facts in the affidavit, there can be no liability on the part of the defendants for republishing the contents of an official document, so long as their account is reasonably accurate and fair. We hold, as a matter of law, that it was." 757 F.2d at 1420.

See also Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), cert. denied, 488 U.S. 825, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988); Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2nd Cir.), cert. denied, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977); Schiavone Constr. Co. v. Time, Inc., 735 F.2d 94 (3d Cir. 1984); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249 (4th Cir. 1988); Clark v. American Broadcasting Co., 684 F.2d 1208 (6th Cir. 1982), cert. denied, 460 U.S. 1040, 103 S. Ct. 1433, 75 L. Ed. 2d 792 (1983); Schuster v. U.S. News & World Report, Inc., 602 F.2d 850

(8th Cir. 1979); Green Acres Trust v. London, 141 Ariz. 609, 688 P.2d 617 (1984); Huszar v. Gross, 468 So. 2d 512 (Fla. App. 1985); Newell v. Field Enters., Inc., 91 Ill. App. 3d 735, 47 Ill. Dec. 429, 415 N.E.2d 434 (1980); Hoeflicker v. Higginsville Advance, Inc., 818 S.W.2d 650 (Mo. App. 1991); Cox v. Lee Enters., Inc., 222 Mont. 527, 723 P.2d 238 (1986); Oweida v. The Tribune-Review Publishing Co., ___ Pa. Super. ___, 599 A.2d 230 (1991), appeal denied, ___ Pa. ___, 605 A.2d 334 (1992); Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982); Mark v. KING Broadcasting Co., 27 Wash. App. 344, 618 P.2d 512 (1980), aff'd sub nom., Mark v. Seattle Times, 96 Wash. 2d 473, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124, 102 S. Ct. 2942, 73 L. Ed. 2d 1339 (1982).

This very issue was involved in our recent case of Dixon v. Ogden Newspapers, Inc., supra, which the majority elects to ignore. I can understand why -- Dixon is against the majority's current holding. In Dixon, we unanimously agreed that the newspaper had not libeled two police officers even though its article about a magistrate court trial suggested that the police officers may have disclosed an impending vice raid to a tavern owner. We found, after an independent review of the record, that the article was substantially accurate.

In my view, this law is dispositive of the case. The Gazette's initial news article on the Levin appeal to this Court was

a fair and accurate summary. The editorial's single omission was its failure to state that Levin's workers' compensation checks were attached and paid to Attorney Hinerman "only until the [fee] bill was paid." The undisputed fact was that Levin received no funds until Attorney Hinerman's fee bill was paid. Unless the reporter or the editorial writer was an expert on workers' compensation award payments, there was no way for either of them to know whether Levin's workers' compensation award would even be sufficient to pay his legal fees.

Moreover, the real harm was that the attachment took all of Levin's source of funds.[15] He was impoverished and without any income. Consequently, omitting the phrase "until the bill was paid" created no defamatory implication -- indeed, this phrase would have added nothing because one would assume that an execution could not collect more than the amount of the debt owed.

If the Gazette's editorial is tested in light of its privilege to report with substantial accuracy documents filed in official proceedings, then I have no doubt that it has met this standard. Under the constitutional prerogative of an appellate court to review First Amendment free press claims, the only conclusion is

[15]Because workers' compensation benefits are not wages, there was no limit on the amount that could be taken from any one check.

that there was no material omission and, therefore, no liability on the part of the Gazette.

III.

Other Errors

A.

I reject the majority's dubious assertion that the current membership of the United States Supreme Court has a "waning enthusiasm for reviewing liable judgments against media defendants." ___ W. Va. at ___, ___ S.E.2d at ___. (Slip op. at 20) This remarkable insight is buttressed by a list of twenty denials of certiorari in the third paragraph of footnote 17 of the majority opinion. ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 21). However, only one of these cases involved a monetary judgment against a media defendant.[16]

In fourteen of the cases, the media defendant was exonerated from the alleged libel, and the plaintiff or another defendant sought certiorari to the Supreme Court.[17] In three of these cases, the media

[16]Ball v. E.W. Scripps, 801 S.W.2d 684 (Ky. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1622, 113 L. Ed. 2d 719 (1991).

[17]Reuber v. Food Chem. News, Inc., 925 F.2d 703 (4th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 2814, 115 L. Ed. 2d 986 (1991); Smith v. McDonald, 895 F.2d 147 (4th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 53, 112 L. Ed. 2d 29 (1990); Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990), cert. denied, ___ U.S. ___, 112 S. Ct. 192, 116 L. Ed. 2d 152 (1991); Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1586, 113 L. Ed. 2d 650 (1991); Mosesian v. McClatchy Newspaper, Inc., 233 Cal. App. 3d 1685, 285 Cal. Rptr. 430 (1991), cert. denied, ___

defendant obtained a summary judgment, which was reversed on appeal, and the media appealed to the Supreme Court.[18] Two of the cases are unpublished opinions, and, therefore, the facts are unreported.[19] These denials of certiorari hardly reflect a studied indifference to the media's libel appeals by the Supreme Court. What it does demonstrate is the shallowness of the majority's research and its "waning enthusiasm" hypothesis.

(..continued)
U.S. ___, 112 S. Ct. 1946, 118 L. Ed. 2d 551 (1992); McCoy v. Hearst Corp., 227 Cal. App. 3d 1657, 278 Cal. Rptr. 596 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 939, ___ L. Ed. 2d ___ (1992); Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172, 264 Cal. Rptr. 699 (1989), cert. denied, ___ U.S. ___, 111 S. Ct. 51, 112 L. Ed. 2d 26 (1990); Locricchio v. Evening News Ass'n, 438 Mich. 84, 476 N.W.2d 112 (1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1267, 117 L. Ed. 2d 495 (1992); Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1071, 112 L. Ed. 2d 1177 (1991); Ward v. Roy H. Park Broadcasting, 328 N.C. 577, 403 S.E.2d 522, cert. denied, ___ U.S. ___, 112 S. Ct. 190, 116 L. Ed. 2d 151 (1991); Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, cert. denied, ___ U.S. ___, 111 S. Ct. 2261, 114 L. Ed. 2d 713 (1991); Dale v. Ohio Civil Serv. Employees Ass'n, 57 Ohio St. 3d 112, 567 N.E.2d 253, cert. denied sub nom., Dale v. American Federation of State, County & Mun. Employees, Int'l AFL-CIO, ___ U.S. ___, 111 S. Ct. 2853, 115 L. Ed. 2d 1021 (1991); Netzley v. Celebrezze, 51 Ohio St. 3d 89, 554 N.E.2d 1292, cert. denied, ___ U.S. ___, 111 S. Ct. 428, 112 L. Ed. 2d 412 (1990); Villarreal v. Harte-Hanks Communications, Inc., 787 S.W.2d 131 (Tex. App. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1316, 113 L. Ed. 2d 249 (1991).

[18]Barber v. Perdue, 194 Ga. App. 287, 390 S.E.2d 234, cert. denied, ___ U.S. ___, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990); Warford v. Lexington Herald-Leader Co., 789 S.W.2d 758 (Ky. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991); Spence v. Flynt, 816 P.2d 771 (Wyo. 1991), cert. denied, ___ U.S. ___, 112 S. Ct. 1668, 118 L. Ed. 2d 388 (1992).

[19]Worldwide Church of God v. McNair, No. 91-495 (Cal. App., 2d Dist., _____), cert. denied, ___ U.S. ___, 112 S. Ct. 380, 116 L. Ed. 2d 331 (1992); Birsner v. Sivalignham, No. 91-1382 (Cal. App., 2d Dist., _____), cert. denied, ___ U.S. ___, 112 S. Ct. 1671, 118 L. Ed. 2d 391 (1992).

Moreover, recent United States Supreme Court cases do not demonstrate that a retreat is occurring. I have already cited Milkovich v. Lorain Journal Co., where Chief Justice Rehnquist made a detailed summary affirming pre-existing First Amendment law. Certainly, Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589, cannot be deemed a retreat inasmuch as the Court strongly reiterated the reckless disregard standard and its relation to the duty to investigate:

> "A 'reckless disregard' for the truth, however, requires more than a departure from reasonably prudent conduct. 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' St. Amant [v. Thompson], 390 U.S. at 731 [88 S. Ct. at 1325, 20 L. Ed. 2d at 267]. The standard is a subjective one -- there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.' Garrison v. Louisiana, 379 U.S. [64] 74 [85 S. Ct. 209, 216, 13 L. Ed. 2d 125, 133 (1964)]. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. See St. Amant, [390 U.S.] at 731, 733 [88 S. Ct. at 1326, 20 L. Ed. 2d at 268]. See also Hunt v. Liberty Lobby, 720 F.2d 631, 642 (CA 11 1983); Schultz v. Newsweek, Inc., 668 F.2d 911, 918 (CA 6 1982). In a case such as this involving the reporting of a third party's allegations, 'recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' St. Amant, [390 U.S.] at 732 [88 S. Ct. at 1326, 20 L. Ed. 2d at 268]." (Emphasis added).

The majority's misunderstanding of Harte-Hanks and the emphasized language is particularly apparent in this case. The majority rests its ultimate conclusions on impermissible standards such as the Gazette's supposed duty to call Attorney Hinerman in advance of publishing the editorial.

Finally, Masson v. New Yorker Magazine, Inc., supra, is the Court's latest statement, and it spells out in elaborate detail that falsity cannot be found by minor inaccuracies that do not alter the thrust of the asserted libel. Had the majority followed these recent United States Supreme Court cases, it would have concluded there was no libel as a matter of law.

B.

Even though I firmly maintain that there was, as a matter of law, no proof of falsity in the Gazette's editorial in light of its privilege to fairly and accurately report official proceedings, I am constrained to express my disagreement with Part IV of the majority opinion.

First, the majority suggests that the Gazette's failure to publish an unequivocal retraction is conclusive proof of malice. This suggestion is simply contrary to established libel law. The general rule is that the presence of actual malice must be determined at the time of the publication of the alleged defamatory statement.

See, e.g., New York Times v. Sullivan, supra; Fitzgerald v. Penthouse Int'l. Ltd., 691 F.2d 666 (4th Cir. 1982), cert. denied, 460 U.S. 1024, 103 S.Ct. 1277, 75 L.Ed.2d 497 (1983); Peisner v. Detroit Free Press, Inc., 104 Mich. App. 59, 304 N.W.2d 814 (1981), modified on other grounds, 421 Mich. 125, 364 N.W.2d 600 (1984); Dupler v. Mansfield Journal Co., 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), cert. denied, 452 U.S. 962, 101 S.Ct. 3111, 69 L.Ed.2d 973 (1981). See generally, R. A. Smolla, Law of Defamation § 3.22(1) (1990).

The Supreme Court in New York Times Co. v. Sullivan, supra, stated that the failure to retract was not alone sufficient to establish malice. The court left open whether the lack of a retraction "may ever constitute such evidence [of malice] . . . ." 376 U.S. at 286, 84 S.Ct. at 729, 11 L.Ed.2d at 710.[20] There are cases where

[20]The discussion of this issue in Sullivan, 376 U.S. at 286-87, 84 S. Ct. at 729, 11 L. Ed. 2d at 710, is:

> "Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point -- a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached."

courts have held that under certain circumstances the failure to retract may be relevant proof on the issue of actual malice, see, e.g., Golden Bear Distrib. Sys. v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983); Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 465 U.S. 1014, 104 S.Ct. 1260, 79 L.Ed.2d 668 (1984). See generally § 580A, comment d, Restatement (Second) of Torts (1977).

There is also authority for the proposition that a prompt retraction may be used by a defendant as evidence of lack of actual malice. See, e.g., Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066 (5th Cir. 1987); Hoffman v. Washington Post Co., 433 F. Supp. 600 (D.D.C. 1977), aff'd, 578 F.2d 442 (1978); Sweaney v. United Loan & Fin. Co., 205 Kan. 66, 468 P.2d 124 (1970); Peisener v. Detroit Free Press, supra. Moreover, the United States Supreme Court in New York Times v. Sullivan reasoned that the refusal of the Times to retract as to Mr. Sullivan reflected its reasonable belief that it had not defamed him. See footnote 20, supra.

Finally, libel law recognizes that a retraction, aside from possible relevance to the malice question, may also be used to mitigate damages. See, e.g., Sweaney v. United Loan & Fin. Co., supra. See generally R. Smolla, Law of Defamation at § 9.10[9]. The right to have damages mitigated through a retraction is specifically authorized

in W. Va. Code, 57-2-4 (1923).[21] We have not had occasion to discuss this statute, but clearly it recognizes that an apology will mitigate the plaintiff's damages.

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[21]W. Va. Code, 57-2-4 (1923), states:

> "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true, and after notice in writing of his intention to do so (given to the plaintiff at the time of, or for, pleading to such action) may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case action shall have been commenced before there was an opportunity of making or offering such apology."

As pointed out in R. Smolla, Law of Defamation at § 9.12[2][a], many states have enacted retraction statutes, and in footnotes 151 and 152 to this section, these statements are made:

> "[151]Robert Sack has counted 33. R. Sack, Libel, Slander and Related Problems, § VIII.2, at 372 (1980). Sack's overview of the various state approaches to retraction is excellent.
>
> "[152]California, for example, follows the majority approach and provides only for certain media defendants in its retraction statute, while Connecticut, Louisiana, Maine, Massachusetts, Nebraska, Texas, and West Virginia apply their statutes to all defendants. Compare Cal. Civ. Code § 48a (West 1954), with Conn. Gen. Stat. Ann. § 52-237 (West 1960); La. Civ. Code Ann. Art. 2315.1 (West 1979); Me. Rev. Stat. Ann. tit. 14 § 153 (1965); Mass. Gen. Laws Ann. ch. 231, § 93 (1956); Mich. Stat. Ann. § 600.2911 (1962); Neb. Rev. Stat. § 25-840.01 (1975); Tex. Rev. Civ. Stat. Ann. art. 5430 (Vernon 1958); W. Va. Code § 57-2-4 (1966)."

In view of the foregoing law, which the majority has ignored, I find its treatment of the ameliorating effect of a retraction to be erroneous. At the very least, a retraction by a media defendant can be introduced to counter the plaintiff's claim that the publication was made with actual malice or a reckless disregard for its truth. Moreover, where such a good faith retraction is shown, it will mitigate the damages, and, in my view, insulate a media defendant from a punitive damage award.

C.

Perhaps in recognition of the paucity of the evidence to support his case as a public official, the appellee argues at some length through his cross-assignment of error that he is a private person and, therefore, is not required to meet the rigorous test of New York Times Co. v. Sullivan, supra. The majority avoids deciding this issue by jumping to its conclusion that the test was met. However, in obiter dictum, the majority intimates some misgivings about this conclusion by saying "should a retrial become necessary, this issue will become important." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 45). It then proceeds to find Mr. Hinerman to be a private figure.

Even if one assumes that attorney Hinerman was a private person, this status would still not support his judgment under Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558,

89 L. Ed. 2d 783 (1986). There, the Supreme Court, while recognizing that a private person need not demonstrate that a publication was made with actual malice or reckless disregard of the truth, held that the plaintiff was still required to "bear the burden of showing falsity, as well as fault, before recovering damages." 475 U.S. at 776, 106 S. Ct. at 1563, 89 L. Ed. 2d at 792. More recently this rule was acknowledged in Milkovich v. Lorain Journal Co., 497 U.S. at ___, 110 S. Ct. at 2704, 116 L. Ed. 2d at 16, where the Supreme Court reiterated the foregoing statement.

As earlier pointed out, this entire libel rests upon the omission of a single phrase, "until the [fee] bill was paid," in the Gazette's editorial that otherwise accurately set out the facts contained in its news article. There is no question that the news article and the editorial stated Hinerman's attachment took 100 percent of Levin's compensation payments. Thus, while the attachment existed, Levin did not receive one penny of his compensation award. While lawyers may quibble over how long this period of no payments would last for Mr. Levin, common sense would compel the conclusion that during this period, Mr. Levin received nothing. This was the obvious meaning of the editorial. It was not false in any material regard, and, as a consequence, Mr. Hinerman, even as a private citizen, is not entitled to recover under Philadelphia Newspapers, Inc. v. Hepps, supra, and its progeny.

IV.

I can only conclude that the significant errors contained in the majority opinion may be rectified in a further appeal to the United States Supreme Court. It is unfortunate that the majority is unwilling to faithfully apply First Amendment law, sworn as we are as judges to uphold the Constitution of the United States. While today's opinion goes against the Gazette, it exposes every media organization in this State to its pernicious reasoning. Thus, I echo the words of the seventeenth century poet, John Donne: "Never send to know for whom the bell tolls; it tolls for thee."[22]

I am authorized to state that Justice Brotherton joins me in this dissent.

[22]Devotions Upon Emergent Occasions, "Meditation XVII."