Constitutional Law: Case Notes

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The Colorado Supreme Court in Walker v. Colorado Springs Sun, Inc. delivered one of the first opinions by a state court of last resort since the United States Supreme Court held in Gertz v. Robert Welch, Inc. that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." In Gertz, the Supreme Court attempted to accommodate the competing values of the first amendment rights of the press and the states' legitimate interest in libel laws. Despite the apparent freedom left to the states, the accommodation required a number of restrictions on state libel law. Implementing the decision, which Justice White in his dissent characterized as "scuttling the libel laws of the States in such wholesale fashion", obliges each state to integrate the new federal rules with its existing tort law.

Because the majority opinion in Gertz does not define the precise scope of its holding, the degree of latitude permitted the states in applying the decision is uncertain. It is clear, however, that whatever implementation a state chooses, the new libel law that develops must provide the constitutional protection for the media which the first amendment demands. Walker illustrates the difficulties facing state courts after Gertz. This case note will focus on the standard of liability adopted by the Colorado Supreme Court and the court's interpretation of the Gertz decision. The validity of the compensatory and
punitive damage awards approved by the *Walker* decision will be discussed after a comparison of the new Colorado liability standard with the constitutional requirements for damage awards in libel actions developed in *Gertz*.

II. *Walker v. Colorado Springs Sun, Inc.*

A. *The Background of the Decision*

The libel action in *Walker* arose from articles and reader letters that the Colorado Springs Sun newspaper printed about a 93 year-old widow’s legal problems in securing return of some household goods which were stolen from her home. The plaintiffs, Mr. and Mrs. Walker, who operated an antique shop in Colorado Springs, purchased the items without knowledge that the goods were stolen. Mr. Simco, a friend of the widow, tried to recover the stolen goods for her but was advised by police that it was a civil matter between the owner of the goods and the Walkers. Frustrated by what he perceived as the injustice of requiring the widow to take legal action to recover her own property from the Walkers, Simco took his story to the Colorado Springs Sun and described the events to a Sun reporter. The reporter published two articles in the Sun about the elderly woman’s legal problems in securing her property, “even though everyone—including the police—know it is hers.” A Sun editor published an editorial expressing “outrage” at “what seemed to be unjust treatment” given the woman. The editor then personally selected for publication a number of letters from readers who shared Simco’s shock and dismay in the situation. The published letters spoke of the “law being used to protect the guilty” and of the Walkers’ “preferring to resell the merchandise rather than return it to its rightful owner.” Headlines supplied to the letters included “Black Eye for All Dealers” and “State ‘Fence’ Paradise.”

In fact the Walkers cooperated with the police and had only rejected Simco’s first money settlements because they were uncertain about his legal capacity to act as the widow’s agent. Some of the Sun articles and letters were published after the Walkers had settled the matter at a financial loss to their business. On the basis of the Sun publications, the Walkers filed a libel action against the Colorado Springs Sun, its editor and reporter, and Mr. Simco.

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7 538 P.2d at 451-53.
9 Defendant Simco is not a party in the appeal. 538 P.2d at 451.
The trial court, after ruling that the publications were of public interest and concern, held that *Rosenbloom v. Metromedia, Inc.*, the most recent United States Supreme Court pronouncement on the liability standards in libel actions, governed the case. The jury was instructed:

You are instructed, however, that under the law a newspaper and its staff . . . are privileged to publish even defamatory material concerning an individual, provided such privilege is not abused. The privilege is abused only if the Plaintiffs establish that the publications were false in some material manner and such statements were published with knowledge that they were false or with reckless disregard of whether they were false or not.¹¹

The jury verdict for the plaintiffs awarded the Walkers compensatory and punitive damages.¹²

After defendants appealed, the Colorado Supreme Court granted writ of certiorari, removing the action from the jurisdiction of the lower appellate court. After oral argument in the supreme court but before a decision obtained there, the United States Supreme Court decided *Gertz v. Robert Welch, Inc.* The Colorado Supreme Court then directed interrogatories to the parties. In substance the court posed the following questions: (1) what standard of liability should Colorado adopt against a media defendant when a private individual is injured by defamatory publications; (2) should different standards be set for public concerns than for purely private matters; (3) if a less stringent liability standard than "actual malice" is adopted (e.g., knowing or reckless disregard for the truth), should it be applied retroactively; and, (4) if "actual malice" is found lacking in this case, what should be its disposition?¹³

Recognizing that the Colorado state constitution prohibited the court from conferring an absolute immunity on the Colorado media, the defendants and the Colorado Press Association as *amicus curiae* urged the court to adopt the qualified immunity offered by the Supreme Court's plurality opinion in *Rosenbloom* for libel actions in-

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¹⁰ 403 U.S. 29 (1971).
¹¹ Id. at 456-457.
¹² Id. at 451.
¹³ Id. at 455.
¹⁴ Colo. Const. art. 2, § 10 provides:

Freedom of speech and press. —No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.
volving publication of public issues. Cases involving purely private matters justified a less demanding standard of liability than the rigorous "knowledge of falsity or reckless disregard for the truth" of *Rosenbloom*. Profiles urged that Colorado adopt a liability standard of simple negligence and that no deviation from the standard be made on the basis of publication of matters of public or general concern. The plaintiffs attacked the distinction between public and private matters as incapable of definition and fundamentally unfair to plaintiffs and defendants alike, while the defendants interpreted *Gertz* to the court as relieving the states of a constitutional requirement to make the determination as a matter of law but not prohibiting states from continuing the distinction.

In response to the remaining questions of the court, the defendants argued that retroactive application of a less stringent standard than "actual malice" would be unfair to defendants who relied on the more protective standard of *Rosenbloom* prevailing at the time of the *Walker* publications. Accordingly, should the court find proof of "actual malice" lacking in the case, the court should reverse the trial court's finding of liability against all the defendants. Plaintiffs contended that retroactive application of a lesser standard of liability than "actual malice" would work no hardship on the publishers because the Walkers had proven "actual malice" with clear and convincing evidence at trial. If the court adopted plaintiff's negligence standard, defendants would still be liable, and the court could, in accordance with *Gertz*, uphold the punitive damages award because plaintiffs had proved "actual malice." The plaintiffs admitted that without proof of "actual malice," the court, under *Gertz*, must withhold the trial court's punitive damages award and affirm only the award of compensatory damages.

b. *The Holding*

The Colorado Supreme Court primarily adopted the liability standard of *Rosenbloom* in its *Walker* decision:

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16 Brief for Appellee on Interrogatories at 1, 16, Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (1975). The Colorado Supreme Court noted, 538 P.2d at 456, that the plaintiff's argument was essentially that of Justice Harlan's dissent to *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 62.
17 Brief for Appellant on Interrogatories at 6.
18 *Id.* at 16, 20.
19 Brief for Appellee on Interrogatories at 17, 20.
We hold that, when a defamatory statement has been published concerning one who is not a public official or a public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.20

The Colorado court qualified its holding with the explanation that proof of "'reckless disregard' for whether or not a statement is true does not mean that there must be a finding that the person making the statement had serious doubts as to the truth thereof."21

The court ruled there was "convincing clarity to the evidence" to support the verdicts against the newspaper and its editor.22 Thus the court followed the more demanding standard of proof of "clear and convincing evidence" associated with the New York Times standard of liability.23 The court did not specifically comment on the damage awards in view of the new Gertz damage rules but did hold that the evidence sufficiently supported liability justifying both compensatory and punitive damages.24

The court approved the jury instruction on the Rosenbloom standard of liability. To avoid confusion with the meaning of common law "malice" (i.e., ill will or intent to harm), the trial judge avoided the shorthand term "actual malice" in the instructions and used the "knowledge of falsity or reckless disregard for the truth" language of Rosenbloom.25 This, the supreme court agreed, was recommended practice for future cases.

Despite the rejection of the "public interest" test in Gertz,26 the Colorado Supreme Court read that decision as permitting states to

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20 538 P.2d at 457.
21 Id.
22 Id. at 459. The court found the evidence insufficient to support the jury's finding of liability against the Sun reporter, id. at 458. The original opinion, decided March 17, 1975, in Walker v. Colorado Springs Sun, Inc., noted at 43 U.S.L.W. 2420 (April 15, 1975), upheld liability as to all defendants. Upon defendants-appellants petition for rehearing, the supreme court amended its decision, reversing only the verdict against the reporter, 538 P.2d at 450.
24 538 P.2d at 458. The Gertz damage rules are discussed at text accompanying note 44 infra.
26 See text accompanying notes 40 and 71 infra.
establish different liability standards depending on state determination of whether or not a matter is of public interest. Accordingly, the court ruled that determination was a question of law for the Colorado courts.\textsuperscript{27} The majority opinion provided no indication which liability standard it would apply to matters not of public interest or general concern.

The two dissenting judges in \textit{Walker} concurred in finding defendants liable but disagreed as to the standard of liability. The urged the Colorado standard be that of simple negligence. If the conflict in \textit{Walker} was between the right of the new media to report on public concerns and the right of a private individual to protect his reputation from defamatory falsehood, then, the dissenters claimed, the majority's \textit{Rosenbloom} standard represented no real accommodation of the two interests. "The majority opinion fully implements the interest of the press, but does not take the private citizen's interest into account."\textsuperscript{28} The majority had, in the dissenters' view, further eroded a citizen's right to recover for defamation by maintaining the public issue-private matter distinction while providing no workable definition for matters of public interest.

III. THE \textit{Gertz} DECISION

\textit{Gertz v. Robert Welch, Inc.} was a reconsideration of recent Supreme Court efforts to balance society's interest in first amendment protection of a vigorous press with society's interest in protection of individual reputation. A decade ago the Supreme Court federalized the law of defamation in \textit{New York Times Co. v. Sullivan}.\textsuperscript{29} The Court held that the first amendment conferred a conditional privilege on the press to publish false defamatory statements about public officials concerning their official conduct.\textsuperscript{30} The privilege was defeated only by a showing on clear and convincing evidence that the statement was published with "actual malice," defined as "knowledge that it was false or with reckless disregard of whether it was false or not."\textsuperscript{31} The \textit{New York Times} privilege elevated to constitutional

\begin{thebibliography}{10}
\bibitem{3} 376 U.S. 254, 280 (1964).
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protection the narrow privilege generally recognized at common law to make "fair comment" on public officials related to matters of public concern.\textsuperscript{32} The new constitutional privilege was soon extended by other cases to include defamatory falsehoods about "public figures" involved in events of public concern.\textsuperscript{33}

Cases following \textit{New York Times} clarified the "actual malice" standard of liability by distinguishing "reckless disregard" from negligence, ill will or intent to injure, and gross negligence.\textsuperscript{34} \textit{St. Amant v. Thompson} presented the first meaningful guidelines for determining "reckless disregard for the truth" and held that the key was the defendant's state of mind.\textsuperscript{35}

In \textit{New York Times} and its progeny, the Court's considerations have remained constant. The demanding "actual malice" standard is necessary to remove the threat of liability which would encourage media self-censorship and discourage critical discussion. Some first amendment protection for falsehood is necessary to protect free and open debate on public issues. Public officials and public figures taking an active role in public affairs must run the risk of public scrutiny and criticism. The Court justifies this conclusion with the observations that most public persons voluntarily involved themselves in public controversy and usually had greater opportunity to respond to false


\textsuperscript{3} Justice Harlan originally defined "public figures" as those who "commanded a substantial amount of independent public interest at the time of the publications" in \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130, 154 (1967). In \textit{Gertz}, 418 U.S. at 352, the Court said "It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." This definition expands the "public figure" class beyond those whose public notoriety is established by prior events independent of those involved in the current controversy. A recent application of the \textit{Gertz} definition of "public figures" is found in \textit{James v. Gannett Co.}, 47 A.D.2d 437, 366 N.Y.S.2d 737 (App. Div. 1975).

\textsuperscript{4} "The test which we laid down in \textit{New York Times} is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth." \textit{Garrison v. Louisiana}, 379 U.S. 64, 79 (1964). A jury instruction requiring "personal spite, ill will or a desire to injure plaintiff" was termed an "erroneous interpretation of \textit{New York Times}" in \textit{Beckley Newspapers Corp. v. Hanks}, 389 U.S. 81, 82 (1967). Though the trial court conditioned liability on defendant's highly unreasonable departures from the standards of the journalism profession and investigatory failures alone were insufficient to satisfy \textit{New York Times}, the evidence sufficiently supported the further finding of reckless disregard for the truth in \textit{Curtis Publishing Co. v. Butts}, 388 U.S. 130, 165-67 (1967).

\textsuperscript{5} 390 U.S. 727 (1968). See text accompanying note 61 infra.
statements and counteract unjust criticism.38

More recently a plurality of the Court in Rosenbloom v. Metromedia, Inc. endeavored to extend the New York Times privilege and its "actual malice" standard to libel actions arising out of publications of matters of public interest even though the plaintiff is neither a public official nor a public figure. The plurality opinion developed the "public interest" test: "that the determinant [of] whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern."37 Although a number of lower courts had already applied the New York Times standard on the independent ground that a public issue was involved,38 the Rosenbloom Court could not agree on a controlling rationale for doing so.39

Gertz v. Robert Welch, Inc., presenting the same private plaintiff-public issue fact situation as in Rosenbloom,40 gave the Court an opportunity to re-evaluate the Rosenbloom result. The majority opinion refused to expand the New York Times privilege for the protection of defamatory publications about private individuals who are involved in events of public or general concern. The Gertz Court refused to follow the Rosenbloom "public interest" test: "The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest [in protecting citizens from defamatory injury] to a degree that we find unacceptable," and, "[t]he 'public or general interest' test . . . inadequately serves both of the competing values at stake."41 Furthermore, the Rosenbloom test requires judges to decide which publications are in the public interest and which are not. In the Court's words, "We doubt the wisdom of committing this task to the conscience of judges."42 After this discussion, it is uncertain whether Gertz prohib-

37 403 U.S. 29, 44 (1971).
39 As the Gertz Court described it: "The eight Justices who participated in Rosenbloom announced their views in five separate opinions, none of whom commanded more than three votes." 418 U.S. at 333.
41 Id. at 346.
42 Id.
its or merely discourages states from continuing the public issue-
private matter distinction.\textsuperscript{43}

The Court then turned to the nature of the states' interests in
protecting their citizens from defamatory injury. Recognizing the
danger of media self-censorship in the doctrine of liability without
fault as it has developed in the states' common law of libel, the Court
for the first time, found a constitutional prohibition of the imposition
of strict liability in all libel actions. Beyond that restriction, the states
could establish any other fault standard for media liability.\textsuperscript{44}

The second part of the holding imposed further reforms on libel
law: "the States may not permit recovery of . . . punitive damages,
at least when liability is not based on a showing of knowledge of
falsity or reckless disregard for the truth."\textsuperscript{45} In cases where the state-
defined standard of liability is less demanding than that required by
\textit{New York Times} (e.g., clear and convincing evidence of actual mal-

ice) the states may only permit recovery for actual injury. The broad
category of actual injury defined by the Court included pecuniary loss
as well as mental harm and injury to reputation.\textsuperscript{46} In contrast to
punitive damages and the presumed damages awarded under com-
mon law (damages that the jury may estimate as necessarily arising
from the defamation), actual injury must be "supported by compe-
tent evidence" of injury and awarded by juries "limited by appropri-
ate instructions."\textsuperscript{47}

IV. \textbf{Analysis of the Colorado Holding in Light of \textit{Gertz}}

\textbf{A. The New Colorado Standard of Liability}

Since the new Colorado standard bases liability squarely on
fault, it assuredly satisfies the minimum constitutional requirements

\textsuperscript{11} See Brosnahan, supra at note 6; \textit{The Supreme Court, 1973 Term}, 88 \textsc{Harv. L. Rev.} 41, 148, n. 54 (1974). See text accompanying note 72 infra.

\textsuperscript{12} 418 U.S. 323, 347 (1974). See generally, \textsc{Prosser, The Law of Torts} §§ 111-115 (4th ed. 1971). "The effect of this strict liability is to place the printed written or spoken word in
the same class with use of explosives or the keeping of dangerous animals." \textit{Id.} at 773.

\textsuperscript{13} 418 U.S. at 349. What meaning should attach to "at least" is unclear. This statement
together with its reiteration later in the opinion is generally interpreted to mean that states may
however, levels severe criticism on these damage categories and their effect on competing first
amendment considerations. Therefore, "at least" may signal that the question of whether states
may award other than compensatory damages is still an open question. See Brosnahan at 795,
supra at note 6.

\textsuperscript{14} \textit{Id.} at 350.

\textsuperscript{15} \textit{Id.} For a discussion of the operation of presumed damages under common law, see
\textsc{Prosser, § 112, supra} at note 44.
set by the Gertz holding. The Colorado Supreme Court in Walker adopted the liability standard of Rosenbloom, but expressly rejected the explanation or definition of "reckless disregard" made by the Supreme Court in St. Amant v. Thompson. The Supreme Court in St. Amant held that a finding of "reckless disregard for the truth" required "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." In Colorado, however, proving "reckless disregard for the truth" does not require a finding that the publisher had serious doubts about the truth of his publications.

The hybrid standard of liability—Rosenbloom-minus-St. Amant—that the Colorado Supreme Court fashions raises some questions. What evidence tends to show "reckless disregard for the truth" under Colorado's definition? Assuredly, the standard requires a private defamation plaintiff to provide more than proof of negligence, but how much more? A question of constitutional significance still remains—is the Colorado liability standard the same demanding New York Times standard the Supreme Court referred to in Gertz?

The Walker majority had two reasons for stripping the Rosenbloom standard of the mental element that St. Amant v. Thompson adds to "reckless disregard." The court found the heavy burden of proof under the St. Amant definition unacceptable. Insofar as St. Amant requires positive evidence of the defendant's awareness of the probable falsity of his publications, the Colorado court makes a substantial concession to private plaintiffs. Ostensibly, the second reason for the rejection of St. Amant was that "the term 'reckless disregard' has had rather frequent usage in the tort field in this state." The court did not cite any Colorado cases as contributing significantly to its legal definition, but the dissenting opinion in criticizing the vagueness of the majority's qualified standard supplied two cases. Both of those cases expressly equate "reckless disregard" to "wantonness." Both draw the distinction between negligence and recklessness on the basis of a defendant's conscious awareness of his misconduct: "Negligence . . . is the negative of attention [but] a
'reckless disregard' . . . involves more than that. To be so classified, conduct . . . must demonstrate indifference as well as inattention to consequences which may result."55 Both cases found the defendant's conduct to fall short of reckless disregard because "it failed to disclose a conscious choice of an act."56 Accordingly, the dissenting opinion warned that despite the majority's rejection of *St. Amant v. Thompson*, Colorado defamation plaintiffs will probably have to prove the conscious awareness of the defendant to the probable falseness of his statements anyway.57

It is hard to deny the dissenters' point—the Colorado Supreme Court "certainly does not provide a settled test."58 On one hand plaintiffs are relieved of showing the publisher's state of mind. On the other hand, if plaintiffs are to rely on Colorado precedent on the requisite degree of proof of reckless disregard, that precedent clearly requires evidence of defendant's conscious awareness of his misconduct and its consequences. The majority opinion acknowledges that incorporation of the *St. Amant* definition would give "a more concrete guideline to a jury with respect to 'reckless disregard'"59 but does not provide its own guidance for evidence that would meet the new Colorado standard.

A more fundamental question is whether the "Rosenbloom minus-*St. Amant*" standard developed by the Colorado Supreme Court is the same demanding standard the Supreme Court referred to in *Gertz* as "knowledge of falsity or reckless disregard for the truth" and "the New York Times standard."60 A comparison of the standard of liability defined by the Colorado Supreme Court in *Walker* with the *New York Times* standard has constitutional significance, because under the *Gertz* decision the constitution limits the states' ability to allow recovery for presumed and punitive damages. Under state-defined liability standards less demanding than "knowing or reckless disregard for truth," the states may only allow recovery for actual injury.

The *New York Times* standard upon which *Gertz* conditions the recovery of damage awards beyond those for actual injury is without doubt that standard of liability as its meaning has developed in over ten years of constitutional adjudication of state libel actions. The

55 351 P.2d at 814; 222 P.2d at 1002.
54 351 P.2d at 816.
57 538 P.2d at 464-65.
58 *Id.* at 465.
59 *Id.* at 457.
60 418 U.S. at 349, 352.
Gertz opinion makes this clear by citing with approval later cases which have explicated the meaning of the "actual malice" standard. In particular, the Gertz majority still adheres to the St. Amant equation of "subjective awareness of falsity" to "reckless disregard."\(^{61}\)

The state of mind element that was enunciated by the Court in St. Amant was not new to the New York Times doctrine. St. Amant relied explicitly on the finding in New York Times that "actual malice" had not been proven because there was no evidence to show that the publisher was aware of the likelihood of falsehoods in his publications and on the "awareness of probable falsity" test applied in later cases.\(^{62}\) The St. Amant decision emphasized objective circumstantial evidence by which a court could categorize speech and measure it against the constitutional standard of "reckless disregard for the truth."\(^{63}\) The St. Amant Court provided objective tests for "reckless disregard" in response to inconsistent lower court holdings confusing the requisite degree of proof.\(^{64}\) Frequent reliance on St. Amant in later Supreme Court libel decisions,\(^{65}\) including Rosenbloom, endorses St. Amant's continued relevance to the New York Times standard of liability.

The Colorado Supreme Court in Walker does not believe that the St. Amant interpretation of "reckless disregard for the truth" is mandatory to the New York Times standard followed in Rosenbloom. The court defends its belief by citing Cantrell v. Forest City Publishing Co.,\(^{66}\) describing it as a libel action brought by private individuals. The Court points out that following the Gertz decision the Supreme Court in Cantrell approved a jury instruction on "reckless disregard" which omitted the St. Amant language of "serious doubts."\(^{67}\) The reliance on Cantrell may well be misplaced—Cantrell involved an action for invasion of privacy,\(^{68}\) and, in the words of the Court in Cantrell, "the case went to the jury on a

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\(^{61}\) Id. at 334-35, n. 6.  
\(^{63}\) 390 U.S. at 732-33.  
\(^{64}\) 1969 UTAH L. REV. 118, 129.  
\(^{67}\) 538 P.2d at 457 n. 2.  
\(^{68}\) For a discussion of common law right of privacy actions, see generally PROSSER, THE LAW OF TORTS § 117 (4th ed. 1971).
so-called 'false-light' theory of invasion of privacy." Application of the New York Times standard of liability in right of privacy actions has been a parallel development, separate from constitutional challenges to state libel laws following New York Times. Moreover, the Cantrell majority opinion expressly left undecided whether a state could constitutionally employ a more relaxed standard than the New York Times libel standard in right of privacy cases.

It seems a reasonable conclusion that the new Colorado standard of liability required of private individuals seeking redress from defamatory injury from publications concerning their involvement in events of public or general interest is not as demanding as the Gertz standard of "knowing or reckless disregard for the truth." Relieving the private defamation plaintiffs from the burden of showing the publisher's faulty state of mind means recovery may be allowed in Colorado against media defendants who would be free of liability under application of the Gertz Court's definition of the New York Times liability standard.

Whether the Colorado Supreme Court erred in deciding to continue the public interest-private matter determination in Colorado libel cases is less certain. The Gertz Court saw some danger in allowing the judiciary to determine "what information was relevant to self-government" and decided that the constitution did not require that publications of differing degrees of newsworthiness be given differing degrees of protection. Whether states may establish different liability standards depending on their evaluation of the content of the publications after Gertz is debatable. If the Gertz Court means that first amendment interest is a constant for all publications and that determining newsworthiness is not a proper judicial function, then the states may not distinguish between public and private matters in libel actions. On the other hand, if the Court meant that the first amendment does not compel greater protection for debate on public issues than non-public ones and that states have some latitude in implementing their interests in protecting the citizenry as well as the press,
then the states are free, though not required, to use the "public interest" test.  

It is clear that the Colorado Supreme Court never considered whether the Gertz decision prohibited the states from deciding which publications addressed public issues. The interrogatories did not seek answers based on such an interpretation, and the Walker plaintiffs did not argue for this interpretation of Gertz. Both the majority and dissenting justices read Gertz as an attempt to dissuade the states from using the Rosenbloom "public interest" test. As Gertz is susceptible of two interpretations on this point, the correctness of the Colorado interpretation must await further Supreme Court clarification.

B. The Damage Awards

The majority opinion in Gertz was explicit: "We . . . find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation." Private defamation plaintiffs who do not prove "knowledge of falsity or reckless disregard for the truth" may recover only for actual injury. There is nothing to indicate that the majority was referring to a standard other than the Court's fully developed meaning of the New York Times standard of liability including the state of mind element added by St Amant. The Colorado Supreme Court rejected St. Amant's requirement for finding "reckless disregard for the truth," and accordingly made no objection to the trial court's failure to instruct the jury that the evidence must be sufficient to conclude from the circumstances that the defendants entertained serious doubts about the truth of their publications. Furthermore, the supreme court did not comment on the strength of the evidence in permitting this conclusion. Thus, the Colorado court upheld the punitive damage award to the Walker plaintiffs on a less demanding standard than Gertz requires for recovery of punitive damages. As a result, the Walker defendants were denied the full protection of the New York Times standard as employed by both Rosenbloom and Gertz.

The constitutionality of the compensatory damages award upheld in Walker is subject to the same question. Under Gertz, recovery

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23 Brosnahan at 792 supra note 6; The Supreme Court 1973 Term, 88 HARV. L. REV. 41, 143 (1974).

24 See text accompanying note 13 supra. The court asked "shall we make the distinction?" not "may we?"

of presumed damages, that is, damages representing general harm to reputation which under common law required no allegation or proof, was also prohibited under state-defined standards of liability less rigorous than the New York Times standard. The compensatory damages award by the Walker trial jury was in fact an award of presumed damages because the Walker trial court, applying existing Colorado common law libel and damage rules, required no proof of injury to support the compensatory damages award.

Under Colorado libel law, those publications tending to harm plaintiff's reputation which are defamatory on their face, or "unmistakably recognized as injurious," are libelous per se and require no proof of actual injury. General damage to reputation is presumed. Words whose defamatory potential is not apparent without explanation or proof of extrinsic facts are libelous per quod and require proof of "special damages"—that is, specific pecuniary loss. Colorado law makes two exceptions to the operation of these libel categories. Words imputing criminal conduct or improper conduct in one's trade, business or office are treated as if libelous per se, even though they first require explanation of their defamatory meaning. In Walker the publications imputed criminal conduct and improper business practices by the Walkers and were treated as libel per se under these two exceptions. Hence, after informing the jury that the publications were libelous per se, the trial court did not instruct the jury to find evidence of actual injury from the Sun publications.

The Walker plaintiffs did in fact present evidence of decreased profits, loss of business reputation, and mental anguish. But the extent to which the jury used this evidence in the absence of explicit instruction is unknown. Although the damages claimed by the Walkers fall within the Gertz broad description of actual injury, the Walker jury was not "limited by appropriate instructions" as required by Gertz.

The Colorado Supreme Court never considered the damage

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76 Id.
77 Brief for Appellee at 28-30; Brief for Appellant at 66-68.
79 Id.
81 Brief for Appellee at 28-30; Brief for Appellant at 66-68.
82 Id.
awards even though neither was based on specific proof of actual injury. It did not comment on the evidentiary support for the damages in view of the *Gertz* damage rules and the proscription on uncontrolled jury discretion. The *Gertz* decision conditions damage awards on competent evidence of actual injury and it follows that the states may not use the libel per se-libel per quod distinction to arbitrarily eliminate plaintiff’s burden of proof of injury. The Colorado Supreme Court did not recognize the parallel between the operation of libel per se in *Walker* and in the trial proceedings for *Gertz*, whose damage award was reversed by the Supreme Court for its lack of proven actual injury in awarding compensatory and punitive damages. It is difficult to ignore the *Gertz* opinion’s persistent criticism of jury discretion in awarding damages under the common law of libel, and allow the Colorado court’s summary affirmance of the so-called compensatory damages in *Walker* to go unquestioned.

The validity of the *Walker* damage awards is subject to further question depending on the proper interpretation of the constitutional limitations established by the *Gertz* holding. The libel per se-libel per quod distinction also operates to determine whether or not the plaintiff must provide extrinsic facts or explanations to demonstrate the defamatory character of the publication. Some interpret the *Gertz* decision to limit its holding to the result of that distinction. As a caveat to the holding that states may define their own standards of liability, the Court says “at least this conclusion obtains where, as here, the substance of the defamatory statement ‘makes substantial danger to reputation apparent.’” The Court implies that a more limited state interest might result when states imposed liability for statements which did not on their face warn of defamatory potential. Justice White in his dissent concludes from this that the *Gertz*

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83 The *Walker* opinion contains only the conclusive statement: “Under the facts of this case, the right of free press does not compel or justify us in finding as a matter of law that the plaintiff[s] did not prove their case against Woestendiek [the Sun editor] and the Sun as to both types of damages.” 538 P.2d at 459.


90 418 U.S. at 348. This interpretation was adopted in *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830, at 833 (8th Cir. 1974).
CASE NOTES

decision only allows state defined standards to be applied when the defamatory character of the publication is apparent on its face—libel per se under the common law definition. He reasoned that for other publications—the libelous per quod category—the New York Times standard must be applied.91

If this interpretation is valid, may the Colorado Supreme Court determine to its satisfaction which statements are libelous per se, or, "make substantial danger to reputation apparent," or is that now a federal question? If the Gertz decision means there is a constitutional privilege riding on the distinction between libel per se and libel per quod, may the state courts rely, as Colorado does here, on their pre-Gertz definitions of what constitutes apparent danger to reputation? The Walker trial court, for example, treated some of the Sun publications as libel per se and required no proof of actual injury because, though ruled to be non-defamatory on their face, (i.e. libelous per quod), their danger meaning, once explained, imputed criminal conduct and unscrupulous business practices.

These special exceptions to the libel per se doctrine do not appear to satisfy the Gertz caveat that the words themselves make substantial danger to reputation apparent. Whether the Colorado Supreme Court considered the publications in Walker defamatory on their face or blindly endorsed the trial court handling of the per quod publications as libel per se is not clear from the opinion.92 If Justice White's interpretation is correct, once the Colorado Supreme Court agreed that the publications required explanation to make their defamatory potential apparent, the defendants, not warned of the substantial danger to plaintiffs' reputations, deserved the protection of the New York Times standard of liability. Accordingly, neither presumed nor punitive damages could be assessed without proof that the constitutional standard had been met. Under this view, the Colorado Supreme Court may have inappropriately applied a state-defined standard of liability under circumstances in which Gertz compels the New York Times standard. However, without further clarification from the Supreme Court, it seems unfair to conclude that the Colorado Supreme Court read too little in the Gertz opinion or that others have read too much.

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91 418 U.S. at 388-89.
92 The court did, however, refuse to destroy the libel per se and libel per quod distinction as urged upon by defendants. 538 P.2d at 460.
IV. Conclusion

The questions raised by *Walker v. Colorado Springs Sun, Inc.* concerning the precise definition of the liability standard adopted, the validity of the presumed and punitive damages upheld under that standard, the evidentiary justification for the compensatory damage award, and the confusion cast on the vitality of the common law libel per se-libel per quod distinction combine to challenge the wisdom of the Colorado Supreme Court's refusal to undertake a *de novo* review of the proceedings and evidence in the trial court. Indeed, whether *Walker v. Colorado Springs Sun, Inc.* could survive Supreme Court scrutiny under the operative requirements of *Gertz v. Robert Welch, Inc.* is open to doubt. The United States Supreme Court will no doubt in the future consider how much latitude the state courts will be allowed in interpreting the *Gertz* decision.93

The new Colorado liability standard for publishers or broadcasters of defamatory falsehoods about private persons involved in events concerning the public interest warrants further examination and precise definition by the Colorado judiciary. Hopefully that effort will provide firmer guidelines for distinguishing between matters of the public interest and those of purely private concern.

In view of the uncertainties about proper implementation of the *Gertz* decision, the Colorado Supreme Court may have been appropriately cautious in limiting its holding to the facts before it and refusing to revise existing state libel law. How useful the *Walker* decision, as it now stands, will be in Colorado defamation actions with different fact situations is uncertain. The narrow scope of the *Walker* holding does not suggest the result in an action against a non-media defendant or one involving a defamatory publication deemed not of general or public interest.94 This suggests that the Colorado judiciary will have future opportunities to re-evaluate its decision here.

Janet R. Burnside

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