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Libel Law - New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure: Marchiondo v. Brown

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LIBEL LAW—New Mexico Adopts An Ordinary Negligence Standard for Defamation of a Private Figure: Marchiondo v. Brown

In Marchiondo v. Brown, the New Mexico Supreme Court addressed the distinction between a public and a private figure in the context of a defamation action and the applicable standard of liability for libel of a private figure. The United States Supreme Court delegated to the states the power to impose any standard of liability for defamation of a private figure except strict liability. Following the United States Supreme Court's direction, the New Mexico Supreme Court, in Marchiondo v. Brown, adopted an ordinary negligence standard for defamation of a private figure. Although other jurisdictions have chosen standards of liability ranging from gross negligence to ordinary negligence, ordinary negligence

2. Id. at 399–400, 649 P.2d at 467–68.
3. The law of defamation is divided into slander, which involves oral communication, and libel, which consists of printed communication. Television and radio broadcasts generally are covered by libel, except in states which distinguish between statements made extemporaneously and statements read from a script. See generally W. Prosser, The Law of Torts, 752–54 (4th ed. 1971) [hereinafter cited as Prosser]. Marchiondo's defamation claims were founded only in libel. Therefore, this Note will address libel only.

The New Mexico Legislature defines libel as “making, writing, publishing, selling, or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business, or occupation of another, or which exposes another to hatred, contempt, degradation or disgrace.” N.M. Stat. Ann. §30-11-1 (1978). New Mexico case law defines a defamatory statement as one which has a tendency to render the party about whom it is published contemptible or ridiculous in public estimation, expose him to public hatred or contempt, or hinder virtuous men from associating with him. Bookout v. Griffin, 97 N.M. 336, 639 P.2d 1190 (1982).

5. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974), the United States Supreme Court held 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 a defamatory falsehood injurious to a private individual.”

6. The New Mexico Supreme Court held:

The Gertz court, therefore, did not require proof of actual malice in cases involving non-public defamation plaintiffs, and left it to the states to impose either an actual malice standard or a lesser standard of fault for non-public defamation plaintiffs, so long as the states did not apply strict liability. In accord with Gertz, we adopt the ordinary negligence standard as a measure of proof necessary to establish liability for compensation for actual injury.

98 N.M. at 402, 649 P.2d at 470.

7. The two minority rule standards are actual malice and gross negligence. For an example of a case holding that a private figure plaintiff must prove the equivalent of the actual malice standard, defined in New York Times v. Sullivan, 376 U.S. 254 (1964), as the defendant's knowledge that the statement was false or that it was made with reckless disregard of whether it was false or not, see Diversified Management Inc., v. Denver Post, Inc., —— Colo. ——, 653 P.2d 1103 (1982). In
is the majority rule. In Marchiondo, however, the New Mexico Supreme Court failed to state what factors it would consider in applying the ordinary negligence standard in libel cases.

This Note is a three-part overview of the basic conflict between the media’s right to publish and an individual’s right to maintain a good reputation and not be defamed. First, the Note provides the reader with prior common law and case law developments which have attempted to resolve this conflict. Second, the Note analyzes the Marchiondo holding in light of this historical development. Third, the Note analyzes how the Marchiondo decision could be clarified to reflect the realities of modern publication practices.

STATEMENT OF THE CASE

William C. Marchiondo, plaintiff-appellant, is a criminal defense attorney who filed suit in 1975 against The Albuquerque Journal newspaper and its editor, Robert A. Brown. Marchiondo claimed he had been libeled by an article published in the Journal entitled “Organized Crime Showing Interest in New Mexico”. He alleged that he had been libeled by "in-nuendo" by the juxtaposition of the headline and his photograph. Mar-

Diversified, the Colorado Supreme Court extended the New York Times actual malice standard from cases involving public officials and figures to cases addressing a private figure’s involvement in matters of general or public concern. Id. at 1106. The New York rule, enunciated in Chapadeau v. Utica-Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61 (1975), is the most strict. It requires a private figure to prove, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for standards of news-gathering and dissemination ordinarily followed by responsible parties.


9. Two issues resolved in Marchiondo but which are beyond the scope of this Note are: (1) the court’s consideration of Marchiondo’s right to full discovery of the identity and state of mind of persons involved in the editorial process surrounding the alleged libelous publications and (2) the subsumation of common law fair comment within constitutionally protected opinion. 98 N.M. at 397-99, 403-404, 649 P.2d at 467, 471-72. For further discussion of the fair comment privilege, see Note, Libel—The Defenses of Fair Comment and Qualified Privilege, 11 N.M. L. Rev. 243 (1980-81).

10. 98 N.M. at 397, 649 P.2d at 465. The article was written by an independent team of reporters belonging to Investigative Reporters and Editors, Inc. (IRE), which had spent five months investigating the threat of organized crime in Arizona. Albuquerque Journal, Feb. 16, 1983, at A3, col. 4. During the investigation, the founding member of IRE was killed in a car bombing in Phoenix, Arizona. Id. Following the death, the New York director of IRE assigned an IRE reporter to interview the plaintiff, Marchiondo. Id. at col. 5. During the interview, the reporter asked Marchiondo about his friendship with James Napoli. Albuquerque Journal, Mar. 26, 1977, at B14, col. 4. In the article, Marchiondo stated that Napoli was a good friend of his and that he was a "beautiful person." Id. Additionally, Marchiondo stated in the article that he had represented Napoli’s son in an armed robbery case and had won. Id. The Journal article stated that law enforcement sources had described Napoli to IRE reporters as "one of the five leading Mafia chieftains" in New York City. Id. This is one example of a specific implication made by the Journal that Marchiondo was connected with organized crime.
chiondo claimed that the *Journal* used this publication to tie him to organized crime. In addition, Marchiondo asserted that the *Journal* had libeled him in an editorial it published entitled "Our Choice—Joe Skeen," by the following language: "as a criminal lawyer, Marchiondo thrives by having friends in key places." The editorial was written in the context of Marchiondo's friendship with the then Democratic gubernatorial candidate Jerry Apodaca who was opposed by Republican Joe Skeen. Marchiondo argued that the language imputed to him a crime, unethical and unprofessional conduct, a lack of legal competence, and it tended to render him contemptuous or ridiculous in public estimation.

The *Journal* responded to Marchiondo's libel claim by filing a motion to dismiss, or, in the alternative, for summary judgment. At the same time, the *Journal* moved to postpone a ruling on Marchiondo's motions to compel answers to depositions. The trial court denied the *Journal's* motion to dismiss Marchiondo's claims. The court held that Marchiondo was not a public figure for all or limited purposes, and that Marchiondo could not recover presumed or punitive damages because he failed to prove the *Journal* had acted with actual malice.

The New Mexico Supreme Court permitted Marchiondo to obtain immediate review of the trial court rulings. The supreme court upheld the trial court ruling that Marchiondo was not a public figure because he had not injected himself voluntarily into a public controversy with the *Journal,* but rather, had been drawn involuntarily into a private controversy with the newspaper. The court ruled that Marchiondo, as a private figure, need only prove ordinary common law negligence and not actual malice. The court did not state what factors it would consider as proof of ordinary common law negligence in libel cases.

DISCUSSION AND ANALYSIS

In order to fully appreciate the impact of *Marchiondo v. Brown* on New Mexico libel law, a modern practitioner should understand how defamation law has developed. The historical development will be dis-

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12. 98 N.M. at 400, 649 P.2d at 468.
13. Id. at 395–96, 649 P.2d at 463–64.
14. The trial court certified its rulings for interlocutory appeal to the New Mexico Court of Appeals. Id. at 396, 649 P.2d at 464. The court of appeals declined to hear the appeal. Id. Marchiondo filed with the New Mexico Supreme Court a writ of certiorari directed at the court of appeals. Id. The supreme court reversed the court of appeals' denial of Marchiondo's appeal. Id. In the interest of time and efficiency, Marchiondo was granted an interlocutory appeal directly to the New Mexico Supreme Court. Id.
15. Id. at 399–400, 402, 649 P.2d at 467–68, 470. The supreme court remanded to the trial court the issue of whether the Journal had libeled Marchiondo by innuendo with the organized crime article. Id. at 404, 649 P.2d at 472. As to the editorial regarding Marchiondo's friendship with Apodaca, the supreme court held that it was absolutely privileged as a constitutionally protected opinion. Id. at 400, 649 P.2d at 468.
cussed in two parts. The first part outlines the basic common law requirements of a defamation case and includes a discussion of publication privileges and defenses available to a defendant. The second part highlights the significant United States Supreme Court opinions which have shaped modern libel law. The Note culminates with an analysis of Mar-
chiondo v. Brown rulings on the public versus private figure distinction and the adoption of the ordinary negligence standard. Throughout this Note, the reader should bear in mind that defamation law is an attempt at resolving the historic tensions between the reputational interests of an individual and the first amendment interests of freedom of speech and of the press. Keeping this in mind, the courts' struggle in balancing these interests can be better understood.

A. Common Law Defamation

1. A Prima Facie Case.

Defamation is the invasion of an individual's interest in a good reputation.\textsuperscript{16} The opinions which members of the community hold about the plaintiff as a result of the defendant's acts are relevant in a defamation case.\textsuperscript{17} Consequently, a plaintiff in a defamation action must prove that the defendant communicated, to a third person, a false statement "of and concerning" the plaintiff. The statement must have actually damaged the plaintiff's reputation or caused personal humiliation, mental anguish or suffering.\textsuperscript{18} Ambiguity exists as to what type of statement is defamatory. Narrowly defined, a defamatory statement tends to cause a plaintiff to be hated, ridiculed, disgraced, or avoided.\textsuperscript{19} Specific categories of defamation are: imputation of a serious crime involving moral turpitude, insanity, loathsome disease, unchastity, and business incompetency.\textsuperscript{20} Statements which would diminish the esteem, respect, confidence, or goodwill with which others regard the plaintiff are defamatory.\textsuperscript{21} Therefore, any false statement may be defamatory if it tends to cause others to think less of the plaintiff. Whether a statement is defamatory is a question of fact.

Defamation also can arise by implication or "innuendo." In order for innuendo to be defamatory, the words or statements must convey a defamatory meaning under the circumstances when considering the publication as a whole.\textsuperscript{22} It is not necessary that anyone believe them to be

\textsuperscript{16} See Prosser, supra note 3, at 737.
\textsuperscript{17} Id. at 739.
\textsuperscript{18} Id. at 737; Times, Inc. v. Firestone, 424 U.S. 448, 460 (1976).
\textsuperscript{19} See Prosser, supra note 3, at 739.
\textsuperscript{20} Id. at 739–41.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 746–49.
true, but absence of belief does affect the amount of damages awarded.23

When determining whether the plaintiff has been defamed, one must determine whether the statement made was "of and concerning" the plaintiff. Usually only defamation of living persons is actionable.24 Defamation of one who is dead is actionable only if the statement reflects on those still living.25 In addition to defamation of actual living persons, corporations also may be defamed when statements cast aspersion on the corporation's prestige, credit, standing in the community, or other business character.26

2. Defenses.

After the plaintiff presents his prima facie case, the defendant may raise several defenses to wholly or partially avoid liability. Defenses are classified as either complete or qualified. Examples of complete defenses are truth and absolute privilege. Examples of statements covered by the qualified privilege are those made in the common public interest, regardless of whether that interest is moral, pecuniary, educational, or simply newsworthy.27 A defense is either complete or qualified depending upon the balance struck in the law between the policies involving an individual's reputational interests and the societal interests advanced by the publication. Conduct which otherwise would be actionable may escape liability because the defendant was acting in furtherance of some interest of social importance.28

The defendant can absolve himself of liability entirely by proving the existence of truth or absolute privilege. However, before the truth of a statement can be determined, the court must decide whether the statement is one of fact or one of opinion. The distinction is based upon the notion that a false opinion or idea is non-existent.29 An absolute privilege covers opinions and ideas. False statements of fact are not protected because they possess no constitutional value which materially advances the purpose of freedom of speech: to foster "an uninhibited, robust and wide-open debate on public issues."30 Therefore, the first amendment protects only ideas, opinions, and truthful statements of fact.

Relevant factors in determining whether a statement is one of fact or one of opinion are: (1) consideration of the statement within the context of the publication as a whole; (2) the extent that truth or falsity may be

23. Id.
24. Id. at 744.
25. Id. at 744-45.
26. Id.
27. Id. at 776-785.
28. Id. at 776.
29. 98 N.M. at 400-401, 649 P.2d at 468-69.
30. Id. at 400, 649 P.2d at 468.
determined without resort to speculation; and (3) whether reasonably prudent persons reading the publication would consider the statement to be an expression of opinion or a statement of fact.\textsuperscript{31} Therefore, the defendant can avoid liability completely under the truth defense only if he publishes a truthful statement of fact or a constitutionally protected opinion.

Absolute privilege is afforded to judicial, executive, or legislative proceedings.\textsuperscript{32} The rationale underlying the privilege is that government officials should be free to administer their offices without fear of negative consequences resulting from statements made during the course of the proceedings. Identical policy considerations grant the same type of protection to jurors and witnesses in these proceedings. However, this immunity extends only to statements made by those persons within the scope of their professional duties.\textsuperscript{33} In addition to the immunity provided the speakers of such statements, the press also may be privileged when reporting these statements because the proceedings during which these statements are made generally are considered newsworthy.\textsuperscript{34} Similarly, a complete defense is afforded to broadcasters of political speeches.\textsuperscript{35}

In contrast, qualified privileges cover an almost unlimited range of statements. It has been said that a publication is covered by a qualified privilege when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."\textsuperscript{36} Generally, qualified privileges extend to statements made by the defendant in furtherance of an interest deemed important to the publisher, a specific group of people, the public in general, or a person who acts in the public interest.\textsuperscript{37}

The privilege is "qualified" because the statement is immune from liability only if published in a reasonable manner and for a proper pur-

\begin{itemize}
\item \textsuperscript{31} Id. at 401, 649 P.2d at 469.
\item \textsuperscript{32} See Prosser, supra note 3, at 777–84.
\item \textsuperscript{33} Id. at 777.
\item \textsuperscript{34} Id. at 830.
\item \textsuperscript{35} Broadcasters of political speeches are protected from liability for libel because they are required under the fairness doctrine of the Federal Communications Act of 1934 to provide all political candidates with equal time and the broadcasters are not empowered to censor the candidates' speeches. 47 U.S.C. §315 (1976).
\item \textsuperscript{36} See Prosser, supra note 3, at 786.
\item \textsuperscript{37} Id. Within the category of interest to the public in general fall "fair comment" and "matters of public concern." Id. at 792, 822–30. Statements are privileged as "fair comment" if they are made about the conduct and qualifications of public officials, employees, or candidates for public office. Id. at 828–30. Subjects which are considered "matters of public concern" are those paid for with public funds, admission or disbarment of attorneys, and the management of institutions, such as schools, charities, and churches. Id. at 822–23. Similarly, acts by a private enterprise which affect general interests of the community, such as pollution of the water supply, employment and racial discrimination, and transportation services, also may be commented on under the public interest privilege. Id.
\end{itemize}
Although there is no clearcut definition of "reasonable manner" and "proper purpose," these terms generally refer to the publisher's intent. Traditionally, a qualified privilege could be lost if the defendant published the defamatory statement with the intent to injure the plaintiff. At common law this intent was labeled malice, meaning ill will. Today, although intent still is required, the constitutional definition of malice is not that the statement was made with ill will. Rather, the test is whether the statement was made with knowledge of its falsity or with reckless disregard for its truth. To be absolved partially of liability under a qualified privilege, the publisher must prove: (1) that he acted reasonably under the circumstances; (2) that he did not know of the falsity of his statement; and (3) that he did not intentionally disregard the truth. Conversely, the plaintiff may attempt to defeat the defendant's privilege by asserting that the defendant acted unreasonably and with knowledge of the falsity of the statement or with intentional disregard for the truth.

A defamation plaintiff generally can hold a defendant liable for libel if he proves that the defendant published a false statement of fact "of and concerning" the plaintiff to a third person. But the defendant may avoid liability if he can prove that the published statement of fact was true or that the publication was a constitutionally protected opinion. Alternatively, a defendant may limit his liability in two ways. First, the defendant's statement may be absolutely privileged if the publication arose out of an official legislative, executive, or judicial proceeding. Second, the defendant's statement may be covered by a qualified privilege if the statement was published in the common public interest. In addition to establishing these essential elements, the outcome of libel cases often turns upon the court's classification of the plaintiff as either a public or private figure. This classification determines which standard of liability applies to the defendant's acts in a given libel case and will be discussed in the next section.

B. The United States Supreme Court Speaks

The law of defamation has evolved from a mixture of conflicting common law and first amendment doctrines. The United States Supreme Court decisions in this area reflect the Court's struggle to balance the individual's reputational interests with the press's right to publish freely. Initially, the Court focused on a commitment to the press's "uninhibited, robust and wide-open" debate of public issues. The Court chose the applicable standard of liability by inquiring whether the plaintiff was involved in an

38. Id. at 786, 792.
40. See generally Prosser, supra note 3, at 792-96.
41. Id. at 796.
issue of public interest. But in more recent decisions the Court has placed
greater emphasis on protecting the individual from defamation and has
adopted a fault standard based upon the plaintiff's status as a public or
a private figure.

The first major United States Supreme Court decision on libel was *New
York Times v. Sullivan.* In *New York Times*, the Court addressed the
standard of culpability which an elected public official would be required
to prove in order to recover damages for defamation arising from a
statement criticizing his official conduct. The Supreme Court held that
first amendment constitutional protections of freedom of speech and press
require a public official, seeking damages relating to his official conduct,
to prove that the statement was false or was made with reckless disregard
for its truth or falsity. The rationale for the actual malice standard for
defamation of a public official was to provide the press with a right to
foster a free and open debate on public issues, but at the same time, to
protect individuals from clear abuses of this power.

The *New York Times'* holding was premised upon the idea that freedom
of expression was designed to maintain the "opportunity for free political
discussion to the end that government may be responsive to the will of
the people" so that desired political and social changes could be obtained
by lawful means. The Court reasoned that because such persons chose
to be administrators of the government, the press should not be punished

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edition of the New York Times newspaper. The advertisement, entitled "Heed Their Rising Voices," was intended to raise funds to support the civil rights movement. The ad criticized the police reaction to the civil rights demonstrations by characterizing it as an unprecedented "wave of terror." *Id.* at 257. The ad exaggerated the police reaction by making such statements as:

[T]ruckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus. When the entire student body protested to state authorities by refusing to re-register, their dining room was padlocked in an attempt to starve them into submission. . . . Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child.

*Id.* The plaintiff Sullivan, Montgomery City Commissioner of Public Affairs, claimed that because he was responsible for the actions of the Montgomery police, the advertisement's references to public wrongdoing constituted accusations of wrongdoing on his part. *Id.* at 258. The jury rendered a verdict for Sullivan, granting him $500,000 damages. *Id.* at 256. The Alabama Supreme Court affirmed. *Id.* The United States Supreme Court held the rule of law which had been applied in the Alabama courts was unconstitutional. *Id.* at 264. The Court also held that for a public official to recover for libel, he must prove actual malice. *Id.* at 281.

The Court defined actual malice as when the defendant acts "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 280. This proof requirement has since become known as the *New York Times* actual malice test. *Gertz v. Robert Welch*, 418 U.S. 323, 343 (1974).

44. 376 U.S. at 280.

45. *Id.* at 279.

46. *Id.* at 269.

47. *Id.*
for publishing criticism of these officials. The Court noted, however, that an official does not lose his right to a constitutionally protected reputation merely by becoming a government official, but rather, that such right is contingent upon a finding of actual malice on the part of the defendant.

On the issue of actual malice, the Supreme Court found that the New York Times published the statements without knowledge of their falsity or reckless disregard for their truth. Thus, the Court concluded that the newspaper had not libeled Sullivan. Had Sullivan been able to prove that the New York Times knew or should have known the publication contained untruths, it is likely he would have recovered under the Court’s standard.

The Supreme Court extended the application of the actual malice standard from public officials to public figures in Curtis Publishing Co. v. Butts. A public figure is one who has attained his status either through his position or by "purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy." A person need not hold public office to be a public figure. Nonetheless, if a person is intimately involved in the "resolution of important public questions or, by reason of [his] fame, shape[s] events in areas of concern to society at large," then he may be considered a public figure.

In applying this definition, the Court held that a public figure could recover damages for a defamatory falsehood, the substance of which

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48. Id. at 272–73.
49. Id. at 282.
50. Id. at 285–86.
51. Id.
52. 388 U.S. 130 (1967). Curtis Publishing Co. v. Butts was consolidated and decided with a companion case, Associated Press v. Walker. Curtis involved an article published in petitioner’s Saturday Evening Post, which accused Butts, athletic director for the University of Georgia, of "fixing" a football game between the University of Georgia and the University of Alabama. Although the University of Georgia is state-owned, Butts was not employed by the state, but by a private corporation, the Georgia Athletic Association. Butts was a well-known and respected figure in coaching, and, at the time of the article, he was negotiating for a coaching position with a professional team. Based upon his fame and connections with the University, the Supreme Court considered Butts to be a public figure. Id. at 144–48, 154.
53. Id. at 155.
54. Id. at 164.
made it apparent that the individual’s reputation was substantially endangered. The public figure had to show that the defendant had exercised highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. It should be noted that although the “highly unreasonable conduct” test is not necessarily identical to the New York Times “knowing falsity or reckless disregard for the truth” actual malice standard, the two tests are basically synonymous and subsequently have been treated as such. The rationale for equating public figures with public officials was that both types of individuals play influential roles in ordering societal issues, are able to oppose criticism of their views and activities, and have access to the media to rebut the criticism.

In a subsequent case, Rosenbloom v. Metromedia, the Court continued to use the New York Times and the Curtis Publishing Co. considerations to determine whether the plaintiff had to prove actual malice or meet a lesser standard. In that case, the defendant, Metromedia, had broadcast a report which did not mention Rosenbloom’s name, but used the terms “smut literature racket” and “girlie book peddlers.” Rosenbloom, a distributor of nudist magazines, sued Metromedia claiming that the broadcast was libelous and that the broadcaster had failed to exercise reasonable care. Metromedia countered by arguing that it had no knowledge of the falsity of the statement, nor had it acted with reckless disregard for the truth. Additionally, Metromedia asserted that Rosenbloom was a public figure. The Supreme Court, in a plurality opinion, found Rosenbloom was not a public figure; however, it held that because the defamatory falsehood in the newscast related to Rosenbloom’s involvement in an event of public concern, the distribution of nudist magazines, the New York Times actual malice standard would apply to him. The Court stated that even though Rosenbloom may not have assumed the risk of defamation and did not enjoy access to the media to rebut the defamation, as do public officials and figures, such acts did not justify stifling public discussion of matters of public interest.

Although the Supreme Court in Rosenbloom held that the New York Times actual malice test was appropriate, it reexamined that standard in light of its application to private figures. Chief Justice Burger and Justices Brennan and Blackmun reasoned that the New York Times test should be equally applied to private figures, public figures, and public officials.

55. Id. at 155.
58. 403 U.S. 29 (1971).
59. Id.
60. Id. at 40–41.
61. Id. at 46–47.
because a "subject of public or general interest does not become less so merely because a private individual is involved." Moreover, the Justices asserted that the distinction between public and private figures makes no sense in terms of the first amendment guarantees. Justice White, in a concurring opinion, also upheld the New York Times test, but contended that it should be limited to "official actions of public servants" and not applicable to persons like Rosenbloom.

Justices Harlan, Marshall, and Stewart, in a dissenting opinion, reasoned that the New York Times test should not be applied as a basis for liability because it requires the courts to decide on a case-by-case basis what is in the public interest. Although Justice Harlan did not advocate abandoning the New York Times rule, he asserted that the states should develop the standard of care applicable to private plaintiffs. He reasoned that the states have legitimate interests in protecting individual citizens' reputations from defamation and are better suited for balancing the needs of constitutionally unfettered speech against individual rights not to be defamed.

In Gertz v. Robert Welch, Inc., the Supreme Court implicitly overruled Rosenbloom when it followed Justice Harlan's position and delegated to the states the responsibility for determining the proper standard of liability for defamation of a private figure. In Gertz, the Court held 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 [a] defamatory falsehood injurious to a private individual." The Court justified this delegation of power to the states by declaring

62. Id. at 43.
63. Id. at 46.
64. Id. at 57 (White, J., concurring).
65. Id. at 62 (Harlan, J., dissenting).
66. Id. at 64.
67. 418 U.S. 323 (1974). Gertz involved a libel case brought by a prominent Chicago defense attorney against the publisher of a John Birch Society magazine. The publication labeled Gertz a "Communist-fronter" and falsely stated that he had arranged for the "frame-up" of a Chicago policeman who was convicted of murdering Gertz's client. Even though Gertz had served on various city committees, the Court held that he was not a public figure merely because of his past achievements and his involvement in the law suit. Id. at 325.
68. Id. at 348. The scope of the Gertz holding was stated in terms of "publisher" and "broadcaster" or "communications media." Therefore, the precise holding did not extend beyond a statement published or broadcast by the communications media. Restatement (Second) of Torts § 580B comment d (Tent. Draft No. 21, 1975). However, the position taken by the drafters of the Restatement and the majority of the courts which have addressed the issue is that Gertz should apply equally to non-media and media defendants. Id.; Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, —, 350 A.2d 688, 694–96 (1976); Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511, 520 (Ct. App. 1982).

The rationale for extending the Gertz rule to non-media defendants is persuasive. Certainly it would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communications, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual conversation with a single person, can be held liable
that it recognizes the strength of the legitimate state interest in compensating private individuals for actual injury to their reputations, yet it shields the press from strict liability. Thus, private individuals are protected by allowing states to set a lesser and more easily proved standard than actual malice and freedom of press is no longer threatened by strict liability. Moreover, the Court's ruling freed state and federal judges from having to decide on an ad hoc basis which publications address issues of "general or public interest," as was required by the New York Times actual malice test.

Gertz implicitly overruled the Rosenbloom application of the New York Times actual malice test to all defamation plaintiffs, including private figures. It replaced Rosenbloom with a ruling which delegated to the states the function of establishing fault standards for defamation of a private individual by a media defendant. Consequently, the New York Times requirement of proving actual malice now applies only to defamation cases involving public figures, but not private figures. Therefore, even if the publication involves a subject of public or general interest, the private individual no longer is required to prove actual malice unless he wants to recover punitive damages. After Gertz, the operative element of a defamation case is whether the individual plaintiff is a public or a private figure.

In Gertz, the Court developed more fully the public and private figure at his peril if the statement turns out to be false, without any regard to his lack of fault.

Restatement (Second) of Torts § 580B Comment d (Tent. Draft No. 21, 1975). To hold a private individual to a strict liability standard is a harsh rule because it is inconsistent with the rationale underlying strict liability. Jacron Sales v. Sindorf, 276 Md. 580, ___, 350 A.2d 688, 695 (1976). Generally, strict liability is imposed in products liability cases on the theory of enterprise liability. Id. The rationale of enterprise liability is that the cost of the injury can be spread over all the users of a given product and one can insure against the risk of liability. Id. An individual person certainly cannot or would not spread the risk or insure against liability arising from possibly defamatory statements. Id.

Another reason for applying Gertz to non-media defendants is the compelling need for consistency and simplicity in the law of defamation. Id. at ___, 350 A.2d at 696. The first amendment protection supports this principle because it extends freedom of speech and freedom of press to everyone. Id. However, courts which hold Gertz does not extend to non-media defendants oppose the extension of the constitutional privilege to private persons because defamatory matter does not contribute to the purpose for the privilege: a free exchange of ideas in decision-making of a self-governing society. Wheeler v. Green, 286 Or. 99, ___, 593 P.2d 777, 782–85 (1979); Harley Davidson Motorsport, Inc. v. Markley, 297 Or. 361, ___, 568 P.2d 1359, 1364 (1977).

69. 418 U.S. at 348. The Court qualified this delegation to situations in which the substance of the defamatory statement "makes substantial danger to reputation apparent," suggesting that if the defamation was not obvious, a different rule might apply. Id. at 349. The Court also held a defamation plaintiff could recover only upon proof of actual damages. This ruling eliminates the plaintiff's common law right to presumed damages based upon mere proof of publication.

70. Id. at 347.

71. See id. at 346–47; see also Justice Brennan's dissent. 418 U.S. at 361 (Brennan, J., dissenting).

72. Id. at 348.
distinction. The Court defined two sub-categories of public figures: (1) an all-purpose public figure and (2) a public figure for a limited range of issues. A person becomes an all-purpose public figure by achieving pervasive fame and notoriety. A limited public figure is an individual who injects himself into a particular public controversy for a limited range of issues. The nature and extent of an individual's participation in the particular controversy, from which the defamation arises, determine whether a person should be classified as a public or a private figure. Therefore, a person who has not achieved general fame or notoriety in the community, or has not played a significant role in a particular public controversy, usually is classified as a private figure.

The Gertz ruling sought to eliminate the difficulties inherent in determining whether an issue was in the public interest by focusing the Court's initial inquiry on the status of the plaintiff. The Court determined whether the plaintiff was a public or private figure, rather than whether the plaintiff was involved in a matter of public controversy. Yet, the Gertz standard suffers from the same inexactness as the standard it replaces. The Supreme Court provided no guidelines for ascertaining exactly what type of, and how much, fame, pervasive influence, or notoriety is required to classify an individual plaintiff as a public figure.

In classifying the petitioner-attorney's status in Gertz, the Supreme Court looked to such factors as his involvement in community and professional organizations, his publications on legal subjects, and his participation in the particular murder trial which gave rise to the defamation. The Court concluded that although Gertz had been well-known in some circles, he had achieved no general fame or notoriety in the community, and therefore was not a public figure for all purposes. Additionally, the Court held that Gertz was not a public figure for the limited range of issues involved in the particular trial. He had played only a minimal role at the coroner's inquest in that his participation related only to the representation of his client. He was not involved in the criminal prosecution of the policeman convicted of murdering his client. He had not discussed the criminal or civil litigation with the press. Therefore, the Court determined that Gertz had not plainly "thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."
or a private figure. Consequently, application of the *Gertz* standards requires lower courts to determine whether the nature and extent of the plaintiff’s actions, collectively or individually, are sufficient to warrant his classification as a public figure. The inadequate guidance with which *Gertz* provided state courts is illustrated in *Marchiondo v. Brown*.

**C. The State Court Response to Gertz: Marchiondo v. Brown**

*Marchiondo v. Brown*[^76] is the first case since *Gertz* in which the New Mexico Supreme Court addressed the issue of what standard of liability a private figure should be required to prove in order to recover for libel. The court held that Marchiondo was a private figure.[^77] Empowered by the United States Supreme Court in *Gertz* to adopt any standard of liability except strict liability, the New Mexico Supreme Court adopted the majority rule of ordinary negligence.[^78]

Although the *Marchiondo* rulings certainly are justified, the court failed to compensate for the *Gertz* deficiencies by providing practitioners with better guidelines for determining whether a plaintiff should be classified as a public or a private figure. Moreover, the supreme court failed to elaborate on what factors it would consider in applying the ordinary negligence standard. The following discussion outlines the *Marchiondo* treatment of the public figure versus the private figure distinction and the ordinary negligence standard issues.

1. Public versus Private Figure

In *Marchiondo*, the New Mexico Supreme Court followed the *Gertz* approach to the public versus private figure distinction. First, the court looked to the nature and extent of the plaintiff’s actions. Recognizing that both Marchiondo and Gertz were criminal defense attorneys, the court considered Marchiondo’s status as a criminal defense attorney. The supreme court, citing *Gertz*, stated, “Generally lawyers, in pursuing their profession, are not public figures unless they voluntarily inject themselves or are drawn into a particular public controversy and thereby become public figures for a limited range of issues.”[^79] The supreme court reasoned that even though Marchiondo is a well-known attorney and a prominent member in the Democratic Party, this involvement was insufficient to depict him as a public figure. His influence in those two capacities was not “pervasive.”

Turning to Marchiondo’s actions in relation to the article on organized crime, the court noted that Marchiondo had not injected himself volun-

[^77]: *Id.* at 399-400, 649 P.2d at 467-68.
[^78]: *Id.* at 402, 649 P.2d at 470.
[^79]: *Id.* at 399, 649 P.2d at 467.
tarily into the controversy on organized crime, but rather, had been drawn into the controversy involuntarily. The court determined that the controversy was not public; it was a private controversy between Marchiondo and the Journal which arose at the time of the alleged libelous publication. On the basis of this analysis, the court concluded that Marchiondo was not a public figure for the purposes of the organized crime article.80

The Marchiondo treatment of the public versus private figure distinction suffers from the same deficiencies as the Gertz opinion. The New Mexico Supreme Court stated that Marchiondo's influence as a private attorney and as a person involved in politics was not pervasive, without clarifying which factors would lead to a conclusion of pervasive influence. Additionally, the court was inconsistent in its reference to what constitutes a public controversy.

The court suggested that organized crime is a public controversy.81 The court retreated from this conclusion, however, by stating that Marchiondo's relationship to the article on organized crime did not constitute involvement in an issue of public controversy because the Journal's suggestion of Marchiondo's involvement in organized crime was a private controversy between Marchiondo and the Journal.82 Although the court's conclusion may be correct, it could be argued that all libel suits are "private controversies" between the plaintiff and defendant. Nevertheless, the subject matter of the publication giving rise to the alleged libel, in this case organized crime, may well be a public controversy. Assuming arguendo that the organized crime subject matter of the Journal's article was a public controversy, the fact that Marchiondo agreed to be interviewed for such an article may have constituted a voluntarily thrusting of himself into a public controversy. The court refrained from exploring such an approach to the public controversy issue.

A recent federal court of appeals decision lists some factors which clarify the public versus private figure distinction in light of the public controversy element. In Waldbaum v. Fairchild Publications, Inc.,83 the Court of Appeals for the District of Columbia interpreted the Gertz all-purpose public figure as someone who is a "'celebrity'—his name a 'household word'—whose ideas and actions the public follows with great interest."84 The court asserted that statistical surveys of recognition of

80. Id. at 400, 649 P.2d at 468.
81. Id.
82. Id.
83. 627 F.2d 1287 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980). Waldbaum involved a suit brought by the president and chief executive officer of a consumer cooperative against the owner of a trade publication. Waldbaum claimed that an article stating that he had been replaced as president of the cooperative was libelous because it falsely implied that the cooperative had been losing money and that he was responsible for that loss. Waldbaum asserted that this allegedly false report damaged his reputation as a businessman.
84. 627 F.2d at 1292.
the plaintiff’s name or prior press coverage could be considered in determining whether the plaintiff was an all-purpose public figure. Additionally, the court was willing to consider whether other individuals altered or reevaluated their conduct or ideas in light of the plaintiff’s actions, and whether the plaintiff had successfully shunned public attention. Most important, however, is whether the plaintiff voluntarily made himself prominent, whether the plaintiff assumed the risk of defamation, and whether, once defamed, the plaintiff had access to the media to rebut the alleged defamation.

The Waldbaum court interpreted the Gertz limited purpose public figure as a person who has attempted to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute. The dispute, gauged by the belief of a reasonable person, must have foreseeable and substantial ramifications for persons beyond its immediate participants. Following the Gertz Court, the Waldbaum court also relied upon the “nature and extent of an individual’s participation in the particular controversy giving rise to the defamation” to determine whether a person should be classified as a limited purpose public figure.

In Waldbaum, the court approached the public versus private figure distinction through two inquiries. The first inquiry requires isolating and defining the public controversy. The court defined a public controversy as “not simply a matter of interest to the public,” but a “real dispute, the outcome of which affects the general public . . . in an appreciable way.” A public controversy is not a private disagreement which attracts attention. It is a dispute which has received public attention because its ramifications affect persons who are not direct participants. The fact that a publication addresses a particular topic does not mean that the topic is a matter of public controversy; rather, it indicates that someone in the press believed the matter deserved media coverage. Moreover, for a controversy to actually exist, the public must be discussing a specific rather than a general concern.

Once the court defined the controversy, its second inquiry was the plaintiff’s role within the controversy. The Waldbaum court accepted the Gertz analysis that for individuals to be held public figures, they must have “thrust themselves to the forefront” of a controversy for the purpose of affecting its ultimate resolution. The plaintiff must have achieved a

85. Id. at 1295.
86. Id.
87. Id. at 1292.
88. Id. at 1296 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974)).
89. 627 F.2d at 1296.
90. Id.
91. Id. at 1297.
“special prominence” in the debate. He either must have been purposely trying to influence the outcome, or realistically could have been expected to influence the outcome because of his position in the controversy. To aid in its analysis, the *Waldbaum* court considered the plaintiff’s past conduct, the extent of press coverage, and the public reaction to the plaintiff’s conduct and statements.

Applying the all-purpose figure analysis of *Waldbaum* to Marchiondo, it is clear that he is not an all-purpose public figure. While Marchiondo is well-known within legal and Democratic party circles, he is not a celebrity, his name is not a household word, and his actions and ideas probably are not followed by the public with great interest.

Although under the facts it is clear Marchiondo is not an all-purpose public figure, the issue of whether Marchiondo is a limited purpose public figure is resolved less easily. Under *Waldbaum*, the first step is defining the public controversy. According to the *Waldbaum* court, a public controversy is not a matter simply of public interest, but is real dispute which affects the public and non-participants in an appreciable way. If the controversy involved in the publication is organized crime, then the public controversy may not only be newsworthy, but it also may be an issue of specific public concern. Organized crime does affect persons other than its participants, albeit indirectly. Alternatively, if the controversy in *Marchiondo* is not organized crime, but the substance of the libel suit between the *Journal* and Marchiondo, as the New Mexico Supreme Court held, then perhaps the controversy is only newsworthy and not a specific public concern.

The second inquiry is Marchiondo’s role within the public controversy. If the controversy is organized crime, then the fact that Marchiondo consented to being interviewed may allow the inference that he thrust himself into the controversy over organized crime for the purpose of exercising influence over the reporter’s conclusion of the presence of organized crime in New Mexico. If, however, the controversy is the libel suit, then his role probably is insufficient to label him a limited purpose public figure.

Even though the *Marchiondo* decision may not have had a different outcome if the court had used the *Waldbaum* analysis, the public controversy element of the public versus private figure distinction is one with which the court could have reached a different result. The court concluded that Marchiondo was not a public figure because it held the controversy to be a private one between Marchiondo and the *Journal*. This emphasis

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92. Id.
93. Id.
94. Id.
on the libel suit itself, as well as Marchiondo’s lack of pervasive influence as a criminal defense attorney and as an active Democrat, may have been misplaced. The controversy involved in Marchiondo could have been held to be public. The issues investigated in the article on organized crime were in existence before publication; they did not arise solely from the publication. Moreover, Marchiondo’s consent to the Journal interview may have constituted thrusting himself into the vortex of the public controversy such that he assumed the risk of defamation. If this approach to the public versus private figure distinction had been used by the New Mexico Supreme Court, perhaps Marchiondo would have been held a public figure.

2. The Ordinary Negligence Standard.

In Marchiondo, the New Mexico Supreme Court held that a private figure had to prove “ordinary common law negligence” in order to recover for libel.95 In adopting the ordinary negligence standard, the court relied upon Gertz which empowered the states to establish standards of liability for defamation of a private figure by a media defendant.96 The only limitation that Gertz imposed upon the states was that a media defendant could not be held liable for defamation without fault.97 Although the New Mexico Supreme Court’s adoption of ordinary common law negligence follows the Gertz ruling, the court failed to state what factors it would use in determining negligence in defamation cases.

The Marchiondo court could have clarified its ruling by restating the general rule that if the defendant is a professional disseminator of news, such as a newspaper, a magazine, or a broadcasting station, or an employee of such a publisher, then the defendant is held to the skill and experience normally possessed by members of that profession.98 Under this standard, negligence is determined by analyzing either the state of mind or the conduct of the publisher or a publisher’s employee.99 Negligence in terms of the defendant’s state of mind is determined by whether...

95. 98 N.M. at 402, 649 P.2d at 470 (1982). The Marchiondo court followed the Gertz decision in limiting the application of ordinary negligence to compensation for actual injury, which includes out-of-pocket loss, impairment of reputation, standing in the community, personal humiliation, and mental anguish and suffering. The plaintiff need not present evidence of an actual dollar value. The effect of the ruling was to abolish strict liability for libel upon proof of publication of a libelous statement.

96. See supra text accompanying note 68.

97. Id. Although the Gertz holding was framed in terms of recovery from a media defendant, see supra note 68, the New Mexico Supreme Court did not define its holding so narrowly. Since Marchiondo, the New Mexico Court of Appeals has extended Marchiondo to non-media defendants. Poorbaugh v. Mullen, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App. 1982).

98. Restatement (Second) of Torts, § 580B comment f, (Tent. Draft No. 21, 1975). Although such a standard traditionally has been considered one of locality or community, it should not be so limited, especially in jurisdictions such as New Mexico, where there may be only one publisher per community.

99. Id.
the defendant had reasonable grounds for believing the communication
to be true. Negligent conduct is conduct which creates an unreasonable
risk of harm as compared with the type of conduct which a reasonable
person would exhibit under similar circumstances. The issue is whether
the defendant acted reasonably in determining the truth or falsity of the
statement prior to publication. 100

The Restatement (Second) of Torts outlines three factors for determin-
ing whether the defendant acted as a reasonably prudent publisher or
publisher's employee under the circumstances. First, the court should
determine the thoroughness of the defendant's investigation before pub-
lication, considering the amount of time the defendant had for investi-
gation from the time the defendant first acquired the information until
the publication deadline. Second, the court should evaluate the nature of
the interests the defendant sought to promote through publication. Third,
the court should inquire into the extent of damage to the plaintiff's rep-
utation which would result if the communication proved false. 101 These
factors illustrate a balanced judicial inquiry into the modern editorial
processes involved in publication and the individual's reputational inter-
ests.

In applying the reasonable publisher standard, the court must guard
against an abusive use of expert witnesses. 102 In an attempt to prove that
the defendant acted unreasonably in publishing the alleged defamatory
statement, the plaintiff may call another publisher as an expert witness.
The expert witness may testify that he would not have acted as the
defendant acted under similar circumstances. The reasonable publisher
standard mandates that the court not accept the testimony of a single
witness as conclusive of the defendant's guilt. On the contrary, the court
should find the defendant negligent only if he acted contrary to the usual
practices of the journalistic profession. Professional practices may be
established by written rules and regulations of journalistic societies or
associations or by very credible oral testimony based upon standard busi-
ness procedures.

Another area of potential abuse of the reasonable publisher standard
is jury inference of guilt. Juries have a tendency to conclude, on the basis
of their own layman's inferences, that if the defendant published a false
statement of fact, then the defendant must have been negligent. 103 This
conclusion is erroneous because the defendant reasonably could have
believed the false statement was true. 104

The court must guard against the abusive use of expert witnesses or
the allowance of jury inference of guilt because either could result in a finding of liability without proof of fault. Such a result blatantly violates the *Gertz* mandate of the abolition of strict liability. Additionally, the purpose of the reasonable publisher standard is to protect publishers from an unduly harsh application of the ordinary negligence standard.


Although the ordinary negligence standard has been adopted as the majority rule, there is some argument that it is not the best rule. Adoption of the ordinary negligence standard is criticized most by publishers and members of the press. Publishers generally feel that ordinary negligence places an intolerable burden upon the press by requiring it to pre-determine how the jury might interpret the reasonableness of its acts. Consequently, publishers' fear of libel suits has led to some self-censorship. Therefore, one effect of the adoption of the ordinary negligence standard is to infringe upon, and possibly to defeat, freedom of the press, thereby inhibiting a robust and wide-open debate on public issues.

Another effect of the ordinary negligence standard is that the press has become reluctant to publish articles concerning the acts of individuals other than public officials or public figures. Publishers receive greater protection for statements made about public officials or figures under the *New York Times* actual malice standard. Consequently, many valid public interest stories involving private figures may not be published. If publishers doubt whether truth can be proved, or if they fear the expense of having to prove truth even if they have reasonable grounds for believing the statement to be true, many publishers may refrain from publishing such stories.

Conversely, the strongest arguments in favor of the adoption of the ordinary negligence standard are made by persons who consider themselves private figures. Private figures assert that they need the ordinary negligence standard to protect themselves against the press because generally they have not thrust themselves into the vortex of a public controversy, they have not assumed the risk of defamation, and, once defamed, they do not have access to the media to rebut the defamation. Although these arguments basically are sound, there is some doubt that public figures actually enjoy greater access to the media to rebut criticism than do private figures, unless they are elected or appointed officials.

Another possible effect of the ordinary negligence standard is to render some of the defendant's absolute and conditional privileges obsolete. The traditional absolute defense of truth is altered by the ordinary negligence

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106. *Id.* at —, 546 P.2d at 104.
107. *Id.*
standard because it requires the plaintiff to prove that the defendant was negligent in failing to ascertain the falsity or defamatory character of the statement. Therefore, in order to prove negligence, the plaintiff in effect may have to prove that the statement was false leaving the defendant to rebut or disprove the falsity. The conditional privileges for statements of public interest also may be rendered valueless under the ordinary negligence standard because those privileges are contingent upon the defendant having no reasonable grounds for doubting the truth of the statement. Because negligence may be an unreasonable belief that the published statement is true, the conditional privileges will be defeated upon a showing of negligence.

CONCLUSION

Marchiondo v. Brown followed the Gertz v. Robert Welch, Inc., mandate that the state courts establish their own fault standard for awarding compensatory damages to plaintiffs who have actually suffered damage as a result of publication of the defendant’s statements. Accordingly, Marchiondo is written in the context of a court struggling to develop a new standard without effective guidelines from the United States Supreme Court. Although the Marchiondo decision has a sound analytical basis, its inadequacies lie in the New Mexico Supreme Court’s failure to carefully interpret the public versus private figure distinction and the ordinary negligence standard. Marchiondo will have the probable effect of placing the burden upon future courts to refine the definitions and significance of the Marchiondo standards. There must be a more clear analysis of what constitutes a public controversy and the role of the private and public figure within it. The New Mexico courts should ensure that the standard of ordinary negligence applied to media defendants is that of a reasonable publisher or broadcaster based upon state-wide professional practices and not jury inferences or one witness’s practices. Ultimately, however, Marchiondo has the effect of altering the timeless conflict between protecting legitimate private individual reputational interests and promoting freedom of speech and freedom of the press by adopting a standard which favors the individual.

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110. Id. at comment k. Another interesting but unaddressed issue is whether New Mexico courts will apply the doctrine of comparative negligence to libel cases involving private figures and the ordinary negligence standard. If comparative negligence were applied to codefendants in the case of repeated publications of defamatory statements by different publications, then perhaps each publisher would be held comparatively negligent. Alternatively, a plaintiff possibly could be held comparatively negligent if his acts also brought about the actual injuries suffered as a result of the publication. While it is likely the courts will find a rational basis for applying comparative negligence to codefendants, the doctrine should not be applied to plaintiffs because it would discourage individuals from cooperating with the press to accomplish a free flow of ideas.