

## ARTICLE

### FIFTY YEARS AFTER *NEW YORK TIMES CO. V. SULLIVAN* AND FORTY YEARS AFTER *GERTZ V. WELCH*: HOW THESE TWENTIETH CENTURY SUPREME COURT RULINGS IMPACT TWENTY-FIRST CENTURY ONLINE SOCIAL MEDIA LIBEL CLAIMS

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2014 marks the fiftieth anniversary of *New York Times Co. v. Sullivan* and the fortieth anniversary of *Gertz v. Welch*, two U.S. Supreme Court decisions that played a paramount role in American libel law. In the 1964 *Sullivan* decision, the Court defined the actual malice burden of proof public officials need to prove a libel claim against the media.<sup>3</sup> Ten years later in *Gertz*, the Court expanded upon *Sullivan's* public official status and recognized three distinct categories of public individuals that required the same actual malice

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<sup>3</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 289-90 (1964).

standards.<sup>4</sup> Taken together, the Court in *Sullivan* and *Gertz* crafted important areas of libel law pertaining to public figures and their need to prove actual malice against a media organization that harmed their reputations.

#### INTRODUCTION

In 1997, the Court in *Reno v. ACLU* commented on the First Amendment status of the Internet.<sup>5</sup> Justice Stevens wrote that the Internet is an online communications medium that “constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.”<sup>6</sup> In a time preceding the Internet’s burgeoning use for blogging and other forms of social media, Justice Stevens noted the vast potential of the Internet as a medium to exchange information and ideas, where anyone – including governments, educational institutions, businesses, advocacy groups, and individuals – can publish.<sup>7</sup> The Court’s accurate depiction of how users can use the Internet is noteworthy:

Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web.<sup>8</sup>

Justice Stevens discussed how email subscriber groups provided a wide range of information to its followers, noting that “[t]here are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic.”<sup>9</sup> His perspective is similar to how social media operates within the present day Internet.

In the early twenty-first century, society’s use of online communication and specifically social media reflects the Court’s accurate portrayal in 1997 of the

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<sup>4</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-37 (1974).

<sup>5</sup> *Reno v. A.C.L.U.*, 521 U.S. 844 (1997). In this decision, the Court struck down the 1996 Communications Decency Act as unconstitutional. The Act violated the First Amendment by prohibiting the knowing transmission to minors of “indecent” or certain “patently offensive” communications. While banning minors from accessing sexually explicit material, the Court ruled the Act would have also unconstitutionally restricted the same speech to adults. The Court struck down the Act as overly broad and a content-based restriction of speech. *Id.* at 844-45.

<sup>6</sup> *Id.* at 853.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (internal quotation marks omitted). In an important footnote, Justice Stevens acknowledged how individual users can publish their own ideas: “[w]eb publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal ‘home pages,’ the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web.” *Id.*

<sup>9</sup> *Id.* at 851.

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Internet and the ease with which it is used. We use social media to communicate with friends, family, and colleagues. Social media websites such as Twitter, Facebook, and blogs allow us to publish our own thoughts on any subject. Increasingly, these same communication mediums are used as forums to disparage individuals, companies, and organizations. The ease with which one can blog, tweet, or post opinions increases the likelihood that someone's reputation may be harmed. In this electronic communications environment, where any person or company can be instantly targeted by a libelous publication, it is important to analyze the relevance of the *Sullivan* and *Gertz* decisions to the current era of social media.

In the context of the anniversaries of these two decisions, this Article provides a timely review of both cases. Part I of this Article provides an analysis of recent research relating to social media and applying actual malice standards in libel claims. In Part II, this Article reviews the *Sullivan* and *Gertz* decisions. It also briefly reviews *Curtis Publishing Co. v. Butts*, the Court's forty-seven-year-old decision that created the public figure category based on the *Sullivan* decision,<sup>10</sup> noting how the *Curtis* decision laid an important foundation for the *Gertz* ruling. In Part III, this Article reviews three lower profile decisions by lower federal district courts in the last two years in which social media was the primary communications medium for publishing defamatory material.<sup>11</sup> While the disputes in these three cases do not involve well-known, all-purpose public figures embroiled in a defamatory controversy, they are nonetheless important because these decisions continue building the legal foundations for applying libel law to social media. In each of these controversies, federal district judges relied on *Sullivan* and *Gertz* in issuing their decisions. These cases necessitated a discussion of public figure status, defining whether the defendants could be classified as media and selecting an appropriate burden of proof for the plaintiffs to prove defamation. These discussions all pertained to how the defendants used social media as a publishing platform. Part IV of this Article concludes that in light of their respective fiftieth and fortieth anniversaries, *Sullivan* and *Gertz* are still highly relevant in today's legal controversies relating to social media.

#### I. LITERATURE REVIEW: SCHOLARS DISAGREE ON HOW TO APPLY ACTUAL MALICE STANDARDS TO SOCIAL MEDIA

While there is a plethora of commentary regarding the *Sullivan* actual malice standard that public officials must meet in order to defend against libel claims and the *Gertz* categories of individuals who may be judged as public

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<sup>10</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 134 (1967).

<sup>11</sup> See *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963 (D. Nev. July 3, 2013); *Obsidian Fin. Grp., LLC v. Cox*, 3:11-CV-57-HZ, 2012 WL 1065484 (D. Ore. Mar. 27, 2012) *aff'd in part, rev'd in part*, 740 F.3d 1284 (9th Cir. 2014) *cert. denied*, 134 S. Ct. 2680 (U.S. 2014); *Ascend Health Corp., UHP, LP v. Wells*, No. 4:12-CV-00083-BR, 2013 U.S. Dist. LEXIS 35237 (E.D.N.C. Mar. 14, 2013).

figures, there are significantly fewer sources that discuss the direct applicability of these standards to online social media. There is no consensus among legal scholars on how to apply the public figure status standards to libel claims arising from alleged defamatory postings in social media.

In 2012, Joe Trevino posited that libel used in social media, especially Twitter, will continue to impose potential legal difficulties for public figures.<sup>12</sup> He said that “[i]n the years since [the *Sullivan* decision], technology has expanded people’s means of communication.”<sup>13</sup> Cell phones, computers, and the Internet have altered the way we communicate.<sup>14</sup> He argued that “[a]s communication has evolved, the defamation standard has remained stagnant.”<sup>15</sup> Trevino’s research focused on professional athletes and their continued use of social media platforms such as Twitter to defame one another. He said the ongoing use of Twitter as a means for athletes to harm one another’s reputation will remain an unsettled area of law until courts determine how to apply libel law to the 140 character messaging medium.<sup>16</sup>

Rebecca Phillips noted in a legal comment that there is no uniform recognition of who is a media or non-media defendant in defamation cases related to defamatory content on blogs and social media sites.<sup>17</sup> Some state courts and federal district courts do recognize a defined distinction between media and non-media defendants where the non-media defendants may have less constitutional protection from libel lawsuits.<sup>18</sup> Other courts look to the First Amendment itself for a guide and, therefore, do not distinguish between the two types of defendants.<sup>19</sup> Phillips asked, “[I]f it is decided that media can be defined and there should be a different standard for nonmedia defendants, the next question that we are faced with is: Who deserves more protection?”<sup>20</sup> She correctly noted that if the standards were lower for bloggers and social media activists to be recognized as media, then victims of libel would have to prove negligence.<sup>21</sup> The consequences could lead to individuals who would attempt to publish “their defamatory statements to a larger audience in hopes that their efforts would qualify them as ‘media,’ thus receiving greater

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<sup>12</sup> See Joe Trevino, *From Tweets to Twibel: Why the Current Defamation Law Does Not Provide for Jay Cutler’s Feelings*, 19 *SPORTS LAW. J.* 49, 69 (2012) (regarding athletes as public figures).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Rebecca Phillips, Comment, *Constitutional Protection for Non-Media Defendants: Should There Be a Distinction Between You and Larry King?*, 33 *CAMPBELL L. REV.* 173, 175 (2010).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 175-76.

<sup>20</sup> *Id.* at 190.

<sup>21</sup> *Id.*

protection, but also causing greater harm to a plaintiff.”<sup>22</sup>

As will be discussed in Part II, the *Gertz* Court recognized three categories of individuals who could be considered public figures.<sup>23</sup> Among those categories are the individuals who, for reasons we may not understand, purposefully insert themselves into a public controversy.<sup>24</sup> Matthew Lafferman argued that in the current era of social media, how an individual is defined as a public figure may directly relate to the privacy settings on their preferred social media platform.<sup>25</sup> Where Facebook may allow users to directly change their privacy settings, other social media sites, such as blogs and bulletin boards, may not provide privacy option settings.<sup>26</sup> Lafferman said that courts may be able to rely on another facet from *Gertz*, that a “social media user voluntarily assumes the risk of injury” if a court determines the social media user who allegedly published libelous content is a public figure.<sup>27</sup> He cautioned any court that may want to apply the public figure status in a uniform way: “[c]ourts should avoid a voluntariness definition that encompasses simple operation and use of a social media site. Such an approach would convert millions of users into public figures in one fell swoop.”<sup>28</sup>

In *Gertz*, the Court defined a voluntary public figure as someone who assumes roles of special prominence in the affairs of society or thrusts themselves into a public controversy.<sup>29</sup> Lafferman suggested that courts may be able to decide who is a public figure on social media by determining two factors: greater access to the media by the plaintiff than by other users and whether the plaintiff is well known among that particular social media platform’s users.<sup>30</sup>

David Ardia offered a novel solution regarding libel lawsuits on the Internet by suggesting that specific online communities act as arbitrators in defamation allegations.<sup>31</sup> Examples of online communities might include “neighborhood groups, business networks, and buyers and sellers on eBay, as well as users of Facebook, YouTube, and Google Search.”<sup>32</sup> Ardia recommended that a user’s “connection” to an online community of users be the major determinant for

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<sup>22</sup> *Id.*

<sup>23</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-37 (1974).

<sup>24</sup> *Id.* at 351.

<sup>25</sup> See Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199, 203-04 (2012).

<sup>26</sup> *See id.*

<sup>27</sup> *Id.* at 205.

<sup>28</sup> *Id.* at 206.

<sup>29</sup> *Gertz*, 418 U.S. at 351.

<sup>30</sup> Lafferman, *supra* note 23, at 207.

<sup>31</sup> David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 264 (2010).

<sup>32</sup> *Id.* at 321.

structuring a review committee or ratings system based from that specific community of online speakers for alleged defamatory materials.<sup>33</sup> He suggested that one model could be similar to eBay's where users rate a seller.<sup>34</sup> In a similar vein, members of an online community include those in social media who could rate publishers of content.<sup>35</sup>

## II. THE COURT PROVIDES LEGAL GUIDANCE FOR PUBLIC FIGURES WITH HARMED REPUTATIONS

### *New York Times Co. v. Sullivan Revisited*

In 1964, the Supreme Court in *Sullivan* provided legal confirmation to public officials that they must prove actual malice or reckless disregard of the truth by a media organization in a libel claim.<sup>36</sup> In its unanimous decision, the Court declared that public officials open themselves up to public criticism of their job duties.<sup>37</sup> Specifically, the Court noted that the United States has a "profound national commitment to . . . uninhibited" debate on public issues.<sup>38</sup> Justice Brennan wrote that on issues of political importance, the public debate can often be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>39</sup>

The event at the heart of the *Sullivan* defamation suit was the *New York Times*' publication of an editorial advertisement that sharply criticized a series of events in Montgomery, Alabama involving a group of college students at Alabama State College.<sup>40</sup> The advertisement made a number of assertions. The third paragraph stated that at a civil rights rally outside the State Capitol, the students sang "My Country 'Tis of Thee."<sup>41</sup> Next, the advertisement directly alleged that the Montgomery Police Department "ringed" the campus with shotguns and tear gas.<sup>42</sup> The advertisement further accused the Police Department of padlocking the campus dining hall after students protested police presence on campus by refusing to register for classes.<sup>43</sup> Lastly, the

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 322.

<sup>35</sup> *See id.* at 321.

<sup>36</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

<sup>37</sup> *Id.* at 268-270.

<sup>38</sup> *Id.* at 270.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 256-57. In the decision, the Court said that the issue of whether the advertisement was paid for "is as immaterial in this connection as is the fact that newspapers and books are sold." *Id.* at 266. Since the advertisement communicated a political idea, expressed opinion, and commented on a public issue, it was regarded in the same category as any print publication. *See id.*

<sup>41</sup> *Id.* at 257.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

sixth paragraph focused on how police had harassed Martin Luther King.<sup>44</sup> The advertisement detailed the bombing of King's home, the physical assaults King experienced, his seven arrests, and the felony charge of perjury leveled against him.<sup>45</sup>

Following the publication of this advertisement, L.B. Sullivan, a Commissioner in Montgomery, filed a lawsuit against the *New York Times*. Though the *Times*' advertisement did not mention Sullivan by name, Sullivan believed the advertisement reflected on his actions as an elected Commissioner in Montgomery, a position involving supervision of the Montgomery Police Department.<sup>46</sup> Sullivan's legal team substantiated this claim when six Montgomery residents testified at trial that they believed the statements in the advertisement directly referenced Sullivan in his position as Commissioner.<sup>47</sup> Both the trial court and the Supreme Court of Alabama issued a verdict in favor of Sullivan under Alabama libel law.<sup>48</sup>

In the Supreme Court's decision, the Court recognized that there were several misstatements of fact in the advertisement.<sup>49</sup> First, the students at the civil rights rally sang the "The Star Spangled Banner," not "My Country 'Tis of Thee."<sup>50</sup> Second, students did not refuse to register for classes; they instead boycotted their classes.<sup>51</sup> Third, police did not padlock the campus dining hall as the advertisement claimed.<sup>52</sup> Fourth, police did not "ring" the campus with shotguns and teargas as alleged.<sup>53</sup> Lastly, Martin Luther King was arrested four times, not seven.<sup>54</sup> The facts also showed that other events referred to in the advertisement, including the bombing of King's home and three out of his four arrests, occurred prior to Sullivan's election as Commissioner.<sup>55</sup> After consideration, the Court concluded that these errors were merely misstatements of fact by the *New York Times* and not indicative of an intended act of actual malice or reckless disregard of the truth.<sup>56</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 257-58.

<sup>46</sup> *Id.* at 258.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 256. Under Alabama law, libel per se occurs when words "injure a person in his reputation" or bring him into contempt in the community. Once libel per se is established, the defendant's only recourse is to prove that each fact is true. No proof of injury by the alleged libel victim is necessary. *Id.* at 267. According to the Court, Sullivan never proved any pecuniary damages upon his reputation based on the advertisement. *Id.* at 260.

<sup>49</sup> *Id.* at 258.

<sup>50</sup> *Id.* at 258-59.

<sup>51</sup> *Id.* at 259.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 286-88. The manager of the *New York Times* Advertising Acceptability Department testified that he approved the advertisement because it was endorsed by people

The Court's confirmation of a higher standard for public officials to prove actual malice stems from its concern that a decision requiring negligence could lead newspapers to refuse to carry similar editorial advertisements.<sup>57</sup> The Court feared this could "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities" and, therefore, must use media to pay for promoting their political or social cause.<sup>58</sup> Essentially, the Court wanted to preserve the lines of communication between political activists and the public about the political and social issues important to both local communities and the nation. The *New York Times* advertisement itself disseminated strong opinions on the Civil Rights Movement, a significant public issue at the time.<sup>59</sup>

The Justices believed that criticism of the Montgomery Police Department's actions deserved constitutional protection.<sup>60</sup> If the *Times*' advertisement alluded to Sullivan's actions as a city commissioner who supervised the police department, the Court held that the *Times* had a right to make such commentary: "[c]riticism of [city commissioners'] official conduct does not lose constitutional protection merely because it is effective criticism and hence diminishes their official reputation."<sup>61</sup> In support of this notion, Justice Brennan wrote that a legal "rule compelling [any] critic to guarantee the truth of all his factual assertions" at the risk of a libel accusation leads to self-censorship.<sup>62</sup> The Justices believed that any other decision would lead to publications censoring themselves out of fear of libel lawsuits.<sup>63</sup> The federal actual malice and reckless disregard for the truth legal standards pertaining to public officials in their official capacities would not diminish the free speech protections of the press.<sup>64</sup> In its unanimous decision, the Court emphasized a democratic ideal, stating "[i]t is as much [the critic's] duty to criticize as it is the official's duty to administer."<sup>65</sup>

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who were well known in the civil rights movement and that he had no reason to question the alleged accusations it contained. *Id.* at 260-61.

<sup>57</sup> *Id.* at 266.

<sup>58</sup> *Id.* at 265-66.

<sup>59</sup> *Id.* at 271.

<sup>60</sup> *Id.* at 272-73.

<sup>61</sup> *Id.* at 273.

<sup>62</sup> *Id.* at 279.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.* at 282-83. In this decision, Justice Brennan noted that the Court's adoption of the actual malice and reckless disregard for the truth standards simply reflected the libel standards in several states including Kansas, Michigan, North Carolina, and California. He also noted that the federal standard reflected the "consensus of scholarly opinion." *Id.* at 280.

<sup>65</sup> *Id.* at 282. While the Court's decision was unanimous, it is important to note that Justices Goldberg, Black, and Douglas concurred in the decision. Justices Black and Douglas disagreed with the implementation of the actual malice standard. They noted that it is an "elusive, abstract concept, hard to prove and hard to disprove," and that newspapers have an absolute right to publish critiques of government officials. *Id.* at 293 (Black, J., concurring). Justices Goldberg and Douglas advocated for an "unconditional privilege to



*Curtis Publishing Co. v. Butts*

While the Court in *Sullivan* created the federal actual malice standard that public officials need to prove in a libel claim, three years later, the Court in *Curtis Publishing Co. v. Butts* expanded this standard's coverage.<sup>66</sup> In *Curtis*, the Court ruled that public figures, not just public officials, must prove actual malice or reckless disregard for the truth.<sup>67</sup> The Court did not deviate from its support for these higher standards; rather it applied them to well-known individuals beyond public officials.<sup>68</sup>

In its decision, the Court combined two separate libel cases, *Curtis* and *Associated Press v. Walker*. In the *Curtis* case, Wallace Butts was the Athletic Director for the University of Georgia.<sup>69</sup> Even though the university was a public institution, the Georgia Athletic Association, a private corporation, employed Butts.<sup>70</sup> Prior to becoming Athletic Director, Butts was the University of Georgia football coach, and he was well known in the college coaching community.<sup>71</sup> The lawsuit arose from an article in the *Saturday Evening Post* alleging that Butts fixed a football game between the University of Georgia and the University of Alabama in 1962.<sup>72</sup> In the lawsuit, Butts argued that the "magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible, amounting to reckless and wanton conduct, in light of the devastating nature of the article's assertions."<sup>73</sup>

*Walker*, the parallel case, arose after the *Associated Press* wire service published an article detailing an eyewitness account of events at the University of Mississippi on September 30, 1962, when a riot broke out following federal efforts to enforce a court order to enroll an African American student at the university.<sup>74</sup> The article concerned Edwin Walker, a U.S. Army veteran who had commanded federal troops during the federal oversight of public school desegregation in Little Rock, Arkansas in 1957;<sup>75</sup> Walker also ran an

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criticize public official conduct despite the harm which may flow from excesses and abuses; . . . [t]he right should not depend upon a probing by the jury of the motivation of the citizen or press." *Id.* at 298 (Goldberg, J., concurring).

<sup>66</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154-55 (1967).

<sup>67</sup> *Id.* at 165.

<sup>68</sup> *Id.* at 165.

<sup>69</sup> *Id.* at 135.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 135-36.

<sup>72</sup> *Id.* at 135.

<sup>73</sup> *Id.* at 138. The *Curtis* lawsuit preceded the Court's *Sullivan* decision. A district court jury awarded Butts \$60,000 in general damages and three million dollars (\$3,000,000) in punitive damages. After the *Sullivan* decision, Curtis Publishing Company informed the trial judge of the actual malice standard that the court should apply to this decision. The trial judge rejected the claim. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's judgment. *Id.* at 138-39.

<sup>74</sup> *Id.* at 140.

<sup>75</sup> *Id.*

organization, “Friends of Walker,” and spoke publicly about the dangers of federal intervention in schools and universities.<sup>76</sup> The *Associated Press* article stated that Walker “had taken command of the violent crowd and had personally led a charge against federal marshals.”<sup>77</sup> The article also said that Walker “encourag[ed] rioters to use violence and [gave] them technical advice on [how to fight] the effects of tear gas.”<sup>78</sup> After publication of the *Associated Press* article, Walker sued for libel under Texas law and was awarded \$500,000 in compensatory damages.<sup>79</sup> The trial judge ruled that there was no actual malice by the *Associated Press* reporter but that there may have been negligence.<sup>80</sup> Both parties appealed to the Texas Court of Civil Appeals, which affirmed the trial court’s decision.<sup>81</sup>

In analyzing both cases, the Court had to determine if Butts and Walker were public figures who had to prove actual malice in their libel claims. Writing for the Court, Justice Harlan noted that “both [Butts and Walker] commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able ‘to expose through discussion the falsehood and fallacies’ of the defamatory statements.”<sup>82</sup> Butts was a public figure due to his position as Athletic Director and as a former university football coach.<sup>83</sup> Walker was a public figure whose activity amounted to a “thrusting of his personality into the ‘vortex’ of an important public controversy.”<sup>84</sup> As public figures, the actual malice and reckless disregard of the truth standards applied to them.<sup>85</sup>

Under the scrutiny of actual malice and reckless disregard for the truth, the Court ruled for Butts and against Walker. The Court first determined that the *Saturday Evening Post* did harm Butts’ reputation.<sup>86</sup> This led the Court to

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 140-41. At trial, Walker admitted he had spoken on campus to a group of students “counsel[ing] restraint and peaceful protest[s].” He denied interfering with federal marshals. *Id.* at 141.

<sup>80</sup> *Id.* at 142. The trial judge noted that if the *Sullivan* actual malice standard was applicable to the *Walker* case, then the *Associated Press* would have won the case. *See id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 155 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927)).

<sup>83</sup> *See id.* at 154-55.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.* The Court noted that “a ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme danger from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.* at 155.

<sup>86</sup> *See id.* at 157-58. The Court noted that the *Saturday Evening Post* committed several poor journalism decisions. The *Post* writer was not a football expert; the facts of the story were not checked by someone who was knowledgeable in the sport; the magazine was involved in a similar trial based on the Coach Paul Bryant’s claims regarding the same article; and the magazine had a policy of “sophisticated muckraking.” *Id.* at 158, 168.

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conclude that the magazine departed from “the standards of investigation and reporting ordinarily adhered to by responsible publishers.”<sup>87</sup> Regarding Walker, the Court ruled that the *Associated Press* was not guilty of actual malice or reckless disregard for the truth.<sup>88</sup> As a wire organization, it publishes several articles on tight deadlines.<sup>89</sup> Justice Harlan noted that other articles detailing the riots at the University of Mississippi were consistent and that the correspondent who provided the information “gave every indication of being trustworthy and competent.”<sup>90</sup> The correspondent’s information detailing Walker’s involvement with the campus activities was not unreasonable considering Walker’s public statements about racial integration on campus.<sup>91</sup>

*Gertz v. Welch*

While the *Curtis* decision laid the foundation of public figure status akin to public officials for actual malice standards, the Court in *Gertz* recognized three categories of public figures: involuntary, all-purpose, and vortex.<sup>92</sup> The facts in *Gertz* are unique because the case involved an attorney who was not in the public eye. A Chicago police officer, Richard Nuccio, was convicted of murdering a youth, and the victim’s family hired Attorney Elmer Gertz to represent them in a civil lawsuit against Officer Nuccio.<sup>93</sup> The *American Opinion* magazine published an article stating that Officer Nuccio’s trial “was part of a Communist conspiracy to discredit the local police.”<sup>94</sup> The article stated that Gertz was a “Leninist” and “Communist-fronter,” that he had a criminal record, and that he had been officer in a Communist organization involved in an attack on Chicago police in 1968.<sup>95</sup> Gertz sued the magazine’s publisher for libel.<sup>96</sup>

The U.S. District Court for the Northern District of Illinois found that the statements in the *American Opinion* article were libel per se.<sup>97</sup> The court applied the *Sullivan* standard of actual malice despite the fact that the court did not recognize Gertz as a public official or public figure.<sup>98</sup> The court entered a judgment for the magazine’s publisher on the basis that there was no actual malice, even though the *Sullivan* standard applied.<sup>99</sup> The U.S. Court of Appeals

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<sup>87</sup> *Id.* at 158.

<sup>88</sup> *Id.* at 159.

<sup>89</sup> *Id.* at 158-59.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 352 (1974).

<sup>93</sup> *Id.* at 325.

<sup>94</sup> *Id.* at 323, 325.

<sup>95</sup> *Id.* at 326. The article also accused Gertz of belonging to the Marxist League for Industrial Democracy, also known as the Intercollegiate Socialist Society. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 327.

<sup>98</sup> *Id.* at 329.

<sup>99</sup> *Id.* at 329, 331-32.

for the Seventh Circuit upheld the verdict.<sup>100</sup>

In the Supreme Court's decision, Justice Powell wrote that the principle issue was whether a media organization that defamed an individual who was "neither a public figure nor public official may claim any constitutional privilege against liability."<sup>101</sup> The decision referenced a previous case, *Rosenbloom v. Metromedia, Inc.*, where the Court held that protections "should extend to defamatory falsehoods relating to private [individuals] if the [alleged] statements concerned matters of general or public interest."<sup>102</sup>

Relying on *Rosenbloom* and *Curtis*, the Court in *Gertz* rejected the notion of a "false idea" and embraced the "marketplace of ideas" theory of free speech.<sup>103</sup> Under this theory, "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." <sup>104</sup> The *Gertz* Court recognized that the best solution to false speech is "the competition of other ideas" or, quite simply, "more speech."<sup>105</sup>

While adopting the marketplace of ideas theory, the Court also cautioned that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."<sup>106</sup> Justice Powell equated false statements of fact with fighting words, which the Court in *Chaplinsky v. New Hampshire* defined as "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>107</sup> Despite this comparison, Justice Powell conceded that false statements of fact are inevitable in any society that embraces free speech.<sup>108</sup> He showed concern for the "intolerable self-censorship" that could result from strict rules requiring

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<sup>100</sup> *Id.* at 331-32.

<sup>101</sup> *Id.* at 332.

<sup>102</sup> *Id.* at 337. In *Rosenbloom v. Metromedia, Inc.*, George Rosenbloom sued a local Philadelphia radio station for characterizing his adult books as obscene and accusing him of selling smut. In its ruling for *Rosenbloom*, a plurality of the Court applied the *Sullivan* actual malice standard to private individuals who are the subject of the media's publication about a subject of interest to society. In the plurality opinion, Justice Black restated his long held views (consistent with Justice Douglas' views on the issue) that the First Amendment protects news media with absolute immunity from liability from defamation. Justice White concurred on narrower grounds stating that the media can comment on the official actions of public officials absent actual malice. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 36, 45, 58, 62 (1971).

<sup>103</sup> *Gertz*, 418 U.S. at 339-40.

<sup>104</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>105</sup> *Gertz*, 418 U.S. at 339-40; see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1036-37 (1995).

<sup>106</sup> *Gertz*, 418 U.S. at 340 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

<sup>107</sup> *Id.*; *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). In *Chaplinsky*, the Court stated that fighting words "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

<sup>108</sup> *Gertz*, 418 U.S. at 340.

the media to guarantee the truth of all its assertions.<sup>109</sup> However, Justice Powell also noted that protecting the media from such self-censorship is not the only interest at issue; individuals must be compensated for “harm inflicted on them by defamatory falsehoods.”<sup>110</sup>

In discussing the need for individuals to recover damages for defamatory statements that harm their reputations, the *Gertz* Court distinguished defamation plaintiffs and recognized three categories of public figures.<sup>111</sup> With the first category, involuntary public figures, the Court acknowledged that private figures may transition to a public figure status by no discernable actions of their own.<sup>112</sup> These private figures may involuntarily become public figures by participating in an event that is covered by the media. Justice Powell conceded that involuntary public figures often attain this status because they have some sort of special prominence within society.<sup>113</sup> As an attorney, *Gertz* was part of a media-covered trial relating to the murder of a youth by a police officer. Thus, *Gertz* could be classified as an involuntary public figure.

The second category of public figures, classified as all-purpose public figures, covers those individuals who are well known in society and “occupy positions of such persuasive power and influence.”<sup>114</sup> However, an individual’s participation in local community or professional affairs does not automatically guarantee the individual’s status as an all-purpose public figure.<sup>115</sup> To fall under the category of all-purpose public figure, there must be clear evidence of the individual’s “general fame or notoriety” and his or her “pervasive involvement in ordering the affairs of society.”<sup>116</sup> The “nature and extent of an individual’s participation in the particular controversy” that led to the defamatory publication may also be taken into consideration.<sup>117</sup>

The third and final category – the vortex public figure- covers to those individuals who have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>118</sup> These public figures invite attention upon themselves and public comments about their actions.<sup>119</sup>

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<sup>109</sup> *Id.* at 340-41 (“Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. . . . The First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

<sup>110</sup> *Id.* at 341.

<sup>111</sup> *Id.* at 335-37.

<sup>112</sup> *Id.* at 345.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 352.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 345.

<sup>119</sup> *Id.*

In addition to recognizing these three categories of public figures, Justice Powell also distinguished between public and private defamation plaintiffs. Whereas public officials and public figures have greater access to the media and more realistic opportunity for fighting defamatory statements and minimizing their effects, private individuals like Gertz may not have similar opportunities.<sup>120</sup> Further, public officials and public figures, unlike private individuals, voluntarily choose to seek government office or an influential role in society, and thus “must accept certain necessary consequences of that involvement in public affairs.”<sup>121</sup> Accordingly, as Justice Powell noted, private individuals “are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.”<sup>122</sup>

In setting out the three different categories of public figures, the *Gertz* Court affirmed the *Sullivan* actual malice and reckless disregard for the truth standards it created ten years earlier for public officials and public figures.<sup>123</sup> However, the Court refused to extend the *Sullivan* standards to private individuals, instead concluding that state legislatures and courts be allowed “substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual,” so long as the remedy did not involve no-fault liability.<sup>124</sup> The Court ultimately held that Gertz did not fall into any of these three categories and remanded the case.<sup>125</sup>

### III. PUBLIC FIGURE STATUS MATTERS IN THE CONTEXT OF SOCIAL MEDIA

Among the numerous defamation claims involving allegations posted on the Internet, especially involving social media, many are lower profile cases that do not garner a vast amount of media attention. These cases reflect the legal effectiveness of *Sullivan* and *Gertz* in applying the legal issues of public figures and actual malice to the contemporary online communications environment. As shown in the following three recent court decisions, it is clear that judges still use both *Sullivan* and *Gertz* as the basis for applying public figure status and actual malice standards of proof to a set of facts. In the current era of social media use, courts are also determining if a social media publisher is considered media. This determination directly influences a court’s decision about public figure status and the need for a libel victim to prove actual malice.

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<sup>120</sup> *Id.* at 344.

<sup>121</sup> *Id.* at 344-45 (“Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”).

<sup>122</sup> *Id.* at 344

<sup>123</sup> *Id.* at 343.

<sup>124</sup> *Id.* at 345-46, 348-49.

<sup>125</sup> *Id.* at 352.

*Obsidian Finance Group v. Cox*

In *Obsidian Finance Group v. Cox*, the 2012 federal district court rehearing based on a 2011 defamation claim, the issue of whether the plaintiff, Obsidian Finance Group, was a limited public figure impacted the court's decision.<sup>126</sup> In the decision, District Judge Hernandez relied on the *Gertz* categories of public figures in order to decide what level of evidence was needed to prove damages in a defamation claim based on a blog post and an associated Twitter account.<sup>127</sup> In this case, the defendant Crystal Cox blogged and tweeted about an Obsidian Finance employee, Kevin Padrick. Cox accused Padrick of committing tax fraud.<sup>128</sup> Cox argued that Padrick was a limited public figure because he was technically an officer of the court in Oregon.<sup>129</sup> If Cox was successful in her public figure claim, Padrick would have had to prove the actual malice standard against Cox, as per *Curtis*. Additionally, Cox claimed to be a media defendant entitled to some protection from defamation under federal law.<sup>130</sup>

Judge Hernandez rejected the plaintiff's alleged limited public figure status.<sup>131</sup> Judge Hernandez said Padrick's status as an officer of the court did not automatically equate with public official status under the *Gertz* standard.<sup>132</sup> "Neither Padrick nor Obsidian Finance were government employees, [elected officials, or] appointed to a[n] federal government position."<sup>133</sup>

Judge Hernandez also analyzed Cox's claim as a media defendant and acknowledged that bloggers may be classified as media, but said that Cox "did not possess any characteristics traditionally associated with the media."<sup>134</sup>

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<sup>126</sup> *Obsidian Fin. Grp., LLC v. Cox*, 3:11-CV-57-HZ, 2012 WL 1065484, at \*6 (D. Ore. Mar. 27, 2012) *aff'd in part, rev'd in part*, 740 F.3d 1284 (9th Cir. 2014) *cert. denied*, 134 S. Ct. 2680 (U.S. 2014).

<sup>127</sup> *Id.* at \*4-5.

<sup>128</sup> *Id.* at \*5. Cox wrote on her blog of a "single instance of alleged tax fraud by [Padrick for] failing to pay taxes" from a bankruptcy estate. *Id.*

<sup>129</sup> *See id.* at \*4.

<sup>130</sup> *Id.* at \*3.

<sup>131</sup> *Id.* at \*4-5.

<sup>132</sup> *Id.* at \*5.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at \*7. In the earlier 2011 trial involving Obsidian Finance and defendant Cox, Judge Hernandez ruled that Cox could not credibly prove her standing as a member of the media based on her blog. According to Judge Hernandez:

Defendant cites no cases indicating that a self-proclaimed "investigative blogger" is considered "media" for the purposes of applying a negligence standard in a defamation claim. Without any controlling or persuasive authority on the issue, I decline to conclude that defendant in this case is "media," triggering the negligence standard.

Defendant fails to bring forth any evidence suggestive of her status as a journalist. For example, there is no evidence of (1) any education in

Judge Hernandez noted that Cox did not claim to be a journalist, an editor, or a fact-checker; did not have any interview notes or records of interviews; and did not write in a journalistic style that could equate her as “media” for a defamation defense.<sup>135</sup> Additionally, upon the plaintiff’s demand that Cox cease publishing what the plaintiff believed to be defamatory statements, Cox offered to conduct public relations work to help mitigate any damage from the defamatory posts.<sup>136</sup> Cox offered to oversee “search engine management and online reputation repair services to Obsidian Finance.”<sup>137</sup> Cox’s public relations assistance offer was one of the factors that convinced Judge Hernandez that Cox should not be considered media for the trial.<sup>138</sup>

As an online publisher, Cox noted that she linked her blog to a Twitter account.<sup>139</sup> Other online users also republished Cox’s postings and tweets.<sup>140</sup> At trial, Cox bragged about her abilities regarding search engine optimization, testifying, “[E]very single word I write, I go for the top ranking, absolutely. Anything else would be ridiculous.”<sup>141</sup> Cox followed the same strategy with her posting about Padrick.<sup>142</sup>

Obsidian Finance successfully proved the damages caused by Cox’s postings.<sup>143</sup> For instance, Padrick testified that his business earnings dropped substantially, including a drop in new clientele.<sup>144</sup> In finding Cox guilty of defamation using social media as the tool, Judge Hernandez wrote that “defendant made the post having been fully informed that plaintiffs alleged the tax fraud statements to be false; [defendant] purposefully manipulated the posts to give [those posts] the most prominence in response to a search query.”<sup>145</sup>

In a January 2014 decision by the Ninth Circuit Court of Appeals, Judge

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journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting “the other side” to get both sides of a story. Without evidence of this nature, defendant is not “media.”

Obsidian Fin. Grp., LLC v. Cox, CV-11-57-HZ, 2011 WL 5999334, at \*5 (D. Ore. Nov. 30, 2011)

<sup>135</sup> *Id.*

<sup>136</sup> *Obsidian*, 2012 WL 1065484, at \*7.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at \*15.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at \*17.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*



Andrew Hurwitz reversed, in part, the decision by the district court.<sup>146</sup> He ruled that Cox should have been considered media in this case. He noted that other federal circuits have not distinguished between institutional press and individual bloggers who consider themselves media, noting that “[t]he protections of the First Amendment do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others’ writings, or tried to get both sides of a story.”<sup>147</sup> While Judge Hurwitz supported Cox’s assertion that Cox be treated as press, he upheld Obsidian Finance’s argument that Padrick was not a public figure simply because he was an officer of the court.<sup>148</sup>

*Rosario v. Clark County School District*

In a 2013 legal action, the U.S. District Court for the District of Nevada held a hearing regarding a former high school basketball player who tweeted defamatory messages about a Nevada high school principal, basketball coaches, and other administrators.<sup>149</sup> The facts of the case revealed that high school senior Juliano Rosario played on the school’s basketball team for a short period of time.<sup>150</sup> Rosario had originally tried out for the team during the Fall 2012 semester, but coaches did not select him for the team.<sup>151</sup> After Rosario’s father protested, Rosario was placed on the team.<sup>152</sup> Following the final game of the season on February 7, 2013, Rosario used Twitter to post several derogatory tweets about the school officials.<sup>153</sup>

Following Rosario’s tweets, the school officials filed a discipline complaint and charged Rosario with cyberbullying.<sup>154</sup> After a disciplinary hearing, Rosario was reassigned to a different high school in the school district.<sup>155</sup> Rosario’s family sued the school district on several counts, including First Amendment free speech rights and defamation.<sup>156</sup>

In his decision, U.S. District Court Judge James Mahan first addressed the

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<sup>146</sup> *Obsidian v. Cox*, 740 F.3d 1284 (9th Cir. 2014).

<sup>147</sup> *Id.* at 1291.

<sup>148</sup> *Id.* at 1293.

<sup>149</sup> *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, at \*1-3 (D. Nev. July 3, 2013).

<sup>150</sup> *Id.* at \*2.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* There were eight tweets in total. The tweets included comments such as: “Mr. Isaacs [athletic director and assistant principal] is a b\*tch too; I hope Coach brown gets f\*ck\*d in tha \*ss by 10 black d\*cks; [and] f\*ck coach browns b\*tch \*ss.” *Id.* at \*8.

<sup>154</sup> *Id.* at \*3.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*4. The other causes of actions included: violation of equal protection; malicious prosecution; intentional infliction of emotional distress; civil conspiracy; denial of procedural due process guaranteed by Fifth and Fourteenth Amendments; and assault and battery. *Id.*

First Amendment claim.<sup>157</sup> Using the Supreme Court's *Miller v. California*<sup>158</sup> obscenity test and Nevada defamation law, Judge Mahan found that one of the tweets - "I hope Coach brown gets f\*ck\*d in tha \*ss by 10 black d\*cks- was beyond the protection of the First Amendment: "<sup>159</sup> Judge Mahan acknowledged that the other tweets may be offensive but were protected categories of speech under *Miller* even though they were racist, violent, offensive, and hateful.<sup>160</sup>

In his defamation claim, Rosario alleged that during a coaches' meeting, the basketball coach accused Rosario of faking an injury.<sup>161</sup> Judge Mahan said that under Nevada law, a plaintiff in a defamation claim must prove the following in order to survive a motion to dismiss: "(1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages."<sup>162</sup> Judge Mahan found that there was cause of action for defamation.<sup>163</sup>

In addressing the First Amendment issue in this case, Judge Mahan analyzed Twitter's use as a communications medium.<sup>164</sup> He pointed out that Twitter has two privacy settings, public and private, that users can choose between.<sup>165</sup> When users maintain a public setting, their tweets can be read by "anyone searching the Internet . . . whether or not that person is a follower of the tweeter."<sup>166</sup> The public setting means that a user "intends the message to be heard by the public at large."<sup>167</sup> Judge Mahan equated Twitter's public setting as the "twenty-first century equivalent of an attempt to publish an opinion piece or commentary" in a newspaper.<sup>168</sup> Similar to the Ninth Circuit's decision in *Obsidian Finance*, Rosario's Twitter activity in this case gave him the equivalent of media status. Essentially, Judge Mahan's decision placed Rosario in the category as a media defendant.<sup>169</sup> Thus, any plaintiff who claims

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<sup>157</sup> *Id.* at \*7-13.

<sup>158</sup> In *Miller*, the Court provided a three part test to determine when speech is obscene: "(1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at \*8 (citing *Miller v. California*, 413 U.S. 15, 24-25 (1973)).

<sup>159</sup> *Id.* at \*8-10.

<sup>160</sup> *Id.* at \*10.

<sup>161</sup> *Id.* at \*27-28.

<sup>162</sup> *Id.* at \*27 (citing *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 483 (Nev. 1993)).

<sup>163</sup> *Id.* at \*28.

<sup>164</sup> *Id.* at \*14.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at \*14-15.

<sup>167</sup> *Id.* at \*15.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

to be a public figure would need to prove actual malice by Rosario.<sup>170</sup> Private plaintiffs, on the other hand, would need to prove negligence.<sup>171</sup>

*Ascend Health Corporation v. Wells*

In a third case involving online defamation through blogging, Facebook, Twitter, and YouTube, the U.S. District Court for the Eastern District of North Carolina had to determine if the defendant's postings on these sites equated the defendant as print media.<sup>172</sup> In *Ascend Health Corporation v. Wells*, the defendant Brenda Wells used several online social media platforms to post defamatory content against the University Behavioral Health of Denton Hospital, a Texas psychiatric facility, and its doctors.<sup>173</sup> Judge W. Earl Britt addressed whether Wells' blogs entitled her to statutory fair reporting privileges as a member of the media under Texas's fair reporting privilege.<sup>174</sup> Under Texas law, fair reporting privilege extends to newspapers or another "periodical."<sup>175</sup>

Judge Britt held that "Wells' internet blogs are not akin to a newspaper or other periodical, even one published electronically. . . [t]hey are not composed of articles, news items, or the like," and were therefore not entitled to the fair reporting privilege.<sup>176</sup> Judge Britt also ruled that the plaintiffs were not public figures.<sup>177</sup> Further, since Texas' defamation statute had a statute of limitation of one year from date of publication, only Wells' postings after May 3, 2011, the date on which the complaint was filed, were actionable under the law.<sup>178</sup> The plaintiff facility's Chief Executive Officer discussed damages resulting from Wells' postings, such as a reduction of admitted patients and other patients declining treatment by "asserting concerns due to Wells' website."<sup>179</sup> Judge Britt agreed with the plaintiffs that this proof was enough to overcome

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<sup>170</sup> *Ascend Health Corp., UHP, LP v. Wells*, No: 4:12-CV-00083-BR, 2013 U.S. Dist. LEXIS 35237, at \*15 (E.D.N.C. Mar. 14, 2013).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at \*3, \*27-28.

<sup>173</sup> *Id.* at \*2. One of the alleged defamatory posts titled "Why does UBH Denton Hold People Against their Will?" stated, "a former nurse from their facility has told me that when they hold daily staff meetings, the discussion emphasizes the patients' insurance benefits." Another posting alleged that "when a patient signed a letter refusing medical treatment, UBH and Dr. Khan "began to shun her, refuse to feed her, and the patient advocate threatened to send her to the state mental hospital." *Id.* at \*18-19.

<sup>174</sup> *Id.* at \*26-27. The Texas fair reporting privilege statute states that reporting privilege applies to: "reasonable and fair comment on or criticism of an official act of a public official or other matter of public concern published for general information." *Id.* at \*27 (citing TEX. CIV. PRAC. & REM. CODE ANN. §73.002(a) (West 2013)).

<sup>175</sup> *Id.* at \*27.

<sup>176</sup> *Id.* at \*29.

<sup>177</sup> *Id.* at \*26.

<sup>178</sup> *Id.* at \*30.

<sup>179</sup> *Id.* at \*32.

Wells' motion to dismiss the case.<sup>180</sup> This case now moves forward on the grounds of defamation and business disparagement.<sup>181</sup>

#### IV. ANALYSIS AND CONCLUSION

The *Ascend Health Corporation* lawsuit is noteworthy because it incorporates the same elements as the *Obsidian Finance* and *Rosario* decisions. The complex issue of who is entitled to classification as media and public figure in the realm of social media is the common legal thread among these cases, but with different outcomes. In *Rosario*, and ultimately in *Obsidian Finance*, the courts ruled that the defendants were entitled to specific sets of speech privileges.<sup>182</sup> Yet, in *Ascend Health*, the court ruled that the defendants could not claim media status. The courts determined that simply publishing a blog and posting on social media sites was not enough to earn classification as a media defendant and therefore did not warrant any heightened legal defense against a libel lawsuit.<sup>183</sup> The different determinations in these cases reflect Rebecca Phillips' 2010 research findings of courts differing on the matter of recognizing media status.<sup>184</sup>

However, all three cases do converge in the consistent application of libel law on the need to assess plaintiffs as public or private figures. This determination is a direct link to whether plaintiffs would need to prove actual malice or negligence by the defendant in any libel claim. This reflects Matthew Lafferman's analysis that this determination is important for any libel allegation based on a social media publication. Despite the use of online social media as the communications platform, the need to assess a plaintiff as a public figure is still crucial in these cases.<sup>185</sup>

The use of social media for posting defamatory comments is a commonplace form of communication. While these posts may be published using convenient and easy to use technology such as a tablet or mobile telephone, courts continue to rely on the standards of who is a public figure for actual malice and negligence determinations. These basic legal elements are rooted in the Supreme Court's *Sullivan* and *Gertz* decisions. The three recent federal district court decisions discussed in Part III of this Article highlight the importance of *Sullivan* and *Gertz* and their fundamental principles and of applying those principles to issues in social media regarding alleged defamatory content. While the technology and ease of publishing has changed since *Sullivan* and *Gertz*, the legal doctrine has not. The fundamental principles of libel law set forth in *Sullivan* and *Gertz* still ring true today.

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at \*46.

<sup>182</sup> *Rosario v. Clark Cnty. Sch. Dist.*, No. 2:13-CV-362 JCM (PAL), 2013 U.S. Dist. LEXIS 93963, at \*13 (D. Nev. July 3, 2013).

<sup>183</sup> *See supra* Part III.

<sup>184</sup> *See supra* notes 15-20 and accompanying text.

<sup>185</sup> *See Lafferman, supra* note 23, at 205.