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Torts - Defamation - Public Figure Doctrine Will Be Used Expansively to Protect Media

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In 1964, with the landmark decision in New York Times Co. v. Sullivan,\(^1\) the law of defamation for the first time became subject to federal constitutional limitations under the first amendment,\(^2\) leaving forever the comfortable confines of the common law.\(^3\) Over time, the Court refined the meaning and expanded the scope of these limitations,\(^4\) which find their present day expression in Gertz v. Robert Welch, Inc.\(^5\)

2. Id. at 283. Recognizing the important first amendment considerations involved in a modern defamation action against the media, the Court sought to extend maximum protection to the first amendment interests of free speech and press, without completely sacrificing the plaintiff's interest in reputation. Id. at 279. In order to achieve this goal, the Court held that a "public official" may not recover in a libel action against a media defendant "unless he proves that the [defamatory] statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 280-81; see also St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (equating reckless disregard with subjective awareness of probable falsity).
3. 376 U.S. at 269. Prior to New York Times, the law of defamation was strictly a matter of state law. Id. See generally W. Prosser, Law of Torts § 113 at 804-12 (5th ed. 1984). Following New York Times, the states were required to conform their common law of defamation to the limitations imposed by the first amendment, making a modern defamation action a combination of both state law and federal constitutional law. Id.
4. In the years following New York Times, the Court has extended first amendment protection under the actual malice standard to cover defamatory statements concerning "public figures." See Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (plurality opinion). The Court has been unable, however, to agree on the proper constitutional standard or definition of "public figures." Id. at 154-55 (plurality opinion), 164 (Warren, C.J., concurring); see also Harris v. Tomczak, 94 F.R.D. 687, 698 (E.D. Ca. 1982) (noting the difficulty of using definitions in the law). After Butts, the Court further extended the actual malice standard to all defamatory statements concerning matters of "general or public interest," regardless of the plaintiff's status. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (plurality opinion).
5. 418 U.S. 323 (1974). In Gertz, the Supreme Court endeavored to strike an appropriate balance between the competing interests involved in a libel action against a media defendant. The Court expressed fear that the Rosenbloom standard would force "state and federal judges to decide on an ad hoc basis... what information is relevant to self government." Id. at 346 (quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)). Accordingly, the Court declared that, henceforth, the level of strategic constitutional protection afforded to defamatory falsehoods would depend upon the status of the plaintiff. Id. at 342-48. Regarding "private plaintiffs," the states would retain the freedom to define for themselves the appropriate standard of liability, save strict liability. Id. However, presumed or punitive damages would be based upon a finding of "actual malice." Id. at 349-50. If a state imposed...
Although several United States Supreme Court cases have since refined the meaning of *Gertz*, many difficult issues remain. In *Marcone v. Penthouse Int'l*, the Third Circuit confronted two such issues: 1) whether the plaintiff should be classified as a public figure, and if so, 2) whether he had proven actual malice. These inquiries were not novel for the Third

liability on less than a showing of actual malice, then recovery would be limited to compensation for "actual injury." *Id.*. Public figures, on the other hand, were required to prove actual malice in order to recover any damages in a libel action against a media defendant. *Id.* at 342. The *Gertz* Court divided its public figure classification into two categories: 1) all purpose public figures, and 2) limited purpose public figures. *Id.* at 345. "All purpose" public figures are those plaintiffs who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.* More common is the "limited purpose" public figure, who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351. For a discussion of damages recoverable under *Gertz*, see infra notes 33-35 and accompanying text. For a discussion of limited purpose public figures in later Supreme Court decisions, see infra note 6. See generally Comment, *Gertz and the Public Figure Doctrine Revisited*, 54 Tul. L. Rev. 1053 (1980).

6. See Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2946 (1985) (recovery of presumed and punitive damages in defamation actions absent showing of actual malice does not violate first amendment when defamatory statements do not involve "matters of public concern"); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167-68 (1979) (holding that plaintiff had not voluntarily thrust himself into a public controversy and rejecting proposition that one who engages in criminal activity automatically becomes limited purpose public figure); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (finding no public controversy prior to publication of allegedly defamatory statements, and noting that libel defendants may not, by publicizing plaintiff's activities, create their own defense); Time, Inc. v. Firestone, 424 U.S. 448, 453-55 (1976) (holding that "public controversy" could not be equated with all controversies of interest to public, and that evidence did not establish voluntary involvement by plaintiff). See generally Comment, supra note 5.


8. 754 F.2d 1072 (3d Cir.), cert. denied, 106 S. Ct. 182 (1985). The case was heard by Circuit Judges Adams, Higginbotham, and Van Dusen. 754 F.2d at 1075. The opinion was written by Judge Adams. *Id.*

9. *Id.* at 1080. For a discussion of the Third Circuit's resolution of these issues, see infra notes 87-133 and accompanying text.
Circuit. However, Marcone is representative of the Third Circuit’s willingness to expand the public figure doctrine in order to provide greater first amendment protection for the media.

In Marcone, Penthouse International, Ltd. (Penthouse) published and distributed for sale the November 1978 issue of Penthouse, The International Magazine for Men which contained an article entitled, “The Stoning of America,” authored by Edward Rasen. The article referred to “criminal attorneys and attorney criminals” involved in drug transactions and cited Frank Marcone as an example. The article stated that “Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dismissed because he cooperated with further investigations.”

10. See Avins v. White, 627 F.2d 637, 648-50 (3d Cir.) (addressing whether a former law school dean was a limited purpose public figure in the context of his law school’s accreditation struggle, and whether he had proven actual malice), cert. denied, 449 U.S. 982 (1980); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 266 (3d Cir. 1980) (discussing whether a meat producer who aggressively advertised his product was a limited purpose public figure in the context of comment on the quality of that product, and whether he had proven actual malice); Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979) (en banc) (considering whether a football player was a limited purpose public figure in the context of discussion concerning his health, without reaching the issue of actual malice). The Third Circuit has had subsequent opportunity to further address issues concerning public figure status and actual malice. See McDowell v. Paiewonsky, 769 F.2d 942 (3d Cir. 1985) (considering whether an architect-engineer involved in public building projects is public figure for purposes of comment on his work with publicly financed projects, and whether the defamatory statements were made with actual malice).

11. For a discussion of the Third Circuit’s liberal view of the public figure doctrine, see infra notes 87-133 and accompanying text.

12. 754 F.2d at 1076. The article concerned the emergence of marijuana trade as a multi-billion dollar industry. Id. The article is subtitled, “Marijuana is now big agri-business—a $12 billion a year corporate growth crop.” Id.

13. Edward Rasen was named as a party but was not served in the action. Marcone v. Penthouse Int’l, 533 F. Supp. 353, 355 (E.D. Pa. 1982).

14. 754 F.2d at 1076-77. Frank Marcone, an attorney maintaining an office in Media, Pennsylvania, was indicted in February of 1976 by a Federal Grand Jury for conspiring with other named defendants to possess and distribute marijuana. Id. at 1076. The indictment charged, inter alia:

[i]t was further a part of said conspiracy that defendant and co-conspirator FRANK MARCONE, during the period of this conspiracy, would supply sums of United States currency to defendant and co-conspirator FREDERICK R. FREY in Philadelphia, Pennsylvania for the purpose of investing said monies in the distribution of marijuana by FREDERICK R. FREY for a profit. ... During May, 1974, FRANK MARCONE gave $25,000 in United States currency to FREDERICK R. FREY in Philadelphia, Pennsylvania, for the purpose of purchasing multi-hundred pound quantities of marijuana in California. Marcone v. Penthouse Int’l, 533 F. Supp. 353, 355 (E.D. Pa. 1982).

15. 754 F.2d at 1077. However, the court found that the charges were actually dismissed because of “legal technicalities” in tying Marcone to the larger conspiracy.” Id. at 1076. The dismissal was without prejudice to his being re-
Marcone brought a diversity action in the United States District Court for the Eastern District of Pennsylvania against Penthouse claiming that the article's statements concerning him were false and defamatory. Penthouse moved for summary judgment on six grounds, among them that Marcone had failed to prove actual malice as required for public figures in defamation actions. The district court denied the motion, holding *inter alia*, that Marcone "was not a public figure" and thus that he need not meet the higher burden of proof. The case was tried before a jury which returned a verdict for Marcone in the indictment in Philadelphia. Id. at 1076. Nevertheless, a second indictment was never brought. Id.

16. Marcone v. Penthouse Int'l, 533 F. Supp. 353, 356 (E.D. Pa. 1982). Marcone asserted that the use of the phrase "attorney criminals" was defamatory and that the mention of his name in the context of the article was defamatory in that it implied that he participated or was involved in the type of illegal activities discussed in the article. Id. at 357.

17. Id. Specifically, Penthouse argued
1. the statements are not capable of defamatory meaning; 2. even if defamatory, the statements are privileged under Pennsylvania law as a substantially fair and accurate report of a judicial proceeding; 3. plaintiff is a public figure and cannot make the showing of actual malice required of public figures by the first amendment; 4. the article involved matters of public concern and under Pennsylvania law, in cases where the alleged defamatory publication involved matters of 'public or general concern,' the defendant [sic] must prove actual malice, and plaintiff cannot make such a showing in this case; 5. the statements are true, and (6) the plaintiff cannot prove special damages.

Id.

18. Id. In disposing of the Motion for Summary Judgment, the district court found that Pennsylvania law applied, as appropriately limited by the first amendment. Id. (citing Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 270 (3d Cir. 1980) (general discussion of *prima facie* elements of defamation case under state and federal law). Furthermore, the court found that the statements concerning Marcone were actionable as libel per se as they imputed the commission of an indictable crime by Marcone. Id. at 357-58 (citing *RESTATEMENT (SECOND) OF TORTS* § 571 (1977)). The court also noted that the statements were not a fair and accurate report of a judicial proceeding, and therefore were not entitled to the protection of conditional privilege. Id. at 358-59 (citing *Binder v. Triangle Publications*, 442 Pa. 319, 275 A.2d 53 (1971); *RESTATEMENT (SECOND) OF TORTS* § 611 (1977)). The court found that Marcone was not a public figure. Id. at 359. Additionally, the court posited that Pennsylvania would no longer follow the decision in *Matus v. Triangle Publications*, Inc., and therefore a private figure defamation plaintiff could recover under Pennsylvania law based upon a showing of negligence, regardless of whether the statement involved matters of "public or general concern." Id. at 361 (citing *Matus v. Triangle Publications*, 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 408 U.S. 930 (1972)). Finally, the court found that because the statements were determined to be libellous per se, no special damages need be assessed. Id. (citing *Baird v. Dun & Bradstreet*, 446 Pa. 266, 285, 285 A.2d 166, 177 (1971); *Solosko v. Parton*, 383 Pa. 419, 119 A.2d 230, 232 (1956)).

amount of $30,000 compensatory and $537,000 punitive damages. Following an appeal by Penthouse, the Third Circuit reversed, holding that Marcone was a limited purpose public figure and that his failure to meet the commensurate burden of proving actual malice precluded recovery.

The Third Circuit began its analysis by noting that a defamation suit is fundamentally a state law cause of action. Accordingly, Judge Adams proceeded to analyze Penthouse’s contentions within the framework of Pennsylvania’s law.

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20. Marcone v. Penthouse Int’l, 577 F. Supp. 318, 322 (E.D. Pa. 1983). Penthouse moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Id. at 323. The district court denied Penthouse’s motions conditioned upon the plaintiff’s acceptance of a remittitur of the punitive damage award to $200,000. Id. The plaintiff moved for reconsideration of the court’s granting of a remittitur, but the court found no reason to alter its prior decision. Id. at 336. The district court held that in the event of a new trial, the scope of such trial would be limited to the issues of the existence of actual malice and the amount of any punitive damages to be awarded. Id. at 338-39. The plaintiff subsequently accepted the remittitur. 754 F.2d at 1077. The award as modified was $30,000 in compensatory damages, and $200,000 in punitive damages. Id.

21. 754 F.2d at 1086-87. For a further discussion of the Third Circuit’s decision to classify Marcone as a limited purpose public figure, see infra notes 41-62 and accompanying text.

22. 754 F.2d at 1089-91. For further discussion of the Third Circuit’s analysis under the actual malice standard, see infra notes 71-86 and accompanying text.

23. 754 F.2d at 1077. The Third Circuit noted, however, that adjudication of a defamation action was "replete with First Amendment implications." Id. The court explained that in adjudicating a defamation action, a court must determine both state and federal law questions: "(1) whether the defendants have harmed the plaintiff’s reputation within the meaning of state law; and (2) if so, whether the First Amendment nevertheless precludes recovery." Id. (quoting Steaks Unlimited, v. Deaner, 623 F.2d 264, 270 (3d Cir. 1980)).

24. 754 F.2d at 1077-87. Penthouse contended first that Marcone had not met the burden of proof concerning the defamatory character of the article. Id. at 1078. For a discussion of plaintiff’s burden of proof, see infra notes 24-28 and accompanying text. Penthouse next argued that Marcone was “libel-proof.” Id. For a discussion of the libel-proof doctrine, see infra notes 30-33 and accompanying text. Penthouse further argued that failure to prove special damages warranted dismissal. Id. at 1079. For a discussion of special damages, see infra note 37 and accompanying text. Additionally, Penthouse contended that Marcone was a public figure and, therefore, that the district court should have applied the actual malice rather than the negligence standard. Id. at 1080. For a discussion of the public figure doctrine, see infra notes 38-62. Penthouse also argued that the district court incorrectly instructed the jury regarding the actual malice standard for punitive damages. Id. at 1087. For a discussion of the actual malice standard, see infra notes 63-67 and accompanying text.

25. 754 F.2d at 1077-78. Under Pennsylvania law, the plaintiff has the burden of proving: 1) the defamatory character of the communication, 2) its publication by the defendant, 3) its application to the plaintiff, 4) an understanding by the recipient of its defamatory meaning, 5) an understanding by the recipient that the statement was intended to be applied to the plaintiff, 6) special harm resulting to the plaintiff from its publication, and 7) if a conditional privilege is...
Penthouse urged that Marcone had failed to prove the article's defamatory character, arguing that the individual phrases referring to Marcone, in isolation, could not be understood as libelous. The court noted, however, that Pennsylvania law requires that "the allegedly libelous communication be read as a whole, in context" to determine whether it is defamatory. The Third Circuit recognized that under Pennsylvania law, a statement is defamatory if the general tendency of the words is to "harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The Third Circuit concluded that the article's title, along with its references to Marcone, suggested that Marcone had committed an indictable offense and was therefore capable of defamatory meaning as a matter of law.

The Third Circuit next dealt with the defendant's contention that Marcone's reputation was so tarnished prior to publication of the allegedly defamatory statement that he was "libel proof." To support its raised, abuse of a conditionally privileged occasion. Id. at 1077-78 (citing 42 PA. CONST. STAT. § 8343(a) (1982); Corabi v. Curtis Publishing Co., 441 Pa. 432, 273 A.2d 899 (1971); Agriss v. Roadway Express, Inc., 394 Pa. Super. 295, 483 A.2d 456 (1984)).

26. 754 F.2d at 1078. For example, Penthouse asserted that its report that Marcone "cooperated with further investigations" could not by itself be understood as libelous. Id.


29. Id. The article was entitled "The Stoning of America." Id. It made reference to "attorney criminals" and listed Frank Marcone as an example. Id. The article also stated that "Frank Marcone, an attorney from the Philadelphia area, contributed down payments of up to $25,000 on grass transactions. Charges against him were dropped because he cooperated with further investigations." Id. See Baird v. Dun & Bradstreet, Inc., 446 Pa. 266, 274, 285 A.2d 166, 171 (1971) (statements inputing commission of indictable offenses are capable of defamatory meaning as matter of law); see also Agriss v. Roadway Express, 334 Pa. Super. 295, 323, 483 A.2d 456, 471 (1984) (false statements charging criminal activity actionable as libel per se).

30. 754 F.2d at 1078. The libel proof doctrine provides that where a plaintiff's reputation is sufficiently poor before the defamatory statement is made he or she is only entitled to nominal damages as a matter of law. Id. (quoting Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982)). To invoke the doctrine, the plaintiff must have an extensive history of anti-social or criminal behavior, and the alleged defamatory communication must specifically relate to that behavior. Id.; see also Cardillo v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975) (prisoner serving 21 years sentenced for assorted federal crimes with several previous convictions for other crimes held libel proof). Additionally, in some circumstances, a plaintiff's general reputation for honesty and fair dealing may be so poor that the plaintiff will be considered "libel proof" on all matters. Wynberg v. National Enquirer, Inc., 564 F. Supp. 924, 928 (C.D. Cal. 1982) (noting that invocation of the doctrine depends on 1) the nature of the conduct, 2) the number of offenses, and 3) the degree and range of
contention, Penthouse cited a series of negative publicity items regarding Marcone from 1976 onward. However, the court, noting that the “libel proof” doctrine is to be construed narrowly, declined to hold that Marcone was “libel proof” as a matter of law.

Penthouse also argued that Marcone’s suit should be dismissed because he failed to prove any actual economic harm. The Third Circuit, relying on \textit{Gertz}, rejected the defendant’s argument, noting that proof of actual economic loss is not required under federal constitutional law. Additionally, the court dismissed Penthouse’s assertion that Marcone’s failure to prove special damages warranted dismissal of his action, determining that such proof was not required under Pennsylvania law.

\textit{But see} \textit{Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1569 (D.C. Cir. 1984) (rejecting libel-proof doctrine as “fundamentally bad idea”).}

31. 754 F.2d at 1079. Penthouse cited the fact that the Philadelphia-area media had widely publicized Marcone’s 1976 drug trafficking indictment. \textit{Id.} Also, Penthouse noted that a number of newspaper articles had linked Marcone to motorcycle gangs and their headquarters, both the subject of criminal investigations. \textit{Id.} Additionally, Marcone’s 1978 trial for tax evasion, which ended in a hung jury, had received widespread media attention. \textit{Id.} Additionally, Marcone was fined twice for contempt for failing to appear at scheduled hearings, although the second contempt citation occurred subsequent to publication of the defendant’s article. \textit{Id.} Finally, Penthouse noted that Marcone had been fined for punching a police officer. \textit{Id.}

32. \textit{Id.} (citing \textit{Buckley v. Littell, 539 F.2d 882 (2d. Cir. 1976) (libel proof doctrine is narrow), cert. denied, 429 U.S. 1062 (1977)}).

33. \textit{Id.} The Third Circuit acknowledged, however, that evidence of a poor reputation is relevant as a mitigating factor in determining compensatory damages, and that the jury’s award may have reflected Marcone’s already tarnished reputation at the time the article was written. \textit{Id.}

34. \textit{Id.} The Third Circuit acknowledged that a motion for dismissal based on failure to prove actual harm “has both constitutional as well as state law dimensions.” \textit{Id.} For a more complete discussion of the constitutional requirements regarding proof of damages, see \textit{supra} notes 5-6 and accompanying text.

35. 754 F.2d at 1079. Under the traditional approach, the existence of injury is presumed from the fact of publication. \textit{Gertz, 418 U.S. at 349.} Juries, therefore, were permitted to award compensatory damages for supposed injury to reputation without any proof that such harm actually occurred. \textit{Id.} In order to reconcile the states’ interest in compensating individuals for harm to their reputations with the competing interest in free speech guaranteed by the first amendment, the Supreme Court held that states could no longer permit recovery of presumed or punitive damages except upon a showing of actual malice. \textit{Id. But see Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S. Ct. 2939, 2946 (1985) (recovery of presumed and punitive damages in defamation actions absent showing of actual malice does not violate first amendment when defamatory statements do not involve matters of public concern).} The \textit{Gertz} Court stated, however, that in limiting plaintiffs in libel actions against media defendants to compensation for “actual injury,” it was not limiting “actual injury” to out-of-pocket loss—that is, economic loss. 418 U.S. at 350. The Court reasoned that the concept of actual harm includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. \textit{Id.}

36. 754 F.2d at 1079-80. The Third Circuit adopted the lower court’s holding that the article constituted libel per se and therefore proof of special dam-
After disposing of the issues of state law, the Third Circuit turned to the federal constitutional questions. After discussing the concurrent evolution of state and federal libel law, the court focused on whether Marcone was a public figure.

The Third Circuit, relying on *Gertz*, acknowledged that the Supreme Court has defined two categories of public figures: all purpose public figures and limited purpose public figures. The court also recognized that plaintiffs in either category must meet the *New York Times* actual malice standard to recover in a libel action against a media defendant.

With these distinctions in place, the Third Circuit addressed the issue of whether Marcone could be classified as a limited purpose public figure. To make this determination in light of Marcone’s alleged involvement in the purchase and sale of illicit drugs, the court stated that two issues had to be considered: “1) whether drug trafficking is a public ages was not required. *Id.* (citing Marcone v. Penthouse Int’l, 533 F. Supp. 353, 361 (E.D. Pa. 1982)); *see Agriss v. Roadway Express, 394 Pa. Super. 295, 317-29, 483 A.2d 468-74 (1984) (reasserting traditional rule in Pennsylvania that a plaintiff may recover in libel action without proof of special damages). Special damage is “harm of a material and generally of a pecuniary nature.” *Agriss, 334 Pa. Super. at 320, 483 A.2d at 469 (citation omitted), cited with approval in Marcone, 754 F.2d at 1080 n.1. The court concluded that Marcone was entitled to damages for injury to his reputation and any personal humiliation or mental anguish suffered as a result of the alleged defamation. 754 F.2d at 1080. However, recovery for such actual injury must be based upon “competent evidence of such harm.” *Id.* The court considered that while Marcone’s testimony concerning actual injury “contained some inconsistencies, it was possible for the jury to assess his credibility and determine whether he actually suffered any harm.” *Id.* For a discussion of the distinction between the terms libel per se and libel per quod and their relevance in the modern law of libel, see *Agriss, 334 Pa. Super. at 317-29, 483 A.2d at 468-74; W. PROSSER, LAW OF TORTS § 113 (5th ed. 1984)."

37. 754 F.2d at 1080. For a discussion of the federal constitutional limits on modern defamation actions, see supra notes 1-7 and accompanying text.

38. 754 F.2d at 1080-81. For a discussion of the “constitutionalization” of state libel law, see supra notes 1-7 and accompanying text.

39. 754 F.2d at 1082. The court stated that: “The classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and then carefully scrutinized by an appellate court.” *Id.* at 1081 n.4 (citing Rebozo v. Washington Post Co., 637 F.2d 375, 379 (5th Cir.), cert. denied, 454 U.S. 964 (1981); Hutchinson v. Proxmire, 443 U.S. 111 (1974); Avins v. White, 627 F.2d 637 (3d Cir.), cert. denied, 449 U.S. 982 (1980)).

40. *Id.* (citing *Gertz*, 418 U.S. at 345). For a description of all purpose and limited purpose public figures, see supra note 5 and accompanying text.

41. 754 F.2d at 1081-82. Classification of a plaintiff as a public figure is an important determination in any libel action against a media defendant because it triggers the actual malice standard for liability. *See generally Franklin, Suing Media for Libel: A Litigation Study, 1981 AM. B. FOUND. RESEARCH J. 795 (noting difficulty public figures encounter in surmounting actual malice barrier). Private figures must similarly overcome the actual malice barrier to recover punitive damages. *Gertz*, 418 U.S. at 350.

42. 754 F.2d at 1082. Penthouse did not contend, nor did the Third Circuit hold, that Marcone was an all purpose public figure. *Id.*
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controversy, and 2) the nature and extent of Marcone's participation in that controversy.

With regard to the public controversy issue, the Third Circuit found that the present case clearly involved a public controversy—that is, "a real dispute the outcome of which affects the general public or some segment of it." The Third Circuit concluded that because the drug trafficking at issue was of such "mammoth proportions", it clearly fell within the definition of public controversy.

The issue of the "nature and extent" of Marcone's participation in the public controversy, however, presented the court with a more difficult problem. The Third Circuit began by noting that "[i]n general, to be a limited purpose public figure, the plaintiff must voluntarily thrust himself into the vortex of the dispute. From the voluntary act is derived the notion of assumption of the risk and the consequent fairness in labelling the person a public figure." After listing several ways in which an individual may attain public figure status, the court turned specifically

43. Id. (citing Avins v. White, 627 F.2d 637, 647 (3d Cir.) (setting forth two prong inquiry), cert. denied, 449 U.S. 982 (1980)).

44. Id. at 1083 (quoting Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1296 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980)). "To be public," said the court, "the dispute must affect more than its immediate participants." Id. at 1083. For a discussion of the difficulties involved in defining a public controversy, see Note, Defining a Public Controversy in the Constitutional Law of Defamation, 69 VA. L. REV. 951 (1983), cited in Marcone, 754 F.2d at 1083 n.7. For a discussion of the Third Circuit's reasoning in this regard, see infra notes 93-96 and accompanying text.

45. 754 F.2d at 1083. At the time of Marcone's indictment, law enforcement officials contended that the conspiracy involved the largest drug smuggling operation ever uncovered in the United States. Id. The Third Circuit rejected the argument that, because most people would agree that drug smuggling is undesirable, there was no "controversy" regarding the matter. Id. at 1083 n.8 (citing Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163 n.6 (1979)); see also Note, supra note 42, at 941-42. For a discussion of this argument, see infra note 94.

46. 754 F.2d at 1085-86.

47. Id. at 1083; accord Gertz, 418 U.S. 434, 435. For a discussion of the Third Circuit's conception of the public figure doctrine, see infra notes 87-133 and accompanying text.

48. 754 F.2d at 1083. The Third Circuit noted: "In the typical limited purpose public figure case, the plaintiff actively participates in the public issue in a manner intended to obtain attention." Id. (citing Steaks Unlimited, Inc. v. Deane, 623 F.2d 264, 273-74 (3d Cir. 1980) (meat producer who aggressively advertises his product in the media becomes a limited purpose public figure for comment on product's quality); Woy v. Turner, 573 F. Supp. 35, 38 (N.D. Ga. 1983) (agent who holds news conference to attract media attention for himself and his client is a public figure in that context)). The Marcone court also stated: "A plaintiff's action itself may invite comment and attention," regardless of the plaintiff's intentions. Id. (citing Rosanova v. Playboy Enterprises, 411 F. Supp. 440, 445 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978) (longstanding association with organized crime figures gives plaintiff limited purpose public figure status)). Additionally, the court recognized that other individuals are deemed limited purpose public figures because of their "status, position or associa-
ally to whether the nature and extent of Marcone's alleged involvement in the drug trafficking conspiracy was sufficient to elevate him to public figure status. The court identified three factors pertinent to that determination: 1) Marcone's indictment in the drug trafficking conspiracy; 2) his representational ties to motorcycle gang members; and 3) his non-representational ties to motorcycle gang members.

Regarding Marcone's indictment and the attendant publicity, the Third Circuit stated that "[a]lthough the criminal activity, by itself, may not create public figure status, such activity may, nevertheless, be one element in a mix of factors leading to that classification." Moreover, the court took notice of the fact that Marcone was indicted for participating, "not in a passive manner," in a drug conspiracy.

Marcone's representational ties to motorcycle gang members did not represent a significant factor in the Third Circuit's analysis. The court commented that legal representation of notorious groups, although inviting public attention, did not, by itself, create public figure status. Moreover, the court found nothing in the record to indicate that Marcone had attempted to bring attention to himself or his clients.

49. 754 F.2d at 1084.
50. Id. at 1085. "Representational ties" refers to Marcone's professional relationship as an attorney with the motorcycle gangs. Nonrepresentational ties refer to his social contacts with the gangs. For a discussion of the relevance of these factors in the Third Circuit's analysis, see infra notes 107-20 and accompanying text.

51. 754 F.2d at 1085 (citing Rosanova v. Playboy Enterprises, 411 F. Supp. 440 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978) (longstanding association with organized crime sufficient to render plaintiff a public figure; cf. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 168 (1979) (rejecting the proposition that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction); Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976) (status as participant in litigation does not automatically render one a public figure).

52. 754 F.2d at 1085 (citing Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979)).

53. Id. Marcone had a significant criminal practice and frequently represented the Pagan and Warlock motorcycle gangs in legal matters. Id.

54. Id. at 1086.

55. Id. at 1085. The Third Circuit stated that to hold otherwise would place an undue burden on attorneys who represent famous or notorious clients. Id. (citing Gertz, 418 U.S. at 352; Steere v. Cupp, 226 Kan. 566, 571, 602 P.2d 1267, 1272-74 (1979) (attorney who actively represents a client does not become limited purpose public figure without additional evidence of an attempt to gain public attention to influence outcome of the controversy)).
in regard to their legal relationships.\textsuperscript{56}

Finally, the Third Circuit considered Marcone's non-representational contacts with motorcycle gang members.\textsuperscript{57} The court noted that Marcone had reportedly met at the Pagans' headquarters (the "Castle") with indicted co-conspirators Frey, Heron, and Mealy, and that he had occasionally accompanied them on weekend trips.\textsuperscript{58} In analyzing these factors, the court stated that it must "look to Marcone's actions in addition to his intentions."\textsuperscript{59} Accordingly, the court concluded that "Marcone's non-representational ties to the Castle and the Pagans [were] sufficient to tip the balance in the [public figure] calculation."\textsuperscript{60}

The court concluded that Marcone had crossed the threshold and become a limited purpose public figure due to the public nature of the indictment, the widespread media attention, and his significant non-representational ties to the Pagans.\textsuperscript{61} The court determined it was irrelevant that Marcone had not sought public figure status.\textsuperscript{62}

\textsuperscript{56}Id. at 1086. However, the Third Circuit recognized that: "Of course, if an attorney does more than merely represent the client in a strictly legal context—such as holding news conferences or otherwise affirmatively making a public issue of the case—then those activities may be counted in the public figure calculus." \textit{Id.; see also Steere v. Cupp, 226 Kan. 566, 571, 602 P.2d 1267, 1273-74, cited in Marcone, 754 F.2d at 1085-86.}

\textsuperscript{57}754 F.2d at 1086. The court stated that these contacts were "[m]ore important for the limited purpose public figure determination" than either Marcone's indictment or his representational ties to gang members. \textit{Id.}

\textsuperscript{58}Id.

\textsuperscript{59}Id. Although the evidence showed no intent to attract attention, the court noted that it may be sufficient that "Marcone [was] engaged in a course of conduct that was bound to attract attention and comment." \textit{Id.} (citing Rosanova v. Playboy Enterprises, 580 F.2d 859, 861 (5th Cir. 1978)) (quoting Rosanova v. Playboy Enterprises, 411 F. Supp. 440, 445 (S.D. Ga. 1976)).

\textsuperscript{60}Id. The court stated that "[b]oth the Pagans and their headquarters were linked to the two billion dollar drug ring, i.e., the public controversy surrounding the alleged libel." \textit{Id.} Marcone's voluntary association with the gang, and the media attention he consequently attracted, were enough to "tip the balance" in favor of his classification as a public figure for the limited purpose of his connection with drug trafficking. \textit{Id.}

\textsuperscript{61}Id.; see Rosanova v. Playboy Enterprises, 411 F. Supp. 440, 446 (S.D. Ga. 1976) ("The purposes of the first amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge."). \textit{aff'd,} 580 F.2d 859 (5th Cir. 1978).

\textsuperscript{62}754 F.2d at 1086-87. The court found that Marcone was a "public figure for the limited purpose of his connection with illicit drug trafficking." \textit{Id.} The court acknowledged that it was a "close case," which turned on a consideration of "all the relevant factors . . . [viewed] in context and as a whole." \textit{Id.} at 1086. The court emphasized that it was not holding that "an attorney whose connection to notorious clients remains purely professional or any person charged with a crime automatically becomes a limited purpose public figure." \textit{Id.} at 1087 n.11. The court concluded that the district court erred in not classifying Marcone as a limited purpose public figure. \textit{Id.} at 1087. For a discussion of the court's reasoning in this regard, see \textit{infra} notes 87-127 and accompanying text.
Once the court had classified Marcone as a public figure for the limited purpose of his connection with drug trafficking, it turned to the question of actual malice.\textsuperscript{63} The district court had considered Marcone to be a private figure and, therefore, had not required that he meet the actual malice standard in order to recover compensatory damages.\textsuperscript{64} As a private figure, he was entitled to an award of compensatory damages merely upon a showing of negligence.\textsuperscript{65} However, the district court did require a showing of actual malice for Marcone to recover punitive damages.\textsuperscript{66} The Third Circuit considered the jury’s decision to award punitive damages to be an indication that Marcone had met the actual malice standard required of limited purpose public figures under Gertz.\textsuperscript{67} Thus the court noted it could uphold the damage award, as long as the judge had correctly charged the jury.\textsuperscript{68} However, the court agreed with Penthouse that the district judge had misstated the actual malice standard,\textsuperscript{69} and incorrectly instructed the jury regarding the proper burden of proof required for punitive damages.\textsuperscript{70} As a consequence, the Third Circuit declared that the punitive damage award “was made under a constitutionally deficient standard,” and, therefore, the verdict could not be used as a predicate to affirm the award of compensatory and punitive damages.\textsuperscript{71} However, rather than remand for a new trial, the Third Cir-

\textsuperscript{63} 754 F.2d at 1087. The court recognized that “[p]ublic officials and public figures must prove actual malice.” \textit{Id.} at 1081-82. For a discussion of the actual malice requirements, see \textit{supra} note 2.

\textsuperscript{64} 754 F.2d at 1087.

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.} For a discussion of the fault requirements established by Gertz, see \textit{supra} note 5 and accompanying text.

\textsuperscript{68} 754 F.2d at 1087. The court stated that if the jury had “properly found that Marcone [had] proven that Penthouse published the article with actual malice, [then their] award of compensatory and punitive damages could [have been] upheld.” \textit{Id.}

\textsuperscript{69} \textit{Id.} The district judge incorrectly instructed the jury:

\begin{quote}
The plaintiff must prove by a \textit{preponderance of the evidence} that the defama-
tory portions of the article were published either with knowledge of their falsity or with reckless disregard as to whether they were true or false. Punitive damages for the purpose of punishing a defendant for its outrageous conduct if you find, of course, that the plaintiff has proven by a \textit{preponderance of the evidence} that the conduct of the defendant was outrageous.
\end{quote}

\textit{Id.} (emphasis added by court of appeals). The Third Circuit stated that although the instruction that the plaintiff had to prove “outrageous conduct” was an accurate reflection of Pennsylvania law, it did not connote the subjective awareness of falsity required by the first amendment. \textit{Id.} at 1088. For a discussion of the subjective awareness of the falsity requirement, see \textit{supra} note 2 and accompanying text.

\textsuperscript{70} 754 F.2d at 1088. The district court judge instructed the jury that the burden of proof required was “preponderance of the evidence.” The correct standard is “clear and convincing” evidence. \textit{Id.} (citing \textit{Gertz}, 418 U.S. at 342; \textit{New York Times}, 376 U.S. at 283-86).

\textsuperscript{71} \textit{Id.}
cuit elected to make a *de novo* review of the evidence of actual malice.\(^\text{72}\)

In reviewing the evidence, the Third Circuit addressed two inaccuracies in Penthouse’s article relating to Marcone: 1) the statement that Marcone had purchased $25,000 worth of marijuana when in fact he had only been indicted for the offense, and 2) the statement that charges against Marcone had been dropped because he cooperated with authorities, when in fact they were dismissed without prejudice so that he could be re-indicted in Philadelphia.\(^\text{73}\)

In regard to the first inaccuracy, Penthouse asserted that the error was made without actual malice because its editors relied on the experience and professional reputation of Edward Rasen, the author who submitted the article.\(^\text{74}\) Moreover, Penthouse’s editors did make an effort to verify Rasen’s information by obtaining a copy of the Detroit indictment charging Marcone,\(^\text{75}\) and an article from the *Philadelphia Inquirer*, dated March 18, 1976, which reported Marcone’s indictment.\(^\text{76}\) The Third Circuit stated that “[w]hile the newspaper article and the indictment do not prove the truth of the assertion, they are sufficiently related to the statement in question that we cannot say the whole story is a fabrication or a product of the author’s imagination.”\(^\text{77}\) Thus, the court concluded that the statement was not so “inherently improbable” as to alert the publishers of its probable falsity.\(^\text{78}\) The court stated that although Penthouse may have been negligent in not further investigating the veracity of the statement, and in failing to distinguish between an allegation and a proven fact, such failings did not, under these circum-

\(^\text{72}\). *Id.* The court considered a *de novo* review to be “not only within our province, but . . . an affirmative duty. . . .” *Id.* (citing Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 510-11 (1984)). See generally Comment, The Expanding Scope of Appellate Review in Libel Cases—The Supreme Court Abandons the Clearly Erroneous Standard of Review for Findings of Actual Malice, 36 MERCER L. REV. 711 (1985) (discussing impact of *Bose Corp.* on traditional appellate review standards).

\(^\text{73}\). 754 F.2d at 1089-90.

\(^\text{74}\). *Id.* Regarding Penthouse’s reliance on Rasen’s professional reputation, the court explained that “[f]ailure to investigate, without more, does not demonstrate actual malice.” *Id.* (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968); *New York Times*, 376 U.S. at 288)). The court also noted that “[r]eliance on the professional reputation of an author may help to defeat an allegation of actual malice.” 754 F.2d at 1089. However, the court cautioned, “[a] mere assertion by the publisher that he thought the statement published to be true does not automatically defeat actual malice.” *Id.* The court concluded that “even if Penthouse had failed to investigate, its reasonable reliance on Rasen arguably would have been sufficient to defeat plaintiff’s attempt to show actual malice.” *Id.*; see *St. Amant*, 390 U.S. at 731 (“reckless conduct is not measured by whether a reasonably prudent man . . . would have investigated before publishing”). For a discussion of the actual malice standard, see *supra* note 2.

\(^\text{75}\). 754 F.2d at 1089-90.

\(^\text{76}\). *Id.* at 1090.

\(^\text{77}\). *Id.*

\(^\text{78}\). *Id.* (citing St. Amant v. Thompson, 390 U.S. 727 (1968)).
stances, establish actual malice.79

Regarding the second inaccuracy, the court noted that it was merely the result of a "mistake" and a "misreading."80 The court noted that Penthouse used as a source a report of a congressional hearing81 listing the disposition of drug charges against a number of individuals, including Marcone.82 At the beginning of the list was a reference to another individual with a footnote stating that charges were dropped due to cooperation.83 The court determined that someone at the magazine apparently confused the individual referred to in the footnote with Marcone.84 This mistake, reasoned the court, "might be called unprofessional, even negligent, but it cannot be said to rise to the level of actual malice."85

The Third Circuit concluded that both mistakes concerning Marcone appeared to be the result of "insufficient editorial verification and checking procedures, but not of a conscious decision to present Marcone in a false light."86 Accordingly, the court held that Marcone had failed to prove either by clear and convincing evidence or even by a preponderance of the evidence that Penthouse published the statements with actual malice.87 The court reversed the judgment of the district court and ordered that judgment be entered for Penthouse.88

The significance of the Marcone opinion rests with the Third Circuit's determination that Frank Marcone was a limited purpose public figure.89 It is submitted that the court's reasoning in this regard indi-

79. Id.
80. Id. In fact, two earlier versions of the article stated that "charges were dismissed in favor of another indictment." Id. Neither Penthouse's editorial director, nor the editor assigned to the article could explain why or when the article was changed to assert that charges were dropped because Marcone "cooperated with further investigations." Id.
82. 754 F.2d at 1090.
83. Id. The individual named was Charles H. Hewitt. Id. The footnote stated "Defendants [sic] sentence reduced at the request of the U.S. Attorney's Office due to cooperation." Id. Hewitt's name was above Marcone's in the article's list of "attorney criminals." Id.
84. Id. The Third Circuit stated that "[s]omeone at the magazine apparently misread the footnote as also referring to the individuals listed below Hewitt, including Marcone, or somehow confused the two men." Id.
85. Id.
88. 754 F.2d at 1091.
89. Id. at 1082-87. The Third Circuit also dealt with several issues concern-
cates a more expansive view of the public figure doctrine than that presently embraced by the United States Supreme Court, thus affording the media greater first amendment protection.

The United States Supreme court, in Gertz, defined limited purpose public figures as those persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."90 In Marcone, the Third Circuit applied the Gertz definition to determine Marcone's public figure status91 focusing on "1) whether drug trafficking is a public controversy, and 2) the 'nature and extent' of Marcone's participation in that controversy."92

In order to resolve whether drug trafficking constituted a public controversy, the Third Circuit applied the public controversy definition

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90. Gertz, 418 U.S. at 345. The Court restated the definition of a limited purpose public figure later in the Gertz opinion as "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." Id. at 351. The "drawn into" language has been interpreted by some courts as creating a third class of public figures—that is, the "involuntary public figure" class. See 754 F.2d at 1084 n.9 (citing Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 272-73 (3d Cir. 1980); Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1292 n.9 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980)). However, the Marcone court preferred to view "involuntary public figures" not as a separate class, but "merely one way an individual may come to be considered a general or limited purpose public figure." Id. It is not altogether clear how the Third Circuit's analysis differs in substance from the views arguing that a separate class has been created. See generally Rosen, Media Lament—The Rise and Fall of Involuntary Public Figures, 54 St. John's L. Rev. 487 (1980) (post-Gertz cases signify retreat from expansive press protections); Note, The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?, 14 U. Mich. J. L. Rev. 71 (1980) (trend of cases, lack of clearly articulable standards, and Supreme Court's failure to mention class following Gertz indicate that involuntary public figure class is dead), cited in Marcone, 754 F.2d at 1084 n.9. In any event, the Supreme Court has stated that "instances of truly involuntary public figures must be exceedingly rare." Gertz, 418 U.S. at 345, quoted in Marcone, 754 F.2d at 1084 n.9. But cf. Dameron v. Washington Magazine, 779 F.2d 736, 741-43 (D.C. Cir. 1985) (air traffic controller involuntary public figure for limited purpose of comment on air crash), cert. denied, 106 S. Ct. 2247 (1986).

91. 754 F.2d at 1082.

92. Id. (citing Gertz, 418 U.S. at 352; Avins v. White, 627 F.2d 637, 647 (3d Cir.), cert. denied, 449 U.S. 982 (1980)).
developed by the District of Columbia Circuit. That definition requires that “a public controversy” . . . “be a real dispute, the outcome of which affects the general public or some segment of it” beyond the immediate participants. The Third Circuit found, without detailed discussion, that the large scale drug smuggling operation involved in

93. Id. at 1083 (citing Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1296 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980)). Waldbaum involved a libel action by the president of a large consumer cooperative against a trade publication for allegedly defamatory statements concerning his ouster from the cooperative. 627 F.2d at 1290. The court held that prior to publication of the article, public controversies existed over cooperatives in general and Waldbaum’s policies in particular. Id. at 1299.


95. 754 F.2d at 1083. The court failed to specifically address why the facts of Marcone satisfied the Waldbaum definition. Id. The defamatory statement asserted that “Marcone purchased $25,000 worth of marijuana as part of a drug smuggling ring.” Id. “In fact,” stated the court, “Marcone . . . was indicted for conspiracy and other charges in a nationwide drug trafficking operation . . . [which] at the time . . . was the largest drug smuggling operation ever uncovered in the United States.” Id. The court concluded that “[d]rug trafficking of such mammoth proportions, which is one of the most troubling issues of our time, surely falls within the ambit of public controversy.” Id. It is suggested that the Third Circuit’s failure to more specifically address the public controversy issue leaves the precise meaning of the Waldbaum definition unclear. For example, why is drug smuggling a “real dispute.” Most all agree that drug smuggling is undesirable. See Wolston v. Reader’s Digest Ass’n, 443 U.S. 157, 166 n.8 (1979). In Wolston, while considering the public figure status of an individual held in contempt for failing to appear before a grand jury investigating Soviet espionage in the United States, the Court commented that it was hard pressed to identify any public controversy since there was no public debate over the desirability of Soviet espionage. Id. “[A]ll responsible United States citizens were and are opposed to it.” Id. The Third Circuit rejected the Wolston “debat**e” notion of public controversy. 754 F.2d at 1083 n.8 (citing Smolla, supra note 47, at 56-57) (arguing that such an approach would be “ludicrous” and would eliminate from the realm of public controversy issues such as crime and violence which are universally condemned, but nonetheless deserving of first amendment protection). If “real dispute” does not refer to debatable subjects, what precisely does it refer to? Or in the Third Circuit’s language, how “troubling” must an issue be? See 754 F.2d at 1083. It is suggested that the “real dispute” language provides little guidance to individuals and the media in identifying public controversies. See Waldbaum, 627 F.2d at 1293 (arguing that clear guidelines are important for both individuals and the media).

The Third Circuit also failed to address the appropriate scope of the controversy. 754 F.2d at 1083. Scope refers to how narrowly or broadly the controversy at issue will be defined. See Note, supra note 7, at 955 n.140, cited in Marcone, 754 F.2d at 1083 n.7. The Marcone court described the controversy rather broadly as “drug trafficking.” 754 F.2d at 1083. The commentator argues that a broad definition of the controversy allows courts to examine more voluntary actions with respect to the controversy, and thereby manipulate public figure status by expanding or contracting the scope of the controversy. See Note,
Marcone satisfied this definition of public controversy.\footnote{754 F.2d at 1083. The United States Supreme Court has provided little guidance regarding the public controversy requirement, indicating only that which will not suffice. See, e.g., Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979) (mere "newsworthiness" is not enough to establish public controversy); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (general concern over public expenditures is not particular enough to establish public controversy); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (public controversy not equated with all controversies of interest to the public).}

The more significant issue that the Third Circuit addressed was whether the "nature and extent" of Marcone's participation in the public controversy was sufficient for him to have become a limited purpose public figure.\footnote{754 F.2d at 1083-87. Penthouse did not contend that Marcone was an all purpose public figure. Id. It is clear that Marcone was not an individual who wielded "persuasive power and influence," as the Supreme Court requires for all-purpose public figures. See Gertz, 418 U.S. at 352. Nor had he achieved "general fame or notoriety . . ." Id. at 345.}

The Third Circuit began its analysis by stating "[i]n general, to be a limited purpose public figure, the plaintiff must voluntarily thrust himself into the vortex of the dispute. From the voluntary act is derived the notion of assumption of the risk and the consequent fairness in labelling the person a public figure."\footnote{754 F.2d at 1083. The Third Circuit adopted this definition from Gertz. See Gertz, 418 U.S. at 352. Underlying this definition is the important normative principle that "the communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Id. at 345. For a further discussion of the Third Circuit's consideration of Gertz, see infra notes 121-25 and accompanying text.} It is submitted that although the Third Circuit requires voluntary involvement as a prerequisite to limited purpose public figure status,\footnote{754 F.2d at 1083-85. Voluntary involvement in the particular public controversy at issue has been recognized as a necessary element in the public figure equation in every Supreme Court decision since Gertz. See Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 166 (1979) (plaintiff not a public figure since he had not voluntarily thrust or injected himself into the forefront of the public controversy); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (plaintiff not a public figure since no controversy existed); Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976) (plaintiff not a public figure since resort to judicial process is not voluntary, and in any event no controversy existed). Voluntariness is measured by the "nature and extent" of an individual's participation in the particu-
The post-Gertz cases indicate that the Supreme Court views the voluntariness requirement in a restrictive manner. In *Time, Inc. v. Firestone*, the Court declined to hold that Mary Firestone, the wife of a wealthy industrialist, had voluntarily thrust herself into a public controversy by resorting to judicial process to settle her marital difficulties. The Court held that resort to judicial process was not voluntary action for purposes of the public figure analysis. In *Hutchinson v. Proxmire*, the Court held that a research scientist who was libeled in a publication which criticized excessive government grant expenditures had not voluntarily sought to influence the outcome of any public controversy and furthermore, had no regular and continuing access to the media. Finally, in *Wolston v. Reader's Digest Ass'n, Inc.*, the Court held that an individual's failure to appear before a grand jury investigating Soviet espionage was not evidence that he had thrust himself to the forefront of any controversy. Indeed, the Court felt that the plaintiff had been dragged unwillingly into the controversy. The Court stated that "a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts lar public controversy. See *Wolston*, 443 U.S. at 167; see also *Waldbaum*, 627 F.2d at 1297 ("trivial or tangential participation is not enough"). The Third Circuit has consistently reiterated the Supreme Court's voluntariness requirement. See, e.g., McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985); Avins v. White, 627 F.2d 637, 648 (3d Cir.), cert. denied, 449 U.S. 982 (1980); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273-74 (3d Cir. 1980). For a further discussion of the Third Circuit's consideration of the voluntariness issue in the principal case, see infra notes 104-27 and accompanying text.

100. For a discussion of the Supreme Court's restrictive application of the public figure doctrine, see Smolla, *supra* note 47, at 49-60. For a discussion of the Third Circuit's approach, see infra notes 103-127 and accompanying text.


102. *Id.* at 452-55. Initially, the Court held that the Firestones' divorce proceeding did not involve a public controversy. *Id.* at 454. The Court refused to "equate 'public controversy' with all controversies of interest to the public." *Id.* Moreover, the Court held Mary Firestone had not voluntarily publicized issues relating to her divorce, despite the fact that she held several press conferences. *Id.* n.3.

103. *Id.* at 454.


105. *Id.* at 134-35. The Court found that no public controversy existed prior to publication of the article, and cautioned that those charged with defamation could not create a public figure defense by pointing to their own article as evidence that a controversy existed. *Id.* at 135.


107. *Id.* at 166-67.

108. *Id.* The Court noted that the plaintiff had not discussed the contempt citation with the press. *Id.* at 167. According to the Court, the nature and extent of his voluntary participation was similar to that of Elmer Gertz. *Id.* (citing *Gertz*, 418 U.S. at 352).
public attention.”109 These cases indicate that the Supreme Court’s conception of the voluntariness requirement is fairly restrictive.110

The Third Circuit, on the other hand, adopts a more liberal view of the voluntariness requirement. In Marcone, the Third Circuit relied heavily on Chuy v. Philadelphia Eagles Football Club111 and Rosanova v. Playboy Enterprises112 to define the way in which one becomes a limited purpose public figure. Both Rosanova and Chuy focus not on a plaintiff’s voluntary actions directed towards influencing public controversies, but rather on a plaintiff’s voluntary actions in associating with controversial individuals.113 As further analysis will demonstrate, the Third Circuit’s

109. Id at 167. To do so, reasoned the Court, would be to reinstate the prohibited Rosenbloom standard. Id. (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (actual malice protection extends to all matters of public concern)).

110. See Smolla, supra note 47, at 49-60 (arguing that post-Gertz cases indicate a narrow and restrictive approach to public figure doctrine).

111. 431 F. Supp. 254 (E.D. Pa. 1977), aff’d, 595 F.2d 1265 (3d Cir. 1979) (en banc); see 754 F.2d at 1083-84 (quoting extensively from Chuy).

112. 411 F. Supp. 440 (S.D. Ga. 1976), aff’d, 580 F.2d 859 (5th Cir. 1978); see 754 F.2d at 1082-86 (quoting extensively from Rosanova).

113. In Chuy, the district court found that Donald Chuy, a professional football player, had voluntarily invited attention and comment simply by choosing to engage in a much-talked-about profession. 431 F. Supp. at 267. The court’s determination that Chuy was a public figure was based solely upon his association with professional football, in spite of the lack of evidence that Chuy had made any effort to influence a public controversy. Id. On appeal, the Third Circuit agreed with the district court’s decision, reasoning that professional football players “generally assume a position of public prominence.” 595 F.2d at 1280. It is submitted that the court’s focus on Chuy’s entry into a much-talked-about profession places little premium on the identification of voluntary action directed towards the resolution of any particular controversy. Cf. Wolston, 443 U.S. at 168 (plaintiff did not seek to influence the resolution of a controversy, and therefore not a public figure); Hutchinson, 443 U.S. at 135 (plaintiff did not thrust himself or his views into a controversy to influence others, and therefore not a public figure); Firestone, 424 U.S. at 454-55 (plaintiff assumed no special prominence in resolution of public questions, and therefore not a public figure); Gertz, 418 U.S. at 352 (plaintiff did not attempt to influence outcome of a public controversy, and therefore not a public figure); see also Jenoff v. Hearst Corp., 644 F.2d 1004, 1007 (4th Cir. 1981). Jenoff involved a libel action by an unpaid police informant against a Baltimore city newspaper for false statements made about the plaintiff in an article concerning governmental use of informants for domestic spying. Id. at 1005-07. Regarding the plaintiff’s position as an informant, the Fourth Circuit stated that “[h]is assumption of the informant’s role cannot constitute voluntary entry into public debate over the role of informants unless we are to hold that all informants, by virtue of that status, become public figures. The use of such ‘subject matter classifications’ . . . has been authoritatively rejected.” Id. at 1007 (citing Hutchinson, 443 U.S. at 135; Firestone, 418 U.S. at 456). In this respect then, the Third Circuit’s analysis in Chuy, is similar to the all-purpose public figure analysis. For a discussion of the all-purpose public figure analysis, see supra note 5 and accompanying text.

In Rosanova, Louis Rosanova was referred to in a published statement as a “mobster.” 580 F.2d at 860. Although never convicted of a crime, Rosanova had a long and well-publicized relationship with organized crime figures. Id. at 861. The Fifth Circuit concluded that Rosanova’s voluntary association with or-
decision to consider both voluntary associations, as well as voluntary attempts to influence public controversies, indicates a more expansive view of the public figure doctrine than that espoused by the Supreme Court.\footnote{114
}

With regard to the "nature and extent" inquiry, the Third Circuit focused initially on Marcone's indictment and the attendant publicity.\footnote{115
} In that context, the court cited Wolston where the Supreme Court rejected the contention that "any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."\footnote{116
} In Wolston, the organized crime figures was a course of conduct "bound to invite attention and comment." \textit{Id.} In response to the plaintiff's argument that he never sought or intended public figure status, the court responded that "[t]he purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure." \textit{Id.} Regarding the nature of Louis Rosanova's "voluntary involvement," the court made clear that although he did not voluntarily seek to influence the outcome of any particular public controversy, he could still be deemed a public figure based on his voluntary choice to associate with controversial individuals. \textit{Cf.} Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980) (meat producer who launched an aggressive advertising campaign had "voluntarily injected himself into a matter of public interest—indeed, [he] appears to have created a controversy—for the purpose of influencing the consuming public"); Avins v. White, 627 F.2d 637, 648 (3d Cir.), cert. denied, 449 U.S. 982 (1980) (former law school dean who "spearheaded" a law school's accreditation effort considered to have played an "affirmative and aggressive role in the accreditation process" and thus deemed a public figure). For a discussion of the distinction between voluntarily injecting oneself into a controversy to influence its outcome, and voluntarily associating with controversial individuals as it relates to the principal case and the underlying principles of Gertz, see supra notes 111-12 and infra notes 114-25 and accompanying text.

\footnote{114
See Smolla, supra note 47, at 51-60 (asserting that Wolston, Hutchinson, and Firestone indicate that the Supreme Court's restrictive interpretation of the public figure doctrine). For a discussion of the more restrictive approach, see supra notes 101-10 and accompanying text.
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\footnote{115
754 F.2d at 1085. The court noted that Marcone's indictment had received widespread local media coverage. \textit{Id.} Also, the local media had focused a good deal of attention on the Pagan and Warlock motorcycle gangs in connection with their involvement in drug trafficking. \textit{Id.}
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\footnote{116
754 F.2d at 1085 (quoting Wolston, 443 U.S. at 168). \textit{But see} Smolla, supra note 47, at 57-58. Smolla criticizes the Supreme Court's rejection of the proposition that any person who engages in criminal conduct automatically achieves public figure status. \textit{Id.} According to Smolla, such a rejection defines the voluntariness requirement in the criminal context as voluntariness in getting caught and convicted rather than voluntariness in engaging in criminal activity. \textit{Id.} Most criminals do not voluntarily submit to capture and conviction. \textit{Id.} Therefore, under the Court's reasoning, they cannot, without more, be deemed public figures. \textit{Id.} In that case, the public may be deprived of relevant information concerning criminal investigations and prosecutions. \textit{Id.; cf.} Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir. 1980) (lawyer practicing law in violation of probation voluntarily chose to engage in prohibited activity, but not because of desire to influence outcome of any controversy, and therefore not public figure; moreover, public interest is irrelevant to public figure determination).
}
Court emphasized that voluntary, active participation\textsuperscript{117} in a public controversy should be the focus of the public figure determination, not particular criminal conduct\textsuperscript{118} or participation in other litigations.\textsuperscript{119} This would appear to preclude the use of Marcone’s indictment as a predicate for finding public figure status. The Third Circuit, however, attempted to distinguish \textit{Wolston}\textsuperscript{120} and considered evidence of criminal activity as one of several factors leading to public figure status.\textsuperscript{121}

The Third Circuit focused next on Marcone’s representational ties to motorcycle gang members.\textsuperscript{122} Although in \textit{Gertz} the Supreme Court indicated that representational ties normally would not play a role in a public figure determination,\textsuperscript{123} the Third Circuit did accord limited sig-

\textsuperscript{117}See 443 U.S. at 166. The Court held that the plaintiff in \textit{Wolston} was not a public figure, despite his contempt citation for failure to appear before a grand jury investigating Soviet espionage activities in the United States. \textit{Id.} The Court reasoned that because the government had pursued the plaintiff, “[i]t would be more accurate to say that he was dragged unwillingly into the controversy.” \textit{Id.}


\textsuperscript{119}For a discussion of this matter, see \textit{supra} note 118.

\textsuperscript{120} 754 F.2d at 1085. The court attempted to distinguish \textit{Wolston} by noting that the crime involved in \textit{Wolston}, a citation for contempt, was “particularly passive.” \textit{Id.} Marcone, on the other hand, had been indicted for participating “not in a passive manner,” in a drug conspiracy. \textit{Id.} It is suggested that this is a distinction without a difference. A decision not to appear before a grand jury is every bit as voluntary as a decision to involve oneself in a conspiracy.

\textsuperscript{121} 754 F.2d at 1085. The court also considered the publicity attending the indictment to be an important factor. \textit{Id.} It is submitted that other jurisdictions would also accept evidence of criminal activity as a factor in the public figure determination. \textit{See}, e.g., \textit{Waldbaum} v. Fairchild Publications, 627 F.2d 1287, 1293 (D.C. Cir.) (court must consider the “facts taken as a whole”), \textit{cert. denied}, 449 U.S. 898 (1980); \textit{Velle Transcendental Research Ass’n} v. \textit{Sanders}, 518 F. Supp. 512, 516 (C.D. Ca. 1981) (“whether a particular plaintiff’s activities make him a limited purpose public figure is usually a very close question which can be resolved only by considering the totality of the circumstances which comprise the publicity surrounding the controversy . . .”). \textit{But see Wolston}, 443 U.S. at 169 (to consider criminal conduct dispositive in the public figure determination would “create an ‘open season’ for all who sought to defame persons convicted of a crime”). \textit{Wolston}’s logic, if accepted, would seem equally compelling with respect to those merely indicted for a crime. \textit{Cf. Smolla, supra} note 47, at 58 (arguing that commentary on criminal activity has great social importance and should be given first amendment protection).

\textsuperscript{122} 754 F.2d at 1085. For a discussion of Marcone’s representational ties to the Pagan and Warlock motorcycle gangs, see \textit{supra} notes 50-56 and accompanying text.

\textsuperscript{123} \textit{See} 418 U.S. at 352. The \textit{Gertz} Court indicated, in dicta, however, that
The fact that the court gave such contacts significance, albeit limited significance, reinforces the view that the Third Circuit considers voluntarily choosing to associate with controversial individuals as equivalent to thrusting oneself to the forefront of a public controversy.

Further evidence of the Third Circuit’s liberal view of the public figure doctrine is found in the court’s consideration of Marcone’s nonrepresentational ties to the Pagans and Warlocks. In that context, the court noted reports that Marcone had met at the Castle (Pagan headquarters) with several indicted co-conspirators, and had occasionally accompanied motorcycle gang members on weekend trips. The court then reasoned, in essence, that: 1) the Pagans and their headquarters were linked to the drug smuggling ring, i.e., the public controversy, 2) Marcone had voluntarily associated with the Pagans and their headquarters, and therefore, 3) Marcone had voluntarily thrust himself into the public controversy for public figure purposes. In other words, Marcone’s voluntary choice to associate with controversial individuals or groups was considered essentially analogous, for public figure purposes, to a voluntary thrusting of himself into a public controversy.

It is submitted that this willingness to equate voluntary association of an attorney making positive efforts to engage the public’s attention in order to influence the outcome of a controversy relating to his client, then his representational actions may be considered. Id.; see also Ratner v. Young, 465 F. Supp. 386, 399-400 (D.V.I. 1979) (attorneys representing defendants in controversial trial are public figures for comment on issues related to trial). It is submitted that nothing in the record indicates that Marcone made any effort to engage the public’s attention regarding motorcycle gangs or drug smuggling.

The court found nothing in the record to indicate that Marcone purposely publicized his legal relationship with motorcycle gangs, it follows that any significance attached to his relationship with motorcycle gangs must relate to his decision to represent—that is, associate with them. Id. In this regard, the court emphasized that it was not holding that “an attorney whose connection to notorious clients remains purely professional automatically becomes a limited purpose public figure.” Id. at 1087 n.11 (emphasis added). Apparently, Marcone’s failure to keep his contacts purely professional rendered his representational ties significant.

The Third Circuit noted that Marcone’s nonrepresentational ties were a “more important factor for the limited purpose public figure determination.” Id. In fact, it is submitted that those ties were not merely important, but determinative in the court’s analysis. Furthermore, it is suggested that the indictment alone would have been insufficient in light of Wolston. See supra note 117. Additionally, it is submitted that representation by itself would have been insufficient in light of Gertz. See supra notes 5 and 123. It is further submitted that it is unlikely that these two factors together would have been sufficient because they do not, taken together, evidence any real voluntary conduct directed towards influencing the outcome of a controversy.

The Third Circuit noted that these factors were “in conjunction with the intense media attention [Marcone] engendered.” Id. For a discussion of the extent of publicity engendered, see supra notes 51-52 and accompanying text.
with the Gertz voluntary thrusting of oneself to the forefront of a public controversy standard evinces a more expansive view of the public figure doctrine than that embraced by the Supreme Court.\textsuperscript{128}

It is submitted, however, that the Third Circuit's more expansive approach is nonetheless consistent with the underlying principles of Gertz\textsuperscript{129} while more adequately protecting the important first amendment interests at stake.\textsuperscript{130} The voluntariness requirement in Gertz rests on the presumption that those who voluntarily involve themselves in controversial societal affairs necessarily assume the risk that they may be subject to media defamation.\textsuperscript{131} It is submitted that those who voluntarily associate with controversial groups similarly assume the risk of false statements concerning their involvement with the group.\textsuperscript{132} Thus it is submitted that the Third Circuit approach, while providing greater protection for first amendment interests, remains consistent with prior Supreme Court authority governing public figure determinations.

In conclusion, it is submitted that Marcone represents a tendency on the part of the Third Circuit to apply a substantially more liberal version of the public figure doctrine than that adopted by the United States Supreme Court.\textsuperscript{133} This tendency, with its expansive notion of the vol-
untariness requirement of Gertz will result in greater first amendment protection for media defendants in the Third Circuit. The danger, of course, is that legitimate reputational interests may be sacrificed. It is submitted, however, that the Third Circuit has properly struck the balance between the individual and constitutional interests at stake.

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134. It is submitted that the Third Circuit's approach, emphasizing as it does the totality of the circumstances pertinent to the public figure determination, better protects the goal of "uninhibited, robust and wide-open' debate on public issues." Gertz, 418 U.S. at 340 (quoting New York Times, 376 U.S. at 270). It permits the court to consider a wider variety of voluntary actions on the plaintiff's part with respect to the public controversy, thereby providing more protection to the media without completely sacrificing an individual's interest in reputation. See generally Smolla, supra note 47 at 48-62 (arguing that the present Supreme Court approach is too restrictive). For an example of the Third Circuit's continued willingness to protect first amendment interests by extending actual malice protection to media defendants, see McDowell v. Paiewonski, 769 F.2d 942 (3d Cir. 1985) (plaintiff found to be limited purpose public figure).