

The Burger Court Opinion Writing Database

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

472 U.S. 749 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

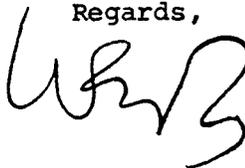
November 29, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Lewis:

I have some problems with this case, and I will await Byron's views which, I gather, he may write out.

Regards,



Justice Powell

Copies to the Conference

NOV 30 1984

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Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

November 29, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Lewis:

I have some problems with this case, and I will await Byron's views which, I gather, he may write out.

Regards,

Justice Powell

Copies to the Conference

PPS: Under no circumstances would I go along with altering the punitive damage standard nor could I agree with anything along the lines of your note 14, page 16.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 20, 1984

Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc.

Dear Lewis:

I will await further writing. I have trouble about the media, and non-media. Dun & Bradstreet is not like the New York Times, but it is a second cousin, at least, of the Wall Street Journal. Like Bill Rehnquist, I'm not ready to drop punitive damages.

Regards,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1984

Re: No. 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I cannot accept either the media-nonmedia dichotomy or the abolition of punitive damages in libel cases, especially the latter. So, very likely I will agree with no one except myself.

Regards,

A handwritten signature in black ink, appearing to be 'W. E. B.', written in a cursive style.

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Personal

April 9, 1985

CONFIDENTIAL

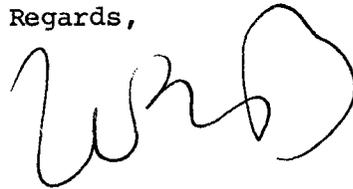
Re: 83-18 - Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Lewis:

As you know, I have long struggled with this case. You know what I think of the excess of New York Times and my reservations on your Gertz. I think my views are best served by joining both you and Byron.

This is a "tight rope" to walk and I hope I can do it sans explanation.

Regards,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

April 10, 1985

Re: No. 83-18 - Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc.

Dear Byron,

I have joined Lewis, but I will also join your
concurring opinion.

As of now I will not undertake to say more.

Regards,

Justice White

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1985

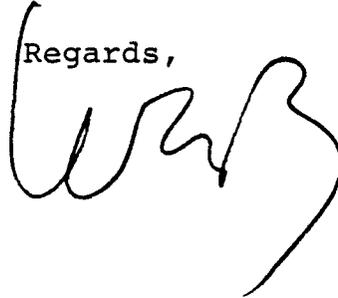
Re: No. 83-18 - Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc.

MEMORANDUM TO THE CONFERENCE:

I will add something along the following line:

I join those parts of Justice Powell's opinion essential to the disposition of the case; I agree generally with Justice White's opinion with respect to Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Regards,



MA

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1985

Re: 83-18 - Dun & Bradstreet

Dear Lewis:

I hereby reassign the above case to you with all the "pluses" and "minuses" that go with it!

Regards,



Justice Powell

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAY 23 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VERMONT

[May —, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), contrary to well-established common law prevailing in the states, a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood. The Court further held that there can be no "presumed" damages in such an action and that the private plaintiff cannot receive "punitive" damages unless it is established that the publication was made with "actual malice," as defined in *New York Times v. Sullivan*, 376 U. S. 254 (1964).

I dissented in *Gertz* because I believed that, insofar as the "ordinary private citizen" was concerned, 418 U. S., at 355, the Court's opinion "abandon[ed] the traditional thread," *id.*, at 354, that had been the theme of the law in this country up to that time. I preferred "to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry." *Ibid.* *Gertz*, however, is now the law of the land, and until it is overruled, it must, under the principle of *stare decisis*, be applied by this Court.

The single question before the Court today is whether *Gertz* applies to this case. The plurality opinion holds that *Gertz* does not apply because, unlike the challenged expres-

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To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

CHANGES AS MARKED: ^{p, 2}

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 17 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VERMONT**

[June —, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), contrary to well-established common law prevailing in the states, a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood. The Court further held that there can be no "presumed" damages in such an action and that the private plaintiff cannot receive "punitive" damages unless it is established that the publication was made with "actual malice," as defined in *New York Times v. Sullivan*, 376 U. S. 254 (1964).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 19, 1985

RE: No. 83-18 - Dun & Bradstreet, Inc. v. Greenmoss
 Builders, Inc.

MEMORANDUM TO THE CONFERENCE:

To accommodate a request of the estate of Roy Howard, I have directed the Reporter of Decisions to change the final paragraph of my concurring opinion in this case to read as follows in the advance sheets and the final published version:

Consideration of these issues inevitably recalls an aphorism of journalism that "too much checking on the facts has ruined many a good news story."

Regards,


REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

82 12 19 1985

13, 18

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: OCT 20 1984

Recirculated:

Handwritten notes and initials, including "12F" and "7/11".

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[November —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent's president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent's president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

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15, 21, 22-23

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: DEC 14 1984

^{2nd}
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[December —, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

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Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

14-16, 22

To: The Chief Justice
Justice White
Justice Marshall ✓✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: 303 17 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONER *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[January —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether that constitutional protection extends to "nonmedia" defendants.

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Respondent then brought this defamation action in Vermont state court, alleging that the false report injured its

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 25, 1985

MEMORANDUM TO THE CONFERENCE

No. 83-18

Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc.

Obviously, Byron's dissent requires
a considered response. I'll undertake
to make one as soon as I can.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 20, 1985

MEMORANDUM TO THE CONFERENCE

No. 83-18

Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

The attached draft in the above has
been substantially revised in light of
the circulations of Byron and Lewis.

Sincerely,

Attachment

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAP 30 1985

STATISTIC CHANGES THROUGHOUT

1, 5-13, 14-17, 18-19, 21, 23,
24, 26, 27, 28, 29, 30, 31-33

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[March —, 1985]

JUSTICE BRENNAN delivered the opinion of the Court.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), a libel action against a magazine, we held that the First Amendment prohibits awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth. The question presented by this case is whether *Gertz* should be restricted to cases that do not involve “nonmedia” defendants or speech about economic and commercial matters.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about corporations. On July 26, 1976, petitioner incorrectly reported that respondent, a Vermont corporation engaged in construction contracting, had filed a voluntary petition for bankruptcy. On the day the report was issued, respondent’s president learned of it from a bank official with whom he was discussing the possibility of future financing. Eight days later, after being contacted by respondent’s president, petitioner confirmed the falsity of the report and sent a retraction to each of its subscribers who had received the original report. Petitioner refused, however, to supply respondent with the names of those subscribers.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 21, 1985

No. 83-18

Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc.

Dear John,

Thank you so very much for your comments on my last circulation. I think they make a great deal of sense. The circulation, I confess, reflects concern that Byron's propositions might attract support. Perhaps that was an overreaction -- your suggestion that eight (or at least seven) of the Court accept the basic holding of New York Times is very comforting. I suppose I'll be getting some other reactions, but meanwhile I'll be trying to adjust the circulation along the lines that you suggest.

Sincerely,



Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 20, 1985

OK

No. 83-18

Dun & Bradstreet, Inc. v. Greenmoss
Builders, Inc.

Dear Thurgood, Harry and John,

Because of the lateness of the Term, I have taken the liberty of adding your names to the dissent in the above. I, of course, welcome any suggestions.

Sincerely,

Bill

Justice Marshall
Justice Blackmun
Justice Stevens

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 22, 1985

No. 83-18

Dun & Bradstreet v. Greenmoss
Builders, Inc.

Dear Thurgood and Harry,

John would prefer that we circulate initially with footnote 2 deleted. His thought is that we don't yet know what Byron may circulate when he converts his present dissent into a concurrence. If Byron repeats his attacks on the Times/Sullivan principles, we could then reconsider a response. If there is to be one, I think John would wish to consider some revision of footnote 2. I have sent the draft to the printer with footnote 2 deleted.

Sincerely,



Justice Marshall

Justice Blackmun

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 23 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VERMONT

[May —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), to credit reporting—a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law—and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice—a clear and convincing showing of knowing falsehood or reckless disregard for the truth—should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, *ante*, at 7, and reaffirms *New York Times v. Sullivan*, 376 U. S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. *Ante*, at 5-6. JUSTICE WHITE also would affirm; he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. *Ante*, at

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 24 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VERMONT

[June —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), to credit reporting—a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law—and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice—a clear and convincing showing of knowing falsehood or reckless disregard for the truth—should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, *ante*, at 7, and reaffirms *New York Times v. Sullivan*, 376 U. S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. *Ante*, at 5-6. JUSTICE WHITE also would affirm; he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. *Ante*, at

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 26, 1984

Re: 83-18 - Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill,

It will be some time before I am ready
in this case. Happy New Year.

Sincerely yours,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 25, 1985

83-18 - Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill,

It will not surprise you, I am sure, to learn that I am voting to affirm in this case. I shall circulate shortly indicating my position. Neither am I joining Lewis at this point. Having said this, I am fleeing the city for a week or two.

Sincerely,



Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: JAN 25 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT**

[January —, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts §621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 19, 1985

83-18 - Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.

Dear Sandra,

I appreciate your passing on to me a copy of Lewis's proposed changes in his separate writing in this case.

Although Lewis has made substantial changes, I still have difficulty with this draft, which at several places states that the publication here was a private publication about a non-public matter. It is emphasized that the circulation here went only to subscribers. I take it, then, that if the publication had been a public one, Gertz rules would apply even if the subject matter was non-public. Although Lewis states that the distinction is not between media and non-media defendants, there obviously are different rules for those who publish publicly and those who circulate privately; and, obviously enough, a media defendant would always be publishing publicly and entitled to the protections of Gertz, whether the subject matter was public or private.

I thus doubt that I can join the draft in this form. To give more protection to those who publish publicly and hence do the most damage makes little sense to me. It also seems that Lewis could do what he wants to do by simply applying Gertz to matters of "public importance", regardless of who the publisher is. As I indicated in what I have already circulated, I believe I could join such an approach, at least for the purpose of producing a court opinion.

I am sending a copy of this to Lewis.

Sincerely,



Justice O'Connor

cc: Justice Powell

Lewis: It's great to have you back in the swim. John
can't yourself.
bw

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAR 5 1985

NO CHANGES THROUGHOUT.
SEE PAGES:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT**

[March —, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts §621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

AMENDMENTS THROUGHOUT.
SEE PAGES: 1

Circulated: _____

Recirculated: MAR 8 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[March —, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts §621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

STYLISTIC CHANGES THROUGHOUT;
see pp. 4, 5, 6, 7, 8, 9, 10, 11.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 3/29/85

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT**

[March —, 1985]

JUSTICE WHITE, dissenting.

Until *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

pp. 1, 3, 4, 6, 7, 8, 9, 10, 11

Circulated: _____

Recirculated: 6/11/85

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.**

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[June —, 1985]

JUSTICE WHITE, concurring in the judgment.

Until *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1985

Re: 83-18 - Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I am not doing as much to my concurring opinion as I thought I would. I am only adding two sentences before the last sentence of the last full paragraph on page 10:

A legislative solution to the damages problem would also be appropriate. Moreover, since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting recoveries would deter or be unfair to them.

I see no reason why the case cannot be scheduled to come down next week.

Sincerely yours,



Justice Powell
Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: 6/21

f. 10

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[June —, 1985]

JUSTICE WHITE, concurring in the judgment.

Until *New York Times v. Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment a, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable per se. This rule performed

"[A] vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in charac-

W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 1, 1984

Re: No. 83-18-Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

3

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 1, 1984

Re: No. 83-18, Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 22, 1985

Re: No. 8³4-18, Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Bill:

I am still with you.

Sincerely,



Justice Brennan

cc: Justice Marshall
Justice Stevens

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 30, 1984

83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Bill:

As you would expect, my position remains basically in dissent. I may make some changes, however, in the draft I circulated last Term.

It may take me a while to get this done.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

81 31 11 11

83-18 Dun & Bradstreet

Dear Chief:

I am circulating an opinion along the lines I indicated at Conference. I adhere to my view of last Term that the entire law of libel should not be constitutionalized. This would be an unprecedented extension of New York Times and Gertz.

After considerable thought, I have concluded that punitive damages should be abolished except where authorized by a statute that prescribes appropriate standards. The imposition of punishment is a function of the state, not of lay juries without standards or statutory limitations. I do not see how permitting a jury to impose private fines can be reconciled with the Fifth and Fourteenth Amendments. Also the purpose of tort recovery is to compensate - not to confer a windfall.

Accordingly, I would hold that in libel cases against non-media defendants punitive damages are improper. I would allow presumed damages that traditionally have been viewed as compensatory. As at common law, no showing of malice should be required.

In libel suits against a media defendant, on the other hand, I would adhere to New York Times and Gertz and allow presumed damages upon proof of actual malice. I would not allow punitive damages as they are not compensatory.

The opinion is divided into parts so that you may, if you wish, join it in part. You would be welcome.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

11/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: NOV 23 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[November —, 1984]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits against media defendants. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the Court's decisions since then that have considered the constitutional role in defamation law also have involved suits against a media defendant arising out of an article or broadcast on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

12/20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

changes

1, 3-5, 8-10, 12, 15-18

From: Justice Powell

Circulated: _____

Recirculated: DEC 21 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS *v.*
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[December —, 1984]

JUSTICE POWELL, affirming in part and reversing in part.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving media expression. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on an issue of public concern and importance. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

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FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

December 29, 1984

PERSONAL

83-18 Dun & Bradstreet

Dear Chief:

Thank you for your note about this case. I write, on a personal basis, to suggest that you may wish to consider two rather major points that may not have come to your attention.

1. Your note suggests that you are having difficulty making a distinction between nonmedia and media defendants, and you have mentioned the Wall Street Journal. The second draft of my opinion, circulated December 21, clarified what concerns you. Initially, I had drawn the distinction simply between media and nonmedia defendants. After a good deal of further research, I concluded that the relevant distinction turns on the nature of the speech rather than who the parties are. If the speech relates to public issues or public persons, my opinion now agrees that the New York Times standard is applicable (subject to my view of punitive damages).

The great majority of the cases cited by Bill Brennan in his reply to the first draft of my opinion, focus on whether the speech involved the type of public discussion that is essential in a democracy: i.e. public issues or criticism of public figures. This is the rationale of New York Times v. Sullivan and Gertz. The present case is a garden variety, old fashioned libel suit by one business company against another. No public issue or public figure is remotely involved. The second draft of my opinion adopts this rationale. I think it may well appeal to you.

2. In your personal note you also expressed a disinclination to abandon punitive damages in this case. I share your view as to the irresponsibility of what sometimes is reported in the press (for example, the recent disclosure to the Soviet Union of the purpose of our top secret military satellite).

I have thought for several years, however, that punitive damages are not compatible with due process. My view is not limited to the media. As my opinion states, England already has rejected punitive damages in all except limited situations such as where authorized by statute and with limited amounts. This is true of the antitrust laws in our country. My concern is with permitting juries, wholly without standards, to mete out punishment, and provide windfalls for plaintiffs who also have recovered compensatory damages, e.g., (see WJB's opinion in the §1983 Missouri case of Smith v. Wade). Punitive damages are awarded in the uncontrolled discretion of lay jurors who are free simply to vent their prejudices.

As a matter of principle, I do not believe a distinction can be made between allowing juries without standards to "punish" the media any more than I would allow this type of punishment in tort cases generally. In my view, punishment may not lawfully be imposed except by the state pursuant to due process. This view would still leave presumed damages that are allowed where no compensatory damages can be proved as in many libel cases.

I am not urging that you join my dissent - though you would be welcome. I do suggest that, in whatever you write, it may be prudent to leave yourself free to consider the punitive damage issue in nonlibel cases. In the typical product liability, personal injury and civil rights cases, compensatory damages normally are provable. Adding windfall punitive damages on top of these is unprincipled; and is without any of the due process protections guaranteed by the Constitution.

Sincerely,

The Chief Justice

lfp/ss

Changes:
1, 3-4, 6-11

Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: FEB 22 1985 _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[February —, 1985]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action involving private expression between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages also long have been available in actions for defamation under

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March 13, 1985

PERSONAL

83-18 Dun & Bradstreet v. Greenmoss

Dear Chief:

We have some good news in this case at long last.

As I believe you know, Sandra, Bill Rehnquist, and I have been cooperating, and the three of us have agreed on the draft (my 4th draft) that I am circulating today. I enclose an extra copy for you.

My understanding is that this draft is in accord with your views also. Your vote will at least give us a plurality to affirm the decision, and prevent the constitutionalizing of all libel law that Bill Brennan's opinion would accomplish.

Sincerely,

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

changes:
1, 3-11

From: Justice Powell

Circulated: _____

Recirculated: MAR 13 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT**

[March —, 1985]

JUSTICE POWELL, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

- omission

I

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FOR THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

03/19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

py

From: **Justice Powell**

Circulated: _____

Recirculated: MAR 20 1985

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.**

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF VERMONT

[March —, 1985]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and
JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

March 28, 1985

83-18 Dun & Bradstreet

Dear Bill and Sandra:

I send to each of you a copy of my opinion with a few suggested changes and additions in response to Bill Brennan's substantially rewritten draft. My clerk, Dan Ortiz, also is delivering a copy to your respective clerks who have been quite helpful.

There is a good deal more that could be said in reply, but I am inclined to think that our view of this case is adequately stated in my fifth draft. Bill Brennan's opinion, although 50% longer, still would constitutionalize the entire law of libel.

I will, of course, welcome any views that you may have. If you approve of my suggested changes, I will recirculate and perhaps - at long last - this case can be brought down. I believe the Chief will join us, but perhaps we should speak to him to make sure that we have a plurality opinion.

Sincerely,

Justice Rehnquist
Justice O'Connor

lfp/ss

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

changes:
 4, 5, 9, 10

From: **Justice Powell**

Circulated: _____

Recirculated: APR 1 1985

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
 GREENMOSS BUILDERS, INC.**

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF VERMONT

[March —, 1985]

JUSTICE POWELL, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court today extends the constitutional rule of *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964), far beyond its origins or its purpose. In that case, the Court for the first time held that the Constitution limits the reach of state laws of libel and slander in suits involving public expression on matters of public concern. Limits are needed in such cases, the Court held, to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open." *Id.*, at 270. All of the cases since then in which the Court has considered the constitutional role in defamation law also have involved public expression on such matters. The Court today goes beyond these precedents and applies the same constitutional restrictions to a libel action between a construction company and a commercial credit reporting agency on an issue of purely private concern. In my view, such a sweeping holding is not required by the First Amendment. Nor is it wise or consistent with precedent.

I

The common law rules that the Court today repudiates are of ancient vintage. The rule that damages are presumed for libel was announced by Hale as early as 1670. *Restatement of Torts* § 568, comment b, at 162 (1938). Punitive damages

April 10, 1985

CONFIDENTIAL

83-18 Dun & Bradstreet

Dear Chief:

Thank you for your note of April 9 indicating that you would like to join both my opinion and Byron's.

I think this is feasible. There is no technical inconsistency between the two opinions. Byron, in effect, has alternative holdings: (i) that New York Times and Gertz are no longer good law and should be overruled, and (ii) that, even if they are good law, they do not apply here for the reasons stated in my opinion. By joining my opinion you would accept New York Times as the current law, but agree with Byron that it should be overruled.

I note that you prefer to join both "sans explanation". I am inclined to think a very brief opinion explaining your position would be helpful. It could be along the following lines:

"I join Justice Powell's opinion that correctly addresses and disposes of this case. I also join Justice White's opinion as I agree that the Court went too far in both New York Times v. Sullivan and Gertz, and agree that both should be overruled."

* * *

Of course, you could write a good deal more but I think something along the foregoing lines would suffice.

Sincerely,

The Chief Justice

lfp/ss

April 12, 1985

CONFIDENTIAL

83-18 Dun & Bradstreet

Dear Chief:

I am concerned by the language in your memorandum circulated yesterday afternoon in which you state that you will "add something along the following lines":

"I join those parts of Justice Powell's opinion essential to the disposition of the case; I agree generally with Justice White's opinion with respect to Gertz . . . and New York Times . . ."

Unless this language is refined, I cannot include you in what we have hoped would be a plurality opinion. Although there will be a judgment to affirm the Vermont court, Bill Brennan's opinion will have four votes - more support than either my views or Byron's. Furthermore, since it is not clear which parts of my opinion you believe are "essential to the disposition of the case" and which parts are not, other courts looking for guidance will have doubts as to where a majority of the Court stands.

As I believe my opinion makes clear, it would preserve the common law of libel in all cases where the subject of the libel is not of general public interest: the typical private libel suit. Bill Brennan's opinion, on the other hand, would extend the "actual malice" standard of Gertz and New York Times to all types of libel cases - thereby abrogating the entire common law.

It was necessary for me to cite Gertz and New York Times to distinguish them. As Byron's opinion implicitly recognizes, Gertz and New York Times at present are "the law". I simply did not consider - and the disposition of this case does not require us to consider - whether these two cases should be reversed.

I believe the purpose of your proposed opinion would be fully achieved by simply saying:

"I join Justice Powell's opinion disposing of this case; I agree generally, however, with Justice White's opinion with respect to Gertz and New York Times."

This would give us a solid plurality for the reasons why the entire law of libel should not be constitutionalized, and - with Byron's opinion - there would be clear guidance to all lower courts.

I have talked to Bill Rehnquist about this, and he also hopes that you can make this sort of clarification of your views. You would still fully preserve your views as to Gertz and New York Times.

Sincerely,

The Chief Justice

lfp/ss

April 22, 1985

83-18 Dun & Bradstreet

Dear Chief:

It was suggested at Friday's Conference that you confirm your assignment of this case to me.

I'll convert my dissent into a plurality opinion for the four of us.

Sincerely,

The Chief Justice

lfp/ss

May 9, 1985

83-18 Dun & Bradstreet

Dear Bill and Sandra:

I am delivering two copies to each of you of what I hope will be a plurality opinion in this case that has now dragged on for almost two years. I wanted you to see it before I circulated.

I have not changed the substance of what you have approved, and yet I think the opinion has been somewhat strengthened. I wrote the Chief a personal letter and talked to him sometime ago in an effort to persuade him that he could join our opinion without qualification, and still agree with Byron that New York Times and Gertz should be overruled. I do not know what he will do.

Sincerely,

Justice Rehnquist
Justice O'Connor

lfp/ss

05/13

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: _____

changes:
2-3, 10

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VERMONT**

[May —, 1985]

JUSTICE POWELL announced the judgment of the Court and an opinion in which JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day,

FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

05/14

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: MAY 16 1985

Changes =
5, 7, 10

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
VERMONT**

[May —, 1985]

JUSTICE POWELL announced the judgment of the Court and an opinion in which JUSTICE REHNQUIST and JUSTICE O'CONNOR join.

In *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day,

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1985

83-18 Dun & Bradstreet

Dear Bill:

I will probably make some response to your 23-page dissenting opinion, and it may take me a while to do this.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

June 19, 1985

83-18 Dun & Bradstreet

Dear Bill and Sandra:

Here is a fourth draft of my opinion in which I respond to Bill Brennan.

I do not think there is anything new in the three additional footnotes, but would appreciate your taking a look before I circulate.

With my thanks.

Sincerely,

Justice Rehnquist
Justice O'Connor

lfp/ss
Enc.

06/19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

notes 4, 7, and 8
added

From: Justice Powell

Circulated: _____

Recirculated: JUN 19 1985

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-18

**DUN & BRADSTREET, INC., PETITIONERS v.
GREENMOSS BUILDERS, INC.**

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CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

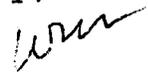
November 29, 1984

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I agree more with your separate opinion in this case than I do with Bill Brennan's proposed opinion, but I have enough reservations about yours so I think that I will wait and see what Byron writes. I am not yet ready to prohibit punitive damages in defamation cases.

Sincerely,



Justice Powell

cc: The Chief Justice
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 1, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I don't fully agree with either your circulation or Byron's as they now stand, I want very much to affirm the judgment of the Supreme Court of Vermont, and I have a strong disinclination to write anything on my own where the Court is already going to be fragmented.

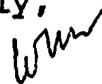
My principal difficulty with your circulation, which has evolved only after I have given considerable thought to it, is its emphasis on the fact that in this case we have a "matter of private expression on a matter of private concern." See, e.g., page 8 of your circulation of February 22nd. I would like to see the emphasis on the "private" nature of the expression either removed or very much subdued, because it seems to me that the way it is now the doctrine has a very ironic twist. A "private expression" that may be circulated to only three or four people is subject to no constitutional protection, but a similar expression on a matter of "private concern" that is circulated to 1,000 people may be able to claim constitutional protection. This runs contrary to one of the principal tenets of libel law, as I understand it, a tenet based on the idea that the greater the circulation of the falsehood, the greater the damage to the plaintiff. Wouldn't it be enough in this case to say that the matter was one of "private" concern--e.g., not a matter of "public concern" and dispense with the fact that it was not widely circulated. If one who falsely defames can gain some sort of constitutional immunity by widely circulating the defamation, I think the doctrine has very little to commend it, and I think you end up deciding only this case.

The distinction between matters of "public concern" and other matters, which Bill Brennan attempted to draw in his

plurality opinion in Metromedia, 403 U.S. 29, 44, is by no means an easy one, and I think the Court rejected it in Gertz when offered as a substitute for the distinction between public figures and private figures in constitutional libel law. Nonetheless, unless one is to go all the way with Bill Brennan and constitutionalize everything--which I certainly don't want to do--or draw the line between media and non-media defendants--which I likewise do not want to do--some useful distinction that can be developed in subsequent cases has to be made here. I think the one you have hit upon--"matters of private concern" versus other matters--is worth a try, but I don't think it should be freighted with the additional requirement that the circulation or expression be "private." I also think that Byron's opinion for the Court in Connick v. Myers offers some additional guidance on matters of public concern versus matters of private concern.

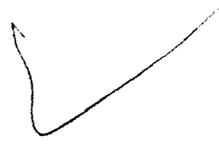
If you find it is not palatable to modify your opinion in this regard, I will think anew and much more promptly than I have previously done about what to do in this case. It is not clear to me from Byron's circulation whether he would affirm the judgment of the Supreme Court of Vermont; but if he would, I might well join him. But since Sandra has already joined you, I would like to join you if possible.

Sincerely,



Justice Powell
Justice White
Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Thank you for your response to my suggestions. I would be happy to join your fourth draft.

Sincerely,

Justice Powell

~~cc: The Conference~~

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 12, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Thank you for your response to my suggestions. I would be happy to join your fourth draft.

Sincerely,



Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 18, 1985

Re: No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

Please join me.

Sincerely,

WHR/gb

Justice Powell

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 31, 1984

Re: 83-18 - Dun & Bradstreet v. Greenmoss
Builders

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 21, 1985

Re: 83-18 - Dun & Bradstreet v. Greenmoss
Builders

Dear Bill:

For several reasons I have serious misgivings about your inclusion of a defense of New York Times v. Sullivan at pages 5 through 12 of your most recent draft.

First, I find the defense of the New York Times rule in this revised draft less persuasive than the New York Times opinion itself. I think the stronger response to Byron's opinion might consist of nothing more than a few appropriate quotations from New York Times together with a brief reference to its solid acceptance in the jurisprudence of the Court.

Second, it seems unwise to describe the opinion as "the well-spring" for the Court's First Amendment libel jurisprudence. In a sense the description is of course accurate because that was indeed a great opinion and it did mark the Court's first step into the field. I believe, however, that the strength of the opinion rests on two premises that are somewhat inconsistent with the "well-spring" categorization. First, you persuasively demonstrated that it was a natural development of principles that have always underlain our First Amendment jurisprudence; second, it was also presaged by a solid common law development and scholarly opinion that you summarized in your footnote 20 at 376 U.S. at 280.

Third, the extensive and passionate discussion of the importance of public debate at the outset of your analysis strikes me as somewhat counter-productive in the context of the particular facts of

this case. As I read these parts of the opinion I kept asking myself whether the arguments shed much light on the question whether commercial credit reports are entitled to special protection.

Unless someone joins Byron, it would seem to me that you could safely assume that eight members of the Court (perhaps I should say seven) accept the basic holding in New York Times and are merely concerned with the scope of that holding.

Although I've only had time to read the remainder of your changes once, they all seem to me to improve the opinion. I think what you have added on pages 18 through 21 is particularly effective.

Respectfully,



Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 21, 1985

Re: 83-18 - Dun & Bradstreet v. Greenmoss
Builders

Dear Bill:

Perhaps I should withhold comment until I see how Byron revises his dissent into a concurrence, but I am presently somewhat concerned about footnote 2 of your circulating dissent. My concerns are that merely by reading your footnote, I have some difficulty identifying the specific proposals to which you are responding and, more fundamentally, since you point out in the text that they are "not at issue," I have great reluctance about engaging in a collateral and somewhat hypothetical debate.

Even though I am not sure I disagree with anything you have said, I am presently inclined to join all of your dissent except footnote 2.

Respectfully,



Justice Brennan

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 30, 1984

No. 83-18 Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Bill,

I will await further writing in this case
before deciding what action to take.

Sincerely,



Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 22, 1985

PERSONAL & CONFIDENTIAL

Re: 83-18 Dun & Bradstreet v. Greenmoss Builders, Inc.

Dear Lewis,

Please do not read this until you are truly ready to go back to work. It can wait.

This case has been making its uncertain way through this Court for two terms now. I am not sure the Court will succeed in resolving it in any way which I regard as satisfactory. But during your illness something has occurred which offers the possibility that four, and perhaps five, of us can partially agree on one significant feature.

Byron has shown me a rough draft of his proposed opinion. He is not planning to join Bill Brennan, so there are potentially five votes in opposition to the circulating "majority" opinion. This is reason enough to make it worthwhile to pursue every avenue of agreement among those in dissent, who might thereby become a majority.

With that prospect in mind, there appears to be possible agreement by you, Byron, the Chief, Bill Rehnquist, and me that the Gertz standards apply at most to expression related to matters of public importance. Furthermore, I think that we all would agree that whatever the precise definition of "matters of public importance," it does not include a credit reporting service. If we were all to agree that the nature of the speech, rather than the nature of the speaker, determines whether Gertz applies, I believe we could then also agree this case should be affirmed, at least in part.

I appreciate that in order to solidify our votes on this point, certain language in Gertz will have to be explained and some other changes will be necessary in your circulating draft. The draft, however, by distinguishing between "public expression" and "private expression" already approaches the position that Gertz only applies to expression concerning matters of public importance. As your

draft explains, this Court already distinguishes between different categories of speech in terms of First Amendment protections and Gertz itself requires courts to distinguish between public figure plaintiffs and private citizen plaintiffs. It is certainly plausible to contend that the reasons for imposing constitutional limits on state libel laws as in New York Times v. Sullivan and in Gertz are not substantially implicated where the libelous expression does not concern a matter of public importance. Time, Inc. v. Firestone, 424 U.S. 448, also is consistent with this view in its reliance on a content-based categorization of speech to determine whether the plaintiff was a public figure.

This approach to Dun & Bradstreet would require a new standard for libel involving private plaintiffs and matters lacking in public importance or concern. One approach would be to allow states to adopt whatever standards they deem appropriate. I tend to favor this, as does Bill Rehnquist, I believe. An alternative approach would be to impose certain limits on punitive or presumed damages. You favor elimination of punitive damages altogether and I think Byron would agree to some limits on damages. Perhaps the differences on punitive damages limits are irreconcilable, but as I understand your circulating draft, you place primary reliance on Due Process to reach your result rather than the First Amendment.

In any event, with some fairly minor changes to parts I-III of your circulating draft, it would effectively hold that Gertz applies only to speech involving public issues and, therefore, does not require a showing of the New York Times type of actual malice in this case. I strongly suspect you could get the additional four votes for that approach, even if not all the same votes were available for the punitive damages aspect. I would certainly be able to join at least parts I-III, and I believe the others would as well.

In addition to some minor suggestions on pages 1, 3, and 5, I would think the first paragraph on page 8 could be revised more or less along the following lines:

"In this case there is no need to define precisely the forms of expression on matters of public importance that qualify for the constitutional protections set forth in Gertz. Cf. Rosenbloom, supra, at 44-45. In accord with the state courts quoted supra, at 5, I think it is clear that the libelous speech at issue here implicates the First Amendment at most only tangentially. Petitioner's credit reporting is not directed at subjects

related to government or other matters of general public concern. There is no credible argument that this sort of speech requires special protection to assure that 'debate on public issues [will] be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, 376 U.S., at 270. Indeed, petitioner's subscription agreement itself prevented clients from disseminating the credit information. This sort of credit reporting is speech solely in the economic interests of the speaker and its business audience, cf. Central Hudson Gas & Elec., 447 U.S., at 561, and this interest warrants no special protection when-- as in this case-- the speech is wholly false and clearly damaging to the victim's reputation. These factors clearly placed petitioner's credit reporting in 'a subordinate position in the scale of First Amendment values.' Ohralik, 436 U.S., at 456."

Perhaps it is worth a try.

We will be very glad indeed to have you actively back among us.

Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 19, 1985

No. 83-18 Dun & Bradstreet, Inc.
v. Greenmoss Builders, Inc.

Dear Lewis,

By now you have seen Byron's response to your recirculation. I have also talked to Bill Rehnquist and the Chief Justice and I feel reasonably confident that you will have four votes for your proposed new circulation. Byron would at least be a fifth vote to affirm the judgment which would effectively place the plurality opinion in your hands. Perhaps this is the best we can do but I am certainly with you on your recirculation.

Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 22, 1985

Re: 83-18 Dun & Bradstreet, Inc. v. Greenmoss Builders,
Inc.

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

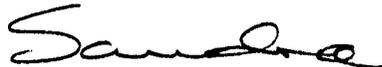
March 29, 1985

No. 83-18 Dun & Bradstreet v. Greenmoss Builders

Dear Lewis,

I agree with all your changes and have no suggestions. I am certainly well satisfied with your draft. I am somewhat concerned that the Chief has not yet joined. I spoke to him about a week ago expressing my earnest hope that he would be joining.

Sincerely,



Justice Powell

cc: Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

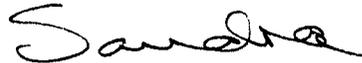
May 9, 1985

No. 83-18 Dun & Bradstreet v. Greenmoss
Builders

Dear Lewis,

Your draft opinion for the plurality looks splendid. I am very happy to join it and think it will be helpful in a number of First Amendment cases in the future.

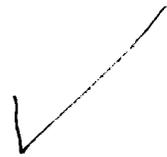
Sincerely,



Justice Powell

cc: Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1985

No. 83-18 Dun & Bradstreet, Inc. v.
Greenmoss Builders, Inc.

Dear Lewis,

I am still in agreement.

Sincerely,

Justice Powell

cc: Justice Rehnquist