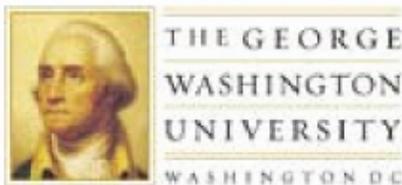


# The Burger Court Opinion Writing Database

*Philadelphia Newspapers, Inc. v. Hepps*  
475 U.S. 767 (1986)

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

February 18, 1986

Re: No. 84-1491 - Philadelphia Newspapers v. Hepps

Dear Bill:

Please take over the assignment in this case.

Regards,

A handwritten signature in black ink, appearing to be 'WB', with a long, sweeping underline that extends to the right and then curves back down.

Justice Brennan

Copies to the Conference

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80 84-18 11

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

CHAMBERS OF  
THE CHIEF JUSTICE

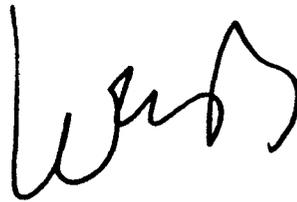
April 16, 1986

85-1491 - Philadelphia Newspapers, Inc. v. Hepps

Dear John:

I join your dissent.

Regards,

A handwritten signature in black ink, appearing to be "J. Stevens", written in a cursive style.

Justice John Stevens

Copies to the Conference

*M*

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 17, 1985

No. 84-1491

Philadelphia Newspapers v. Hepps

Dear Thurgood, Harry and Lewis,

We four are in dissent in the  
above. Would you, Harry, be willing to  
undertake it?

Sincerely,

*B. J.*

Justice Marshall  
Justice Blackmun  
Justice Powell

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

FEB 19 11 13 AM '86

February 18, 1986

No. 84-1491

Philadelphia Newspapers v. Hepps

Dear Chief,

In light of Sandra's change of vote in the above in her memorandum of February 18, am I to make the reassignment? Thurgood, Harry, Lewis and I voted to reverse at Conference and now Sandra makes the fifth.

Sincerely,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

February 19, 1986

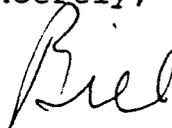
No. 84-1491

Philadelphia Newspapers v. Hepps

Dear Chief,

Sandra will try her hand at an  
opinion for the Court, reversing the  
judgment of the Third Circuit.

Sincerely,



The Chief Justice

Copies to the Conference

1

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

March 28, 1986

No. 84-1491, Philadelphia Newspapers, Inc. v. Hepps

Dear Sandra,

Please join me.

Sincerely,

Bill

Justice O'Connor  
Copies to the Conference

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

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., AP-  
PELLANTS *v.* MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[March —, 1986]

JUSTICE BRENNAN, concurring.

I believe that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false, and thus join the Court's opinion. Cf. *Rosenbloom v. Metromedia*, 403 U. S. 29 (1971). I write separately only to note that, while the Court reserves the question whether the rule it announces applies to non-media defendants, *ante* at 12, n. 4, I adhere to my view that such a distinction is "irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, — U. S. —, — (1985) (BRENNAN, J., dissenting) (quoting *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 777 (1978)).

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

From: Justice Brennan

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Recirculated: APR 7 1986

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., APPELLANTS  
*v.* MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[April —, 1986]

JUSTICE BRENNAN, with whom JUSTICE BLACKMUN joins,  
concurring.

I believe that where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false, and thus join the Court's opinion. Cf. *Rosenbloom v. Metromedia*, 403 U. S. 29 (1971). I write separately only to note that, while the Court reserves the question whether the rule it announces applies to non-media defendants, *ante* at 12, n. 4, I adhere to my view that such a distinction is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, — U. S. —, — (1985) (BRENNAN, J., dissenting) (quoting *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 777 (1978)).

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 15, 1986

84-1491 -

Philadelphia Newspapers, Inc. v. Hepps

Dear Sandra,

I shall await further writing in this  
case.

Sincerely yours,



Justice O'Connor 52 100 1000

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

April 14, 1986

84-1491 -

Philadelphia Newspapers, Inc. v. Hepps

Dear John,

Please join me.

Sincerely yours,



Justice Stevens

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 7, 1986

Re: No. 84-1491-Philadelphia Newspapers v.  
Maurice S. Hepps

Dear Sandra:

Please join me.

Sincerely,



T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 17, 1985

Re: No. 84-1491, Philadelphia Newspapers, Inc. v. Hepps

Dear Bill:

I shall be glad to undertake the dissent in this case.

Sincerely,



Justice Brennan

cc: Justice Marshall  
Justice Powell

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 7, 1986

Re: No. 84-1491, Philadelphia Newspapers, Inc. v. Hepps

Dear Bill:

Please join me in your separate concurring opinion

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 7, 1986

Re: No. 84-1491, Philadelphia Newspapers, Inc. v. Hepps

Dear Sandra:

Please join me. I would feel easier if you would see fit to drop footnote 4 on page 12, but my joinder is not conditioned on this.

Is there something wrong in the ninth line on page 4 of your opinion? I may misread it, but I think the word "falsity" should be "truth." You may also wish to correct the date in the third line on page 10.

Sincerely,



Justice O'Connor

cc: The Conference

①

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

WSB?

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 20, 1986

84-1491 Philadelphia Newspapers v. Hepps

Dear Sandra:

Please join me.

Sincerely,

*Lewis*

Justice O'Connor

lfp/ss

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 WILLIAM H. REHNQUIST

April 14, 1986

Re: 84-1491 - Philadelphia Newspapers, Inc. v.  
Hepps

Dear John:

Please join me in your dissent.

Sincerely,



Justice Stevens

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 JOHN PAUL STEVENS

March 27, 1986

Re: 84-1491 - Philadelphia Newspapers,  
Inc. v. Hepps

Dear Sandra:

As soon as I can get to it, I will try my hand  
at a dissent in this case.

Respectfully,



Justice O'Connor

Copies to the Conference

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

From: **Justice Stevens**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., APPELLANTS  
*v.* MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[April —, 1986]

JUSTICE STEVENS, dissenting.

The issue the Court resolves today will make a difference in only one category of cases—those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today's decision are those who act negligently or maliciously.

The Court, after acknowledging the need to “accommodat[e] . . . the law of defamation and the freedoms of speech and press protected by the First Amendment,” *ante*, at 1 (quoting *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 325 (1974)), decides to override “the common-law presumption” retained by several states<sup>1</sup> that “defamatory speech is false”

<sup>1</sup>See, e. g., *Elliot v. Roach*, 409 N. E. 2d 661, 681 (Ind. App. 1980); *Trahan v. Ritterman*, 368 So. 2d 181, 184 (La. App. 1979); *Parsons v. Gulf & South American Steamship Co.*, 194 So. 2d 456, 460 (La. App.), cert. denied, 389 U. S. 896 (1967); *Madison v. Yunker*, 180 Mont. 54, 61, 589 P. 2d 126, 129-130 (1978), cert. denied, 461 U. S. 945 (1983); *Rogozinski v. Airstream by Angell*, 152 N. J. Super. 133, 146-147, 377 A. 2d 807, 814 (1977), judgment modified by 164 N. J. Super. 465, 397 A. 2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P. 2d 85, 87, 94 (Okla. 1976); *Corabi*

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

From: **Justice Stevens**

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STATISTICS CHANGED THROUGHOUT.  
SEE PAGES: |

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., APPELLANTS  
*v.* MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[April —, 1986]

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE REHNQUIST, join, dissenting.

The issue the Court resolves today will make a difference in only one category of cases—those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today's decision are those who act negligently or maliciously.

The Court, after acknowledging the need to “accommodat[e] . . . the law of defamation and the freedoms of speech and press protected by the First Amendment,” *ante*, at 1 (quoting *Gertz v. Robert Welch, Inc.*, 418 U. S., at 325, decides to override “the common-law presumption” retained by several states<sup>1</sup> that “defamatory speech is false” because of

<sup>1</sup>See, e. g., *Elliott v. Roach*, 409 N. E. 2d 661, 681 (Ind. App. 1980); *Trahan v. Ritterman*, 368 So. 2d 181, 184 (La. App. 1979); *Parsons v. Gulf & South American Steamship Co.*, 194 So. 2d 456, 460 (La. App.), cert. denied, 389 U. S. 896 (1967); *Madison v. Yunker*, 180 Mont. 54, 61, 589 P. 2d 126, 129-130 (1978), cert. denied. *sub nom. Williams v. Pasma*, 461 U. S. 945 (1983); *Rogozinski v. Airstream by Angell*, 152 N. J. Super. 133, 146-147, 377 A. 2d 807, 814 (1977), judgment modified by 164 N. J. Super.

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

From: Justice Stevens

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## SUPREME COURT OF THE UNITED STATES

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., APPELLANTS  
v. MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[April 21, 1986]

JUSTICE STEVENS, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST join, dissenting.

The issue the Court resolves today will make a difference in only one category of cases—those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 347 (1974), he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today's decision are those who act negligently or maliciously.

The Court, after acknowledging the need to “accommodat[e] . . . the law of defamation and the freedoms of speech and press protected by the First Amendment,” *ante*, at 1 (quoting *Gertz v. Robert Welch, Inc.*, 418 U. S., at 325, decides to override “the common-law presumption” retained by several states<sup>1</sup> that “defamatory speech is false” because of

<sup>1</sup>See, e. g., *Elliott v. Roach*, 409 N. E. 2d 661, 681 (Ind. App. 1980); *Trahan v. Ritterman*, 368 So. 2d 181, 184 (La. App. 1979); *Parsons v. Gulf & South American Steamship Co.*, 194 So. 2d 456, 460 (La. App.), cert. denied, 389 U. S. 896 (1967); *Madison v. Yunker*, 180 Mont. 54, 61, 589 P. 2d 126, 129-130 (1978), cert. denied. *sub nom. Williams v. Pasma*, 461 U. S. 945 (1983); *Rogozinski v. Airstream by Angell*, 152 N. J. Super. 133, 146-147, 377 A. 2d 807, 814 (1977), judgment modified by 164 N. J. Super.

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 18, 1986

No. 84-1491 Philadelphia Newspapers v. Hepps

Dear Chief,

At conference on this case I explained that my vote to affirm was very tentative. You assigned the case to me to write. I have reluctantly concluded that the better view is that, in a libel case such as this against a media defendant and involving matters of public concern, the plaintiff is required to prove not only fault but also falsity. This means I am now persuaded the judgment below should be reversed. Unfortunately, the change will necessitate a reassignment of the case as the vote was 5 to 4. I am distressed to be the cause of such a change and can only offer my apologies to all.

Sincerely,



The Chief Justice

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., APPELLANTS  
v. MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[March —, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us once more to "struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 325 (1974). In *Gertz*, the Court held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue. 418 U. S., at 347. Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.

I

Maurice S. Hepps is the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as "Thrifty" stores—selling beer, soft drinks, and snacks. Mr. Hepps, GPI, and a number of its franchisees are the appellees here.<sup>1</sup> Appellant Philadelphia Newspapers, Inc. owns the *Philadel-*

<sup>1</sup>Appellants list nine entities as appellees in the proceedings in this Court: Maurice S. Hepps; General Programming, Inc.; A. David Fried, Inc.; Brookhaven Beverage Distributors, Inc.; Busy Bee Beverage Co.; ALMIK, Inc; Lackawanna Beverage Distributors; N. F. O.. Inc.; and Elemar, Inc. Brief for Appellants ii.

Stylistic Changes Throughout

pp. 4

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 84-1491

PHILADELPHIA NEWSPAPERS, INC., ET AL., APPELLANTS  
*v.* MAURICE S. HEPPS ET AL.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA,  
EASTERN DISTRICT

[April —, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us once more to “struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment.” *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 325 (1974). In *Gertz*, the Court held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue. *Id.*, at 347. Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.

### I

Maurice S. Hepps is the principal stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as “Thrifty” stores—selling beer, soft drinks, and snacks. Mr. Hepps, GPI, and a number of its franchisees are the appellees here.<sup>1</sup> Appellant Philadelphia Newspapers, Inc. owns the Philadel-

<sup>1</sup>Appellants list nine entities as appellees in the proceedings in this Court: Maurice S. Hepps; General Programming, Inc.; A. David Fried, Inc.; Brookhaven Beverage Distributors, Inc.; Busy Bee Beverage Co.; ALMIK, Inc; Lackawanna Beverage Distributors; N. F. O., Inc.; and Elemar, Inc. Brief for Appellants ii.

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

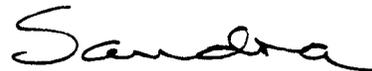
April 7, 1986

No. 84-1491 Philadelphia Newspapers, Inc. v. Hepps

Dear Harry,

Thank you for your joinder. I will correct the date and the sentence on p. 4 in the next draft, although I prefer to keep footnote 4, at least for the present.

Sincerely,



Justice Blackmun

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

April 22, 1986

No. 84-1672 Hepps v. Philadelphia Newspapers  
(Hold memo for No. 84-1491)

MEMORANDUM TO THE CONFERENCE

This appeal was held for No. 84-1491, Philadelphia Newspapers, Inc. v. Hepps, which was handed down on Monday, March 21st.

No. 84-1672 is styled as a cross-appeal from No. 84-1491, and the facts and parties are therefore the same. Of relevance to this case but not 84-1491 is that the trial court found insufficient evidence on which to submit to the jury the issue of actual malice, and thus of punitive damages. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (actual malice necessary to obtain punitive damages in private-figure case involving speech of public concern).

The Pennsylvania Supreme Court affirmed the trial court's decision not to instruct on punitive damages, and stated that its "thorough review of the record," app. to Juris. Statement A-25, convinced it that "there was no basis for the jury to have concluded that the publication was made with [either] the knowledge of the falsity of its content [or] ... with reckless disregard of the truth of its content." Id., at A-26. See New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1963) (actual malice is a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not").

On the merits, the decision in No. 84-1491 is not particularly helpful in determining how to resolve No. 84-1672. No. 84-1672 does not involve a challenge to the standard for determining actual malice, but rather to the application of that standard and it is fact specific. In addition, in light of the fact that the jury found no negligence when instructed that the plaintiff bore the burden of proving the falsity of the statements before recovering, it would be quite difficult for the same jury to have found actual malice.