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ON March 6, 1981, the Virginia Supreme Court decided *Fleming* v. *Moore*[1], an important case affecting many aspects of defamation law. The court held, *inter alia*, that one does not become a public figure for purposes of the stringent *New York Times Co.* v. *Sullivan*[2] "actual malice" test merely by speaking out in a public forum in defense of one's private rights. This article examines the analysis employed to reach that conclusion and explores the ruling's possible ramifications.

Evolution of Constitutional Constraints on State Defamation Law

In *New York Times* the U.S. Supreme Court held that the first and fourteenth amendments prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves "with convincing clarity"[3] that the statement was made "with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[4] The defendant cannot be deemed reckless simply because a reasonably prudent person would have investigated the facts more thoroughly before publishing. Rather, the defendant must have published the defamatory statement with a "high degree of awareness of . . . [its] probable falsity."[5] In other words, for liability to attach, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[6]

Curtis Publishing Co. v. *Butts* and *Associated Press* v. *Walker*[7] extended the *New York Times* rule to nonofficial public figures. The "actual malice" test's ambit expanded still further in the wake of *Rosenbloom* v. *Metromedia*[8], a 1971 case in which a plurality of the justices announced a shift in focus from the status of the plaintiff to the nature of the defendant's statements. Under the *Rosenbloom* plurality's view, if an allegedly defamatory statement involved "matters of public or general concern,"[9] *New York Times* controlled, regardless of whether the plaintiff was a public or a private figure.

The *Rosenbloom* approach was repudiated in 1974 when the Court decided *Gertz* v. *Robert Welch, Inc.*[10] As a result of *Gertz*, the plaintiff's status again became crucial. The *Gertz* majority held that the Constitution does not require a defamation plaintiff who is neither a public official nor a public figure to prove *New York Times* "actual malice." "[S]o long as they do not impose liability without fault," the Court concluded, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[11] The Court provided two principal reasons for establishing different constitutional standards for public and private persons. First, because public officials and public figures usually enjoy greater access to channels of communication than private citizens, they have better opportunities to rebut falsehoods. Defamation therefore poses a larger threat to private persons, which gives the state a correspondingly greater interest in affording them the protection of its tort law. Second, unlike public officials and public figures, private persons do not invite attention and comment. Not having voluntarily assumed the risk of defamation, they are more deserving of judicial redress than public officials and public figures.

Gertz's public person private person dichotomy remains the touchstone for imposing liability in media defamation cases. If the plaintiff is classified as a public official or a public figure, he must perform the next-to-impossible task of proving "actual malice"; if he is a private figure, some lesser showing of fault will satisfy the Constitution's requirements. Public officials are fairly easy to identify.[12] But what makes someone a public rather than a private figure?

Constitutional Tests For Distinguishing Between Public and Private Figures

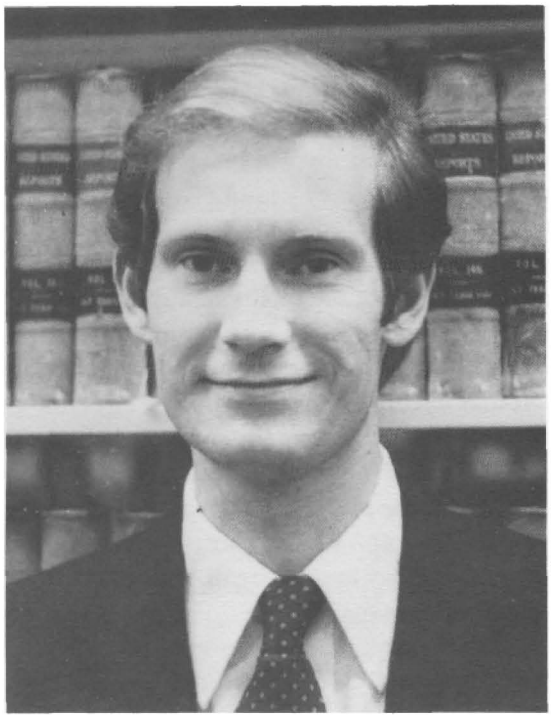
Prior to *Gertz*, *Butts* and *Walker* prescribed the tests for determining whether a given plaintiff was a public or a private figure. Butts, a nationally prominent athletic director and football coach, acquired his public-figure status "by position alone."[13] Walker, a retired general who made anti-integration speeches and headed a group that shared his views, became a public figure when he engaged in "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[14]

Gertz refined the classification analysis by dividing public figures into two major categories. The first consists of persons who are considered public figures for all purposes. Falling within this group are those who, having "assumed roles of especial prominence in the affairs of society,"[15] occupy "positions of . . . persuasive power and influence"[16]; those who have achieved "pervasive fame or notoriety"[17]; and those who have become "pervasive[ly] involve[d] in the affairs of society."[18] The second category consists of persons who are deemed public figures vis-à-vis specific subjects. These limited-purpose public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[19] Whether a plaintiff belongs in this class depends upon the nature and extent of his involvement in the dispute giving rise to the alleged defamation. To date most of the case law has developed in connection with the second category.[20]

The plaintiff in *Gertz* was a lawyer for suitors seeking civil damages from a policeman who had killed a member of their family. A John Birch Society publication alleged that the plaintiff had framed the policeman on criminal charges. The magazine also falsely accused the plaintiff of having Communist affiliations and a criminal record. The Supreme Court found that although Gertz was prominent in legal circles, he was not sufficiently well-known to be a public figure for all purposes. After examining Gertz's role in the particular controversy that prompted the magazine article, the Court likewise concluded that he fell outside the limited-purpose public-figure class. While it was true that Gertz voluntarily participated in a newsworthy lawsuit, he limited his activities to the representation of his client's private interests; he did not try to influence the resolution of broader issues affecting the public as a whole. Moreover, Gertz stayed within the boundaries of an official forum (a courtroom) instead of trying his case in the news media. Therefore the Court characterized him as a private figure and freed him of the burdens of *New York Times*.

Time, Inc. v. *Firestone*[21] also involved a plaintiff who attracted media attention by taking action in a public forum. Once again the forum was a courtroom. The plaintiff and her husband, both of whom were prominent members of Palm Beach society, became embroiled in a well-publicized divorce proceeding. *Time* erroneously reported that the Firestones' divorce was granted on grounds that included adultery. Mrs. Firestone sued *Time* for defamation and managed to persuade the Supreme Court that, despite her local notoriety and her contacts with the press, she was a purely private figure. The Court was influenced by the fact that, although the public may have been interested in Mrs. Firestone's marital difficulties, the divorce litigation that led to *Time's* article implicated only private rights. Mrs. Firestone did not air her private problems in court because she wanted to serve the common weal; rather, she did so because the state compelled her to go there in order to obtain release from the bonds of matrimony. "There appears little reason," said the Court, why persons in Mrs. Firestone's position "should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom."[22] Nor should they lose that protection simply because they hold press conferences, provided the briefings' purpose is to satisfy "inquiring reporters" and not to influence the lawsuit's outcome.[23]

Since *Firestone* the Supreme Court has decided two defamation cases raising the plaintiff-classification issue: *Hutchinson* v. *Proxmire*[24] and *Wolston* v. *Reader's Digest Ass'n, Inc.*[25]. The plaintiff in *Hutchinson* alleged that his professional reputation was injured when Senator William Proxmire cited his federally funded research projects as examples of wasteful government spending. The Court held that because Hutchinson was not a public figure *prior* to the controversy sparked by Senator Proxmire's "Golden Fleece of the Month" Award, he did not have to prove "actual malice" in order to recover libel damages. Although Hutchinson had applied for federal funds and had published articles about his research before Proxmire made the allegedly defamatory statements, he had not invited attention and comment outside the relatively narrow circle of his academic discipline. Nor had he thrust himself or his views into a public controversy over government expenditures in order to influence others. Hutchinson's work did not become controversial in any public sense until after the Award was announced. The Award did not alter Hutchinson's private status, the Court held, reasoning that one charged with defamation cannot unilaterally create his own defense by showering the plaintiff with unwanted publicity. The mere fact that the news media reported Hut-



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chinson's response to Proxmire's criticism did not make him any less private. To fit within the Court's definition of a public figure, one must have "regular and continuing access to the media,"[26] which Hutchinson plainly lacked.

The plaintiff in *Wolston* was also found to lack the characteristics of a public figure. In the late 1950s, Wolston had failed to respond to a grand-jury subpoena issued in connection with a major Soviet spy ring investigation. Amid considerable publicity, he pled guilty to a contempt charge and received a suspended sentence. He sued for libel in response to a 1974 publication that referred to him as a Soviet agent. The Supreme Court held that neither Wolston's involvement in a newsworthy event nor his conviction of a crime made him a public figure. The investigation of Soviet activity in the United States created a public controversy, to be sure, but Wolston did not voluntarily thrust himself into the fray so as to draw attention to himself and his views. On the contrary, he was "dragged unwillingly"[27] into court and forced to defend his private rights. For reasons similar to those articulated in *Firestone*, the Court in *Wolston* refused to attach a *New York Times* price tag to the plaintiff's use of a public forum.

Having examined the leading U.S. Supreme Court cases, we must now turn to the Virginia Supreme Court's interpretation of the constitutional principles governing the classification of defamation plaintiffs.

Fleming v. Moore: Defamation Law and the Protection of Private Rights in Public Forums

At the time of the alleged defamation, the plaintiff (Moore), a white assistant professor, was a member of the University of Virginia faculty. His home was located in Albemarle County adjacent to "Evergreen," a tract partly owned by the defendant (Fleming), a black real-estate broker and developer. Fleming sought to have "Evergreen" rezoned so he could construct high-density residential units for a predominantly black, lower-middle income group of occupants.

Moore spoke briefly in opposition to the proposed rezoning and development at two meetings held by the local Planning Commission and Board of Supervisors. He contended that Fleming's project would create a pollution hazard to the Rivanna Reservoir, which supplies water to the city of Charlottesville, and complained that it would also diminish the value of his own property. Moore made no other public pronouncements on the subject and never discussed it with the news media.

After Fleming's rezoning application was rejected, he published newspaper advertisements captioned "RACISM" in which he accused Moore of not wanting blacks to reside within sight of his home. Moore sued for libel and recovered $10,000 in compensatory damages and $100,000 in punitive damages following a jury trial. The Virginia Supreme Court reversed on the ground that the trial court erred in deeming Fleming's statements defamatory *per se* and remanded the case for a new trial. In the course of its opinion, the court dealt with various issues that might arise upon retrial, including the important question of whether Moore was a public or a private figure.

The court summarily rejected the notion that Moore occupied a position of such power and influence that he qualified as a public figure for all purposes. Focusing upon the nature and extent of Moore's participation in the controversy surrounding Fleming's rezoning application, the court concluded that he was not a limited-purpose public figure either. Thus, the *New York Times* test did not apply, and Moore was permitted to recover upon proof of a lesser degree of fault than "actual malice."[28]

The court emphasized that Moore expressed his opinions to the zoning authorities "in his capacity as an adjoining private landowner whose property might be affected by the proposed development."[29] Although he may have shared Charlottesville residents' anxiety about the project's effect on the community as a whole, "his use of the public forum *substantially* resulted from his desire to protect his *private* interests."[30] His solicitude toward the public's welfare was ancillary to concern for his own well-being. In the court's view, Moore, like Mrs. Firestone, had done nothing more than avail himself of the state's private dispute-resolution mechanism, as was his undoubted privilege. Application of *New York Times* to people in Moore's position might deter them from exercising their right of access to a public forum. Hence, the court ruled, one who resorts to a judicial or an administrative tribunal solely or substantially for the purpose of vindicating private rights remains a private figure exempt from *New York Times'* limitations on recovery for defamation.

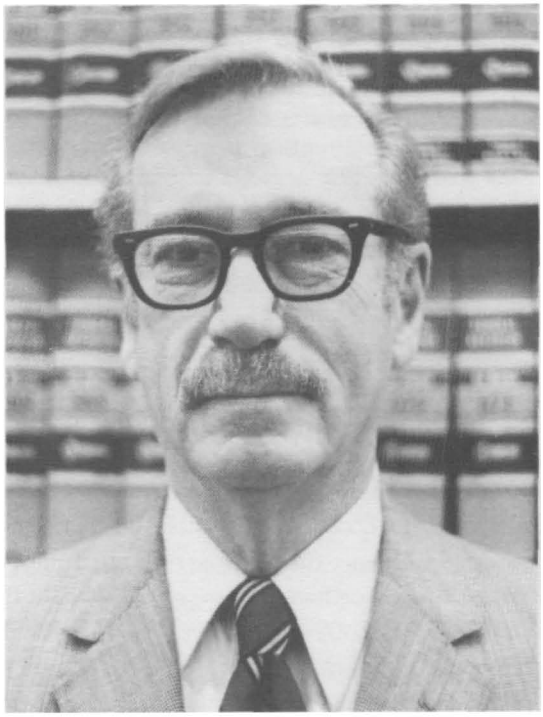
What the Virginia Supreme Court did in *Fleming* v. *Moore* was grant defamation plaintiffs protection analagous to that which defendants have long enjoyed under the rubric of absolute or qualified privilege. Relevant statements made during the course of judicial proceedings are absolutely privileged and thus are never actionable.[31] Participants in informal administrative hearings enjoy a qualified privilege.[32] To defeat the privilege, the plaintiff must prove the defendant acted maliciously. In other words, his communication must have been "actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or . . . such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff."[33] Privileges enable potential defendants to speak their minds before judicial and administrative bodies without having to worry unduly about having to pay defamation damages. *Fleming* v. *Moore* encourages similar candor on the part of potential plaintiffs, for it allows them to petition their government for redress of private grievances without automatically giving the press or their opponents a *New York Times* license to defame.

Classifying Plaintiffs in Particular Situations Involving Use of Public Forums

Firestone, *Wolston*, and *Fleming* tell us that ordinarily only private interests are at stake when married individuals sue for divorce, when accused persons defend themselves against charges of criminality, and when affected landowners object to rezoning proposals. Applying *Wolston*, the U.S. District Court for the Western District of Virginia held in *Mills* v. *Kingsport Times-News* that a woman who had been prosecuted for murdering her husband was a private figure since she "did not inject herself into the homicide trial to attract attention or influence a public controversy."[34] The district court went on to say that "mere newsworthiness is not enough to bestow the public figure status on a criminal defendant, rather, the person must invite the situation as a means to create an atmosphere for public discussion."[35] Along similar lines, the U.S. Court of Appeals for the Eighth Circuit recently held that an attorney does not acquire public-figure status by virtue of being involved in bar disciplinary proceedings.[36]

In each of the cases described above, there existed no *public controversy into which the defamation plaintiff* could have thrust himself. How does one distinguish between *public and private controversies?* The U.S. Court of Appeals for the District of Columbia Circuit has offered some useful guidelines:

> A public controversy is not simply a matter of interest to the public; it must be a real dispute,



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> the outcome of which affects the general public or some segment of it in an appreciable way. . . .[E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention. . . .Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.[37]

A member of the general public probably would not feel any ramifications if a tribunal decided to rezone an area where he neither owns nor uses property. But he would experience some effects if an agency were persuaded to take action affecting a system that furnishes water to the whole community. Water policy therefore fits squarely within the definition of a public controversy. Were a person to assert his position on water policy before a legislative, judicial, or administrative body, his use of that forum to influence the controversy's outcome might provide the "thrusting forward" necessary to make him a limited-purpose public figure. *In Yiamouyiannis v. Consumers Union of the United States, Inc.*[38], for example, an active opponent of fluoridation of public water supplies was held to be a public figure in part because he testified against fluoridation before congressional committees and a state court.

We should note, however, that while a person can become a public figure by speaking out on a public issue in a public forum, the cases do not specify how vocal he must be to trigger *New York Times*. The plaintiff in *Yiamouyiannis* wrote numerous articles and served as an officer of an anti-fluoridation organization in addition to giving testimony. Whether the court still would have considered him a public figure had he merely voiced his opinions before official bodies remains an open question. Likewise, the majority opinion in *Fleming* does not indicate whether the Virginia Supreme Court would have classified Moore as a public figure had he opposed Fleming's housing project solely on the ground that it might endanger the community's water supply. Such a designation seems improbable in light of Moore's quite limited advocacy. He spoke "briefly" on only two occasions[39], exerting little if any leadership. To use the D.C. Circuit's test, it is highly unlikely that "a reasonable person would have concluded" that Moore "was seeking to play a major role in determining the outcome"[40] of the controversy over "Evergreen's" impact on the Rivanna Reservoir. Therefore, even under the alternative scenario his status would have been private.

Certain language in *Fleming* does suggest, however, that a person can lose his private status by engaging in additional advocacy outside official forums. The court took pains to point out that Moore refrained from soliciting media attention or otherwise instigating public opposition to Fleming's proposal.[41] In that regard his conduct was distinguishable from the behavior of the plaintiff in *DiLeo v. Koltnow*[42], a recent decision of the Colorado Supreme Court. After being fired from the police force, DiLeo filed several lawsuits seeking reinstatement and redress for alleged violations of his civil rights. Had he been content to pursue his legal remedies in police department hearings and court actions, the dispute would have remained a private matter. However, DiLeo expressly requested news coverage, explaining to reporters that he believed his lawsuits were newsworthy and should be brought to the public's attention. Unlike Mrs. Firestone's press conferences, DiLeo's contacts with journalists were designed to improve his chances of successfully prosecuting his legal claims. By stimulating and encouraging media interest, he transformed an employment squabble into a *cause célèbre*, elevating what was initially a private disagreement into a public controversy. In so doing, he "voluntarily exposed himself to the increased risk of injury to his reputation resulting from defamatory falsehoods concerning his fitness as a police officer."[43] By carrying the dispute beyond the bounds of official forums, DiLeo made himself a public figure.

Conclusion

Fleming v. *Moore* adds a helpful gloss to the U.S. Supreme Court's tests for classifying defamation plaintiffs. The case stands for the proposition that, provided a person conducts his advocacy inside a public forum, he can speak out in defense of his private rights without setting himself up as a target for careless purveyors of defamatory falsehoods. Insofar as *Fleming* fosters uninhibited recourse to official modes of dispute resolution the decision represents a significant step forward.

Footnotes

1. 221 Va. 884, 275 S.E.2d 682 (1981).
2. 376 U.S. 254 (1964).
3. *Id.* at 285-86. The Court has since used the "convincing clarity" standard interchangeably with the "clear and convincing proof" test. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).
4. *New York Time Co. v. Sullivan*, 376 U.S. at 280.
5. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).
6. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
7. 388 U.S. 130 (1967).
8. 403 U.S. 29 (1971).
9. *Id.* at 44.
10. 418 U.S. 323 (1974).
11. *Id.* at 347.
12. For purposes of applying *New York Times*, public officials are those persons "among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or

control over the conduct of governmental affairs." The applicable test is whether "a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." *Rosenblatt* v. *Baer*, 383 U.S. 75, 85-86 (1966). *See also Arctic Co., Ltd.* v. *Loudoun Times Mirror*, 624 F.2d 518, 521-22 (4th Cir. 1980), *cert. denied*, 101 S. Ct. 897 (1981).

13. *Curtis Publishing Co.* v. *Butts*, 388 U.S. at 155.

14. *Id.*

15. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 345.

16. *Id.*

17. *Id.* at 351.

18. *Id.* at 352.

19. *Id.* at 345.

20. The Court in *Gertz* alluded to a third group: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345. This concept was ignored in later cases. *See, e.g., Wolston* v. *Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164-65 (1979); *Time Inc.* v. *Firestone*, 424 U.S. 448, 453-55 (1976).

21. 424 U.S. 448 (1976).

22. *Id.* at 457.

23. *Id.* at 454-55 n.3.

24. 443 U.S. 111 (1979).

25. 443 U.S. 157 (1979).

26. *Hutchinson* v. *Proxmire*, 443 U.S. at 136.

27. *Wolston* v. *Reader's Digest Ass'n, Inc.*, 443 U.S. at 166.

28. The court's opinion did not explicitly state what standard of fault is to govern the case on remand. However, the court did say that "since Fleming is not a media defendant and Moore is not a public figure, *Gertz* does not control." 221 Va. at 893, 275 S.E.2d at 638. In light of that statement and the absence of references to proof of fault, one can reasonably infer that common-law strict liability will apply on remand. Thus, Moore will be able to recover compensatory damages if he proves Fleming's statements defamed him and caused him actual injury.

We find the court's treatment of the fault question perplexing, to say the least. It is true, as the court points out, *Id.*, that *Hutchinson* contains a footnote saying the U.S. Supreme Court has never decided whether the *New York Times* standard ever applies to individual defendants as well as to media defendants. 443 U.S. at 133-34 n. 16. But the *Hutchinson* footnote speaks in very broad terms; it does not purport to contain an exhaustive summary of the Court's defamation rulings. The footnote fails to mention that in *New York Times* itself the Supreme Court held the "actual malice" test applies to at least one type of individual defendant: a person who places a paid "editorial advertisement" in a newspaper. 376 U.S. at 266, 285-86. With regard to libel actions brought by public officials or public figures, *New York Times* establishes beyond peradventure that individuals who advertise in the media occupy the same constitutional status as newspaper publishers, broadcasters, and other media defendants. Logic dictates that if we do not differentiate between media-using individual defendants and media defendants proper when the plaintiff is a public official or a public figure, we should not do so when the plaintiff is a private figure.

Fleming's allegedly defamatory statements were contained in a paid "editorial advertisement" run in two newspapers. *See* 221 Va. at 887-88 n.2, 275 S.E.2d at 634-35 n. 3. Heavily political in tone, Fleming's advertisement, like the one placed by the civil rights leaders who were the individual defendants in *New York Times*, "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses." 376 U.S. at 266. Such publications must receive constitutional protection, the Court declared, because "[a]ny other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." *Id.* Given these policy consideration, Fleming seemingly was entitled to the same constitutional safeguards that the *Charlottesville-Albemarle Tribune* and *The Cavalier Daily* would have enjoyed had Moore chosen to sue them. Without question *Gertz* would have applied to suits against the two newspapers. Therefore, we can only express puzzlement over the Virginia Supreme Court's assertion that *Gertz* afforded no protection to Fleming's advertisement.

29. *Fleming* v. *Moore*, 221 Va. at 892, 275 S.E.2d at 637.

30. *Id.* (emphasis supplied).

31. *Watt* v. *McKelvie*, 219 Va. 645, 248 S.E.2d 826 (1978).

32. *Elder* v. *Holland*, 208 Va. 15, 155 S.E.2d 369 (1967).

33. *Preston* v. *Land*, 220 Va. 118, 120-21, 255 S.E.2d 509, 511 (1979), *quoting Chesapeake Ferry Co.* v. *Hudgins*, 155 Va. 874, 902, 156 S.E. 429, 439 (1931).

34. 475 F. Supp. 1005, 1009 (W.D. Va. 1979).

35. *Id.*

36. *Littlefield* v. *Fort Dodge Messenger*, 614 F.2d 581 (8th Cir.), *cert. denied*, 445 U.S. 945 (1980).

37. *Waldbaum* v. *Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied*, 101 S.Ct. 266 (1980) (footnote omitted).

38. 619 F.2d 932 (2d Cir.), *cert. denied*, 101 S.Ct. 117 (1980).

39. *Fleming* v. *Moore*, 275 S.E.2d at 634.

40. *Waldbaum* v. *Fairchild Publications, Inc.*, 627 F.2d at 1298.

41. *Fleming* v. *Moore*, 275 S.E.2d at 634, 637.

42. ____ Colo. ____, 613 P.2d 318 (1980).

43. *Id.* at 322.