Freedom of the Press Box: Classifying High School Athletes under the Gertz Public Figure Doctrine

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Recommended Citation
Jonathan Deem, Freedom of the Press Box: Classifying High School Athletes under the Gertz Public Figure Doctrine, 108 W. Va. L. Rev. (2006).
Available at: https://researchrepository.wvu.edu/wvlr/vol108/iss3/12

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I. INTRODUCTION

Americans are fascinated with sports. Every week thousands of fans cram into stadiums while millions more stay glued to their television sets to watch athletes battle on the field of competition. Television and other forms of mass communication grant fans unprecedented access to athletes.¹ This massive exposure coupled with a high demand for in-depth news reporting has fostered a trend in sports journalism that focuses on every aspect of athletes’ lives.² In the

² Id. at 527.
past, the press limited its commentary to athletes’ performances on the field. In those days, the press shielded athletes from public comment unrelated to athletics. Today, statistics, injuries, and trades are still a central focus of sports reporting, but at times, the sports page takes on an almost tabloid appearance. An athlete’s professional and personal escapades are now fair game for analysis and criticism from the press.

Supporting this trend in journalism is a legal doctrine that protects the press from libel suits when reporting on athletes. Constitutional safeguards require public figures to prove with clear and convincing evidence that false defamatory communications were published maliciously to recover for libel. The public or private status of a defamation plaintiff, therefore, is often the primary focus of libel litigation, and is a significant hurdle for plaintiffs to overcome. Accordingly, public figures rarely sue for defamation because the chances of recovery are slight. Courts will almost always find professional and college athletes to be public figures. As a result, the sports media enjoys a near immunity from libel suits because pro and college athletes rarely sue for defamation.

A more difficult question is whether or not publications concerning high school athletes are similarly protected. High school coaches have pressed libel suits, but defamation law concerning high school athletes is largely undeveloped. As a practical matter, the public or private status of a high school athlete is a rare question for courts. However, television’s increased interest in amateur sports combined with a changing atmosphere of high school athletics may lead

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3. *Id.*

4. A knowing press once reported that Babe Ruth’s absence from baseball was due to a belly ache. In reality, Ruth was suffering from venereal disease. *Id.* at 527 n. 2.

5. An obvious example of this phenomenon is press coverage of the Kobe Bryant sexual assault trial. In 2003, Bryant was accused of sexually assaulting a nineteen year old female at a Colorado Springs resort. The drama of Bryant’s arrest and subsequent trial received massive media coverage and dominated sports pages. During the 2004 NBA playoffs, reports of Bryant’s legal troubles often overshadowed coverage of Bryant’s performances on the court.


8. Nat Stern, *Unresolved Antithesis of the Limited Purpose Public Figure Doctrine*, 33 Hous. L. Rev. 1027, 1028 (1996). “Perhaps no element more frequently determines the outcome of defamation suits than the plaintiff’s designation as either a public or private figure.” *Id.*


11. See Craige, *supra* note 1, at 548. Craige notes that Michael Jordan did not file suit for libel when it was widely reported that his father’s death was linked to Jordan’s gambling debts.

to an increase in libel suits involving high school athletes.\textsuperscript{13} \textit{Wilson v. Daily Gazette Co.},\textsuperscript{14} a recent decision of the West Virginia Supreme Court of Appeals, held that a prominent high school athlete was not a public figure.\textsuperscript{15} The sporting press should take special notice of this decision. \textit{Wilson} suggests the possibility that the tabloid freedom the sports media enjoys while reporting on professional and college athletes does not extend to the high school ranks. If courts begin to systematically treat high school athletes as private figures, reporters publishing controversial stories about high school athletes will be forced to tread lightly for fear of libel suits.

It is crucial for the press to be able to predict with accuracy how courts will rule on the status of plaintiff athletes.\textsuperscript{16} A lack of clear rules to guide reporters may “chill” the press or result in needless litigation.\textsuperscript{17} Similarly, a defamed high school athlete cannot properly assess the costs or benefits of a libel suit if she cannot accurately predict how the court will rule on her status.\textsuperscript{18} Direction is needed, therefore, to inform the press of its responsibilities when reporting on high school athletes, and to guide potential plaintiffs considering defamation suits. The purpose of this Note is to clarify when a high school athlete will be considered a public figure.

Section II of the Note will provide a brief overview of defamation law, beginning with its common law roots and ending with the Supreme Court’s articulation of the public figure doctrine in \textit{Gertz v. Robert Welch, Inc.} Section III will take a close look at how courts have applied the public figure doctrine post-\textit{Gertz}. Section IV will show how courts traditionally apply the \textit{Gertz} public figure tests to athletes. Finally, Section V will examine how the West Virginia Supreme Court of Appeals applied the public figure tests to a high school athlete in \textit{Wilson} and will suggest what facts must be shown to prove that a high school athlete is a public figure.

II. THE LAW OF DEFAMATION AND THE RISE OF THE PUBLIC FIGURE DOCTRINE

It has been said that an “individual’s right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of or-

\textsuperscript{14} 588 S.E.2d 197 (W. Va. 2003).
\textsuperscript{15} \textit{Id.}
\textsuperscript{16} See Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 (D.C. Cir. 1980) (discussing the importance of a clear test for public figures); Mark D. Walton, \textit{The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations}, 16 N. ILL. U. L. REV. 141, 147 (1995) (a lack of clear guidelines leads to self-censorship in the media).
\textsuperscript{17} Waldbaum, 627 F.2d at 1293.
\textsuperscript{18} \textit{Id.}
dered liberty.”

Accordingly, protecting individual reputation from defama-
tory speech is a fundamental concept that evolved throughout many generations. Defamation law may be traced back as far as the time of Alfred the Great.\(^{20}\) In those days, defamation was remedied by cutting out the offender’s tongue.\(^{21}\) Although undoubtedly effective at deterring defamatory speech, this practice eventually gave way to a less barbaric approach. The foundation of the modern tort of defamation was laid in the common law courts of England in the seventeenth century.\(^{22}\) Modern defamation law, as it is practiced in this country, is a unique and oftentimes confusing area of civil law.

A. The Common Law of Defamation

The tort of defamation in its present form is unique in that it consists of a mix of common law rules, state statutory reforms, and constitutional doctri-


\(^{21}\) Id.

\(^{22}\) Id.

\(^{23}\) ROYDEN A. SMOLLA, LAW OF DEFAMATION § 1:6 (1986).

\(^{24}\) RESTATEMENT (SECOND) OF TORTS § 559 (2000).

\(^{25}\) Id. § 558. The Restatement defines publication as “communication intentionally or by a negligent act to one other than the person defamed.” Id.

\(^{26}\) SMOLLA, supra note 23, § 1:7.

\(^{27}\) The Supreme Court has held that, “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

\(^{28}\) RESTATEMENT (SECOND) OF TORTS § 568 (2000).

\(^{29}\) Id.

\(^{30}\) SMOLLA, supra note 23, § 1:04. Most Americans were illiterate in the early days of the Republic. The written word was viewed with an awesome respect and written defamation was
tinction is awkward and often difficult to apply. Its only relevance rests in the fact that the prevailing common law requires plaintiffs to plead and prove “special damages” in an action for slander, unless the slander is slander per se. A slander is slander per se if it imputes to another a criminal offense, a loathsome disease, matters incompatible with her profession, or serious sexual misconduct.

A person accused of defamation may avoid liability if she can prove that the defamatory communication was factually true. Other defenses to defamation include a mix of common law absolute and qualified privileges. Absolute privileges are a complete defense to a claim of defamation. Consent of another to the publication of defamatory matter is an example of an absolute privilege. Other absolute privileges apply to publications relating to judicial matters, legislative proceedings, executive publications, publications between spouses, and publications required by law. Qualified, or conditional, privileges attach principally to communications published to protect the interests of a publisher, the interests of a third person, family members, or matters of important public interest. These privileges serve as a defense to defamation as long as they are not abused by the publisher. A publisher of defamatory matter abuses a qualified privilege if she knows the information is false or publishes with a reckless disregard as to falsity.

B. The Rise of the Public Figure Doctrine

It is important to understand the common law of defamation because defamation is still largely a matter of state tort law. A line of Supreme Court cases, however, superimposes First Amendment constitutional doctrines atop the common law and requires states to hold certain defamation plaintiffs to a...
higher standard of proof. The genesis of this doctrine is found in New York Times Co. v. Sullivan. In New York Times, the Supreme Court held that persons who hold public office must prove defamatory statements were published with "actual malice" to recover for defamation. A false communication is made with "actual malice," the Court said, when it is published knowingly or with reckless disregard for whether it is false. Holding public officials to this higher standard of proof was necessary, the Court felt, to safeguard the freedom of the press guaranteed by the First Amendment and to prevent self-censorship on matters of public importance.

Curtis Publishing Co. v. Butts, and its companion case Associated Press v. Walker, extended the rule of New York Times to include public figures as well as public officials. Freedom of discussion, the Court reasoned, "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period." The Court felt, therefore, that publications concerning well-known figures connected to areas of public interest warranted constitutional protection from the dangers identified in New York Times. The public versus private dichotomy created by Butts was soon placed aside, however. In Rosenbloom v. Metromedia, the Court extended the application of the New York Times burden of proof to protect any defamatory falsehoods related to matters of general or public interest. This holding provided the media with a fantastic level of protection from libel suits. Rosenbloom proved to be short lived, however.

Three years later in Gertz v. Robert Welch Inc., the Court expressly rejected the public interest test and announced a return to the rules of New York

44 Id. at 279-80.
45 Id.
46 Id. The Court stated, constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves 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.
47 388 U.S. 130 (1967).
48 Id. at 154.
49 Id. at 147 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).
50 Id. at 155.
51 403 U.S. 29 (1971).
52 Id.
Times and Butts.\textsuperscript{55} Elmer Gertz, the plaintiff, filed suit for libel in response to a magazine article portraying him as the architect of a Communist plot to discredit the Chicago Police.\textsuperscript{56} Gertz, a Chicago lawyer, had been hired to represent the family of a slain youth in civil litigation against a Chicago policeman responsible for the boy’s death.\textsuperscript{57} The defendant was the publisher of American Opinion, a magazine that served as an outlet for the views of the John Birch society.\textsuperscript{58} An article in that magazine covering the criminal trial of the policeman portrayed Gertz as a Leninist and a criminal.\textsuperscript{59} These statements and others about Gertz were false, and the managing editor of American Opinion made no effort to substantiate the claims or verify their accuracy.\textsuperscript{60}

Gertz sued the publisher, claiming the defamatory falsehoods injured his reputation as a lawyer and a citizen.\textsuperscript{61} In his defense, the publisher asserted that Gertz was a public official or a public figure and invoked the New York Times privilege.\textsuperscript{62} After hearing evidence on the issue, the District Court found that Gertz was neither a public official nor a public figure.\textsuperscript{63} Nevertheless, the court anticipated the reasoning of Rosenbloom and held that the New York Times privilege protected the publication because the article addressed an issue of public interest.\textsuperscript{64} The Seventh Circuit agreed on appeal and read the Supreme Court’s intervening opinion in Rosenbloom as requiring the application of the New York Times standard to “any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed . . . .”\textsuperscript{65}

The Supreme Court reversed and, in so doing, revived the public/private dichotomy of Butts.\textsuperscript{66} The Court reasoned that the public interest tests of Rosenbloom failed to properly accommodate a balance between the need for a free,

\begin{footnotesize}
\textsuperscript{55} Id. at 342. Gertz also significantly altered other areas of the common law of defamation. The other rules announced in Gertz are as follows: (1) Private, as well as public, figures must base suits for defamation upon a showing of fault; (2) Presumed damages are not permitted absent a showing of actual malice, and “actual injury” must be proven before damages can be awarded; (3) punitive damages may not be awarded absent proof of actual malice; and (4) the expression of opinion is afforded constitutional protection. Id. at 347-50. Numbers (2) and (3) above were subsequently altered by the Supreme Court’s decision in Dunn & Bradstreet Inc. v. Greenmoss Builders Inc., 472 U.S. 749 (1985).

\textsuperscript{56} Gertz, 418 U.S. at 326.

\textsuperscript{57} Id. at 325.

\textsuperscript{58} Id.

\textsuperscript{59} Id. at 326. The article stated that Gertz’s police file “took ‘a big, Irish cop to lift.’” Id.

\textsuperscript{60} Id. at 326-27.

\textsuperscript{61} Id. at 327.

\textsuperscript{62} Id.

\textsuperscript{63} Id. at 329.

\textsuperscript{64} Id.

\textsuperscript{65} Id. at 330.

\textsuperscript{66} Id. at 351.
\end{footnotesize}
uninhibited press and the legitimate state interest in redressing wrongful injury.\textsuperscript{67} A return to the New York Times doctrine was necessary, the Court felt, to bring these interests back into stasis.\textsuperscript{68} Private individuals, the Court said, do not possess access to the media and thus lack the means to fend off damaging attacks.\textsuperscript{69} On the other hand, the Court reasoned that public officials and public figures have access to effective modes of mass communication and can publicly correct defamatory misstatements.\textsuperscript{70} More importantly, the Court said, public officials and public figures necessarily assume the risk of defamatory criticism by voluntarily choosing to live public lives.\textsuperscript{71} These two concerns, self-help and assumption of risk, are central to the Court's justification for applying the actual malice standard of New York Times to public officials and public figures.\textsuperscript{72}

After finding that Gertz was not a public official, the Court turned its attention to deciding whether he was a public figure.\textsuperscript{73} Public figures, the Court stated, "[assume] roles of especial prominence in the affairs of society."\textsuperscript{74} Further, the Court said the designation of a plaintiff as a public figure may rest on either of two alternative bases.\textsuperscript{75} The Court said,

\begin{quote}
[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.\textsuperscript{76}
\end{quote}

Applying this test to Gertz, the Court found that he was not a public figure for all purposes.\textsuperscript{77} Gertz had long been active in community affairs; he had served as an officer of local civic groups and professional organizations, and had published books and articles on legal subjects.\textsuperscript{78} But although he had gained recognition in some circles, the Court held he had not achieved general

\begin{footnotes}
\footnotetext[67]{Id. at 346.}
\footnotetext[68]{Id. at 343.}
\footnotetext[69]{Id. at 344.}
\footnotetext[70]{Id. Gertz did recognize however that "an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie." Id. at 344 n. 9.}
\footnotetext[71]{Id.}
\footnotetext[72]{Id.}
\footnotetext[73]{Id. at 351-52.}
\footnotetext[74]{Id. at 345.}
\footnotetext[75]{Id. at 351.}
\footnotetext[76]{Id.}
\footnotetext[77]{Id. at 352.}
\footnotetext[78]{Id.}
\end{footnotes}
fame or notoriety in the community. The Court noted that none of the prospective jurors called at trial had ever heard of Gertz and there was no evidence to suggest this was not an atypical response in the community.

The Court further found that Gertz was not a public figure for the limited purpose of comment on issues surrounding the policeman's criminal trial. Gertz had attended a coroner's inquest into the death of his clients' son, but he never participated in the prosecution of the policeman responsible. His involvement with the case was restricted to the civil litigation and there was no evidence that he discussed either the criminal prosecution or the civil case with the press. The Court found, therefore, that Gertz neither thrust himself into the vortex of the public issue surrounding the prosecution, nor did he engage the public's attention to influence its outcome.

III. APPLYING THE GERTZ PUBLIC FIGURE DOCTRINE

The public figure doctrine calls for the trial judge to decide whether or not the privilege applies to a particular communication. In Gertz, the Supreme Court eschewed an ad hoc approach to determining public figure status and instead laid down broad rules of general application that would "treat alike various cases involving differences as well as similarities." The Court basically defined two categories of public figures for lower courts to apply: all purpose public figures and limited purpose public figures. A third category, the involuntary public figure, is sometimes mentioned by courts, but rarely applied. All defamation plaintiffs, regardless of which category they fall under, must meet the access to the media and assumption of risk concerns of Gertz to be considered public figures.

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79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
87 Id. at 351. The Supreme Court legitimized this interpretation in Wolston v. Reader's Digest Ass'n. 443 U.S. 157, 164 (1979). ("We identified [in Gertz] two ways in which a person may become a public figure for purposes of the First Amendment[].")
88 See infra notes 161-64 and accompanying text.
89 Gertz, 418 U.S. at 344.
A. All Purpose Public Figures

Anyone who achieves general fame or notoriety in their community may be deemed a public figure for all purposes. All purpose public figures are rare. They are usually celebrities whose names are household words. Actors, entertainers, and political candidates are usually all purpose public figures. Sports figures as well are often labeled with this distinction. In Gertz, the Supreme Court recognized the great influence all purpose public figures have over the public so it afforded public criticism of these individuals great protection under the first amendment. All purpose public figures are public figures for all aspects of their lives, and any publication concerning these individuals must meet the actual malice test to be considered defamatory.

A court may or may not require an individual to be nationally well-known to be considered an all purpose public figure. Gertz did not specifically require all purpose public figures to be nationally famous. This view is echoed in jurisdictions that have found well-known individuals in small geographic areas to be all purpose public figures. The D.C. Circuit held that nationwide fame was not required in Waldbaum v. Fairchild Publications, Inc. The Waldbaum court said that the inquiry should be "whether the individual has achieved the necessary degree of fame and notoriety where he was defamed i.e.,

90 Id. at 351.
91 See Smolla, supra note 23, § 2:22. Professor Smolla notes that the Supreme Court in Gertz expressed its preference for classifying plaintiffs as limited purpose public figures.
93 See generally Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997) (Clint Eastwood); Newton v. NBC, Inc., 930 F.2d 662 (9th Cir. 1990) (Wayne Newton); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976) (Johnny Carson); Burnett v. Nat'l Enquirer, Inc., 144 Cal. App. 3d 991 (1983) (Carol Burnett); Williams v. Pasma, 656 P.2d 212 (Mont. 1982) (unsuccessful candidate for United States Senator was public figure); Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969) (U.S. Senator who became the Republican presidential nominee in 1964 was a public figure); Nader v. Ralph Toledano and Copley Press, Inc., 408 A.2d 31 (D.C. 1979)(finding Ralph Nader, a political activist, to be a public figure).
95 Gertz, 418 U.S. at 344.
96 Id. at 352.
97 Id. The Gertz Court simply stated that an all-purpose public figure requires "general fame or notoriety in the community." Id. (emphasis added).
98 See Williams v. Pasma, 656 P.2d 212 (Mont. 1982); Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282 (Ala. 1979). But see Smolla, supra note 23, § 2.20. Professor Smolla cautions that the Supreme Court's recent conservatism, as well as philosophies underlying the Court's recent defamation decisions may indicate an unwillingness on the part of the Supreme Court to accept a "local" all-purpose public figure.
99 627 F.2d 1287 (D.C. Cir. 1980).
where the defamation was published." In other words, a plaintiff, although she is not well-known nationally, may become a public figure if she is well-known to the publication’s audience.

Another issue sometimes addressed by courts is whether an all-purpose public figure can shed the status over time. Hypothetically, an all purpose public figure may wish to escape celebrity and seek a life of anonymity. Should this person still be treated as a public figure? The Supreme Court has said very little about this possibility. In Rosenblatt v. Baer, the Court suggested in dicta that a public official may be so far removed from a former position of authority that comment on the person may no longer maintain the interest required to sustain the actual malice protection. Lower courts thus far have been reluctant, however, to follow this advice and allow the passage of time to affect public figure status.

B. Limited Purpose Public Figures

Publications concerning limited purpose public figures receive a lesser degree of protection than publications concerning all purpose public figures. Limited purpose public figures are public figures only with respect to a particular public controversy. Criticism of limited purpose public figures, therefore, is protected only to the extent that it references the controversy giving rise to public figure status. In Gertz, the Court stated, "[i]t is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular public controversy giving

100 Id. at 1295. Compare Time, Inc. v. Firestone, 424 U.S. 448 (1976) (holding plaintiff was not an all-purpose public figure because she did not assume any role of especial prominence outside of Palm Beach Society).

101 Waldbaum, 627 F.2d 1287. This notion of “audience” can present problems however. For example, assume a defamatory statement was disseminated to a wide audience, but the plaintiff is well-known only to a small community. Should the plaintiff be treated as a private figure since she is unknown to the majority of the publication’s audience? Or should she be treated as a public figure for the segment of the audience to which she is well known and as a private individual for the rest? The court in Waldbaum seems to prefer the later. Id.


103 Id. at 87 n. 14.

104 See generally Street v. Nat’l Broad. Co., 645 F.2d 1227 (6th Cir. 1981), cert. granted, 454 U.S. 815, cert. dismissed, 454 U.S. 1095 (1981) (alleged rape victim remained a public figure 40 years after the incident for purposes of comment concerning the allegations); Brewer v. Memphis Publin’s Co., 626 F.2d 1238 (5th Cir. 1980) (former girlfriend of Elvis Presley remained a public figure despite her efforts to seek anonymity); Time, Inc. v. Johnston, 448 F.2d 378 (4th Cir. 1971) (former professional basketball player remained public figure nine years after retirement).

105 Gertz, 418 U.S. at 345.

106 Id.
rise to the defamation."\textsuperscript{107} Courts, for the most part, follow this advice and prefer to classify plaintiffs as limited purpose public figures when possible.\textsuperscript{108}

1. The Supreme Court's Treatment of the Limited Purpose Public Figure Doctrine.

Supreme Court decisions following \textit{Gertz} significantly narrowed the limited purpose public figure doctrine. The first of those decisions was \textit{Time, Inc. v. Firestone}.\textsuperscript{109} \textit{Firestone} arose when news of a divorce proceeding between Russell Firestone, heir to the Firestone tire fortune, and Mary Alice Firestone was printed in the "Milestones" section of Time magazine.\textsuperscript{110} Included in a short blurb about the divorce trial was a statement that testimony at the proceedings revealed extramarital affairs that would "make Dr. Freud's hair curl."\textsuperscript{111} Mary Alice denounced the testimony as false and sued Time for libel.\textsuperscript{112} Time argued that Mary Alice was a public figure and had to prove actual malice.\textsuperscript{113}

The Firestone divorce, as characterized by the Florida Supreme Court, was a "cause celebre."\textsuperscript{114} Time argued the divorce was therefore a public controversy, and Mary Alice's involvement in the trial rendered her a limited purpose public figure.\textsuperscript{115} The Supreme Court disagreed and refused to classify Mary Alice as a limited purpose public figure.\textsuperscript{116}

The Court found that Mary Alice did not \textit{voluntarily} assume a position of especial prominence in the resolution of a public question.\textsuperscript{117} Mary Alice Firestone was compelled by the state to enter into the divorce proceedings as a condition to receiving a divorce.\textsuperscript{118} As such, she did not voluntarily thrust herself into any discussion as to the propriety of her marriage.\textsuperscript{119} Moreover, the Court refused to consider tabloid affairs such as the "marital difficulties of extremely wealthy individuals" public controversies.\textsuperscript{120} To do so, the Court ar-

\begin{thebibliography}{120}
\bibitem{id} Id. at 352.
\bibitem{see} See \textit{supra} note 23 at § 2:15.
\bibitem{424} 424 U.S. 448 (1976).
\bibitem{id} Id. at 452.
\bibitem{id} Id. Testimony on behalf of Russell Firestone alleged at trial that Mary Alice was "guilty of bounding from one bed partner to another with the erotic zest of a satyr." Id. at 450.
\bibitem{id} Id. at 482.
\bibitem{id} Id. at 452-53.
\bibitem{id} Id. at 454.
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{id} Id.
\bibitem{id} Id.
\end{thebibliography}
gued, would reinstate the public interest approach of *Rosenbloom.* The Court opined that a better analysis for determining the extent of constitutional protection afforded defamatory falsehoods is to focus on the self-help and assumption of risk-concerns of *Gertz* instead of broad, subject-matter classifications.

Three years later, the Court dealt with limited purpose public figures and public controversies again in *Hutchinson v. Proxmire.* *Hutchinson* arose from a dispute between Ronald Hutchinson, a behavioral scientist, and William Proxmire, a United States Senator, over what Proxmire referred to as his "Golden Fleece" award for government spending. The "Golden Fleece" was an invention of Proxmire's to draw attention to frivolous government spending. Hutchinson sued for libel after Proxmire delivered a speech to Congress presenting the award to federal agencies funding Hutchinson's research. Hutchinson was observing chewing behavior in certain animals in order to study the effects of stress.

The District Court concluded Hutchinson was a public figure for the limited purpose of comment on his receipt of federal funds for research projects and the Court of Appeals affirmed. The Supreme Court disagreed and held that Hutchinson was not a limited purpose public figure. The Court held that Hutchinson did not voluntarily expose his work to the public, so he assumed no risk that his receipt of federal grants would invite public criticism and comment. The Court considered the fact that Hutchinson was a published author in its assumption of risk analysis, but found that his works reached only a limited audience within the scientific community. The Court also found that Hutchinson's media response to the "Golden Fleece" award was insufficient evidence that he possessed continuing media access sufficient to rebut Proxmire's claims.

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121 Id.
122 Id. at 456.
124 Id. at 114.
125 Id.
126 Id. at 119. Proxmire was unsure if he delivered the speech on the Senate floor, or merely inserted the speech into the Congressional record. Consequently, the majority of the Court's opinion in *Hutchinson* dealt with the issue of whether an undelivered speech inserted into the Congressional record is protected by the Speech or Debate Clause of the United States Constitution. Id.
127 Id. at 115.
128 Id. at 120-22.
129 Id.
130 Id. at 135.
131 Id.
132 Id. at 136.
Further, the Court noted that "Hutchinson did not thrust himself into a public controversy" because no public controversy existed over the funding of Hutchinson's research at the time of the alleged libel.\textsuperscript{133} The Court found that all of the controversy over the matter was created by the defamatory statement itself.\textsuperscript{134} It held, therefore, that Proxmire could not create his own defense by arguing that his treatment of Hutchinson turned him into a public figure.\textsuperscript{135} Lastly, the Court rejected the notion that a general controversy surrounding public grants warranted a finding that Hutchinson was a limited purpose public figure.\textsuperscript{136} Broad, subject-matter classifications, the Court warned, were too much like the Rosenbloom public interest test and resulted in an improper balancing of the competing interests underlying defamation law.\textsuperscript{137}

\textit{Wolston v. Reader's Digest Association},\textsuperscript{138} a case decided on the same day as \textit{Hutchinson}, found the plaintiff's involuntary and minor involvement in a controversy crucial to its finding that the plaintiff was not a limited purpose public figure.\textsuperscript{139} A grand jury investigation into Soviet espionage in the United States was at the center of the conflict in \textit{Wolston}.\textsuperscript{140} Ilya Wolston, the plaintiff, became involved in the proceedings after his aunt and uncle were arrested on, and later pled guilty to, charges of espionage.\textsuperscript{141} The media took a brief interest in Wolston when he failed to respond to a subpoena after unsuccessfully arguing to authorities that a mental condition prevented him from traveling from his home in the District of Colombia to New York where the grand jury was sitting.\textsuperscript{142} Wolston’s later offer to testify was refused, and thereafter he pled guilty to contempt and received a suspended sentence.\textsuperscript{143}

Wolston’s claim for libel arose when a book published by the defendant chronicling Soviet spy activities in the United States listed him as a spy.\textsuperscript{144} A passage in the book stated that Wolston was among Soviet agents identified as

\begin{itemize}
\item \textsuperscript{133} \textit{Id.} at 135.
\item \textsuperscript{134} \textit{Id.} at 127.
\item \textsuperscript{135} \textit{Id.} at 135. ("Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."). Commentators refer to this as the "bootstrap" problem. \textit{See SMOLLA, supra} note 23, § 2:10. Professor Smolla notes that lower courts responding to this language adhere to a rule that the public controversy must pre-exist the speech giving rise to the defamation suit. \textit{See, e.g.}, Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980); Wilson v. The Daily Gazette Co., 588 S.E.2d 197, 206 (W. Va. 2003).
\item \textsuperscript{136} \textit{Hutchinson}, 443 U.S. at 135.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} 443 U.S. 157 (1979).
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.} at 161.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.} at 162.
\item \textsuperscript{143} \textit{Id.} at 162-63.
\item \textsuperscript{144} \textit{Id.} at 159.
\end{itemize}
living in the United States and that he was convicted of contempt charges following his indictment for espionage.\textsuperscript{145} These accusations were false; although he had been subpoenaed, Wolston was never actually indicted as a spy.\textsuperscript{146}

Reader's Digest argued that Wolston's involvement in the spy trial rendered him a limited purpose public figure for purposes of any commentary on soviet espionage in the 1940's and 1950's.\textsuperscript{147} The Supreme Court disagreed and declined to extend the \textit{New York Times} privilege to the publication.\textsuperscript{148} First, the Court found that Wolston had not thrust himself into the forefront of a public controversy because he was "dragged unwillingly" by the Government into the spy proceedings.\textsuperscript{149} Moreover, that Wolston voluntarily chose not to respond to a grand jury subpoena during the proceedings did not convince the Court that he had voluntarily exposed himself to public comment even though media attention and publicity resulted.\textsuperscript{150} The Court said "the simple fact that these events attracted media attention . . . is not conclusive of the public-figure issue. A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."\textsuperscript{151} Rather, the Court felt the focus should rest on the nature and extent of an individual's participation in the particular public controversy.\textsuperscript{152} Wolston had not discussed the matter with the press and played only a tangential role in the spy proceedings.\textsuperscript{153} Therefore, the Court found his actions did not thrust him into the vortex of a public controversy.\textsuperscript{154} The Court also rejected the notion that any person who engages in criminal conduct automatically becomes a public figure for the purposes of comment addressing that person's conviction.\textsuperscript{155}

2. Lower Court Treatment of the Limited Purpose Public Figure Doctrine

Critics argue that \textit{Gertz} and its progeny failed to establish any clear, objective guidelines for lower courts to follow when applying the limited purpose

\textsuperscript{145} Id.
\textsuperscript{146} Id. at 160.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 166.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 167.
\textsuperscript{151} Id.
\textsuperscript{152} Id. at 166.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id. at 168.
public figure test. At least one judge feels that applying the doctrine is like "trying to nail a jellyfish to a wall." This lack of clarity, some argue, has led jurisdictions to develop inconsistent limited purpose public figure tests. Limited purpose public figure tests in different jurisdictions may differ slightly from one another, but they all examine essentially the same factors. For the most part, the tests consider whether the plaintiff was involved in a public controversy, whether the defamatory statement is related to the plaintiff’s involvement in that particular controversy, and whether the plaintiff voluntarily or intentionally thrust herself to the forefront of the controversy.

Individual factors aside from the above considerations that lower courts have found to be influential are: the extent of the plaintiff’s involvement in the controversy, the degree of public divisiveness concerning the controversy, whether the plaintiff attempted to influence resolution of the controversy, whether the controversy preexisted the defamatory speech, whether non-participants are affected by the controversy, whether the plaintiff is in a position to influence the controversy, whether the plaintiff had access to the media, whether the plaintiff’s public figure status continued to exist at the time of the defamation, and whether the defamatory speech was geographically or institutionally limited to the area in which the plaintiff had achieved public figure status. Not all of these factors will be relevant in every case. Jurisdictions may weigh some factors differently and reach different results in cases with similar fact patterns. The important thing to remember is that a myriad of factors may be relevant to a defamation plaintiff’s limited purpose public figure status. Waldbaum, for instance, advocates an objective approach that calls for courts to look through the eyes of a reasonable person at the facts taken as a whole.

156 Mark D. Walton, The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations, 16 N. ILL. U. L. REV. 141, 155 (1995).
158 See Walton, supra note 156 at 159.
159 Id. at 165.
160 Id.
161 See SMOLLA, supra note 23 at § 2:09.
162 See Walton, supra note 156 at 167. Walton notes that a California appellate court held that organized crime is not a public controversy in Rancho La Costa, Inc. v. Super. Ct., 165 Cal. Rptr. 347, 354 (Cal. Ct. App. 1980); but see Rosanova v. Playboy Enter., Inc., 580 F.2d 859, 861 (5th Cir. 1978) (finding that organized crime is a public controversy).
C. Involuntary Public Figures

Some courts have interpreted a line from Gertz as creating a third category of public figure, the involuntary public figure. In Gertz, the Court said "[h]ypothetically, it may be possible for someone to be a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." Supreme Court decisions after Gertz failed to mention involuntary public figures and lower courts rarely apply the distinction, leading some commentators to doubt the continued existence of the category. Involuntary public figures seem to be resurfacing, however. In Wells v. Liddy, the Fourth Circuit Court of Appeals held that a defamation plaintiff is an involuntary public figure when she is a central figure in a significant public controversy, the defamatory statement arose from discourse surrounding the controversy, and the plaintiff acted, or failed to act in a way in which a reasonable person would understand that publicity would inhere.

IV. THE GERTZ PUBLIC FIGURE DOCTRINE AND ATHLETES

Athletes are, for all intents and purposes, entertainers like actors and musicians and, as such, are highly exposed to the public and the media. Media coverage of athletes and athletics is pervasive. Cable television networks dedicated to around-the-clock sports coverage provide up-to-the-minute updates on the latest happenings in the world of professional and amateur sports. The success of these networks reflects both the intense public demand for sports reporting and the high level of celebrity athletes are capable of achieving. It is not surprising, therefore, that athletes often find themselves as subjects of a libel suit and scrutinized under the Gertz public figure analysis.

Curtis Publishing Co. v. Butts, the genesis of the public figure doctrine, is the only Supreme Court decision to apply the public figure test to a sports figure. Butts stemmed from controversy surrounding a 1962 football game between the Universities of Georgia and Alabama. After Georgia received a "frightful physical beating" at the hands of the Crimson Tide, an article published in the Saturday Evening Post accused Wally Butts, then the

166 See Wells v. Liddy, 186 F.3d 505, 538 (4th Cir. 1999) (stating "[s]o rarely have courts determined that an individual was an involuntary public figure that commentators have questioned the continuing existence of that category.").
167 186 F.3d 505 (4th Cir. 1999).
168 Id. at 539-40.
170 Id. at 135.
171 Id. at 136.
athletic director at Georgia, of "fixing" the game.\textsuperscript{172} The article alleged that Butts supplied legendary Alabama football coach Paul "Bear" Bryant with "plays, defensive patterns, [and] all the significant secrets Georgia's football team possessed."\textsuperscript{173} An insurance salesman, George Burnette, claimed to have accidentally overheard the espionage while listening to a phone conversation between Butts and Bryant.\textsuperscript{174} Butts sued for libel after resigning his position at Georgia.\textsuperscript{175} The Court, ruling on the case, extended the \textit{New York Times} privilege to public figures and held that Butts was a public figure by virtue of his former position and notoriety as a former coach of the Bulldogs and an athletic director at UGA.\textsuperscript{176} After Butts, courts began finding athletes to be public figures with regularity.\textsuperscript{177}

A. \textit{Professional Athletes}

Professional athletes are almost always found to be public figures.\textsuperscript{178} A case decided after Butts, but before Gertz, saw public figures as "those who, though not public officials, are 'involved in issues in which the public has a justified and important interest' ... and include ... athletes."\textsuperscript{179} In \textit{Time Inc. v. Johnston},\textsuperscript{180} another pre-Gertz decision, the Fourth Circuit Court of Appeals found Neil Johnston, a former professional basketball player with the Philadelphia Warriors, to be a public figure.\textsuperscript{181} The court said, "[Johnston] had offered his services to the public as a paid performer and had thereby invited comments on his performance as such. In a sense, he assumed the risk of publicity, good or bad, as the case might be, so far as it concerned his public performance."\textsuperscript{182}

Post-Gertz cases continue to find professional athletes to be public figures. \textit{Chuy v. Philadelphia Eagles Football Club}\textsuperscript{183} is recognized by commenta-

\textsuperscript{172} \textit{Id.} at 135-36.
\textsuperscript{173} \textit{Id.} at 136.
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} Curtis Publ'g Co. v. Butts, 388 U.S. 130, 137 (1967).
\textsuperscript{176} \textit{Id.} at 154.
\textsuperscript{177} See, e.g., Cepeda v. Cowles Magazine and Broad., Inc., 392 F.2d 417, 419 (9th Cir. 1968) (finding Orlando Cepeda, a professional baseball player, to be a public figure); Time Inc. v. Johnston, 448 F.2d 378, 380 (4th Cir. 1971) (finding Neil Johnston, a professional basketball player with the Philadelphia Warriors, to be a public figure).
\textsuperscript{178} See supra note 10. Professor Wise cautions against this assumption, however. He notes that a reserve place kicker for a professional football team may play for several years without making a mark nationally or locally. Wise, supra note 10, at 354 n. 230.
\textsuperscript{179} \textit{Cepeda}, 392 F.2d at 419 (emphasis added).
\textsuperscript{180} 448 F.2d 378, 380 (4th Cir. 1971).
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} 595 F.2d 1265 (3d Cir. 1979).
torss as the most important case brought by an athlete since Butts. Donald Chuy was a starting offensive lineman for the Philadelphia Eagles. His suit for defamation against the Eagles arose from reports of a severe injury he received while executing a downfield block in a game against the New York Giants. When the Eagles team physician was interviewed by a reporter from the Philadelphia Bulletin about Chuy's injuries, he stated that Chuy was suffering from a rare fatal blood disease and would never play football again. Chuy became panicked after reading the article and suffered severe emotional distress. Chuy sued for defamation after it became apparent to him that he was not suffering from the alleged disease.

At trial, the jury resolved Chuy's defamation claim in favor of the Eagles. Chuy argued that the court applied the wrong standard of proof and motioned for a new trial. Ruling upon Chuy's motion, the United States District Court for the Eastern District of Pennsylvania said that "[f]ew would deny that Donald Chuy was a public figure in the ordinary sense of the word, for ... he was a prominent professional athlete, frequently the subject of sports news." Explaining its holding further, the district court clarified why Chuy's situation as a professional athlete was different from that of the celebrity plaintiff's in Firestone and why professional sports must be considered amongst the "affairs of society" that warrant special protection for the press. The court said,

[w]here a person has, however, chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community,' even if he has no ideological thesis to promulgate, he invites general public discussion. We obviously cannot say that the public's interest in professional football is important to the commonwealth or to the operation of a democratic society in the same sense as are political and ideological matters. However, the fabric of our society is rich and variegated. As is demonstrated by the Niel-

184 Wise, supra note 10, at 344.
186 Id. at 257.
187 Id.
188 See id.
189 Id. at 256-57. Included amongst Chuy's defamation claim were claims for breach of contract and intentional infliction of emotional distress.
190 Id.
191 Id. at 258.
192 Id. at 266.
193 Id. at 267.
sen ratings, the American public is fascinated by professional sports. In view of that fact we must affirm the proposition that interest in professional football must be deemed an important incident among many incidents, of a society founded upon a high regard for free expression.\textsuperscript{194}

Americans' interest in professional sports, the district court reasoned, justifies protecting publications about athletes.\textsuperscript{195} The court explained,

\begin{quotation}
[i]f society chooses to direct massive public attention to a particular sphere of activity, those who enter that sphere inviting such attention must overcome the \textit{Times} standard. Society's interest inspires comment in the press and elsewhere. The greater the interest, the greater is the public's self-generating need for the facts. This is especially so in this case where the subject matter pertained to Donald Chuy's ability to continue playing professional football, a matter in which the sports loving public had a not insignificant interest.\textsuperscript{196}
\end{quotation}

The Third Circuit Court of Appeals affirmed the district court's ruling.\textsuperscript{197} Chuy, the court said, was a public figure at least with respect to his ability to play football.\textsuperscript{198} The court stated, "[p]rofessional athletes, at least as to their playing careers, generally assume a position of public prominence. Their contractual disputes, as well as their athletic accomplishments, command the attention of sports fans."\textsuperscript{199} Accordingly, the court applied the \textit{New York Times} burden of proof to Chuy's case because the statements in the \textit{Bulletin} article addressed a matter that occurred on the playing field in front of thousands of interested spectators and dealt directly with Chuy's ability to continue playing professional football.\textsuperscript{200} The court of appeals also affirmed the district court's take on \textit{Firestone}.\textsuperscript{201} Don Chuy was a public figure, the court reasoned, partly because intrigue surrounding professional athletics commands a wider audience than the tabloid controversies of the rich and famous.\textsuperscript{202}

\begin{footnotes}
\item[\textsuperscript{194}] \textit{Id.}
\item[\textsuperscript{195}] \textit{Id.}
\item[\textsuperscript{196}] \textit{Id.}
\item[\textsuperscript{197}] Chuy v. Phila. Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979).
\item[\textsuperscript{198}] \textit{Id.} at 1280.
\item[\textsuperscript{199}] \textit{Id.}
\item[\textsuperscript{200}] \textit{Id.}
\item[\textsuperscript{201}] \textit{Id.} at 1280 n. 21.
\item[\textsuperscript{202}] \textit{Id.} ("Although the marital troubles of the wealthy do not make them public figures, a professional athlete's contractual troubles relating to his playing performance commands the attention of a more sustained and wider public audience.").
\end{footnotes}
Since Chuy, athletes competing professionally in sports such as football, boxing, golf, and horse racing have been found to be public figures. In Bell v. the Associated Press, Theo Bell, a wide receiver for the Tampa Bay Buccaneers whose notorious career includes a litany of misdeeds, was found to be a limited purpose public figure. The court held, "with respect to professional athletes . . . charges of criminal misconduct are a subject of public controversy and those who are the subject of such charges are public figures for that limited purpose." In Gomez v. Murdoch, a flat track jockey was found to be a public figure. The Gomez court said, "there is no way in the world that a man could decide to become a jockey, put the silks on and ride before hundreds of thousands of people as he [plaintiff] has and not call himself a public figure." In Wilsey v. Saratoga Harness Racing, Inc., a harness track driver was found to be a public figure, in part, because harness racing attracted significant public interest throughout New York and the plaintiff was generally recognized by the public as an expert in the sport. In Brooks v. Paige, a star professional soccer player for the Denver Avalanche, a team in the now-defunct Major Indoor Soccer League, was found to be a public figure. A Colorado district court ruled that Adrian Brooks, the plaintiff, was a public figure because he was a well-known sports figure in the Denver area and statements concerning him were a matter of public concern. The court held,


205 Id. at 131. Bell was arrested for trespassing, disorderly conduct, drunk driving, and sexual misconduct during his tenure as a college and professional athlete, and over 100 newspaper articles had been printed about his escapades at the time of his suit against the Associated Press. Id. A song had even been written about him: "It's Oilcan Harry, that's my name, I drank that oil and I smoke cocaine." Id. at note 8.

206 Id. at 132.


208 Id. at 624.

209 Id. (quoting trial court).


211 Id. at 690.


213 Id.
[I]n a sportsminded town such as Colorado [sic.], contract issues concerning star-players in fact become matters of public concern . . . matters concerning Mr. Brooks, his contract, his relations with the team, the fact that the team was going to be in the playoffs and then, did play in the playoffs became a matter of general discussion and comment among people generally and in the media. \(^{214}\)

The court did not specify whether this made Brooks a limited purpose or all purpose public figure. \(^{215}\)

**B. College Athletes**

*Chuy* and the cases above dealt exclusively with professional athletes, persons who voluntarily chose to enter a profession that invites public attention and comment. Collegiate athletes, at times, also compete in sports that draw attention from the public and the media, but not for pay. This begs the question of how a plaintiff athlete’s amateur status should affect a court’s public figure analysis. The fact that a plaintiff was not paid to play college football did not affect the court’s analysis in the case of *Holt v. Cox Enterprises*. \(^{216}\)

The *Holt* court found Darwin Holt, a former college football player for the University of Alabama, to be a public figure at least as it related to publications addressing his athletic performance. \(^{217}\) Holt’s claim for libel arose from a hit he placed upon Chick Graning in a football game between Alabama and Georgia Tech. \(^{218}\) Holt, the defensive signal caller for the Crimson Tide, struck Graning in the face with his elbow late in the fourth quarter of the game. \(^{219}\) Graning suffered a broken jaw, broken nose, a concussion, and lost several teeth. \(^{220}\) Controversy ensued, and newspaper articles written after the game described the hit as an illegal play. \(^{221}\) Georgia Tech ended its series of games with Alabama sometime after the affair, and it was widely speculated that the “Holt-Graning incident” was the cause of Tech’s decision. \(^{222}\) Eighteen years later, Tech and Alabama resumed their rivalry, rekindling interest in that
Articles describing the incident appeared in the *Atlanta Journal and Constitution* and contained defamatory comments about Holt’s character. Holt, a former High School All-American, was a well-known player and an award-winning star on the Alabama team, but the court held he was not an all purpose public figure. Instead, the court found Holt was a limited purpose public figure, not by virtue of the Holt-Graining incident, but because he voluntarily engaged in the sport of college football. Citing *Chuy*, among others, the court stated, 

As a member of the Alabama football team, Holt voluntarily played that sport before thousands of persons – spectators and sportswriters alike – and he necessarily assumed the risk that these persons would comment on the manner in which he performed. The defamatory comments in the articles relate solely to Holt’s play on the field and are thus within the limited range of issues upon which Holt invited comment. Holt, like other sports figures who have sought redress through defamation actions must be considered a public figure, whose actions on the field sportswriters may criticize within the protective “breathing space” required by the First Amendment.

That Holt was not paid to play football was deemed irrelevant. The court felt that Holt’s amateur status did not change the fact he voluntarily engaged in a highly publicized event knowing that the public would comment on his play.

V. WHEN IS A HIGH SCHOOL ATHLETE A PUBLIC FIGURE?

As the cases above demonstrate, an athlete who competes in major sporting events has basically no shot at convincing a court she is a private individual. Litigants and the media should not presume, however, that the public figure privilege automatically applies to all publications addressing athletes. The public or private status of a defamation plaintiff is a factual inquiry that depends heavily upon the individual circumstances of each case. It is entirely possible to hypothesize an athlete courts will say is not a public figure. So

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223 *Id.*
224 *Id.*
225 *Id.* at 411-12.
226 *Id.* at 412.
227 *Id.* (citations omitted).
228 *Id.*
229 *Id.*
230 See *supra* note 174.
although the sports page is well protected by the public figure doctrine, it is not an impregnable fortress.

Stories about high school athletes may be a chink in the armor. High school athletes, like the plaintiffs in the cases above, compete in spectator sports that invite attention and comment. It is unclear, however, whether the status of “high school athlete” will warrant holdings similar to the cases above. The cases in the previous section are telling indicators of how a court is likely to treat an athlete, but none of those plaintiffs were in high school. Courts have applied the doctrine to high school coaches, but there is very little case law dealing with high school athletes.231 Wilson v. Daily Gazette Co.,232 a recent decision of the West Virginia Supreme Court of Appeals, is the only published opinion to thoroughly discuss applying the public figure test to a high school athlete.233 As such, Wilson should be viewed as the current authority on the subject matter. This section will analyze Wilson and suggest when a court is likely to find that a high school athlete is a public figure.


The controversy in Wilson stems from an incident following the conclusion of the 1999 West Virginia statewide championship high school basketball game between Weir and East Bank High Schools.234 It was rumored after the game that Quincy Wilson, a seventeen year old student at Weir and a participant in the game, exposed himself to the East Bank fans during a frenzied player celebration sparked by Weir’s last-second victory.235 Accounts of the alleged exposure circulated throughout the crowd after the game, and East Bank’s principle reported the incident to police.236 Articles appearing in the Charleston Gazette repeated the allegations, and an editorial in that paper cited the incident as part of a growing trend of inappropriate behavior among athletes.237 Wilson sued the Gazette for defamation following the publication of the articles.238

Wilson was arguably West Virginia’s best-known high school athlete at the time the articles were published. He was a star on Weir’s football and basketball teams, lead each of those teams to state championships, was the co-winner of the Kennedy award given to the state’s top high school football

231 See Brewer v. Rogers, 439 S.E.2d 77 (Ga. 1993) (finding a high school football coach to be a public figure); contra Milkovich v. The News-Herald, 473 N.E.2d 1191 (highly successful high school wrestling coach not a public figure).
233 See Pendelton v. City of Haverhill, 156 F.3d 57, 68 (1st Cir. 1998) (briefly discussing plaintiff’s notoriety as a former high school sports star in deciding plaintiff was not a public figure).
234 588 S.E.2d at 200.
235 Id.
236 Id. at 201, n.4.
237 Id. at 200-01.
238 Id. at 202.
player, received press coverage of his signing a letter of intent to accept a scholar-
ship to play football at West Virginia University, had his athletic accomplish-
ments listed in a biography on that university’s web-site, and was the son of a
former professional football player. Based on this evidence, the trial court
concluded that Wilson was a public figure and granted summary judgment for
the defendant after it found that he had failed to allege the articles were pub-
lished with actual malice. The West Virginia Supreme Court of Appeals re-
versed despite Wilson’s notoriety and held that he was not a public figure.

In a 3-2 decision, the court held that Wilson did not fit into any of the
three public figure categories. The court found first that Wilson did not pos-
sess the sort of general fame or notoriety required to be an all-purpose public
figure. A reputation as a quality high school athlete, the court said, did not
“satisfy the high bar outlined by Gertz” and evidenced only a “limited circle of
notoriety.” Next, the court held that Wilson was not a limited purpose public
figure because he had not voluntarily injected himself into a public contro-
versy. After reviewing the articles in question, the court determined that the
present theme of the publications was “sportsmanship,” and that no public con-
troversy regarding sportsmanship existed prior to the publication. Moreover,
the court refused to “carve out an exception” to the limited purpose public figure
category and consider Wilson a public figure for the limited purpose of comment
on his role as a high school athlete. Criticizing Holt as convoluted dicta, the
court declined to place participation in amateur athletics within the public con-
troversy requirement of Gertz. Finally, the court held that Wilson was not an
involuntary public figure because he had not become a central figure in a sig-
ificant public controversy that existed prior to the publication of the alleged
defamation.

239 Id. at 205.
240 Id. at 202.
241 Id. at 210.
242 Id.
243 Id. at 205.
244 Id. at 206.
245 Id. at 208.
246 Id. at 209.
247 See id. at 207-08.
248 Id. at 206. “The central requirement imposed by Gertz for labeling a person a limited pur-
pose public figure is that there must be ‘a particular controversy.’ The mere fact of playing on a
high school football team, or little league baseball team, or a college golf team, is not in and of
itself a controversy.” Id.
249 Id. at 208-09.
B. When is a High School Athlete a Public Figure?

In all likelihood, most courts will be reluctant to label high school athletes public figures. High school athletes are not your typical defamation plaintiffs; they are teenagers. Judges will likely consider this fact relevant. A dissenting justice in Wilson remarked, "[a]s undesirable [sic.] as I believe it is to make young high school students public figures, I believe that, in fact, is what our society has done." It is probably safe to assume that most judges feel the same way and will err on the side of protecting a teenager's reputation from harm. A libel defendant will have to be very convincing, therefore, if she hopes to apply the public figure privilege to a publication about a high school athlete.

This is not to say a court will never find a high school athlete to be a public figure. Wilson was decided as a close case, 3-2. It is not too much of a stretch to presume that a different court presented with the same facts may have reached an opposite conclusion. So libel defendants should not give up hope for a public figure ruling simply because the plaintiff is a teenage athlete. The following subsections suggest when a court will apply the public figure doctrine to a high school athlete.

1. Meeting the Twin Concerns: Assumption of Risk and Access to the Media

It must be shown that a high school athlete meets the twin concerns of Gertz before she can be considered a public figure. Chuy and the cases in the preceding section stand for the proposition that a professional or college athlete voluntarily assumes a position of public prominence inviting attention and comment the moment he or she sets foot on the field of play. In Gomez, the flat track jockey case, the court relied on the fact that the plaintiff voluntarily competed in front of hundreds of thousands of people. Similarly, the Holt court noted that the plaintiff chose to participate in a sport before thousands of spectators and sportswriters, and naturally assumed the risk of defamatory comment. This begs the question: does a high school athlete automatically assume the risk of defamatory comment by voluntarily engaging in a spectator sport?

Yes, if there are facts sufficient to show a high level of public interest in the athlete's particular sport. The Supreme Court in Wolston said that a plaintiff's involvement in an event that attracts significant public interest is not itself conclusive of the public figure question, but it should go towards proving assumption of risk. The Chuy court found the "massive public attention" paid to

250 Id. at 210 (McGraw, J. dissenting).
professional football highly relevant to its decision that Don Chuy was a public figure.\textsuperscript{254} Public interest in high school sports rarely equals the level of attention paid to professional football, but high school sports are very popular in some areas of the country. The \textit{Wilson\textsuperscript{268}} court presumably felt the level of public interest in high school football in West Virginia did not justify labeling the sport’s most prominent athlete a public figure. It is not inconceivable to assume, however, that in some jurisdictions such a showing may be made. For instance, a high level of public interest may easily be proven in states such as Texas where high school football is king. The same may be true for high school basketball in Indiana or high school ice hockey in Minnesota. Where there is evidence that the public directs significant attention to a particular high school sport, athletes competing in that sport must assume the risk of public comment.

Several factors within a community may evidence a high level of public interest in a particular high school sport. For instance, a judge may consider attendance numbers at high school athletic events as telling indicators of public interest. The success of a local sports team may also show a high level of public interest. In \textit{Brewer v. Rogers,\textsuperscript{255}} a high school football coach in Georgia was found to be a public figure partly because his team was considered to be an elite squad.\textsuperscript{256} Pervasive coverage of high school sports in local papers and on local television stations may also indicate high levels of public interest. Courts may also take into account the “sportsmindedness” of the local community. In \textit{Brooks,\textsuperscript{257}} for example, the court was persuaded by the fact that a lot of sports fans lived in Denver.

A plaintiff must also possess significant media access to be considered a public figure. This means that a high school athlete has the means to rebut defamatory comments about themselves via the channels of mass communication. Due to the weight of a teenage student’s reputation interests, courts will probably require clear evidence of continuing media access to satisfy this requirement. In most cases, this will be a heavy burden because press coverage of high school sports is generally limited to few media outlets within a specific geographic region.

The defendant in \textit{Wilson\textsuperscript{268}} apparently did not convince the court that Quincy Wilson possessed significant access to the media, although it was established that he received press coverage of his signing a letter of intent to play football at West Virginia University.\textsuperscript{258} In \textit{Firestone\textsuperscript{269}}, the Supreme Court suggested in a footnote that holding a few press conferences alone will not trans-

\textsuperscript{255} 439 S.E.2d 77 (Ga. 1993).
\textsuperscript{256} Id. at 78.
form a person into a public figure. A high school athlete’s ability to command the attention of a statewide press conference should suffice, however, to show significant media access. A pervasive amount of interviews, articles, television spots, etc. evidence media access. The Chuy court found the fact that Don Chuy was “frequently the subject of sports news” relevant to its public figure analysis. If a high school athlete is frequently the subject of sports news within the area in which she was defamed, she probably possesses significant access to the media.

2. Classifying A High School Athlete Under the Three Public Figure Categories

The twin concerns of Gertz are the fundamental characteristics of the public figure. Although central to a public figure finding, they are not necessarily determinative of the issue. A high school athlete must also fit into one of the three public figure categories – all purpose, limited purpose, or involuntary – before she can be considered a public figure. Wilson is especially helpful in this regard because it analyzed a high school athlete’s status under all three categories.

In Wilson, the court was unwilling to label the plaintiff athlete an all purpose public figure because he was known only to a “limited circle” of high school football fans in the state of West Virginia. Wilson’s holding suggests that success as a high school athlete alone may not lead a court to find the “pervasive fame or notoriety” required for an all purpose public figure, even in jurisdictions like West Virginia that do not require nationwide fame. Moreover, labeling a high school athlete an all purpose public figure opens that individual up to defamatory criticism related to any subject. It is logical to assume that courts will be wary of placing such a burden upon a teenager. So where all purpose public figures are rare, high school athlete all purpose public figures are probably rarer. If courts follow Wilson’s lead, a showing that a plaintiff’s notoriety transcends that of a successful high school athlete will be necessary to support an all purpose public figure finding.

In deciding whether a plaintiff athlete is an all purpose public figure, the court in Wilson said trial courts may consider: (1) statistical survey data concerning the athlete’s name recognition; (2) evidence of previous media coverage of the athlete; (3) evidence that others alter or reevaluate their conduct or ideas.

261 Wilson, 588 S.E.2d at 206.
262 West Virginia only requires “clear evidence of the plaintiff’s general fame or notoriety in the state.” Wilson, 588 S.E.2d at 216.
in light of the athlete’s actions; and (4) any other relevant evidence.\textsuperscript{263} Probably a good example of a high school athlete who possessed pervasive fame and notoriety is former high school basketball standout and current NBA superstar Lebron James. At seventeen, James was billed as the second coming of Michael Jordan, his games were televised regularly to a nation-wide audience, and he had already been featured on the cover of \textit{Sports Illustrated}.\textsuperscript{264} James achieved the status of “household name” as a high school athlete and he was viewed as a celebrity. Had James pressed a libel suit at that time, the court most certainly would have found him to be an all purpose public figure.

Courts are probably more likely to find that a high school athlete is a limited purpose public figure as opposed to an all purpose public figure. It is not difficult to imagine a high school athlete becoming embroiled in some sort of public controversy involving high school sports. Sports related controversies are often featured in the media.\textsuperscript{265} Take the facts of \textit{Wilson} for instance. The reports of the plaintiff’s alleged misbehavior in that case obviously stirred up a brief controversy over the appropriateness of player celebrations.\textsuperscript{266} One of the allegedly defamatory articles reprinted in the opinion spoke of widespread public discord over player taunting and trash talking.\textsuperscript{267} The \textit{Wilson} court found no public controversy existed over sportsmanship prior to the incident in question.\textsuperscript{268} But if the plaintiff had embraced the controversy and had attempted to sway public opinion on the issue by speaking to the media about it, perhaps the court would have found him to be a limited purpose public figure.

It is unlikely that courts will accept the \textit{Holt} reasoning and hold that any plaintiff who voluntarily participates in a sport before spectators and sportswriters is a public figure for the limited purpose of comment on their role as an athlete.\textsuperscript{269} The court was unwilling to do so in \textit{Wilson} and other courts will likely follow suit.\textsuperscript{270} Cases like \textit{Holt} and \textit{Chuy} seem to apply the public controversy requirement of the limited purpose public figure test broadly to protect basically

\textsuperscript{263} Wilson, 588 S.E.2d at 216.

\textsuperscript{264} Grant Wahl, \textit{Ahead of His Class}; Ohio High School junior LeBron James is so good that he’s already been mentioned as the heir to Air Jordan, \textit{SPORTS ILLUSTRATED}, Feb. 18, 2002, at 62.

\textsuperscript{265} For examples of sports-related controversies, see Hoffman v. Washington Post Co., 433 F. Supp. 600, 604 (D.D.C. 1977) (athletic trainer public figure for limited purpose of issues concerning the value of protein supplements); Brewer v. Rogers, 439 S.E.2d 77, 81 (Ga. App. 1993) (high school coach implicated in grades scandal was a public figure); Barry v. Time, Inc., 584 F. Supp. 1110, 1116 (N.D. Cal. 1984) (public controversy requirement of \textit{Gertz} met by investigations by the NCAA into university’s recruiting practices); Silvester v. A.B.C., Cos., Inc., 839 F.2d 1491, 1494 (11th Cir. 1988) (jai alai fonton owner’s central role in industry gambling scandal rendered him a public figure).

\textsuperscript{266} Wilson, 588 S.E.2d at 200-203.

\textsuperscript{267} \textit{Id.} at 201.

\textsuperscript{268} \textit{Id.} at 209.


\textsuperscript{270} Wilson, 588 S.E.2d at 208.
any publication addressing an athlete-related subject. Bell, for example, justified its limited purpose public figure finding partly on the public’s ongoing interest in athletes’ off-the-field misconduct.\(^{271}\)

Wilson, by contrast, refused to a find a public controversy over sportsmanship existed prior to the defamatory statements published in the Gazette although sportsmanship and player celebrations are often a hot topic of discussion in the sports media.\(^{272}\) This holding is more consistent with the Supreme Court’s suggestion in Firestone to avoid broad subject-matter classifications of public controversies and will better protect high school athletes from defamatory accusations related to sports-related scandals.\(^{273}\) Assuming other courts will agree with Wilson’s approach, a more traditional showing of a pre-existing, specific, and localized controversy will be necessary to support finding that a high school athlete is a limited purpose public figure. Of course, any showing of additional facts listed in the limited purpose public figure sections of this article will also support branding a high school athlete a limited purpose public figure.

It will take a very persuasive argument to convince a court that a high school athlete is an involuntary public figure, even in jurisdictions that accept the category. The involuntary public figure is the rarest breed of public figure. Only a handful of courts have ever been willing to label a plaintiff an involuntary public figure.\(^{274}\) Courts’ general distaste for the category coupled with a desire to protect the reputation interests of young high school athletes suggests courts will find in favor of the designation only in unusual instances. Accordingly, a high school athlete will rarely be found to be an involuntary public figure. In Wilson, the court analyzed the plaintiff athlete’s status under the Wells test and summarily held that the plaintiff did not match the description.\(^{275}\) That test assesses whether the plaintiff is a central figure in a significant public controversy, the defamatory statement arose from discourse surrounding the controversy, and the plaintiff acted, or failed to act in a way in which a reasonable person would understand that publicity would inhere.\(^{276}\)

VI. CONCLUSION

As a general rule, high school athletes will not be classified as public figures with the same frequency as professional and college athletes. Courts


\(^{274}\) Wilson, 588 S.E.2d at 208.

\(^{275}\) Id. at 208-09

\(^{276}\) Id.
should be wary, however, of summarily treating all high school athletes as private individuals. The press must be afforded "breathing space" to report on high school athletics or self-censorship will occur. Courts will likely prefer to find high school athletes to be limited-purpose public figures as opposed to all purpose public figures. To avoid libel suits, the press should limit reports of materials that are possibly defamatory to specific public controversies when reporting on high school athletes.

Jonathan Deem

* This article is dedicated to my mother, the librarian, who taught me the importance of literacy and to my father, the football coach, who taught me that "if it was easy, the whole town would be doing it." Special thanks to my wife, Leslie, for weathering countless tirades, breakdowns, binges, freak-outs, and temper tantrums connected to this article and law school in general. A thank you, as well, to the faculty and staff of the West Virginia University College of Law.