DEFAMATION—LIBEL—ENGLISH TRANSLATION OF SPANISH PUBLICATION CANNOT BE USED TO ESTABLISH ACTUAL MALICE—*Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987).

The first amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] In the first half of the twentieth century a prominent writer suggested that pursuing a libel suit was unimportant in a capitalistic society.[2] The libel suit, however, has experienced unexpected revitalization in the latter half of the twentieth century prompting the Supreme Court to address the extent to which the Constitution restricts recovery for defamation.[3] It is axiomatic that recovery by a public official would raise particularly poignant constitutional issues in a nation where criticism of the government is considered a central freedom.[4] In 1964, the Supreme Court determined that a public official's recovery in a libel suit was predicated on establishing with convincing clarity that the statement was published with actual malice.[5] Reflecting on an issue indigenous to a heterogeneous society, the Third Circuit in *Dunn v. Gannett New York Newspapers, Inc.*[6] held that under the re-

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[1] U.S. CONST. amend. I. The first amendment in its entirety states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[2] Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942). David Riesman analyzed America's disinterest in pursuing libel suits as follows:

> [T]he American attitude towards reputation is unique . . . where tradition is capitalistic rather than feudalistic, reputation is only an asset, "good will", not an attribute to be sought after for its intrinsic value. And in the United States these business attitudes have colored social relations. The law of libel is consequently unimportant.

Id. at 730.

[3] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that a public official may recover damages for a defamatory statement only if he proves that the statement was made with malice). *See also* Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983). The rejuvenation of libel law can be attributed to the Court's recognition of recovery for purely emotional injury, the trend toward favoring compensation and risk allocation, the difficulty in separating the entertainment and informative functions of the media and the lack of coherent standards in libel law. *Id.* at 11.

[4] *See generally* R. LABUNSKI, LIBEL AND THE FIRST AMENDMENT (1987) (discussing the role of libel laws in a society which promotes freedom of expression).

[5] *New York Times*, 376 U.S. at 279-280.

[6] 833 F.2d 446 (3d Cir. 1987). The appeal was brought before Chief Judge

quirement of establishing actual malice, a published statement must be evaluated in its original language and not by its English translation.[7]

Dunn involved a Spanish language daily newspaper entitled *El Diario-La Prensa* (*El Diario*) which covered a statement by Thomas G. Dunn, Mayor of Elizabeth, New Jersey.[8] During a campaign debate, Mayor Dunn attributed the city's litter problem to the number of new inhabitants who had arrived from impoverished countries and were unaccustomed to their new environment.[9] In response to Mayor Dunn's statement, the October 23, 1984 edition of *El Diario* printed the following front page headline for its Spanish readership: "*Alcalde de Elizabeth al ataque: LLAMA 'CERDOS' A LOS HISPANOS.*"[10] The English translation of the headline read: "Elizabeth Mayor on the attack: CALLS HISPANICS 'PIGS.' "[11] In addition, on October 28, 1984, *El Diario* published an open letter from Manuel de Dios Unanue, its Editor-in-Chief, to Mayor Dunn alleging that Mayor Dunn had concealed embezzlement within the city government and had directed city officials not to speak with *El Diario* representatives.[12]

Gibbons, Circuit Judges Aldisert and Mansmann. *Id.* at 447. Judge Aldisert authored the unanimous opinion of the court. *Id.*

7 *Id.* at 452.

8 *Id.* at 448.

9 *Id.* Mayor Dunn stated that:

> [L]itter, of course, is an ever growing problem because we are a very busy, a growing city. And you know our public work employees do not go around deliberately filling the curbs up with debris. People, people make debris. And we're constantly trying to educate people to the fact that if they want a clean downtown they're going to have to do their part to keep it clean. You have a lot of new people moving into the City of Elizabeth, some coming from foreign lands where abject poverty was something they lived with everyday and they have not yet been assimilated into our type of society, and it will take a great deal of time for some of them to respect the rights and the properties of other people, and above all, to respect a city that offers them a home in what I consider to be a wholesome environment.

Id.

10 *Id.*

11 *Id.*

12 *Id.* at 448, 452. As translated, the segments of the October 28th *El Diario* open letter stated:

> Again Mr. Mayor? In all of my career as a newspaperman, I have never encountered a politician who has committed so many mistakes and demonstrated such little sensitivity toward the people he supposedly represents.
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> . . . .
>
> We do not doubt any of our personnel. Can you say the same? What happened with the $687,000 which the federal Department of

Mayor Dunn filed a complaint against Gannett New York Newspapers, Inc. (Gannett), publishers of *El Diario*, asserting that the October 23, 1984 headline and segments of the October 28, 1984 open letter were defamatory.[13] On May 1, 1986, the United States District Court for the District of New Jersey, applying New Jersey law, granted Gannett's motion to dismiss the action regarding the October 28th open letter.[14] The district court, however, denied Gannett's motion to dismiss the complaint as to the October 23rd headline.[15]

The district court subsequently granted Gannett's motion for reargument and on September 16, 1986, vacated its earlier opinion denying summary judgment to dismiss the claim as to the October 23rd headline.[16] Holding that Mayor Dunn had failed to establish by clear and convincing evidence that the headline was published with actual malice, the district court granted Gannett's motion to dismiss.[17] The district court, however, denied Mayor Dunn's motion for reconsideration and his request to supplement the record.[18] Mayor Dunn appealed from the district court's decision granting summary judgment and denying record supplementation.[19] The Third Circuit affirmed the district court's decision, holding that actual malice cannot be established by an English translation of a Spanish publication.[20]

The United States Supreme Court initially addressed the extent to which the first amendment restricts the states' authority to award damages in a libel suit in *New York Times Co. v. Sullivan*.[21]

> Housing discovered had been lost and the report which you had asked the City Council to keep confidential?
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> . . . .
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> But there is also something which I cannot ignore and that is your order to municipal employees not to talk with the reporters of El Diario-LaPrensa. That again brings back memories of Adolf Hitler or the censorship prevalent in totalitarian regimes like those of Fidel Castro.

Id. at 453-54.

13 *Id.* at 448.

14 *Id.*

15 *Id.*

16 *Id.* at 448-49.

17 *Id.* at 449. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (clear and convincing evidence standard must be employed in summary judgment motions). For a more detailed discussion of *Anderson* see *infra* notes 51-56 and accompanying text.

18 *Dunn*, 833 F.2d at 449.

19 *Id.*

20 *Id.* at 452.

21 376 U.S. 254 (1964). The Supreme Court has held that libelous speech is an unprotected class. *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 49-50 & n.10

In *New York Times*, L.B. Sullivan, an elected commissioner in Montgomery, Alabama, alleged that a full-page advertisement published in the *New York Times* contained statements which were defamatory to him in his official capacity.[22] The advertisement, published during the civil rights movement, alleged incidents of police suppression in Montgomery, Alabama.[23] The Supreme Court of Alabama awarded Sullivan $500,000 in damages concluding that under Alabama law the advertisement was libelous per se.[24] The Supreme Court of the United States reversed and remanded the decision of the Supreme Court of Alabama finding Alabama's libel law constitutionally deficient.[25] The unanimous Court in *New York Times* concluded that statements concerning the official conduct of an elected government employee[26] could only support an action for libel if the plaintiff established by clear and convincing evidence[27] that the statements were published

(1961); Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486-87 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

See generally PROSSER AND KEETON, LAW OF TORTS § 113, at 804-12 (5th ed. 1984) (discussing the current law of defamation).

22 *New York Times*, 376 U.S. at 256.

23 *Id.* at 257-58. The advertisement was entitled "Heed Their Rising Voices" and included allegations that students attending Alabama State College protested to state authorities by not registering for classes and signing "My Country, 'Tis of Thee" on the steps of the state capital. *Id.* at 256-57. It was also alleged that Dr. Martin Luther King's home was bombed and that he had been arrested seven times for offenses including loitering, speeding and perjury. *Id.* at 257-58.

24 New York Times Co. v. Sullivan, 273 Ala. 656, 659, 680, 144 So.2d 25, 28, 52 (1962), *rev'd and remanded*, 376 U.S. 254 (1964). Although the advertisement did not specifically mention Sullivan, he asserted that because he was the Commissioner responsible for supervision of the Montgomery Police Department, any allegations of wrongdoings by that department would implicate him. 273 Ala. at 670, 144 So.2d at 39. In Alabama a plaintiff could establish that a published statement was libelous per se by showing that "the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt." *Id.* at 668, 144 So.2d at 37.

25 *New York Times*, 376 U.S. at 264.

26 *Id.* at 279. First amendment protections of speech were extended to non-elected public officials in Rosenblatt v. Blair, 383 U.S. 75 (1965). Justice Brennan, writing for the majority, stated that "[t]here is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Rosenblatt*, 383 U.S. at 85.

27 *New York Times*, 376 U.S. at 285-86. The Supreme Court summarized the three standards of proof in Addington v. Texas, 441 U.S. 418 (1979). In typical civil cases involving monetary disputes, a plaintiff must establish his or her position by a preponderance of the evidence, the lowest evidentiary standard. *Addington*, 441 U.S. at 423. In criminal cases, however, guilt must be proved beyond a reason-

with actual malice.[28] In proving actual malice, the Court stated that the plaintiff must establish that the defendant published the statement while knowing its falsity or with reckless disregard of the truth.[29] The Supreme Court considered its decision necessary to protect first amendment freedoms of speech and of the press which safeguard uninhibited and robust debates on public issues.[30]

Three years later, the Supreme Court consolidated *Curtis Publishing Co. v. Butts*[31] and *Associated Press v. Walker*,[32] and extended first amendment protections of speech to criticism of public figures.[33] *Curtis* involved the *Saturday Evening Post's* accusation that University of Georgia athletic director, Wally Butts, had disclosed the football team's offensive and defensive patterns to the opposing team's coach.[34] In *Walker*, the Associated Press was alleged to have mischaracterized former Major General Edwin Walker's participation in a riot on September 30, 1962 at the University of Mississippi.[35] Neither Butts nor retired Major Walker were government employees for the purposes of the *New York Times* requirement.[36] The Supreme Court concluded that a public figure could only recover for an injurious and defamatory falsehood on evidence that the publisher was engaged in unrea-

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able doubt, thereby protecting the defendant and imposing the entire risk of error on the state. *Id.* at 423-24 (citing *In re* Winship, 397 U.S. 358, 364 (1970)). In civil cases where interests are more substantial than monetary loss alone, an intermediate standard requiring clear and convincing evidence has been employed. *Id.* at 424.

28 *New York Times*, 376 U.S. at 279-80. The Supreme Court cited with approval Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) which held that the freedom to make good-faith statements about issues of public concern was essential to the welfare of the nation. *New York Times*, 376 U.S. at 280-82 (citing Coleman v. MacLennan, 78 Kan. 711, 720, 98 P. 281, 286 (1908)).

29 *Id.* at 280.

30 *Id.* at 270. The Supreme Court decided *New York Times* "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* (citations omitted).

31 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).

32 393 S.W.2d 671 (Tex. Civ. App. 1965), *rev'd and remanded sub nom.* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

33 *Curtis Publishing*, 388 U.S. at 155.

34 *Id.* at 135-36.

35 *Id.* at 140. Major General Walker was reported to have encouraged rioters to use violence and was also reported to be instructing rioters in techniques to combat the effect of tear gas. *Id.*

36 *Id.* at 154. Although the University of Georgia is a state university, a private corporation employed Butts. *Id.* at 135.

sonable conduct.[37]

The Supreme Court was compelled to re-examine the *New York Times* actual malice requirement in *St. Amant v. Thompson*,[38] where a public official established that false information had been broadcasted recklessly but without the defendant having actual knowledge of its falsity.[39] Adopting a subjective standard, the *St. Amant* Court concluded that reckless disregard is limited to circumstances where the defendant had, in fact, doubted the validity of the statement.[40] Focusing on whether the defendant had en-

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37 *Id.* at 155. The Supreme Court enunciated its opinion as follows:

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standard of investigation and reporting ordinarily adhered to by responsible publishers.

Id.

The Court subsequently offered a definition of a public figure in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The Court identified two ways of establishing a person's status as a public figure:

> For the most part those who attain [the] status [of a public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id. For an example of the Court's analysis of the public figure requirement, see Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (evidence that petitioner had lived 20 years in relative obscurity following a grand jury inquiry and criminal sentence precluded petitioner's classification as a public figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (director of a non-profit research facility was not a public figure by virtue of his application for a federal grant); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (wealthy socialite was not a public figure by her involvement in divorce proceeding); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (attorney involved in controversial civil trial was not a public figure). *But see* Marcone v. Penthouse Int'l Magazine For Men, 754 F.2d 1072 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985) (attorney's voluntary association with motorcycle gangs who were the subject of media attention rendered the attorney a public figure as to allegations of drug trafficking).

38 390 U.S. 727 (1968).

39 *Id.* at 730.

40 *Id.* at 731. The Supreme Court had previously considered the reckless disregard standard concluding that even words spoken in hatred were protected under the actual malice requirement if the speaker honestly believed the statement was valuable in the free exchange of ideas and the search for truth. Garrison v. Louisiana, 379 U.S. 64, 73 (1964). *But see St. Amant*, 390 U.S. at 734 (Fortas, J., dissenting):

> The First Amendment does not require that we license shotgun attacks on public officials in virtually unlimited open season. The occupation of public officeholder does not forfeit one's membership in the human

tertained serious doubts as to the information's truth, the Supreme Court discounted the defendant's failure to verify his information.[41]

The Supreme Court, in a plurality opinion, *Rosenbloom v. Metromedia, Inc.*,[42] further expanded first amendment protections of speech. *Rosenbloom* involved news broadcasts of a bookseller's arrest for possession of obscene literature.[43] After Rosenbloom was acquitted of criminal obscenity charges, he filed suit against Metromedia alleging that broadcasts which did not specifically name him but characterized him as a "girlie-book peddler[ ]" and "smut distributor" were defamatory.[44] The Supreme Court concluded that the journalists were entitled to first amendment protections of speech when covering private citizens involved in matters of public interest, and therefore, the *New York Times* actual malice requirement was applicable.[45]

After a period of continued expansion of first amendment protections of speech, the Supreme Court reexamined a private individual's right to bring a suit for defamation in *Gertz v. Robert Welch, Inc.*[46] Gertz was a reputable attorney who represented a victim's family in a civil action against a police officer convicted of murder.[47] The defendant's magazine alleged that Gertz had arranged the "frame-up" of the police officer and was a "Communist-fronter" with a criminal record.[48] The Supreme Court

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> race. The public official should be subject to severe scrutiny and to free and open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy in law. *New York Times* does not preclude this minimal standard of civilized living.

Id.

41 *Id.* at 731.

42 403 U.S. 29 (1971).

43 *Id.* at 33-34.

44 *Id.* at 36.

45 *Id.* at 52. *See generally* Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931 (1983) (an analysis of various states' definitions of a public controversy). New Jersey has recognized matters of public interest as including persons who "voluntarily and knowingly engage[] in conduct that one in his position should reasonably know would implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny." Sisler v. Gannett Co., 104 N.J. 256, 274, 516 A.2d 1083, 1092 (1986).

46 418 U.S. 323 (1974).

47 *Id.* at 325.

48 *Id.* at 325-26. The defendant published *American Opinion*, a monthly magazine, which espoused the views of the John Birch Society. *Id.* In the 1960s, *American Opinion* warned of a conspiracy to discredit the police force and replace the policemen with Communist supporters. *Id.* The article which asserted Robert Gertz's participation in framing a police officer for murder was part of this series on the Communist conspiracy to discredit the police force. *Id.*

concluded that Gertz was neither a public official nor a public figure by virtue of his role in the civil trial, and therefore, the *New York Times* standard was not applicable.[49] The Supreme Court left to the states the determination of appropriate standards for a private individual's recovery for defamation.[50]

Recently, in *Anderson v. Liberty Lobby, Inc.*[51] the Supreme Court considered the appropriate summary judgment standard for those cases where the *New York Times* requirements are applicable.[52] In *Anderson*, the publisher of *The Investigator* submitted an affidavit stating that the article in question was fully researched and compiled from a number of sources.[53] Moving for summary judgment, the publisher argued that a finding of malice was precluded.[54] The Supreme Court concluded that the *New York Times* clear and convincing evidentiary standard must be used to determine whether a genuine issue remains for trial.[55] The Court further stated that a properly supported motion for summary judgment may only be defeated when an opposing party has presented sufficient evidence to support a judgment in his favor.[56]

The United States Court of Appeals for the Third Circuit was faced with a unique question of defamation law in *Dunn v. Gannett New York Newspapers, Inc.*[57] In determining whether a statement referring to a public figure's official conduct constituted actionable libel, the Third Circuit was required to decide

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49 *Id.* at 352.

50 *Id.* at 347. Furthermore, the Court mandated that recovery of punitive damages is precluded unless actual malice is proven. *Id.* at 349.

51 477 U.S. 242 (1986).

52 *Id.* at 244.

53 *Id.* at 245.

54 *Id.* In federal court, summary judgment is granted according to FED. R. CIV. P. 56. Rule 56(a) specifies that:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Id.

55 *Anderson*, 477 U.S. at 255-56. The Supreme Court had previously discussed the requirement of providing a genuine issue to block an adversary's motion for summary judgment in Matsushita Elec. Indus. Co. v. Zenith, 475 U.S. 574 (1986), where the Supreme Court noted that a motion cannot be blocked simply by alleging that there is some doubt to the opponent's argument. *Id.* at 586.

56 *Anderson*, 477 U.S. at 257.

57 833 F.2d 446 (3d Cir. 1987).

whether the published Spanish word or the word's English translation should be used to establish actual malice.[58] Judge Aldisert began his analysis by reviewing the principles of summary judgment noting that the judge's function in a summary judgment proceeding is to determine whether a genuine issue exists for trial.[59]

Considering whether summary judgment was appropriate,[60] the court noted that it must first determine whether *El Diario* had damaged Mayor Dunn's reputation within the meaning of New Jersey law and, if he were harmed, whether the first amendment precluded recovery.[61] Judge Aldisert noted that, under New Jersey law,[62] published material which injures a person's reputation is subject to liability only when the statement is false[63] and simultaneously indicates an assertion of fact.[64] After these elements are established, the court noted that the issue becomes whether the statement is susceptible to defamatory meaning.[65] Judge Aldisert observed that it is the court's and not the factfinder's function to determine if the statement is patently defamatory by its subjection of an individual to ridicule, hatred or contempt.[66] The court further stated that in situations where the

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58 *Id.* at 447-48.

59 *Id.* at 449.

60 *Id.* Judge Aldisert noted that "[s]ummary judgment can be granted only if no genuine issue of material fact exists." *Id.* (citing FED. R. CIV. P. 56(c); Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977)). A genuine issue was further defined by Judge Aldisert as evidence which would persuade a reasonable jury in finding for the non-moving party. *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

61 *Id.* (citing Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1077 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); Steaks Unltd., Inc. v. Deaner, 623 F.2d 264, 270 (3d Cir. 1980)). New Jersey tends to favor granting summary judgment to media libel defendants. *See* Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 157, 516 A.2d 220, 236 (1986).

62 In some areas, New Jersey has extended greater protection of free speech than is required by the federal Constitution. State v. Schmid, 84 N.J. 535, 555, 423 A.2d 615, 625 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982). *See also* Maressa v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376, *cert. denied*, 459 U.S. 907 (1982) (In a libel action, New Jersey Shield Law grants newspersons absolute privilege to withhold confidential sources which relate to the editor's thought processes.).

63 *Dunn*, 833 F.2d at 449 (citing Maressa v. New Jersey Monthly, 89 N.J. 176, 190, 445 A.2d 376, 383-84, *cert. denied*, 459 U.S. 907 (1982)).

64 *Id.* (citing Karnell v. Campbell, 206 N.J. Super. 81, 89, 501 A.2d 1029, 1033 (App. Div. 1985)).

65 *Id.* (citing Kotlikoff v. The Community News, 89 N.J. 62, 66, 444 A.2d 1086, 1088 (1982)).

66 *Id.* (citing Lawrence v. Bauer Publishing & Printing, Ltd., 89 N.J. 451, 459, 446 A.2d 469, 473, *cert. denied*, 459 U.S. 999 (1982)).

statement is capable of defamatory and nondefamatory interpretation, the question of whether the statement is actionable must be decided by a jury.[67] Reviewing the instant matter, Judge Aldisert adopted the district court's determination that the October 23rd headline was actionable.[68]

Addressing the question of whether first amendment protections barred Mayor Dunn's recovery, Judge Aldisert stated that public issues should be uninhibitedly debated under circumstances which occasionally include sharp attacks on government officials.[69] The court of appeals further noted that a public official's recovery for defamation regarding official conduct is predicated on establishing with convincing clarity that the statement was published with actual malice which is defined as knowledge that the statement is false or a reckless disregard of the truth.[70] The court further defined reckless disregard as the publisher's awareness of the statement's inaccuracy at the time of the publication.[71]

Determining the quantum of malice that must be demonstrated for a successful summary judgment motion, the court observed that it must support a jury's finding that there was or was not clear and convincing evidence of actual malice.[72] Judge Aldisert further stated that when the issue of actual malice is raised on appeal, the court must examine the record to assure that the judgment did not impair the defendant's right of free expression.[73]

The court of appeals affirmed the district court's determination that *New York Times* was applicable to Mayor Dunn's official conduct.[74] Reviewing the allegations raised by Mayor Dunn to

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67 *Id.* (citing Lawrence v. Bauer Publishing & Printing, Ltd., 89 N.J. 451, 459, 446 A.2d 469, 473, *cert. denied*, 459 U.S. 999 (1982)).

68 *Id.* at 450.

69 *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

70 *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).

71 *Id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). *See also* Bose Corp. v. Consumers Union of United States Inc., 466 U.S. 485 (1984) (a publisher could not be held liable for an article which incorrectly evaluated loudspeaker system); Coughlin v. Westinghouse Broadcasting & Cable Inc., 780 F.2d 340, 342 (3d Cir. 1985), *cert. denied*, 476 U.S. 1187 (1986) (malice could not be established by evidence that publisher relied on biased sources and failed to properly investigate story).

72 *Dunn*, 833 F.2d at 450 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

73 *Id.* (quoting Bose Corp. v. Consumers Union of United States Inc., 466 U.S. 485, 499 (1984)).

74 *Id.*

illustrate the existence of actual malice, Judge Aldisert compared the headline to Mayor Dunn's actual statements from the debate.[75] Specifically, Mayor Dunn asserted that the denotation of *cerdos* with single quotation marks conveyed to *El Diario's* readers that Mayor Dunn had used the word "pigs" in his speech.[76] In support of that proposition, Mayor Dunn offered the deposition testimony of Antonio Santurio, an assistant metropolitan editor of *El Diario*, to establish that Santurio knew at the time the headline was published that Mayor Dunn had neither specifically referred to Hispanics nor used the word "pig."[77]

The court of appeals also considered the statement of Jose Rohaidy, who wrote the article which accompanied the October 23rd headline.[78] Rohaidy based the article on reports received from Manuel Goberna and Juan Sierra who attended the campaign debate.[79] In his affidavit, Manuel Goberna stated that he understood Mayor Dunn's statement to refer to Hispanics and, although "pigs" was not used in the debate, the effect was identical.[80] The court also noted that Juan Sierra and another individual present at the debate concurred with Goberna's assessment of Mayor Dunn's statement and the reaction it caused.[81]

The court of appeals referred to Santurio's affidavit, which explained that the editorial staff decided to use the word *cerdos*, because there was no Spanish equivalent for the English word "litterbug" and alternative Spanish words were too inflammatory or vulgar.[82] Judge Aldisert noted the import of the editor's assertion that the staff chose *cerdos* because it is used in Spanish to refer to individuals who dirty the street by littering.[83] The court also considered Antonio Santurio's explanation that the quotation marks were placed around *cerdos* to indicate its figurative

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75 *Id.*

76 *Id.*

77 *Id.* at 450-51.

78 *Id.* at 451.

79 *Id.* In circumstances such as these, the Third Circuit has identified the "operative inquiry" as being "whether he published the statement even though he 'in fact entertained serious doubts as to the truth of his publication.' " Pierce v. Capital Cities Comm., Inc., 576 F.2d 495, 508 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978) (footnote omitted).

80 *Dunn*, 833 F.2d at 451. Sierra stated in his affidavit that he believed Mayor Dunn's remarks to refer to Hispanics and that he also believed the article correctly reflected the Hispanic community's frustration and anger with Mayor Dunn's accusation. *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

use.[84] Recognizing that the use of quotation marks in the Spanish language does not uniformly signify a literal quotation, the court considered Santurio's representation that the headline was neither perceived by the Spanish readership nor intended by its authors to convey a direct quotation of Mayor Dunn's words.[85]

Judge Aldisert concluded that the evidence persuasively illustrated that *El Diario* formulated the October 23rd headline from numerous sources who believed that Mayor Dunn's statement referred to Hispanics.[86] The court stated that Mayor Dunn failed to demonstrate that *El Diario* questioned the accuracy of its sources and further mentioned that Mayor Dunn failed to successfully challenge the use of *cerdos* as an accurate reflection of his statements as translated into Spanish.[87] Judge Aldisert did not accept Mayor Dunn's contention that the use of *cerdos* was inappropriate because one of its English translations is "pig."[88]

The court declared that the determination of actual malice must be made from the original word used by the defendant and not by its English translation.[89] In so doing, the court indicated that translations may not reflect the nuances and subtleties contained in the original statement.[90] The court observed that this concern was particularly evident in the instant matter where there exists no Spanish translation for the word "litterbug."[91]

Judge Aldisert determined that while *El Diario* may have mischaracterized Mayor Dunn's statements, such mischaracterization would not be sufficient to establish actual malice under the *New York Times* standard.[92] Noting that the Spanish word *cerdos* was a

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84 *Id.*

85 *Id.* Santurio stated that the headline "was not intended to convey, nor do I believe that our Spanish-speaking readership interpreted it to convey, that Dunn was being directly quoted." *Id.* (citation omitted).

86 *Id.* According to the RESTATEMENT (SECOND) OF TORTS § 581A, comment f, at 237 (1977), slight inaccuracies are not actionable if the substance of the statement is accurate. *See also* Dickey v. CBS, Inc., 583 F.2d 1221, 1226 (3d Cir. 1978) (holding that there is no constitutional privilege to neutral reportage).

87 *Dunn*, 833 F.2d at 451-52.

88 *Id.* at 452. Judge Aldisert considered Mayor Dunn's strongest argument to be the difference between the English word that he actually used and the English translation of the Spanish word which was published. *Id.*

89 *Id. See also* Jenkins v. KYW Westinghouse Broadcasting & Cable, Inc., 829 F.2d 403 (3d Cir. 1987), where the Third Circuit considered an English statement's possible defamatory meaning under Pennsylvania law and noted the difficulty in perceiving the broadcast as it was interpreted by the viewing public. *Id.* at 406-07.

90 *Dunn*, 833 F.2d at 452.

91 *Id.*

92 *Id. See also* Bose Corp. v. Consumers Union of United States Inc., 466 U.S. 485, 512-13 (1984) (an unintentional malapropism is protected speech under the

fair, though inadequate, translation of litterbug, the court concluded that Mayor Dunn failed to present any countervailing evidence of actual malice which could raise a genuine issue of material fact.[93]

The court of appeals next considered the cause of action concerning the October 28th open letter authored by Manuel de Dios Unanue, Editor-in-Chief of *El Diario*.[94] The court recognized that expressions of opinions would not be actionable for libel unless there was reliance on undisclosed defamatory facts.[95] Judge Aldisert continued his analysis by distinguishing between pure opinions and mixed opinions, noting that the former occurs when the author does not explicitly disclose the facts on which the opinion is based, but the parties assume the facts exist.[96] Considering the applicable New Jersey law, Judge Aldisert noted that expressions of pure opinion regarding issues of public concern may not support an action for defamation.[97] The court further noted that mixed opinions, based on undisclosed facts, may be actionable if the underlying and undisclosed facts are defamatory.[98] Judge Aldisert predicted that the Supreme Court of New Jersey would have advocated the foregoing approach in deciding whether the October 28th open letter constituted defamation.[99]

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first amendment, even though an informed reader would have known the term was inaccurate in the context in which it was used); Time, Inc. v. Pape, 401 U.S. 279 (1971) (inaccurate interpretation is not sufficient to establish a jury question under the actual malice requirement).

93 *Dunn*, 833 F.2d at 452.

94 *Id.* The Third Circuit noted that New Jersey uses the RESTATEMENT (SECOND) OF TORTS § 566 (1977) to determine whether an opinion constitutes defamation. *See* Kotlikoff v. Community News, 89 N.J. 62, 69, 444 A.2d 1086, 1089 (1982). *See also* Karnell v. Campbell, 206 N.J. Super. 81, 89, 501 A.2d 1029, 1033 (App. Div. 1985) ("The question of whether the statement has a defamatory meaning does not even arise, however, unless the statement is an assertion or implication of 'fact.' ").

95 *Dunn*, 833 F.2d at 453. Section 566 of the RESTATEMENT (SECOND) OF TORTS (1977) provides that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), where Justice Powell stated in dicta that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40 (footnote omitted).

96 *Dunn*, 833 F.2d at 453. The terms pure and mixed opinions and the court's discussion thereof were extracted from the comments to the RESTATEMENT (SECOND) OF TORTS § 566 (1977).

97 *Dunn*, 833 F.2d at 453 (quoting Kotlikoff v. Community News, 89 N.J. 62, 69-70, 444 A.2d 1086, 1089-1090 (1982)).

98 *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977)).

99 *Id.*

The court of appeals considered the paragraphs in the October 28th open letter which accused Mayor Dunn of embezzlement, concealing misconduct and restricting city employees' right to free speech.[100] Judge Aldisert compared this case to a prior Supreme Court decision where a statement alleging that a local developer was blackmailing the city was not actionable because it was obvious that the term was a rhetorical hyperbole.[101] The court also examined a New Jersey Supreme Court decision where a letter to the editor making allegations of a "conspiracy" and a "huge cover-up" were protected opinions when examined in the full context of the document.[102]

Judge Aldisert stressed that the October 28th open letter was based on fully disclosed facts including references to $687,000 in missing funds and Mayor Dunn's directive that municipal employees not speak to *El Diario* reporters.[103] The court determined that opinions which include underlying non-defamatory facts cannot support an action for defamation regardless of how derogatory the statements may be.[104] The court considered this rule justifiable due to the readers' ability to assess for themselves the validity of the author's opinion against the disclosed facts.[105] The court concluded that the contested paragraphs contained in the October 28th open letter were protected as expressions of pure opinion.[106] Relying on the loose and figurative language of the letter, the court determined that the statements could not have been interpreted as accusing Mayor Dunn of committing a criminal offense.[107]

Additionally, the court of appeals concluded that the October 28th open letter's comparison of Mayor Dunn to notorious

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100 *Id.* at 453-54.

101 *Id.* at 454 (citing Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)).

102 *Id.* (citing Kotlikoff v. Community News, 89 N.J. 62, 444 A.2d 1086 (1982)).

103 *Id.*

104 *Id.* (quoting Kotlikoff v. Community News, 89 N.J. 62, 73, 444 A.2d 1086, 1091 (1982)).

105 *Id.*

106 *Id.*

107 *Id.* The court reasoned that the first amendment protects "pure" opinion. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974) (publication of "traitor" in commentary on union negotiations could not be interpreted as representation of fact, as the word was clearly used in loose, figurative sense). *But see* Cianci v. New Times Publishing Co., 639 F.2d 54, 64 (2d Cir. 1980) (article alleging specific charges of rape and obstruction of justice was capable of defamatory meaning).

dictators is protected under the first amendment.[108] The court characterized the open letter as no greater than an imaginative expression of contempt and ruled that the district court was correct in granting defendant's motion for summary judgment as to the October 28th open letter.[109]

The court of appeals proceeded to review the district court's denial of Mayor Dunn's motion for reconsideration and request to supplement the record.[110] Applying an abuse of discretion standard, Judge Aldisert noted that Gannett's motion for summary judgment could only have been successfully blocked by clear and convincing evidence of actual malice.[111] The court concluded that Mayor Dunn was not entitled to supplement the record to address the impact of the recently decided *Anderson v. Liberty Lobby, Inc.*[112] as Mayor Dunn had previously filed a letter brief for that purpose.[113] The court of appeals, therefore, affirmed the district court's granting of Gannett's motion for summary judgment.[114]

The *Dunn* decision involved questions of state and federal law.[115] Hearing the case under diversity jurisdiction, the Third Circuit was required to examine the substance of Mayor Dunn's complaint under New Jersey law while assuring that the court's decision did not violate the federal constitution's guarantees of free speech.[116] Mayor Dunn's complaint asserted that *El Diario* had published a defamatory statement and a defamatory opinion.[117] Alleged defamatory statements are only actionable in New Jersey if the statement falsely asserts a fact which is reasonably susceptible to defamatory meaning.[118] Section 556 of the *Restatement (Second) of Torts* has been adopted in New Jersey in de-

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108 *Dunn*, 833 F.2d at 454 (citing Koch v. Goldway, 817 F.2d 507 (9th Cir. 1987); Buckley v. Littell, 539 F.2d 882, 893-94 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)).

109 *Id.* at 454-55 (quoting Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974)).

110 *Id.* at 455.

111 *Id.* *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). *See also supra* notes 51-56 and accompanying text.

112 477 U.S. 242 (1986).

113 *Dunn*, 833 F.2d at 455.

114 *Id.*

115 *Id.* at 449.

116 *See id.* at 450.

117 *Id.* at 448.

118 *Id.* at 449 (citing Karnell v. Campbell, 206 N.J. Super. 81, 501 A.2d 1029 (App. Div. 1985); Kotlikoff v. Community News, 89 N.J. 62, 444 A.2d 1086 (1982)).

termining whether opinions are subject to liability.[119] The *Restatement* advises that an opinion cannot be actionable for defamation unless it asserts undisclosed and defamatory facts.[120]

After adopting the district court's determination that the October 23rd headline was actionable under New Jersey law,[121] the court focused on whether first amendment protections of free speech precluded recovery.[122] Using the *New York Times* actual malice standard, Judge Aldisert considered Mayor Dunn's assertion that the headline itself evidenced malice by using the word *cerdos*.[123] Mayor Dunn's allegations were weighed against *El Diario*'s representations that numerous sources were relied upon in formulating the headline which they believed correctly reflected the impact of Mayor Dunn's statement.[124] The Third Circuit concluded that actual malice could not be derived from the English translation of a published word.[125] In addition, Judge Aldisert summarily dismissed Mayor Dunn's complaint as to the editorial open letter by determining that the facts on which the opinion relied were fully disclosed.[126]

The decision in *Dunn* comports with the Supreme Court's protection of free speech which began with the landmark *New York Times* decision. Throughout the 1960's, the Supreme Court enthusiastically expanded the scope of first amendment protections of speech to encompass statements concerning public officials, public figures and public issues.[127] The *Gertz* decision in 1974 restated the Supreme Court's commitment to first amendment protection of speech and publication, while preserving a private individual's right to pursue a libel suit.[128]

The Supreme Court has not evidenced an intent to weaken the first amendment protections of speech which require a public official or a public figure to establish that the statement was published with actual malice. In fact, the Supreme Court's recent de-

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119 *Id.* at 452-53.

120 RESTATEMENT (SECOND) OF TORTS § 566 (1977). For the text of § 566 see *supra* note 95.

121 *Dunn*, 833 F.2d at 450.

122 *Id.*

123 *Id.*

124 *Id.* at 451.

125 *Id.* at 452. The court explicitly stated that "[w]e are not willing to base an actual malice determination solely on the translation to English from Spanish of the language used by the defendant." *Id.*

126 *Id.* at 454-55.

127 *See supra* notes 21-45 and accompanying text.

128 *See supra* notes 45-50 and accompanying text.

cision in *Anderson v. Liberty Lobby, Inc.*[129] reaffirms the Court's commitment to the protection of speech by mandating that a plaintiff provide clear and convincing evidence of actual malice to suppress a defendant's motion for summary judgment.[130] The *Anderson* decision further assures that spurious defamation suits will be dismissed before they reach trial.[131]

Considering the difficulties which confront foreign language publishers in reporting and translating English dialogue, *Dunn* promises to be instrumental in preserving first amendment protections of speech regarding America's foreign speaking citizens. As an elected public official, Mayor Dunn fits squarely within the contemplated class of persons addressed by the Supreme Court in *New York Times Co. v. Sullivan*.[132] Under *New York Times*, Mayor Dunn is required to prove that the publication was issued with actual malice.[133] The basis of Mayor Dunn's complaint was that *El Diario*'s choice of *cerdos* was itself malicious.[134] Mayor Dunn, however, failed to illustrate that there was a more appropriate Spanish word for litterbug.[135] Further, *El Diario* presented a persuasive argument justifying the headline as an accurate reflection of the frustration and humiliation which was perceived by the audience at the campaign debate.[136]

In addition, as Mayor of Elizabeth, New Jersey, Mayor Dunn had the ability to access the media to present a rebuttal to publications such as *El Diario*'s. Debate on issues concerning elected officials has been of primary importance in prior decisions.[137] Moreover, foreign language newspapers are an indispensable forum in which to involve foreign speaking citizens in the American political system. *El Diario*'s publications were politically significant and representative of the editor's viewpoint regarding Mayor Dunn's capacity as an elected official.[138] America is commonly viewed as a "melting pot" nation where it would seem axiomatic that foreign language publishers are entitled to effective first amendment protections of speech. Considering *New York*

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129 477 U.S. 242 (1986).
130 *Id.* at 255-56.
131 *Id.* at 257.
132 376 U.S. 254, 255-56 (1964).
133 *Id.* at 280.
134 *See Dunn*, 833 F.2d at 450.
135 *Id.* at 452.
136 *Id.* at 451-52.
137 *See New York Times*, 376 U.S. at 280-81 (quoting Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908)).
138 *Dunn*, 833 F.2d at 451.

Times use of a subjective standard to determine actual malice,[139] the decision in *Dunn* is justified by the necessity of analyzing a published word in its original language to fully understand the nuances and subtleties intended by the author.[140]

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139 *New York Times*, 376 U.S. at 279-80.
140 *See Dunn*, 833 F.2d at 452.