

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-18

**TITLE** DUN & BRADSTREET, INC., Petitioner v.  
GREENMOSS BUILDERS, INC.

**PLACE** Washington, D. C.

**DATE** March 21, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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DUN & BRADSTREET, INC., :  
Petitioner :  
v. : No. 83-18  
GREENMOSS BUILDERS, INC. :  
- - - - - x

Washington, D.C.  
Wednesday, March 21, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 2:14 p.m.

APPEARANCES:  
GORDON LEE GARRETT, ESQ., Atlanta, Georgia;  
on behalf of Petitioner.  
THOMAS F. HEILMANN, ESQ., Burlington, Vt.;  
on behalf of Respondent.

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on behalf of Respondent	

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Dun & Bradstreet against Greenmoss Builders, Incorporated.

Mr. Garrett, I think you may proceed when you're ready.

ORAL ARGUMENT OF GORDON LEE GARRETT, ESQ.,  
ON BEHALF OF PETITIONER

~~MR. SELLER~~ <sup>GARRETT</sup>: Mr. Chief Justice and may it please the Court:

The issue before you today is whether the First Amendment's limitations on presumed and punitive damages apply to non-media defendants in actions for defamation. Petitioner Dun & Bradstreet has urged the Court to confirm that the First Amendment protects all speech against the award of presumed and punitive damages, absent actual malice.

QUESTION: "Confirm" to me, Mr. Garrett, would suggest that we would be ratifying what someone else has already said is correct. Who is that someone else?

MR. GARRETT: Fully recognizing, Your Honor, the footnotes in several opinions dealing with private defamation, we believe that this Court's opinion in Gertz versus Robert Welch leads to the inescapable conclusion that on the one hand the states have no



1 substantial interest in awarding presumed and punitive  
2 damages against any speech when balanced against the  
3 First Amendment protections. We believe that's why the  
4 word "confirm" is appropriate.

5 QUESTION: I'm not sure I track what you mean  
6 when you say private defamation.

7 MR. GARRETT: Your Honor, I agree with you. I  
8 think in this Court's opinions "private defamation" has  
9 been used to signify the status of the plaintiff, from a  
10 public figure, to a public official, to a private  
11 figure. But defamation by definition includes a  
12 publication to a third party.

13 I think Your Honor is correct that there  
14 really is no such thing as private defamation. When I  
15 speak of private defamation in this case, I am really  
16 referring to a private party, not a public figure or a  
17 public official.

18 We believe a ruling which would --

19 QUESTION: I thought perhaps you had it the  
20 other way around, that there is some concept that a  
21 private party does not share all the protections that  
22 all other persons share under the First Amendment.

23 MR. GARRETT: Absolutely not, Your Honor. We  
24 believe that the decisions of this Court recognize that  
25 the First Amendment is a freedom which is enjoyed by

1 all, and that this Court doesn't make distinctions based  
2 on the speaker or his message in connection with  
3 defamation cases.

4 We believe that a ruling recognizing that  
5 neither presumed nor punitive damages could be allowed,  
6 absent actual malice, would do two very important  
7 things. First, it would recognize the very legitimate  
8 and important state interest in protecting the  
9 reputational interests of citizens by allowing private  
10 defamation plaintiffs to recover damages for actual  
11 injury.

12 QUESTION: Well, that isn't the result of any  
13 limitation. That's the result of the basic state  
14 general damage award.

15 MR. GARRETT: I'm sorry, Justice Rehnquist?

16 QUESTION: I thought you were saying the  
17 reasons why we should have this limitation on the  
18 states' authority are two, and one is the state ought to  
19 do what it isn't limited to do by this limitation.

20 MR. GARRETT: No, Your Honor. My point was  
21 that if you recognize the rule which we suggest in our  
22 case you would do two different things: One, you would  
23 recognize that the states have an interest in protecting  
24 the reputations of their citizens, and that interest is  
25 satisfied by awarding damages for actual injury.

1           The second point is that it would also  
2 recognize that, absent actual malice, the states have no  
3 interest in awarding either presumed or punitive  
4 damages, and that when balanced against the First  
5 Amendment freedoms it precludes such an award.

6           Let me emphasize that Dun & Bradstreet seeks  
7 only the same result that would be required in actions  
8 brought against newspapers, television, syndicated  
9 columnists. Whatever the term "media" means, we believe  
10 that all citizens are entitled to that freedom under the  
11 First Amendment.

12           As I mentioned earlier, we believe that that  
13 ruling would flow naturally from the Court's holding in  
14 Gertz versus Robert Welch, which significantly  
15 recognized that the states have no interest in securing  
16 for defamation plaintiffs gratuitous awards of money  
17 damages far in excess of any actual injury.

18           We believe the highlights of the case before  
19 the Court recognize the very concerns which troubled  
20 this Court in Gertz: jury awards of presumed and  
21 punitive damages in wholly unpredictable amounts,  
22 bearing no relationship to the actual harm caused.

23           QUESTION: Well, why are these damage awards  
24 so much different than awards in personal injury cases?  
25 They're all going up nowadays. Why shouldn't they go up

1 against libel defendants, too?


2 MR. GARRETT: Some of my colleagues at the  
3 libel bar would agree with you, Your Honor, that they  
4 are going up. There is one fundamental difference. In  
5 the case before the Court, where there was libel per se  
6 charged, the jury was instructed that damages are  
7 presumed.

8 Other torts do not allow a court to give  
9 presumed damages. I should not say "allow." States do  
10 not give damages for presumed injury.

11 QUESTION: You have to prove the element of  
12 damage?

13 MR. GARRETT: That's correct. And in an  
14 ordinary negligence case, for example, one of the key  
15 elements is injury, and that is why. Plus -- and I tend  
16 to forget this, too -- we are balancing defamation laws  
17 against a corresponding First Amendment right, and in  
18 ordinary negligence cases there is not even that  
19 corresponding First Amendment right except as due  
20 process would require.

21 QUESTION: Your client isn't exactly in the  
22 position of the New York Times in New York Times against  
23 Sullivan, where the Court talks about the dangers of  
24 self-censorship and that sort of thing. Really, no  
25 great social harm would be done if Dun & Bradstreet did





1 a little self-censorship when it comes to defaming  
2 people's business reputations, would it?

3 MR. GARRETT: I think, Your Honor, that it's  
4 important to focus on what chilling effect it would have  
5 on Dun & Bradstreet. I do not mean to suggest to the  
6 Court that Dun & Bradstreet is going to go out of  
7 business. In fact, it's been in business for a number  
8 of years.

9 But I think we must look, Your Honor, at two  
10 interests, one in the interest of the free flow of  
11 information generally, and secondly the interest in the  
12 recipients of Dun & Bradstreet reports to get prompt,  
13 accurate information. And let me be specific.

14 If Dun & Bradstreet or any other non-media  
15 speaker, whatever that means, is subject to unlimited  
16 awards for presumed and punitive damages, I think two  
17 things will happen.

18 One, rather than publish something that cannot  
19 be triple checked and guaranteed, that information  
20 simply will not be published. For example, Dun &  
21 Bradstreet will oftentimes include in its reports  
22 information about how a creditor thinks a particular  
23 corporation or proprietorship pays its bills.

24 Now, when that person that is the subject of  
25 the report calls Dun & Bradstreet and says, I don't

1 agree with you, I was not slow 90 days, and then Dun &  
2 Bradstreet calls the creditor to check that information  
3 and they say, well, we believe that's correct, but it's  
4 in our files, we can't be sure, if Dun & Bradstreet is  
5 subject to unlimited awards, they simply won't publish  
6 that.

7 And it's important in the free flow of  
8 commercial information that the recipients of those  
9 reports know that.

10 QUESTION: Know what?

11 MR. GARRETT: Know the fact that someone is  
12 slow pay, know the fact --

13 QUESTION: Even though the creditor wouldn't  
14 corroborate?

15 MR. GARRETT: What I'm saying is, Your Honor,  
16 he may have sent magnetic tapes to Dun & Bradstreet  
17 which are no longer in existence. It may take three or  
18 four weeks to corroborate. And it's important to get  
19 that information out.

20 QUESTION: Well, but is that really more  
21 important than making sure someone in the Respondent's  
22 position here isn't false accused of having filed  
23 bankruptcy?

24 MR. GARRETT: I agree, Your Honor, that it is  
25 very important that we recognize the reputational

1 interest of our citizens. And I think the Court struck  
2 the appropriate balance when in the Gertz case it says  
3 private defamation plaintiffs may be compensated for  
4 their actual injury.

5 In this case, plaintiffs defamed are entitled  
6 to compensation for actual injury. Our problem with  
7 this case is that the jury was told that damages were  
8 presumed, period. They need not prove actual damages.  
9 And I agree with Your Honor that it's important --

10 QUESTION: But the jury was also told that  
11 they had to find malice or lack of good faith to find  
12 any damages at all.

13 MR. GARRETT: That was based, Your Honor, on  
14 the Vermont qualified privilege, not on a constitutional  
15 standard.

16 QUESTION: What difference does it make? They  
17 were instructed.

18 QUESTION: That was the instruction.

19 MR. GARRETT: Well, the instruction was faulty  
20 because it did not define actual malice in the sense of  
21 New York Times versus Sullivan. It was faulty there.

22 QUESTION: Well, that would be lesser.

23 QUESTION: That's the issue in the case.

24 MR. GARRETT: I'm sorry, Justice?

25 QUESTION: Nothing. Go ahead.

1           QUESTION: Well, that's part of the issue in  
2 the case, is what kind of malice you have to show to  
3 justify punitive damages.

4           MR. GARRETT: And we believe that the  
5 decisions of this Court correctly recognize that that is  
6 constitutional malice in the sense of reckless disregard  
7 for the truth or knowledge of falsity.

8           QUESTION: Was Dun & Bradstreet requested to  
9 make a retraction and did they do anything about it?

10          MR. GARRETT: Yes, sir. Your Honor, we  
11 believe that --

12          QUESTION: Did they go the whole way?

13          MR. GARRETT: Oh, yes. We believe the record  
14 reflects this: that promptly after the issuance of the  
15 special notice which caused -- which set forth that  
16 Greenmoss Builders had filed a petition in bankruptcy,  
17 that when the President of Greenmoss called Dun &  
18 Bradstreet, on that very day they issued a correction in  
19 the form of a -- excuse me, a retraction, in the form of  
20 a correction notice.

21          QUESTION: Did Dun & Bradstreet let them know  
22 who were the recipients of the original false  
23 information?

24          MR. GARRETT: At that time, Your Honor, I do  
25 not believe that Dun & Bradstreet did.



1 QUESTION: They declined to give it to them.

2 MR. GARRETT: That's correct, although they  
3 did send that information to the five recipients that  
4 did get the original special notice. That is clear from  
5 the record.

6 QUESTION: Well, do you think it would be  
7 improper for a jury to infer malice from their refusal  
8 to let Greenmoss know who received the original false  
9 report?

10 MR. GARRETT: I don't believe so under this  
11 Court's constitutional standard dealing with focusing on  
12 the speaker's mind at the time of the publication. This  
13 would go to something after the publication was done.

14 As I was indicating --

15 QUESTION: Mr. Garrett, as long as you're  
16 interrupted, may I ask you another question?

17 MR. GARRETT: Yes, Your Honor.

18 QUESTION: There are federal laws in the  
19 securities fields, such as Section 10(b)(5), that govern  
20 statements that are made in connection with the sale of  
21 securities. Do you think there's a First Amendment  
22 right for people who are publishing information about  
23 securities that has to be considered every time we have  
24 a 10(b)(5) action?

25 MR. GARRETT: Your Honor, I think that would

1 require a different analysis than we have in the  
2 defamation area. As I understand the question, we would  
3 be talking about individuals publishing matters who are  
4 subject to the control of the SEC, as being licensed,  
5 perhaps.

6 I think that in restraining those types of  
7 publications there is a much different focus. In those  
8 cases, I believe the Court is focusing on the recipient  
9 of the report rather than the individual identified in  
10 the report in defamation cases. And I think --

11 QUESTION: Well, but you're asking us to  
12 recognize a First Amendment right here in connection  
13 with the Dun & Bradstreet type of publication, and I'm  
14 just wondering if that wouldn't lead us to having to  
15 recognize First Amendment rights in a 10(b)(5) situation  
16 or an ordinary fraud situation, anything?

17 MR. GARRETT: I do not believe so, Your Honor,  
18 because what we are talking here about is the sole issue  
19 of speech in context of defamation, not speech in the  
20 context of giving advisor's advice to the SEC. And as I  
21 indicated, I believe a totally different analysis would  
22 apply there.

23 What we are asking the Court to recognize is  
24 that the First Amendment protects all speakers against  
25 these types of awards, and we do not believe that the

1 state interest varies in securing gratuitous awards of  
2 money damages for plaintiffs depending on the speaker or  
3 the message.

4 QUESTION: Mr. Garrett, may I ask you a  
5 question right there? You seem to treat the case as  
6 though there are two kinds of speakers, media speakers  
7 and non-media speakers. You're in the non-media  
8 category and you get all of that. But yet, in the  
9 instructions to the jury you got a special instruction  
10 for the privilege for credit reporting agencies, which  
11 kind of suggests maybe you're in a special narrow  
12 category. Up here your opponent argues, yes, you're in  
13 a narrow category and you don't get all the benefits of  
14 other non-media people.

15 Would you kind of comment on how much you  
16 think you're typical of non-media defendants generally?  
17 You see, they also say this is commercial speech and  
18 it's not something distributed at large, that you don't  
19 need robust debate on whether somebody went into  
20 bankruptcy or not. It's kind of a different,  
21 specialized area.

22 MR. GARRETT: Your Honor, I must admit that I  
23 have a great deal of difficulty in deciding what is  
24 "media" and what is non-media. As we indicate in our  
25 reply brief, many of the functions that Dun & Bradstreet

1 does are very analogous to what a newspaper does. We  
2 send reporters out to get information. The information  
3 is edited and sent to clients or prepaid subscribers of  
4 Dun & Bradstreet.

5           The information relates to matters about  
6 commerce. Not much different, we suggest, than what's  
7 in the Wall Street Journal every day or the business  
8 page of any newspaper.

9           Moreover, as I was reviewing the transcript of  
10 the case last night, I came across something which  
11 struck me, which I think directly goes to your  
12 question. One of the recipients of the Dun & Bradstreet  
13 report was the manager of a local bank. He testified  
14 that the bankruptcy notice, which was quickly corrected,  
15 had nothing to do with the relationship between the bank  
16 and Greenmoss.

17           But he also said: You know, I look at  
18 newspapers because I'm concerned about bankruptcies, and  
19 I use newspapers to inform me about that just as well as  
20 I do Dun & Bradstreet. And I think that points out that  
21 many of the same functions done by Dun & Bradstreet are  
22 done by newspapers and vice versa.

23           And I believe the second aspect of your  
24 question dealt with the commercial speech doctrine.  
25 Your Honor, whatever commercial speech is, it is not



1 speech about commerce. I don't think anyone would  
2 seriously contend that the statement Greenmoss is  
3 bankrupt, if it appeared on page 17 of the Vermont Daily  
4 Free Press, was commercial speech. We were not  
5 advertising anything. We were not promoting any of our  
6 products. This simply is not commercial speech.

7           And we suggest blur is nothing more than an  
8 attempt to get around what we believe to be the central  
9 issue in the case, balancing the First Amendment rights  
10 of all speakers on the one hand against the states'  
11 limited interest in securing only awards of actual  
12 damages for private plaintiffs. ✓

13           We believe that the facts of this case  
14 highlight the very concern the Court recognized in  
15 Gertz. In July 1976 Dun & Bradstreet sent the special  
16 notice to five subscribers of Dun & Bradstreet. None of  
17 these subscribers was a customer of Greenmoss, a local  
18 building concern. It did state that Greenmoss had filed  
19 a petition in bankruptcy. As I indicated earlier, a  
20 retraction in the form of a correction notice was issued  
21 promptly.

22           The complaint in this case sought damages of  
23 \$7500 and \$15,000 in punitive damages. Yet, after a  
24 two-day trial the jury awarded \$50,000 in compensatory  
25 damages and \$300,000 in punitive damages.

1                   QUESTION: Do you suggest that there was no  
2 evidence? Did you suggest that before you got here,  
3 that there was no evidence to support?

4                   MR. GARRETT: Your Honor, we believe that the  
5 evidence showed that plaintiff had not called any  
6 recipient of the report to prove that there was a causal  
7 connection between the issuance of the report, its  
8 receipt, and any damage by Greenmoss. And in fact,  
9 there was no evidence introduced at this trial by anyone  
10 establishing a causal connection between the publication  
11 of the special notice and the company's alleged injury  
12 and damage.

13                   What we believe this exorbitant verdict  
14 resulted from were jury instructions which gave the jury  
15 uncontrolled discretion to assess unlimited amounts of  
16 damages without regard to actual injury and without  
17 regard to Dun & Bradstreet's state of mind.

18                   The jury was instructed that it was a case of  
19 libel per se, damage and loss were conclusively presumed  
20 from publication. The jury, as I indicated previously,  
21 was not given the New York Times versus Sullivan actual  
22 malice charge and punitive damages in the amount of  
23 \$300,000 were awarded.

24                   QUESTION: Well, they were told, though, that  
25 they had to find malice or absence of good faith,

1 right?

2 MR. GARRETT: Your Honor, my recollection on  
3 the state law privilege was that they were given several  
4 alternatives. I believe we set that forth on pages 18  
5 and 19 of the joint appendix. It must show malice or  
6 lack of good faith on the part of the defendant. If the  
7 defendant acted in bad faith toward the plaintiff in  
8 publishing the report, or that the defendant intended to  
9 injure the plaintiff in its business, or that it acted  
10 in a willful, wanton or reckless disregard to the  
11 interests of the plaintiff, the defendant has acted  
12 maliciously and the privilege is destroyed.

13 QUESTION: They never defined "malice" in the  
14 New York Times standard or manner?

15 MR. GARRETT: Let me be clear, Justice White.  
16 They defined "malice" in the state law privilege, and  
17 then they also said, but you may award punitive damages  
18 if you find actual malice, and the court never defined  
19 "actual malice."

20 QUESTION: In any way?

21 MR. GARRETT: That is correct, that is  
22 correct.

23 QUESTION: Was there a request for a  
24 definition?

25 MR. GARRETT: I'm sorry?

1 QUESTION: Was there a special request for a  
2 definition instruction?

3 MR. GARRETT: I do not believe that there was  
4 a special request.

5 QUESTION: Well, a request?

6 MR. GARRETT: No, sir. My recollection of  
7 what happened at the trial court was that defendant's  
8 counsel moved on directed verdict to dismiss all  
9 punitive damages because it had not met the actual  
10 actual malice standard of New York Times versus  
11 Sullivan.

12 QUESTION: Well, Mr. Garrett, I gather the  
13 report was false.

14 MR. GARRETT: That is correct.

15 QUESTION: And what you felt you were entitled  
16 to was an instruction that your client was not to be  
17 liable unless it published the falsehood knowing it was  
18 false, right, or with reckless disregard to whether it  
19 was true or false?

20 MR. GARRETT: No, Justice Brennan. All we  
21 asked for was -- our position in the case is that it is  
22 a private figure case and we should have the same  
23 protection as the John Birch Society had in the Gertz  
24 case, that you cannot award presumed or punitive damages  
25 absent the showing in New York Times. But the plaintiff



1 consistent --

2 QUESTION: Well, I still don't understand.  
3 What is the form of New York Times instruction you  
4 thought you were entitled to?

5 MR. GARRETT: We thought, Your Honor, that if  
6 the jury was going to be charged on giving punitive  
7 damages that they must be given the actual malice  
8 standard.

9 QUESTION: Only in relation to the punitive  
10 damages?

11 MR. GARRETT: That is correct, and to be  
12 awarded presumed damages. But that the plaintiff, on  
13 the fault standard adopted by the courts in Vermont,  
14 should be entitled to receive --

15 QUESTION: Well, on compensatory damages what  
16 type of instruction satisfied you?

17 MR. GARRETT: Are you talking about damages,  
18 Your Honor, or fault?

19 QUESTION: Damages.

20 MR. GARRETT: We would be satisfied with  
21 traditional state law damage charges proper in a libel  
22 case, but which did not allow the jury to award presumed  
23 damages.

24 QUESTION: Well, but you wouldn't -- well --

25 MR. GARRETT: Absent a showing of actual

1 malice.

2 QUESTION: Well, I'm still lost. You said  
3 once or twice you thought that there should have been no  
4 damage award whatever, except under instructions that  
5 the plaintiff had to prove actual damage.

6 QUESTION: Well, that's Gertz, isn't it?

7 MR. GARRETT: Yes. We are arguing, Your  
8 Honor, that the Gertz standard for private plaintiffs  
9 should have been applied in this case to Dun &  
10 Bradstreet, and the jury should not have been allowed to  
11 award presumed damages.

12 QUESTION: And you concede that as the case  
13 comes to us, at least you concede liability, you concede  
14 falsity and you concede fault?

15 MR. GARRETT: I concede fault under whatever  
16 Vermont standard there is.

17 QUESTION: Exactly. And New York Times is not  
18 involved in that.

19 MR. GARRETT: That is correct, Your Honor.

20 QUESTION: Then it's just the question of  
21 damages, that you think you're entitled to the New York  
22 Times malice instruction if you're going to presume  
23 damages or give punitive damages.

24 MR. GARRETT: That is absolutely correct. As  
25 I emphasize again --

1           QUESTION: Which is what Gertz said about  
2 media defendants. At least that's what Gertz said about  
3 defendants, and it happens to be that a media was  
4 defendant in that case?

5           MR. GARRETT: In that case. I will agree with  
6 that, because throughout that opinion we hear the phrase  
7 publishers, media. It may be that the word "speakers"  
8 was even used.

9           QUESTION: Of course, you are a publisher.

10          MR. GARRETT: We are absolutely a publisher.

11          QUESTION: And you are a media. You are a  
12 medium.

13          MR. GARRETT: We are a medium of  
14 communication, and like an individual in the street is a  
15 medium of communication and like the New York Times is a  
16 medium of communication.

17          QUESTION: Mr. Garrett, in your colloquy with  
18 Justice Brennan and Justice White you stated what  
19 instructions you thought you were entitled to under your  
20 theory, constitutional theory of the case. Did you  
21 request these instructions from the Superior Court in  
22 Vermont?

23          MR. GARRETT: Let me rephrase that, Justice  
24 Rehnquist.

25          QUESTION: Well, I don't want to rephrase my

1 question.

2 MR. GARRETT: Oh, no, I'm not. I just want to  
3 turn it to I think give the proper answer to you. I  
4 think our position is not what request that we would  
5 have requested, but objections to requests permitting  
6 presumed damages. We objected to a presumed damage  
7 charge.

8 QUESTION: Well, doesn't Vermont follow the  
9 rule that most other states follow, that if you want a  
10 particular instruction on a question you have to submit  
11 it to the court?

12 MR. GARRETT: I don't think this was a case of  
13 wanting a presumed damage charge, but not wanting a  
14 presumed damage charge. Our point is we don't think  
15 presumed damages should have been charged unless we met  
16 the New York Times versus Sullivan actual malice test.

17 QUESTION: No, but did you submit a request  
18 for instruction?

19 MR. GARRETT: Yes, Your Honor.

20 QUESTION: And what was it you asked him to  
21 instruct?

22 MR. GARRETT: In the lower -- on the subject  
23 of New York Times?

24 QUESTION: At the trial.

25 MR. GARRETT: At the trial court level, my

1 recollection is that the only charge requested by Dun &  
2 Bradstreet going to damages was that, if you're going to  
3 charge libel per se, please charge it this way. There  
4 was no charge, Your Honor --

5 QUESTION: "Please charge it this way"?  
6 What's "this way"?

7 MR. GARRETT: The concern was that the trial  
8 court --

9 QUESTION: What was the actual request?

10 MR. GARRETT: It is set forth, I believe, in  
11 the cert petition. It is Petitioner's requested charge  
12 number three. And I believe we were in a Hobson's  
13 choice. We knew that the court was going to charge  
14 libel per se. Our concern was, if you're going to  
15 charge it, which we did not agree with, that at least  
16 charge it this way.

17 And I believe that was the only charge that  
18 was given at the lower court level concerning damages,  
19 although prior to that the judge had been handed a copy  
20 of the Gertz decision in connection with plaintiff's  
21 request that he be allowed to introduce Dun &  
22 Bradstreet's financial statements.

23 QUESTION: Are you challenging the \$50,000 of  
24 actual damages found by the jury?

25 MR. GARRETT: Yes, we are, Your Honor.



1                   QUESTION: On what grounds?

2                   MR. GARRETT: Two grounds. First and

3 foremost, that the jury charge permitted an award of

4 presumed damage, that the plaintiff did not have to

5 prove actual injury. That we believe alone is

6 sufficient to order a new trial. In fact, we believe

7 that's what happened in the Gertz case.

8                   QUESTION: Well, you have to go another step:

9 and that they didn't prove damages.

10                  MR. GARRETT: That's correct.

11                  QUESTION: Don't you have to prove that, too?

12                  MR. GARRETT: Well, I don't believe so,

13 because if the jury was allowed to presume damage I

14 think it's very difficult to tell what in fact --

15                  QUESTION: If the evidence showed that the man

16 called up a man and said, I hate this stinker and he

17 just went into bankruptcy, I take it you'd give him

18 damages without a charge?

19                  MR. GARRETT: Could they give him damages?

20                  QUESTION: Yes.

21                  MR. GARRETT: Yes, I think that is correct,

22 Your Honor.

23                  QUESTION: May I ask --

24                  MR. GARRETT: Yes, Mr. Justice.

25                  QUESTION: Your brief refers to \$50,000

1 compensatory damages. That's a curious way to describe  
2 presumed damages.

3 MR. GARRETT: That is because of the way it  
4 was described in the jury verdict, Your Honor. We used  
5 that phrase because that's the exact phrase that the  
6 jury foreman signed dealing with compensatory and  
7 punitive.

8 QUESTION: The question I'd like to ask you  
9 is, all of the New York Times and Gertz formulas all  
10 focus on the state of mind of the defendant at the time  
11 the defamation occurred, at the time here we know there  
12 was a falsehood. Would you say that there's anything in  
13 the New York Times line of cases that would prevent the  
14 State of Vermont assessing punitive damages for your  
15 conduct after the libel occurred, when you refused to  
16 give the names of the five people who received it, which  
17 might have enabled him to go out and check it out?

18 MR. GARRETT: If that action was the result of  
19 a totally independent tort and that action would sustain  
20 an award of presumed damages having nothing to do with  
21 the First Amendment, I would agree with Justice  
22 Stevens.

23 But this case was a case based on the First  
24 Amendment, based on defamation, and we don't believe  
25 that there is anything in the record which would permit

1 the State of Vermont, consistent with the First  
2 Amendment --

3 QUESTION: Well, their theory, as I understood  
4 it, their theory of malice emphasized, their arguments  
5 to the jury and the like, emphasized this conduct as a  
6 reason for making you pay a heavy damage award.

7 MR. GARRETT: That is correct, and we do not  
8 believe that the First Amendment would protect that --  
9 would allow that. What we do say --

10 QUESTION: Well, why wouldn't the First  
11 Amendment allow that? Because I can see how that would  
12 be quite important to a businessman, to go around and  
13 straighten out his reputation with all these people.

14 MR. GARRETT: Because the First Amendment in  
15 the defamation area we believe focuses on the  
16 defendant's state of mind when the publication was  
17 made.

18 QUESTION: But does that immunize? If two  
19 weeks later he goes out and does a lot of other stuff  
20 that's related to it and is very harmful to the  
21 plaintiff, is that also immunized by the First  
22 Amendment?

23 MR. GARRETT: Your Honor, my reading of the  
24 First Amendment cases simply would not permit that kind  
25 of --

1           QUESTION: You see, I haven't seen a case  
2 quite like this before.

3           MR. GARRETT: I understand that. But I don't  
4 believe that it is much different than other cases where  
5 in fact you don't know who's received it. I mean, if  
6 the New York Times were sued, would it be a good defense  
7 at state law to suggest that we don't know the 500,000  
8 people that got the daily copy of the New York Times?

9           QUESTION: No, but here you did know and it  
10 was a handful and it could easily have been given and it  
11 would have made a lot of difference, I suppose, to the  
12 plaintiff.

13          MR. GARRETT: And as I understand it, Your  
14 Honor, the client has changed his policy in that regard,  
15 that in fact it is now given out.

16               Let me suggest one --

17          QUESTION: So maybe punitive damages do  
18 accomplish something once in a while.

19          MR. GARRETT: Your Honor, I would suggest not  
20 in this case.

21               One quick point on what happened in connection  
22 with the request. I believe the record reflects that  
23 one request was made for disclosure at the time of the  
24 initial contact between plaintiff and defendant's  
25 office. We said we didn't have it at that time and no

1 further request was made.

2 QUESTION: Do you say that a juror sitting in  
3 the box couldn't say to himself and to the other jurors,  
4 their attitude after the original defamation, afterward,  
5 relates back and shows that the state of mind all the  
6 way through was one of malice?

7 MR. GARRETT: I do not believe, Your Honor,  
8 that that would be consistent with this Court's  
9 teachings in St. Amant versus Thompson. You look at the  
10 subjective actual malice of the speaker at the time.

11 Thank you very much.

12 CHIEF JUSTICE BURGER: Mr. Heilmann.

13 ORAL ARGUMENT OF THOMAS F. HEILMANN, ESQ.

14 ON BEHALF RESPONDENT

15 MR. HEILMANN: Mr. Chief Justice and may it  
16 please the Court:

17 It was not until 2:30 this afternoon that we  
18 heard for the first time that Dun & Bradstreet claims  
19 that it is a media defendant. They never suggested that  
20 in this case before. So, in response to your question,  
21 this case came to the Court as a non-media defendant  
22 case, and they never asserted a media defendant position  
23 below.

24 The questions that you asked about the facts I  
25 think raise some serious questions about just what went



1 on here and I think show why the Gertz formula should  
2 not be used in this type of litigation. You asked the  
3 question, did they retract the whole way? Well, that  
4 was a major part of the trial in this case.

5 Contrary to what's been said to you, in this  
6 case what happened was, after our client found out about  
7 the false report of bankruptcy they asked to find out  
8 who the report was submitted to so that they could  
9 engage in what Gertz says is the first remedy of a  
10 defamed plaintiff, self-help. And they couldn't get the  
11 answers to those very simple questions until the lawsuit  
12 was filed and until discovery was submitted.

13 So Greenmoss found itself in the position of  
14 knowing that this information was being disseminated,  
15 but not knowing to whom and not knowing the breadth of  
16 the dissemination. And as the trial indicated, as the  
17 president of the company testified at length, he had a  
18 bizarre problem. Every customer that he visited with,  
19 he would not know whether that customer had heard about  
20 the bankruptcy.

21 So he was forced into the awkward position of  
22 saying: Do you know that we're not bankrupt? That's a  
23 very extraordinary position for a businessman to find  
24 himself in.

25 So I think it is a whole course of conduct.

1 That's the way this case was tried. And with respect to  
2 whether Gertz was raised at the trial court level, we  
3 submitted some extensive information to the court in our  
4 brief about the fact that Gertz was not properly  
5 raised.

6 In this case, the common law privilege was an  
7 open question in Vermont and that appeared to be all  
8 that Dun & Bradstreet wanted. They only suggested Gertz  
9 as, in their words, "a second rationale" behind the  
10 protection that common law extended.

11 QUESTION: Didn't the Vermont Supreme Court  
12 address this issue?

13 MR. HEILMANN: They addressed it. We pointed  
14 out to the court --

15 QUESTION: Whether or not it was raised in the  
16 trial court?

17 MR. HEILMANN: That's right. But it poses one  
18 of the difficulties of getting a clean record to really  
19 answer the questions here.

20 QUESTION: Well, I know, but the Vermont court  
21 decided it.

22 MR. HEILMANN: I understand that, Your Honor.

23 QUESTION: They decided the issue and that's  
24 what the argument is here, is whether the Vermont court  
25 was right or not --

1 MR. HEILMANN: I understand that.

2 QUESTION: -- as to whether Gertz applies.

3 MR. HEILMANN: In this case, we don't think  
4 that the issue is properly framed. What we really think  
5 this case is about is credit reports, and we think that  
6 these credit reports, which involve only statements of  
7 fact, which are made exclusively in the business and  
8 financial arena, come within the definition and  
9 description of what this Court has called commercial  
10 speech.

11 This case does not present the difficult  
12 questions that other commercial speech cases have  
13 presented, because we don't have speech, commercial or  
14 otherwise, on public issues, and we don't have speech  
15 that involves the total suppression in advance of  
16 speech.

17 I think common sense is the first test that  
18 you can utilize in looking at credit reports as  
19 commercial speech, and common sense has led virtually  
20 all of the lower federal courts -- in fact, in one  
21 opinion written by Mr. Justice Clark -- to say that  
22 commercial credit reports, in fact the same reports that  
23 are in this case and the exact same defendant, are  
24 commercial speech.

25 QUESTION: You're suggesting that this kind of

1 speech can certainly libel, but you think the First  
2 Amendment is just irrelevant, that this kind of speech  
3 just doesn't deserve First Amendment protection?

4 MR. HEILMANN: I'm saying it's commercial  
5 speech and you use --

6 QUESTION: Yes, but you're saying that the  
7 First Amendment doesn't protect it.

8 MR. HEILMANN: Because under the commercial  
9 speech doctrine the first test is truth or falsity or  
10 misleading, and then in this case it clearly is false  
11 and misleading.

12 There is no such tort as the tort of  
13 outrageous commercial speech. Commercial speech gets to  
14 the Court in various contexts. In one case it was the  
15 suspension of a lawyer to practice law, the Arala case  
16 and the Primus case, that raised the commercial speech  
17 question.

18 In the last case that the Court handled, the  
19 Bolger case, it was the circulation of family planning  
20 information that raised commercial speech. As I've  
21 indicated, Mr. Justice Clark, writing for the Eighth  
22 Circuit in the Millstone-O'Hanlan case, a commercial  
23 credit reporting case, said this is commercial speech.

24 In fact, even in the case that Dun &  
25 Bradstreet relies upon, Mr. Justice Douglas' dissent

1 from Grove versus Dun & Bradstreet's denial of  
2 certiorari, Mr. Justice Douglas says this is commercial  
3 speech.

4 The key here -- I think the two qualities that  
5 make this commercial speech is that --

6 QUESTION: Yes, but did he draw a distinction  
7 between commercial speech and other speech when he wrote  
8 that dissent?

9 MR. HEILMANN: He wanted to see what level of  
10 constitutional protection, if any, commercial speech  
11 should receive.

12 QUESTION: Well, wasn't the gist of his  
13 dissent, however, that there should be no distinction?

14 MR. HEILMANN: I think that's what his  
15 position was, but he wanted the Court as a group of nine  
16 Justices to handle that question.

17 QUESTION: Was he right?

18 MR. HEILMANN: I don't think so.

19 I think in this case the qualities that make  
20 commercial speech commercial speech are the fact that  
21 it's fact-based information combined with information  
22 solely about business.

23 QUESTION: Well, certainly Valentine against  
24 Christianson has been eroded substantially, hasn't it?

25 MR. HEILMANN: That's right, Your Honor. And



1 we don't mean to suggest --

2 QUESTION: Maybe he was right.

3 MR. HEILMANN: Well, we don't mean to suggest  
4 that just because speech is commercial speech that it  
5 does not have any constitutional protection. In the  
6 Bolger case, a substantial degree of constitutional  
7 protection is afforded to commercial speech. But the  
8 way to handle issues like this is to call it commercial  
9 speech.

10 QUESTION: Well, did I understand you earlier  
11 to say that what this poses is commercial speech, that's  
12 all, therefore it has no First Amendment effects?

13 MR. HEILMANN: That's right.

14 QUESTION: And that's your position, is it?

15 MR. HEILMANN: That's right. If this isn't  
16 commercial speech and the large body of precedent in the  
17 lower courts are wrong, then I think the message that  
18 will be delivered by the Greenmoss case is that  
19 commercial speech doctrine applies only to commercial  
20 advertising and activity like that.

21 QUESTION: Well what's wrong with that?

22 MR. HEILMANN: Well, if that's so I question  
23 whether the Government will lose its power to regulate,  
24 by content or otherwise, a whole gamut of "commercial  
25 speech." In other words, will a consumer credit agency

1 say that the rules under the Consumer Credit Reporting  
2 Act are unenforceable because of the free speech  
3 clause? Will licensing of doctors and lawyers raise  
4 full freedom of speech?

5 I suggest that companies like Dun & Bradstreet  
6 will come in in those contexts, Your Honor, and say, all  
7 we want -- and I'm quoting from the Dun & Bradstreet  
8 brief here -- "is the limited protection that you gave  
9 people in Gertz."

10 QUESTION: Well, in view of the development of  
11 the law about commercial speech and the movement toward  
12 limiting it to advertising, would it make sense to try  
13 to draw a distinction between public speech and private  
14 speech instead?

15 MR. HEILMANN: That may be a possibility, Your  
16 Honor. I think in this case the real issue -- I think  
17 it is commercial speech. But the real issue when  
18 everything is moved away is, do presumed and punitive  
19 damages unreasonably chill this type of speech? Without  
20 necessarily getting involved in --

21 QUESTION: Did you present this argument to  
22 the Vermont court?

23 MR. HEILMANN: Yes, we did. We argued that  
24 this was commercial speech before the Vermont Supreme  
25 Court.

1               QUESTION: Well, I know you argued it was  
2 commercial speech. But did you go on and argue this is  
3 commercial speech, it deserves no protection because  
4 it's false?

5               MR. HEILMANN: That's right. That's what we  
6 said.

7               QUESTION: And the way they responded, that  
8 isn't the issue they responded to?

9               MR. HEILMANN: No, the court didn't address  
10 that issue.

11              QUESTION: They responded to the argument  
12 about the applicability of Gertz.

13              MR. HEILMANN: That's right, Your Honor.

14              QUESTION: So you're presenting this as an  
15 alternate grounds for affirmance?

16              MR. HEILMANN: Yes.

17              Even apart from the commercial speech question  
18 in this case, I think the type of speech that's involved  
19 raises a very fundamental reason why the Gertz doctrine  
20 is inapplicable. To me there has always been something  
21 hollow about what Dun & Bradstreet is asking the Court  
22 to do here, and I think when all the rhetoric is removed  
23 what Dun & Bradstreet is asking the Court to do is to  
24 apply New York Times and Gertz to protections for  
25 concededly false statements of fact, which statements

1 stand totally and exclusively by themselves.

2 The facts here are not made in support of or  
3 associated with any thesis. They are not made to  
4 advance any idea. This is a different type of situation  
5 than the Court had in Gertz.

6 But in Gertz you said that a false fact  
7 without more has absolutely no constitutional  
8 protection. Well, here the entire conceptual structure  
9 of these credit reports is only grounded in fact. Their  
10 usefulness is directly and exclusively tied to their  
11 accuracy.

12 QUESTION: Of course, you could say the same  
13 thing about the ad in the New York Times case, couldn't  
14 you?

15 MR. HEILMANN: No, I don't think you can, Your  
16 Honor, because there is a message there. There is no  
17 message here. The efficacy and the total intrinsic  
18 value of this speech depends only on its factual  
19 nature.

20 QUESTION: Well, but Mr. Heilmann, supposing  
21 they had a credit rating and said, we now give this  
22 company a credit rating of C instead of B, reason,  
23 bankruptcy filed. So that you then have a message and  
24 then a false fact in support of it.

25 MR. HEILMANN: Well, I have trouble with --

1 QUESTION: Some of these things are --

2 MR. HEILMANN: I have a great deal of trouble  
3 determining what, if any, that message would be.  
4 There's really no thesis that a company like Dun &  
5 Bradstreet --

6 QUESTION: The message would be his credit  
7 isn't too good any more.

8 MR. HEILMANN: But I don't think that that's  
9 the thesis we're talking about. I think there is really  
10 no thesis in that type of analysis.

11 QUESTION: I know in this particular report  
12 it's kind of a one-fact special report. But it seems to  
13 me very often these reports have a lot of facts in them,  
14 and you might have one of them false and a lot of others  
15 that are not false, and the conclusion that's doubtful.

16 MR. HEILMANN: To follow up what you said  
17 earlier, this may be a very rare situation. This may be  
18 the only type of case dealing with just credit reports  
19 about facts, that you have to analyze what was said in  
20 Gertz and the other cases about facts standing alone.

21 QUESTION: Well, yes, but if you're right  
22 about your commercial speech ground you never get to all  
23 this other argument.

24 MR. HEILMANN: That's correct, Your Honor.

25 QUESTION: Because I guess you rely on the



1 first requirement for constitutional protection that the  
2 Court suggested in Central Hudson.

3 MR. HEILMANN: We do, and it's never been --

4 QUESTION: You say that there's no  
5 constitutional objection to the suppression of  
6 commercial messages that do not accurately inform the  
7 public.

8 MR. HEILMANN: That's right.

9 QUESTION: And if it's -- you say that if it's  
10 conceded this report was false, they have conceded  
11 themselves out of First Amendment protection.

12 MR. HEILMANN: Yes, because --

13 QUESTION: Because this is commercial speech.

14 MR. HEILMANN: Not only because it's  
15 commercial speech.

16 QUESTION: Well, if we agree with that isn't  
17 that the end of the case?

18 QUESTION: Yes.

19 MR. HEILMANN: I think that is the end of the  
20 case.

21 QUESTION: Do you agree with Mr. Garrett that  
22 there's no evidence at all about damages?

23 MR. HEILMANN: No, I don't. My name is  
24 Heilmann, Your Honor. Mr. Garrett argued for Dun &  
25 Bradstreet.

1 I don't agree that there's no evidence of  
2 damages at all. In fact --

3 QUESTION: Well, what evidence? Would you  
4 mind giving me, not too much, but just --

5 MR. HEILMANN: I'll give you just a thumbnail  
6 sketch of what happened. What happened in this case,  
7 Your Honor, was that the bank that our client had done  
8 business with for many years received the bankruptcy  
9 report and, in close proximate time thereafter, not only  
10 told our client to take a particular loan request that  
11 was on the table elsewhere, but to take the entire  
12 banking --

13 QUESTION: How big was the loan?

14 MR. HEILMANN: The loan I think was for  
15 \$20,000. We had about \$96,000 in other loans with that  
16 bank.

17 And that bank received the Dun & Bradstreet  
18 report and shortly thereafter asked our client to go  
19 elsewhere. We went elsewhere.

20 QUESTION: And that was put in evidence?

21 MR. HEILMANN: That was put in evidence, Your  
22 Honor.

23 Additionally, what I'd like to point out about  
24 the compensatory damage award here is that I don't think  
25 presumed damages have any application at all on what I

1 call the compensatory damage award.

2           Number one, there were no compensatory damages  
3 in fact awarded because what the trial court said was  
4 that, assuming there's a high enough level of  
5 culpability -- that is, using that state common law test  
6 for commercial credit reporting agencies, Greenmoss had  
7 to prove culpability far higher than negligence to  
8 receive any verdict. If we didn't defeat the privilege,  
9 we would not receive anything.

10           But if we did defeat the privilege -- and we  
11 did that in this case -- the damages under any  
12 presumption were, as the trial court said, one dollar.  
13 The trial court said that substantial damages were not  
14 permitted unless Greenmoss proved they in fact occurred;  
15 and in the very next sentence said compensation had to  
16 be specifically related to damages that were actually  
17 caused by D&B. Further, compensatory damages here were  
18 only lost profits and and out of pocket losses.

19           Now, the court allowed the jury to assess  
20 pre-judgment interest at Vermont's statutory rates on a  
21 per annum basis from the date of injury to the date of  
22 verdict. Dun & Bradstreet in its brief says that the  
23 most actual damages we showed was \$36,000. When you  
24 calculate the interest on \$36,000 at the rates the trial  
25 court allowed the jury to do, you come up with a figure

1 of \$50,022.30. I think that is exactly what the  
2 compensatory damage award did in this case.

3 Secondly, Dun & Bradstreet points out that  
4 \$36,000 is only one year of lost profits, ignoring the  
5 evidence at transcript 99 and 104 that an additional  
6 \$42,000 of lost profits was incurred in the next year  
7 thereafter. Curiously, the aspect of --

8 QUESTION: Excuse me. Do you think that Gertz  
9 applies at all in this?

10 MR. HEILMANN: No, I don't.

11 QUESTION: So that you wouldn't need to prove  
12 fault, either?

13 MR. HEILMANN: No, we wouldn't have to prove  
14 fault.

15 QUESTION: You just go under traditional libel  
16 law?

17 MR. HEILMANN: That's right.

18 QUESTION: Once you've proved falsity and the  
19 kind of libel that justifies damages, then the jury is  
20 free to presume?

21 MR. HEILMANN: That's right.

22 But I'd like to focus, Your Honor, on the  
23 state's interest in presumed damage, and I'd like to  
24 move a little bit differently than this Court did in  
25 Gertz. I would submit that presumed damages, especially

1 in cases like this where you have defamation of a  
2 corporation, it really doesn't involve the plaintiff  
3 proving the quantum of damages that makes presumed  
4 damages so necessary to the states for preservation of  
5 reputation.

6 Quite to the contrary, I suggest to the Court  
7 that it's making the causal link between demonstrated  
8 injury and the defendant's acts that really involves the  
9 states' interests. If a plaintiff comes into court, as  
10 did Elmer Gertz, and says, I've been defamed, but says  
11 nothing else about suffering damages -- Justice Stevens,  
12 your opinion in the Court of Appeals case in the Gertz  
13 case points that out; there was no evidence of actual  
14 damage in Gertz -- I would suggest that a jury will not  
15 hand out and a judge will not condone a hefty verdict  
16 under a charge like the charge in the Greenmoss case.

17 It's the causality link in the presumption  
18 that has the important state function. It's the tracing  
19 and linking between the loss and the wrongful conduct  
20 that creates the problem for the defamed person.

21 QUESTION: Mr. Heilmann, were the instructions  
22 given given at your request?

23 MR. HEILMANN: Yes, Your Honor -- well, they  
24 were Dun & Bradstreet's instructions almost verbatim.  
25 But we did ask the court to charge under traditional



1 common law libel. The trial court used virtually all of  
2 Dun & Bradstreet's requests.

3 QUESTION: One other point. The argument was  
4 made here about Dun & Bradstreet had a lot of similar  
5 points with a newspaper.

6 MR. HEILMANN: I don't think they have a  
7 similarity with the newspapers, Your Honor.

8 QUESTION: Was it argued below?

9 MR. HEILMANN: Yes, it was, in the Vermont  
10 Supreme Court. We never got to the question of whether  
11 Gertz should apply at the trial court level. They just  
12 didn't raise it until after the verdict.

13 But getting back to where the legitimate state  
14 function comes in here --

15 QUESTION: May I ask one other question about  
16 the instructions, before we lose it. The instruction on  
17 the qualified privilege of a credit reporting agency  
18 that was given, was that given at your opponent's  
19 request over your objection?

20 MR. HEILMANN: Yes. The court adopted their  
21 request verbatim -- no, they didn't request it  
22 verbatim. The trial court I believe went to the Vermont  
23 Supreme Court law library during the lunch recess and  
24 got that charge. It wasn't really what Dun & Bradstreet  
25 had asked for.

1 QUESTION: But you objected to that charge?

2 MR. HEILMANN: Oh, yes.

3 QUESTION: Did not Gertz say that included

4 within actual damages could be injury to reputation?

5 MR. HEILMANN: That's right.

6 QUESTION: Did you ask for an instruction

7 along those lines?

8 MR. HEILMANN: No, we didn't, Your Honor, and

9 the reason we didn't do that is because we're dealing

10 with defamation of a corporation, and I felt as a trial

11 strategy it was a difficult thing to suggest to a jury

12 that a corporation can be humiliated, and so I didn't

13 ask for --

14 QUESTION: You may lose your reputation with

15 respect to paying your debts.

16 MR. HEILMANN: You certainly can. But I

17 thought with a Vermont jury it was better to say to them

18 that you lose your profits and you lose your out of

19 pocket damages.

20 QUESTION: You mean they're that hard-headed

21 in Vermont?

22 MR. HEILMANN: Well, sometimes they're cheap,

23 Your Honor.

24 (Laughter.)

25 MR. HEILMANN: But the presumption that allows

1 substantial damages without even an offer of evidence of  
2 actual injury, which is what you had in Gertz, is one  
3 thing. But here the legitimate state function of  
4 presumed damages is that the intuition of common  
5 experience as it has found its way in the common law  
6 through centuries of defamation precedent counseled that  
7 it's certain that the harm proved is causally related to  
8 the defamation when those two things coexist in time.

9           And I think that's really the function that  
10 the states have here. Bear in mind what Dun &  
11 Bradstreet is asking this Court to do is to say that the  
12 states' interests don't matter, and the effect of this  
13 case if Dun & Bradstreet is right will be without  
14 question to totally constitutionalize the state law of  
15 defamation.

16           Now, I think there is another role or another  
17 state interest that states have in defamation, and that  
18 is the interest, as the Vermont Supreme Court pointed  
19 out, in the difference between an individual who lives  
20 in a world that is increasingly dominated by large  
21 commercial entities, may well be less able to bear the  
22 burden of the consequences of the falsehood than the  
23 business that sells the report. I think that's another  
24 legitimate state interest involved here.

25           Finally, Vermont, different than Gertz and in

1 fact different than many states, has a specific  
2 constitutional provision that protects the reputation of  
3 its citizenry. Our constitution specifically says that  
4 the character of our citizens has special protection.

5 So I think the key to this case here is to  
6 say, does a constitutional interest apply? We say the  
7 only way the constitutional interest can apply is if  
8 there is a real valid threat of self-censorship. I  
9 don't think there's a valid threat of self-censorship.

10 QUESTION: May I ask one question. I think  
11 you're getting to your end. Take your opponent's  
12 hypothetical of a newspaper of general circulation that  
13 has a column on the back: Recent legal developments,  
14 subhead bankruptcies, and they mistakenly say your  
15 company went into bankruptcy, the same facts. *Stevens*

16 What happens with that?

17 MR. HEILMANN: Well, the issue again is  
18 self-censorship. Is the newspaper going to say that  
19 they won't publish this fact -- and we're not talking  
20 about your analysis of Greenmoss' business. We're  
21 talking about this fact, Greenmoss is bankrupt.

22 If the newspaper is going to say they won't  
23 publish the fact because of presumed damages, and if  
24 they won't publish that for that reason, for the reason  
25 of presumed and punitive damages, then the news will

1 just be pabulum, and that's the fear that the Court has,  
2 obviously.

3 QUESTION: Let me be sure I understand your  
4 answer. You're saying a different rule would apply to  
5 that case than to this case?

6 MR. HEILMANN: Yes. I'm getting into the  
7 answer that I think is involved here. The issue is  
8 chilling of speech. I don't think a company like Dun &  
9 Bradstreet is going to be chilled, because, for one  
10 thing, the news media very rarely simply publishes a  
11 fact. They publish the fact in connection with a  
12 thesis.

13 QUESTION: But in Justice Stevens' question I  
14 thought he did give you a hypothetical where the  
15 newspaper published a fact somewhat separately from its  
16 editorial and news coverage. And I think his question  
17 was what should be the rule in that case as to the  
18 newspaper.

19 MR. HEILMANN: Well, I'm not really addressing  
20 what should happen in the situation with the newspaper.  
21 I don't think you can take the result --

22 QUESTION: If you won't answer it for him,  
23 will you answer it for me?

24 MR. HEILMANN: Yes, I will, Your Honor.

25 (Laughter.)



1           MR. HEILMANN: I think under Gertz if there  
2 was negligence, which in this case there is obviously  
3 negligence, the plaintiff would be entitled to the Gertz  
4 -- the plaintiff would be limited by the Gertz rule.  
5 But I really think we have a different type of defendant  
6 here.

7           Gertz talks about broad rules of application,  
8 and you don't have to look at every particular possible  
9 exception. But I would say one other thing, hopefully  
10 to more fully answer your question, Your Honor, and that  
11 is in this case if the exact same facts occurred we may  
12 have the same result. If the newspaper did exactly what  
13 Dun & Bradstreet did, by sending a 15 year old high  
14 school kid with no training up to the federal court in  
15 Burlington for \$200 a year and never told her what she  
16 was supposed to do up there, never edited the  
17 information, never followed its own rules that it had on  
18 the books for prepublication verification --

19           QUESTION: Well, you're just arguing you'll  
20 win under the actual malice standard, so you can go  
21 ahead and retry the case and you'll still win. That's  
22 what you're really saying now, I think.

23           MR. HEILMANN: Well, I think I'm just saying  
24 in those hypotheticals what Dun & Bradstreet is trying  
25 to tell you is that the newspaper would not have the

1 same result, and I disagree with that.

2 QUESTION: Well, the question is really should  
3 the same standard apply to the two papers, and I think  
4 you say no.

5 MR. HEILMANN: I do say no, Your Honor. ✓

6 QUESTION: You've answered it.

7 QUESTION: Do you think you would give a  
8 \$75,000 punitive damage against a local newspaper?

9 MR. HEILMANN: I don't know what a jury would  
10 do, Your Honor. I think when you're dealing with the  
11 type of instructions that we had in this case, the  
12 instructions were very carefully drafted to deal with  
13 the question of the defamation and the punitive damage  
14 award, and they didn't focus on the speech. They  
15 focused on the entire gamut of conduct.

16 It wasn't really looking at the speaker and  
17 saying that speech is bad and we're going to punish it  
18 by way of punitive damages. It really looked at the  
19 entire course of conduct under traditional common law  
20 rules.

21 One thing that I'd like to point out finally  
22 is that, let's suppose, to follow up on your point, Your  
23 Honor, that Dun & Braistreet got the same protection  
24 that Robert Welch, Incorporated, got. Under this trial  
25 what would happen is that constitutional protection for

1 actual damages would apply because of Gertz, and then  
2 the constitutional damages for punitive damages under  
3 New York Times would apply.

4 But in addition to that, not only would the  
5 plaintiff, but Dun & Bradstreet would look for the  
6 common law punitive damage charge just to get to the  
7 question of any compensatory damage, and then common law  
8 malice to think about and focus upon the other activity  
9 that this defendant engaged in.

10 So you would have four separate things for the  
11 jury to handle. I think that would just hopelessly  
12 confuse a jury. There's been a lot of commentary about  
13 the difficulty between actual malice and common law  
14 malice and constitutional malice, and essentially what  
15 they're asking the Court to do is to have a trial where  
16 there are those four instructions.

17 QUESTION: Of course, the net result if you go  
18 back to the Gertz case is you may end up with more  
19 money, even after a second trial.

20 MR. HEILMANN: Well, I understand that that is  
21 what happened with Mr. Gertz, Your Honor. But the  
22 problem in Mr. Gertz' case is he didn't come in and show  
23 any --

24 QUESTION: It could happen here, too, because  
25 there's no North Carolina against Pierce problem, I

1 guess, in this area of the law.

2 MR. HEILMANN: I think the difficulty that  
3 this case presents really shows why Gertz was formulated  
4 just to handle media defendants. This defendant has  
5 never claimed until this afternoon that it's a media  
6 defendant. The case proceeded to the Vermont Supreme  
7 Court and the certiorari petition was granted solely  
8 based on non-media status.

9 And I think the difficulties here with Gertz  
10 show that the decision was very carefully framed in both  
11 rationale, philosophy, and language to deal with a  
12 specific type of defendant.

13 My final point is this. I mentioned earlier  
14 that if this case is extended, if Gertz is extended to  
15 this type of a defendant, what we will have is the total  
16 constitutionalization of the state laws of libel. And I ✓  
17 think we really have to ask ourselves whether that's  
18 appropriate policy.

19 Now, we have made accommodations as a society  
20 to the reputation of our citizens for the benefit of  
21 strong First Amendment protections. But if Gertz  
22 applies here, I'd suggest to the Court it will mean that  
23 reputation is so cheap and so unvalued in our society  
24 that it can be destroyed by the local gossip monger or  
25 by a huge company that pays an untrained high schooler

1 \$200 a year to perform a task she was never trained to  
2 do.

3 If private reputation can be so easily  
4 damaged, then we have to ask the other question: What  
5 benefit is there to a good reputation? I think the  
6 Court will have to question what such a result will do  
7 to the positive normative benefits that reputation  
8 contributes to our society, and at the same time  
9 consider what it will do to the goal that the framers  
10 had in mind for the First Amendment if over-the-fence  
11 rumor and idle gossip at the water cooler receives  
12 constitutional protection.

13 Every constitutional -- every libel case in  
14 the country will have the Gertz standard if Dun &  
15 Bradstreet is correct in this case. I think enough  
16 speech has been protected under the New York Times  
17 formula where you look at the plaintiff and enough  
18 speech has been protected when you look at media  
19 defendants. I don't think there's a need to extend  
20 Gertz any further.

21 Thank you.

22 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
23 The case is submitted.

24 (Whereupon, at 3:14 p.m., argument in the  
25 above-entitled case was submitted.)



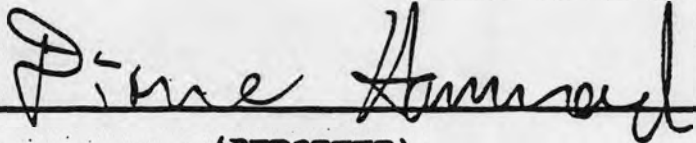
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Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:  
#83-18 - DUN & BRADSTREET, INC., Petitioner v. GREENMOSS BUILDERS, INC.

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pine Hunsford", written over a horizontal line.

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