

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-18

TITLE DUN & BRADSTREET, INC., Petitioners, v. GREENMOSS BUILDERS,
INC., Respondent.

PLACE Washington, D. C.

DATE Wednesday, October 3, 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., :
Respondent. :

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Washington, D.C.

Wednesday, October 3, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

GORDON LEE GARRETT, JR., ESQ., Atlanta, Georgia; on behalf of the Petitioner.

THOMAS F. HEILMANN, ESQ., Burlington, Vermont; on behalf of the Respondent.

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STATEMENT OF

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on behalf of the Petitioner

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on behalf of the Respondent

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on behalf of the Petitioner - rebuttal

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1 demanding standard, that the New York Times test of
2 actual malice may only recover damages which compensate
3 him for actual injury.

4 It is these constitutional rules prohibiting
5 awards of proved, presumed, and punitive damages absent
6 calculated falsehood that Petitioner Dun and Bradstreet
7 asks this Court to apply.

8 We believe that Gertz properly considered the
9 tension between First Amendment freedoms on the one hand
10 and reputational interest on the other. Neither
11 Greenmoss Builders nor the Vermont Supreme Court
12 advanced any reason why the states have a greater
13 interest in awarding presumed and punitive damages
14 against a non-media defendant who speaks about business
15 matters or matters about the arts than a media speaker.

16 QUESTION: I wonder if you would tell me your
17 definition of the difference between media and
18 non-media. I can understand it clearly if a private
19 individual writes a letter and makes the statement. That
20 person as an individual is probably non-media. But what
21 is your definition of non-media generally?

22 MR. GARRETT: Your Honor, I think that is the
23 rub in this case when it comes to deciding
24 constitutional limitations on presumed and punitive
25 damages. Obviously, the media could be defined as one

1 who uses a medium to communicate information, and Dun
2 and Bradstreet, much like a newspaper, does that. We
3 hire reporters to obtain information which our
4 subscribers will want.

5 QUESTION: Now, we have in Washington I don't
6 know how many, but I suppose it must be a great number
7 of letters, like The Kiplinger Letter, that goes out
8 every week or periodically, sometimes on a broad range
9 of subjects, sometimes on a limited subject like labor
10 law.

11 Is that media or non-media?

12 MR. GARRETT: It seems to me, Your Honor,
13 while The Kiplinger Letter, like Dun and Bradstreet,
14 may not be considered the traditional media, it is
15 certainly media in that it is an organization that
16 communicates information to its readers which have a
17 reason to know that.

18 QUESTION: Is that issue before us, counsel?
19 You didn't bring that issue up here.

20 MR. GARRETT: The media/non-media issue? That
21 is the very basis that the Vermont Supreme Court ruled
22 against Dun and Bradstreet in this case.

23 QUESTION: I know, but they held that you were
24 non-media.

25 MR. GARRETT: They held -- they said --

1 QUESTION: Did you challenge that in your
2 petition for certiorari?

3 MR. GARRETT: Oh, absolutely, Your Honor.
4 Well, we did not -- we have never taken the position,
5 Your Honor, that we were the traditional media.

6 QUESTION: Are you taking the position that
7 you are media?

8 MR. GARRETT: We certainly take the position
9 that we are media for the application of the Gertz rules
10 on presumed and punitive damages.

11 QUESTION: Well, of course, your first
12 question presented in certiorari is, do the First and
13 Fourteenth Amendments to the Constitution permit private
14 plaintiffs to recover presumed compensatory damages or
15 generally for libel against a non-media defendant?

16 MR. GARRETT: That is correct, Your Honor. As
17 I said, we have never taken the position that Dun and
18 Bradstreet was part of the traditional media like the
19 New York Times or CBS, but we certainly are media in the
20 sense that we communicate information to our
21 subscribers.

22 QUESTION: Yes, but the way you present the
23 case to us is that -- let's assume that this is a
24 non-media defendant, and then does Gertz apply to
25 non-media defendants. That is the question you put to

1 us.

2 MR. GARRETT: That is correct --

3 QUESTION: So we have to get into whether Dun
4 and Bradstreet is or isn't a media defendant?

5 MR. GARRETT: Your Honor, I think it is --

6 QUESTION: You say we don't, really, in this
7 question.

8 MR. GARRETT: Well, I think it is quite
9 correct that the constitutional prohibitions against
10 presumed and punitive damages don't depend on the nature
11 of the speaker or the subject matter of his speech.

12 QUESTION: Right. I thought you thought in
13 order to win your case you would have to convince us
14 that Gertz applies to non-media defendants generally,
15 and I think that is your whole argument, too, in your
16 brief.

17 MR. GARRETT: I think certainly that that
18 would win the case for us, Your Honor.

19 QUESTION: How do we reach that question if we
20 don't know what a non-media defendant is?

21 MR. GARRETT: Well, I think that is the very
22 problem in the case, Your Honor, that it would force the
23 Court to go back to basically the Rosenbloom ad hoc test
24 to make determinations on who is and who is not the
25 media, and I think the most important thing is that the

1 rationale for the Gertz opinion simply does not depend
2 on those kinds of distinctions.

3 The states have no interest in awarding
4 presumed and punitive damages absent actual malice.

5 QUESTION: Against anyone.

6 MR. GARRETT: Against anyone.

7 QUESTION: That is your argument, I think.

8 MR. GARRETT: That is our argument, but I
9 would suggest to the Court that if the Court is
10 concerned that a media/non-media distinction should be
11 made in certain contexts, this is not the one to make it
12 in. There may be areas where that would be appropriate,
13 but not in connection with the awards of presumed and
14 punitive damages.

15 QUESTION: But I thought your position was and
16 is that it makes no difference who the defendant may be.
17 If you sued me for libel, for example, the rule would be
18 the same in your view.

19 MR. GARRETT: That is correct. We do not
20 believe that an individual could be awarded presumed
21 damages, because that simply is not proper for the
22 states.

23 QUESTION: Yes, right, and while we are
24 getting at definitions, how do you define the difference
25 between presumed and punitive damages?

1 MR. GARRETT: Your Honor, in traditional libel
2 law, presumed damages really took the place of
3 compensatory or actual damages. Punitive damages on the
4 other hand were more of a punitive punishment measure.

5 The problem in the cases, however, Your Honor,
6 is that they are both used selectively to punish
7 unpopular speakers. I think it is very difficult to
8 make a distinction when it comes to the effect of
9 presumed and punitive damages on First Amendment
10 activities.

11 QUESTION: If you went back to the common law
12 perception of presumed damages as being a substitute for
13 actual damages, would that make a difference in your
14 submission?

15 MR. GARRETT: No, Your Honor, because the only
16 rule we are asking for is that the jury not be told that
17 damages are presumed. We are fully prepared to live
18 with the Gertz rule that says a defamation plaintiff may
19 recover all injuries -- excuse me, all damages for his
20 actual injury.

21 QUESTION: Will you sort of itemize what they
22 may be?

23 MR. GARRETT: Well, for example --

24 QUESTION: Under the Gertz formula.

25 MR. GARRETT: Under the Gertz formula, for

1 individual, it may be humiliation, it may be
2 embarrassment, it may be damage to reputation. There
3 are a number of intangible things. For other
4 plaintiffs, such as a corporation, it could be lost
5 profits, it could be an inability to borrow money which
6 affected the business, it could be the business's
7 reputation.

8 QUESTION: You agree with Gertz that you don't
9 have to prove actual pecuniary loss?

10 MR. GARRETT: I agree with Gertz that for the
11 private individual, he not prove actual pecuniary loss,
12 and I think the Gertz rule says that you don't have to
13 give a damage figure.

14 QUESTION: But even with respect to a
15 corporation, it could be a loss of reputation, as in
16 this case.

17 I say, there could be a loss of a
18 corporation's reputation. In this case, for example,
19 the problem was a report of bankruptcy, which doesn't do
20 a corporation very much good.

21 MR. GARRETT: That's correct, Your Honor. The
22 distinction in this case, rather than proving a quantum
23 of damages, is proving a causal connection between the
24 fact that the report was issued and the individuals to
25 whom it was issued to took any action adverse to

1 Greemoss.

2 QUESTION: Would you agree that any damages
3 can be proved in this case?

4 MR. GARRETT: Based on the evidence in the
5 lower court, or could be?

6 QUESTION: Could be.

7 MR. GARRETT: Oh, yes, I think damages could
8 be proved, but what the jury could not be told was
9 damages are presumed. I think that is the single rule
10 that we ask this Court to apply, as well as the
11 prohibition against punitive damages.

12 QUESTION: Do punitive damages serve the same
13 purpose as presumed damages? I assume not. I would
14 like to know what you think.

15 QUESTION: Your Honor, traditionally punitive
16 damages have been used to deter conduct. That is the
17 rationale behind them. I guess technically speaking
18 there is a difference between presumed and punitive
19 damages as far as their effect.

20 However, I think in the area of libel law,
21 they both have the same effect. When a jury is told
22 that you may presume damage, we believe that that -- by
23 the very nature of that charge you chill First Amendment
24 activity.

25 QUESTION: A punitive damage award is a

1 private fine. Do you agree with that?

2 MR. GARRETT: That's correct, Your Honor.

3 It's a private fine unfortunately based on various state
4 standards which do not give juries much guidance. And
5 we think in the area of libel law, the actual malice
6 test focuses on the conduct of the defendant at the time
7 he made the publication, and that is the correct test.

8 QUESTION: Would your view, and this is the
9 last question I will ask you for a while, I think, would
10 your view of punitive damages apply to a garden variety
11 tort case other than the tort of libel where
12 compensatory damages can be proved?

13 MR. GARRETT: Well, Your Honor, I think --

14 QUESTION: That is not the question before
15 you, but I am interested in your perception of the
16 purpose and range of punitive damages.

17 MR. GARRETT: Well, Your Honor, I think as the
18 Court indicated in Smith versus Wade, punitive damages
19 are a very troublesome area in the law. You know, I am
20 reminded of what Justice Rhenquist wrote in that
21 decision from Oliver Wendell Holmes. You know, a dog
22 can tell the difference between accidentally kicked and
23 being stomped every day.

24 Well, if you stomp somebody every day, you are
25 going to chill their activity, and the real problem is

1 that punitive damages often chill beneficial conduct,
2 that they are too far ranging, and it is a very
3 difficult problem in the law, separate and apart from
4 the libel area, Your Honor.

5 QUESTION: You are having private parties
6 impose punitive fines.

7 MR. GARRETT: That's correct.

8 QUESTION: Without due process of law?

9 MR. GARRETT: It is a close question,
10 depending on the standards. I do not believe that is
11 the case in the First Amendment test of actual malice,
12 but when punitive damages, for example, can be given, as
13 they were in this case, Your Honor, for something called
14 reckless disregard of the interests of the plaintiff,
15 that is a fairly broad ranging --

16 QUESTION: Isn't that language from New York
17 Times against Sullivan?

18 MR. GARRETT: I am sorry, Your Honor?

19 QUESTION: Isn't the reckless disregard from
20 Sullivan?

21 MR. GARRETT: No, Your Honor. The lower court
22 was reckless disregard for the interests of the
23 plaintiff.

24 QUESTION: That language. That language is --

25 MR. GARRETT: Oh, certainly, reckless

1 disregard, but it is for a different interest, reckless
2 disregard for the truth in New York Times versus
3 something called reckless disregard for the interests of
4 the plaintiff.

5 We believe, Your Honor, that the facts of this
6 case highlight the very concern that the Court
7 recognized in Gertz, presumed and punitive damages
8 awarded by juries to punish an unpopular speaker. Here
9 we sent a special notice to five people. It was
10 corrected shortly thereafter. None of these individuals
11 were a customer of Greenmoss.

12 As I said, we sent the retraction
13 immediately. Plaintiff called not one recipient of the
14 notice to the stand to testify. There was no causal
15 connection between our report and the alleged lost
16 profits of the company.

17 What occurred was a jury instruction that
18 allowed the jury to award unlimited amounts of presumed
19 and punitive damages. The jury was instructed that this
20 was a case of libel per se, and that damage and loss
21 were conclusively presumed. The court instructed the
22 jury that it could award presumed or exemplary damages
23 based on something called actual malice, which was never
24 defined for the jury.

25 The lower court found that its jury charge was

1 misleading, and granted Dun and Bradstreet a new trial.
2 The Supreme Court of Vermont reversed, finding that Dun
3 and Bradstreet was a non-media defendant, and that
4 non-media defendants, a state could award presumed and
5 punitive damages.

6 What the Vermont Supreme Court did was focus
7 on the status of D&E or what it termed as a non-media
8 defendant and the content of its message. The Vermont
9 Supreme Court fails to identify any state interest which
10 justifies awards of presumed and punitive damages
11 against Dun and Bradstreet any more than against a small
12 newspaper or a local radio station.

13 The issue in this case, simply put, is this.
14 If the Burlington Vermont publishes Greenmoss is
15 bankrupt, they are entitled to a constitutional
16 instruction that precludes the awards of presumed and
17 punitive damages, yet if Dun and Bradstreet publishes
18 that same information to its subscribers because they
19 want to know, they are not entitled to that
20 constitutional protection.

21 QUESTION: Are you entitled to an instruction
22 that no damages can be awarded even if they are proved
23 unless -- without proof of fault?

24 MR. GARRETT: Yes, we believe that we are
25 entitled to the full standard, and even Sunward, that

1 filed an amicus brief in this case said we are entitled
2 at least to the fault standard. In this case we do not
3 contest fault.

4 QUESTION: I suppose if you say that the Gertz
5 rules don't apply against non-media defendants, the
6 fault requirement would disappear too, I suppose.

7 MR. GARRETT: That's correct. In other words,
8 if that were the case, Your Honor, a plaintiff could
9 merely prove falsity of the report and go to the jury on
10 damages.

11 QUESTION: Go back to the old rule.

12 MR. GARRETT: That's absolutely correct, Your
13 Honor.

14 QUESTION: Mr. Garrett, you suggest there
15 can't be a difference between your client and a
16 newspaper of general circulation. Supposing there were
17 a statute that said credit reporting agencies that
18 report of a bankruptcy must in addition state the source
19 of their information. Would that be constitution? I
20 don't suppose you could compel a newspaper to do that,
21 but could you compel a credit reporting agency to do
22 that?

23 MR. GARRETT: Your Honor, I think the Miami
24 Herald case answered it for the newspapers.

25 QUESTION: Right.

1 MR. GARRETT: I see differences, Your Honor,
2 in connection with requiring credit reporting agencies,
3 for example, the Fair Credit Reporting Act, from
4 requiring disclosures and from requiring identity of
5 information.

6 To me that is much different than a warning of
7 presumed or punitive damages, and I think there is
8 arguably a state and federal interest in the former, but
9 not the latter.

10 QUESTION: I agree. It is, however, quite
11 clearly it would be a regulation of content, and you
12 would nevertheless say it would be permissible.

13 MR. GARRETT: I think regulation of content in
14 certain instances like that could be permissible. I do
15 think there is a distinction, Your Honor, in regulating
16 awards of presumed and punitive damages based on the
17 subject matter of the speech. In fact --

18 QUESTION: Supposing I went one step further
19 and my statute said that if you fail to do this, you
20 should be subject to a \$100 fine, purely punitive.

21 MR. GARRETT: I think the difference in that,
22 Your Honor, is, you are not regulating the speech so
23 much as you are the violation of a federal or state
24 statute, and to me that is different, because in my case
25 you are punishing speech.

1 And I think to go further with your question,
2 Justice Stevens, the actual malice test of New York
3 Times and said further in Time, Inc., versus Firestone
4 was designed to avoid looking at the subject matter.
5 You focused on misconduct.

6 And I believe in Time, Inc., versus Firestone
7 the Court acknowledged that too often when we look at
8 subject matter we skew the balance of the state interest
9 on the one hand and the First Amendment on the other,
10 and that is what the Vermont Supreme Court did in this
11 case.

12 It skewed the balance between free speech and
13 state interest in reputation. It allowed the jury to
14 compensate Greenmoss beyond actual injury. It allowed
15 the jury to punish Dun and Bradstreet, not because of
16 any showing of calculated falsehood, but simply because
17 that special notice turned out to be false.

18 The First Amendment rests on the assumption of
19 the widest possible dissemination of information from
20 diverse sources. There is no reason to permit defamed
21 private plaintiffs in a business context or defamed
22 private plaintiffs by a non-media defendant for windfall
23 damages, because the effect is still the same. It is
24 punishment.

25 The prospect of discretionary awards has a

1 chilling effect on what is published and when, whether
2 media or non-media.

3 QUESTION: Are you saying that presumed
4 damages are a punishment? That certainly wasn't the
5 basis on which the libel law developed. It was the idea
6 that the kinds of injuries you suffer in libel to
7 reputation are not easily quantified in dollar amounts,
8 isn't it?

9 MR. GARRETT: That is certainly historical,
10 but Your Honor, in looking at the jury verdicts, the
11 Sunward case that filed an amicus brief, \$3.5 million,
12 when a jury is allowed to give damages without any
13 regard to actual injury, that can be punishment, because
14 it can be used to punish an unpopular speaker.

15 QUESTION: Well, you say without any regard to
16 actual injury.

17 MR. GARRETT: That's correct.

18 QUESTION: Are you saying then that damage or
19 ruining a reputation is not actual injury?

20 MR. GARRETT: Your Honor, that certainly could
21 be actual injury, but in the business context that we
22 are in, it is no different from proving damages for a
23 corporation, for breach of contract or any other thing.
24 You have to come into court with competent evidence.

25 QUESTION: But Gertz says you don't have to

1 itemize dollar amounts, like pain and suffering,
2 medicals, and that sort of thing. So, I mean, if you
3 are going to have damages to reputation, it is going to
4 be a lump sum type of thing that you can't relate to
5 dollar testimony, isn't it?

6 MR. GARRETT: That's correct, Your Honor, but
7 you still have to prove a causal connection between the
8 publication of defamatory words and the damage.

9 QUESTION: Surely, but --

10 MR. GARRETT: And that is what was lacking in
11 this case.

12 QUESTION: Well, it may be lacking in this
13 case, but your suggestion that any award of \$3.5 million
14 for damages to reputation must be punishment because it
15 couldn't possibly have amounted to that much I would
16 think would depend very much on the facts and
17 circumstances of each case.

18 MR. GARRETT: Your Honor, I would agree with
19 you if no presumed damage charge is given, but when the
20 jury is told damages are presumed, and then this Court
21 or any court reviewing that has no idea what the jury
22 based it on, and that is the problem with the presumed
23 damage charge.

24 QUESTION: You mean you think there ought to
25 be proof of some damage?

1 MR. GARRETT: There ought to be proof of
2 actual injury.

3 QUESTION: Well, all right. Let's assume you
4 get one witness come in and say, I think less of Dun and
5 Bradstreet than I did before. As a matter of fact, I
6 have cancelled my subscription, which ought to injure
7 them.

8 QUESTION: That is the defendant.

9 QUESTION: I know, but nevertheless --
10 (General laughter.)

11 QUESTION: -- there is proof, there is proof
12 of an injury, and now is that enough for you, or would
13 you have to quantify it?

14 MR. GARRETT: I think that a plaintiff could
15 come into court with a witness and say, my injury, or my
16 reputation has been injured. No dollar figure has to be
17 assigned to that, but once an injury is proved, it
18 doesn't mean that you can presume any amount of damages
19 based on that. You may get damages which naturally flow
20 from the damage to reputation.

21 QUESTION: Then you really think that you have
22 to do the impossible, prove the amount of the damage?

23 MR. GARRETT: No, sir. I did not suggest
24 that, Your Honor. I merely suggested that the fact that
25 you have one witness that says the plaintiff's

1 reputation has been damaged --

2 QUESTION: Well, he has proved injury. He
3 proves an injury.

4 MR. GARRETT: That's correct, and he may get
5 all the damages for that actual injury.

6 QUESTION: Let me put this to you. Suppose
7 the witness that Justice White has postulated was one of
8 the directors of the bank where Greenmoss did business,
9 and under examination he said that this was discussed
10 for a half hour at a meeting of the bank's board of
11 directors, and that the conclusion was from the
12 president, summing it up, from now on keep a very close
13 eye on Greenmoss Builders, because there is something
14 wrong here. Now, is that a damage or is it not?

15 MR. GARRETT: Your Honor, it is very difficult
16 for me to say that that is a damage to a corporation.

17 QUESTION: That is why perhaps the law has
18 said that certain damages can be presumed.

19 MR. GARRETT: Your Honor, I don't believe
20 that's what the law said in Gertz. Certainly before
21 that it did.

22 QUESTION: I am talking about the law of
23 Delaware. The common law of the states has been
24 that --

25 MR. GARRETT: The common law of the states

1 certainly has been a presumption that --

2 QUESTION: -- because this injury is so
3 difficult to measure, there is a presumption that is
4 permitted by the jury.

5 MR. GARRETT: That certainly was the common
6 law prior to Gertz, Your Honor. That's correct.

7 QUESTION: Well, suppose the president --

8 QUESTION: If somebody comes in and says that
9 you -- I am a corporation doing business, and you have
10 circulated a statement that I am bankrupt, isn't that
11 damage per se, without more?

12 MR. GARRETT: No, Your Honor, I don't believe
13 it is.

14 QUESTION: Well, let me put it this way. It
15 won't help them.

16 (General laughter.)

17 MR. GARRETT: It may not help them, but it may
18 not hurt them either, Your Honor.

19 QUESTION: You mean -- would you do business
20 with a bankrupt corporation?

21 MR. GARRETT: If I got a notice that someone
22 was bankrupt, and I knew it was wrong, and it didn't
23 affect my relationship, I don't believe that makes any
24 difference, Your Honor.

25 QUESTION: Would you buy any stock in that

1 corporation?

2 MR. GARRETT: If I knew it was incorrect,
3 certainly, Your Honor.

4 QUESTION: Oh, I didn't say -- would you buy
5 stock in a bankrupt corporation?

6 MR. GARRETT: No, Your Honor.

7 QUESTION: Well, then, that's an injury, isn't
8 it?

9 MR. GARRETT: If the fact of the publication
10 resulted in that.

11 QUESTION: What?

12 MR. GARRETT: If the fact of the publication
13 resulted in that effect.

14 QUESTION: Well, I ask you, would you buy
15 stock in a corporation that Dun and Bradstreet said was
16 bankrupt?

17 MR. GARRETT: No, sir, I would not.

18 QUESTION: That is sort of an injury, isn't
19 it?

20 MR. GARRETT: If in fact it was incorrectly
21 reported, and that was a result, yes, that would be a
22 quantifiable injury, Your Honor.

23 QUESTION: And compensable.

24 MR. GARRETT: That is correct, if in fact that
25 occurred.

1 QUESTION: What is this case?

2 MR. GARRETT: This case is, there was no --
3 the jury was allowed to presume damages, and there was
4 no causal --

5 QUESTION: Isn't this presuming what I just
6 said?

7 MR. GARRETT: No, Your Honor. They were told
8 damages are presumed, period, and there was no causal
9 connection by evidence between the publication of the
10 report and any action by the people that received it.
11 No showing that anyone did anything toward Greenmoss as
12 a result of that --

13 QUESTION: Well, what was the purpose of Dun
14 and Bradstreet's publication?

15 MR. GARRETT: To inform its subscribers about
16 an event which it thought was correct.

17 QUESTION: True.

18 MR. GARRETT: That is correct.

19 QUESTION: And it was a lie.

20 MR. GARRETT: That is correct. And Your
21 Honor, it is no different than the lie in every libel
22 case. It is no different than the lie in Gertz versus
23 Welch.

24 QUESTION: Well, in most of the libel cases I
25 have done, you can get punitive damages.

1 MR. GARRETT: If you meet a certain standard.
2 That's correct, Your Honor.

3 QUESTION: That's right.

4 QUESTION: Is it the same, really? Couldn't
5 they pick up the telephone and call the clerk of the
6 court where the bankruptcy was asserted to have been
7 filed and said, is Greenmoss Builders -- has Greenmoss
8 Builders filed or has someone sought a bankruptcy on
9 them? It is very easy to find out the truth, the fact,
10 isn't it?

11 MR. GARRETT: Your Honor, this is verifiable
12 information, no matter whether it is published in Dun
13 and Bradstreet or a local newspaper. It is a matter of
14 public record.

15 QUESTION: Well, it is a lot easier than what
16 a newspaper is frequently confronted with.

17 MR. GARRETT: I would not think so, Your
18 Honor, when it comes to reporting matters of public
19 record. Both Dun and Bradstreet and the newspapers can
20 make mistakes. They are reading the same document.

21 If I might, I would like to reserve the
22 remainder of my time for rebuttal.

23 CHIEF JUSTICE BURGER: Mr. Heilmann.

24 ORAL ARGUMENT OF THOMAS F. HEILMANN, ESQ.,

25 ON BEHALF OF THE RESPONDENT

1 MR. HEILMANN: Thank you, Your Honor.

2 Mr. Chief Justice, and may it please the
3 Court, before commencing my argument, I would like to
4 correct what I think is not the evidence before this
5 Court, and I'd like to start by focusing on this
6 correction report.

7 The correction report, which was a very
8 important part of this case, we say was worse than the
9 actual report of the bankruptcy. In other words, we
10 were focusing on the conduct of this defendant after the
11 publication. The corrective report, we said, was more
12 damaging in many respects because it left creditors with
13 ambiguity.

14 The second point that I want to correct is
15 that Mr. Garrett tells you that there was no showing
16 that anyone did anything at the bank with respect to the
17 Greenmoss Builders. That is not what the evidence
18 demonstrated.

19 First, the evidence demonstrated that the
20 specific loan request, and the Vermont Supreme Court
21 found this, the specific loan request was immediately
22 suspended, and we are talking about August in Vermont,
23 when you have to start building.

24 Secondly, in close temporal proximity to the
25 report of the bankruptcy, a bank that had a perfectly

1 good relationship with this construction company all of
2 a sudden told that construction company not only will we
3 deny that request for a loan, but we would like you to
4 go somewhere else for all of your banking business.

5 I don't think that it is credible to say that
6 no one showed any injury, no one showed any harm
7 resulting from the bankruptcy.

8 QUESTION: Mr. Heilmann, doesn't that merely
9 establish the proposition that if you are required to
10 prove actual injury, you will be able to do so?

11 MR. HEILMANN: No, Your Honor.

12 QUESTION: How does that go to the question
13 whether you need to prove actual injury?

14 MR. HEILMANN: Your Honor, I think it focuses
15 on the conduct of Dun and Bradstreet after the
16 publication, which I think is a separate issue.

17 QUESTION: Which again, I suggest, just means
18 you can win the case if you have to go back and try it
19 according to their theory.

20 MR. HEILMANN: As far as Dun and Bradstreet's
21 argument, their initial question before the Court, I
22 think there are two different starting points. To Dun
23 and Bradstreet, the existence of full First Amendment
24 protection for these credit reports is a given
25 proposition, and I don't think that they identify or

1 associate themselves with the recognized First Amendment
2 interest in the area of defamation.

3 On the contrary, they start with the
4 proposition that the common law of defamation does not
5 have legitimacy. If there is no full First Amendment
6 interest that Dun and Bradstreet can point to in a
7 defamation context, the Court cannot reshape the common
8 law because it feels the common law is imperfect or
9 unwise.

10 So, in order to vest --

11 QUESTION: Well, Mr. Heilmann, did you really
12 answer Justice Stevens' question? Could you prove
13 actual damages here if you had to?

14 MR. HEILMANN: In this case, I think we could
15 prove actual damages. I think that --

16 QUESTION: Do you think that most libel
17 plaintiffs can prove actual damages if they have to?

18 MR. HEILMANN: I think that the presumption is
19 necessary to assist private plaintiffs to bridge several
20 causation gaps. I think many private plaintiffs may be
21 able to prove some form of actual injury. I am thinking
22 now about Mr. Gertz, who on retrial testified that he
23 suffered emotional distress.

24 QUESTION: But you would have real problems
25 with quantifying the -- even if you -- you could prove

1 an injury, but to prove the extent of it would be
2 extremely difficult, I suppose, without the aid of a
3 presumption.

4 MR. HEILMANN: Well, I think so, Your Honor.
5 I think that is where the common law has its most
6 beneficial effects, because the intuition of the common
7 law says that harm has occurred, and these presumptions
8 assist the private plaintiff in demonstrating and
9 getting to the jury the kind of harm.

10 QUESTION: What is the presumption you contend
11 is appropriate? Does it tell us the amount of damages?
12 Is there any presumption that concerns the amount of
13 damages? Or does the presumption really go to the fact
14 of damage?

15 MR. HEILMANN: I think the presumption goes to
16 the fact of damage, and not so much to the amount of the
17 damage, and I really think the presumption --

18 QUESTION: So that if you are able to prove
19 the fact of damage independently, then you don't need
20 the presumption.

21 QUESTION: Doesn't it depend --

22 MR. HEILMANN: Your Honor, we --

23 QUESTION: Doesn't it depend, counsel, on a
24 jury's evaluation of in effect punishment, how vicious,
25 how bad was the libel, or how mild and inconsequential

1 was it, and if they think it was very vicious and very
2 bad, they might give a large punitive damage, presumed
3 damage, or if they thought it was casual and
4 inconsequential, they would give one dollar, as
5 sometimes happens.

6 MR. HEILMANN: That may be so, Your Honor.
7 That is more in connection with the punitive damage than
8 presumed damage. Justice Stevens, I would like to
9 finish --

10 QUESTION: How do you distinguish punitive and
11 presumed?

12 MR. HEILMANN: Well, I think that in this
13 case, for example, the presumed damages were equated
14 with actual injury within the description utilized by
15 the Court in Gertz. Punitive damage has, if you will,
16 the white knight aura, the private attorney general.

17 QUESTION: What do you think this large
18 verdict was, presumed or punitive or both?

19 MR. HEILMANN: Well, this verdict was
20 separated, \$50,000 was actual, \$300,000 was punitive.
21 The large part was therefore punitive, the deterrence
22 aspect.

23 If I may, I would like to get back to the
24 question that you posed. You talk about the
25 presumption. Gertz doesn't talk about the presumption.

1 What Gertz talks about is the presumption of substantial
2 damages. There are many common law presumptions, and I
3 don't think Gertz focused on all common law presumptions
4 in the defamation context.

5 The common law presumption that I am focusing
6 on here is the presumption of causation, and I think
7 that is particularly important when a business libel is
8 concerned, because as Mr. Garrett pointed out, there is
9 a federal statute dealing with the Consumer Credit
10 Reporting Act, but there is no federal or state statute
11 dealing with business credit reports.

12 Therefore, a bank, a creditor does not have to
13 talk with you about the reasons why your credit was
14 rejected. The bank can simply say, and this was the
15 testimony at the trial, the bank can simply say, we have
16 no obligation to speak with you about it.

17 Therefore in business libel, it is very
18 difficult to prove these kinds of issues. But with
19 respect to Gertz, I think that what Dun and Bradstreet
20 is essentially focusing on in the Gertz case is, they
21 are trying to avail themselves of the strategic
22 protection aspect of Gertz.

23 Now, when I say strategic protection, I mean
24 two things within the context of Gertz. Number One,
25 Gertz necessarily protects by way of the scope of the

1 ruling all media speech irrespective of whether that
2 speech raises a public issue and irrespective of whether
3 the speech is of a general or public concern.

4 The second part of the strategic protection of
5 Gertz is that it protects false speech so that true
6 speech can have breathing space. Therefore it is a
7 broad prophylactic rule. Here, the type of speech that
8 is involved in this case falls within the strategic
9 protection rule of Gertz.

10 And on the type of speech, I would, without
11 trying to split hairs, I would like to go back to the
12 facts here a bit and point out that we have talked about
13 "Greenmoss is bankrupt" as being the statement that was
14 made. The specific statement that was made, without
15 splitting hairs, is that "Greenmoss filed for
16 bankruptcy."

17 That is, I submit, a purer statement of fact
18 than the statement "Greenmoss is bankrupt." So, the
19 question before the Court is, what strategic protection
20 is necessary to protect business credit reports? And
21 will there be ad hoc balancing if the distinction
22 created by the Court here is retained?

23 I don't think there are valid fears of ad hoc
24 balancing along partisan lines by saying that an
25 admittedly non-media defendant should not receive full

1 First Amendment protection.

2 Dun and Bradstreet said, well, we circulated
3 information and therefore we are like the media. In
4 other words, they claim they are closer to the line
5 between media and non-media than perhaps some other
6 non-media defendants.

7 But in terms of the traditional First
8 Amendment values in defamation cases, they aren't closer
9 to the line. They are among the farthest away from that
10 line, especially when you look at the rationale behind
11 Gertz and New York Times.

12 Fostering public debate, robust debate about
13 public issues. Self-censorship. I really don't think
14 that self-censorship is a valid and legitimate interest
15 when a company like Dun and Bradstreet is concerned.

16 In short, D&B would simply have you return the
17 Gertz decision to the constitutional garage, excise all
18 reference in the majority and concurring opinions to the
19 media and the press, and put forth a new, improved 1984
20 model Gertz with full First Amendment protection for
21 every speaker and every form of speech, regardless of
22 that speaker's need for protection and regardless of the
23 significance or importance of the speech involved.

24 It is the strategic protection area of Gertz
25 that Dun and Bradstreet's particular speech here falls

1 intc, and I think the Court should recognize that aspect
2 of the argument.

3 When Dun and Bradstreet tells you that it is
4 an unpopular speaker, what it says in its briefs is that
5 it is an unpopular speaker because it is an out-of-state
6 financial reporting company.

7 This is not the kind of unpopularity that the
8 Court sought to protect in Gertz, even assuming that
9 those features make Dun and Bradstreet unpopular, which
10 I don't think they necessarily do, and the civil rules
11 of procedure have avenues for avoiding that kind of
12 unpopularity, to wit, removal. The message that they --

13 QUESTION: Could Dun and Bradstreet have
14 removed this case?

15 MR. HEILMANN: Yes, they could have, Your
16 Honor. It was a diversity case, and the ad damnum was
17 sufficient to take the case to federal court.

18 The message that Dun and Bradstreet conveys is
19 not of necessity unpopular. Gertz talked about
20 viewpoints and opinions being unpopular. There is no
21 viewpoint and no opinion here.

22 QUESTION: Well, Mr. Garrett, what damages did
23 you ask for in your complaint?

24 MR. HEILMANN: When we initially filed the
25 complaint, as I have pointed out in my latest brief, we

1 asked for -- there were two plaintiffs. Mr. Flannagan
2 was also a plaintiff. We asked for \$7,500 compensator,
3 \$15,000 punitive.

4 After discovery was over, we submitted a
5 request to the court to amend that ad damnum to seek
6 \$300,000 in damages, and as I have pointed out in the
7 appendix --

8 QUESTION: Did they grant that or not?

9 MR. HEILMANN: The court didn't act on it,
10 because under the Vermont procedure, the ad damnum is a
11 totally irrelevant concept other than establishing the
12 jurisdictional predicate.

13 QUESTION: And the jury gave you \$15,000
14 actual?

15 MR. HEILMANN: No, \$50,000.

16 QUESTION: \$50,000.

17 MR. HEILMANN: Yes.

18 QUESTION: And \$300,000?

19 MR. HEILMANN: That's right. I might point
20 out that on that \$300,000, many of the actions that we
21 say were outrageous conduct occurred after the complaint
22 was filed.

23 The main point that Dun and Bradstreet ignores
24 is that credit reports are fact-oriented, which contain
25 no opinion and no editorialization. They are not

1 opinions as to creditworthiness. Their own witnesses
2 admitted this at the trial, and the evidence in this
3 case belies the suggestion that they are opinions as to
4 creditworthiness. And therefore Dun and Bradstreet --

5 QUESTION: Give us an example of that. What
6 did they do or say?

7 MR. HEILMANN: We asked their witnesses at
8 trial whether this was an opinion as to
9 creditworthiness, and they immediately said, no, we
10 don't analyze creditworthiness. We analyze these
11 facts. We have a rating system. If they fall within
12 the rating system, then we give them the specific
13 categorization.

14 QUESTION: Hasn't that got something to do
15 with your view of their creditworthiness, what category
16 you put them in?

17 MR. HEILMANN: I don't think it has to do
18 with --

19 QUESTION: Don't your customers think it
20 does?

21 MR. HEILMANN: Well, they said that the
22 customers understand what those ratings mean, but it is
23 not so much creditworthiness. It is things like size of
24 assets to the value of the debt of the corporation,
25 things like that, basic, factually verifiable

1 information.

2 But using the broad rules of general
3 application as the majority did in Gertz, there is a
4 very basic difference between media defendants and
5 defendants like Dun and Bradstreet. A media defendant
6 as a basic proposition simply doesn't have the incentive
7 to publish anything that might lead to a libel suit
8 other than with some media defendants a sense of
9 professionalism.

10 Therefore, when a media defendant is involved,
11 libel is not just a cost of doing business like highway
12 accidents and equipment failures are to a trucking
13 company. The media can avoid liability without
14 discontinuing its business by ceasing to carry or
15 publish the material that creates the risk.

16 Much to the contrary, Dun and Bradstreet has a
17 tremendous pecuniary interest in publishing this
18 material, this particular fact-based information. So,
19 for them it really is a cost of doing business; for the
20 media, it's not. In fact, on the strategic protection
21 of Gertz aspect, the breathing space to commit error is
22 very effectively rebutted, I think, by one of D&B's own
23 amici.

24 The association to which this petitioner
25 belongs says, "The type of information companies like

1 Dun and Bradstreet disseminate," and I am quoting,
2 "depends for its success on a constant striving for
3 accuracy because the specific markets served are highly
4 sensitive to error."

5 This suggests Dun and Bradstreet doesn't need
6 breathing space. It also suggests that the kind of
7 breathing space needed where free debate prevails just
8 doesn't exist here. Dun and Bradstreet doesn't say that
9 it will stop publishing this information, and it doesn't
10 say it will tone these reports down.

11 It simply says it will check them more
12 carefully, and then publish them. This is not, we
13 think, self-censorship under the cases decided by the
14 Court, and given the admitted need for accuracy, even if
15 this is censorship, the needs for accuracy outweigh it.

16 In summary, I don't think that this is the
17 type of speech that should get full First Amendment
18 protection.

19 I would like to address Dun and Bradstreet's
20 arguments that the state has no legitimate interest in
21 presumed damages. The only thing Gertz focused on, as I
22 have alluded to, is the presumption of substantial money
23 damages in a setting where Mr. Gertz offered no evidence
24 of any actual injury at all.

25 From that limited perspective, which was the

1 only feature of the common law of defamation addressed
2 by the Court in Gertz, Dun and Bradstreet claims the
3 states have no interest at all in presumed damages. In
4 a business libel setting, that isn't so. Here, the
5 amount of damages proved were limited to profit and
6 out-of-pocket loss, so we didn't have the broader type
7 of injury permissible under the Gertz rule.

8 Secondly, the amount of damages that are
9 proved under ordinary trial practice, introduction of
10 evidence, cross examination, contrary witnesses, that is
11 all available to a defendant in a defamation case, and
12 it was available here.

13 Point Number Three, as I have talked about,
14 the causal link between demonstrated injury and a
15 defendant's acts may be one of the most important
16 aspects of the common law of defamation, and I don't
17 think Gertz addresses that.

18 Fourth, where business libel is concerned, it
19 is very difficult to locate the person who actually made
20 the decision to withhold business credit, especially
21 where, as I have said, in business credit contexts, the
22 creditor does not have to talk with you.

23 On punitive damages, D&B's conduct, not its
24 publication, is what caused this punitive award, and the
25 Vermont Supreme Court's decision recognized that. As

1 D&E's concession at the last oral argument demonstrates,
2 punitive damages do deter.

3 They do work. The punitive damages here were
4 focused on the flaws in the information-gathering system
5 that D&B has erected, and the gross and extreme
6 insensitivity and total lack of cooperation by that
7 system with the person it harmed.

8 For example, Dun and Bradstreet refused for no
9 reason to give Greenmoss the names of the recipients of
10 the reports so it could help itself cure the
11 defamation.

12 The final reason why Gertz should not be
13 expanded to this non-media defendant is that what
14 automatically flows from Dun and Bradstreet's position
15 is that the Gertz doctrine will apply irrespective of
16 the significance of the speech, so no matter how
17 trivial, unimportant, or meaningless the speech is, it
18 always will be deemed more constitutionally significant
19 than the state's interest and reputation.

20 That makes the First Amendment apply to the
21 most trivial and meaningless speech imaginable while
22 private reputation is sacrificed. I think core notions
23 of the First Amendment would be obliterated in
24 defamation cases because they wouldn't have relevance,
25 as would in the long run the positive, normative goals

1 of our society in fostering good reputation, because
2 after all, the rules of defamation are just society's
3 statement about the importance and value of a good
4 reputation.

5 And finally, the person who subsidizes D&E's
6 expansion of the Constitution is the defamed
7 individual. If he is unable to obtain redress because
8 of the First Amendment, he subsidizes defamatory
9 speech.

10 QUESTION: But, Mr. Heilmann, there is no
11 suggestion that he is not entitled to redress. It is,
12 he is not entitled to punitive damages or to redress
13 unless he proves he has been injured. So there is no
14 subsidy, is there?

15 MR. HEILMANN: I think so, Your Honor. If you
16 accept Dun and Bradstreet's proposition that every
17 presumption at common law is defeated by the Gertz case,
18 a business libel plaintiff may have a very difficult
19 time ferreting out the kind of witnesses that will
20 establish the causation.

21 QUESTION: Well, yes.

22 MR. HEILMANN: That is my point, Your Honor.

23 QUESTION: But if he does have the witnesses
24 and can prove the fact of damage, then your subsidy
25 argument collapses.

1 MR. HEILMANN: If he can show some kind of
2 witness connection, but it is a difficult proposition.

3 QUESTION: And does he need punitive damages
4 to avoid a subsidy?

5 MR. HEILMANN: I didn't hear the last part.

6 QUESTION: Does he need punitive damages to
7 avoid the subsidy? Put aside for a moment the presumed
8 damages. Punitive damages, you certainly can't say
9 punitive damages -- a rule which foreclosed punitive
10 damages without proof of actual malice certainly
11 wouldn't be a subsidy, would it?

12 MR. HEILMANN: There was no presumption at all
13 about punitive damages in this case. In fact, there was
14 -- the Court specifically made that --

15 QUESTION: No, but the punitive damage issue
16 is whether you may recover punitive damages without
17 proving actual malice, in the New York Times standard.
18 Of course, you think you can prove actual malice, and
19 therefore you may get your punitive damages, but I just
20 don't follow your subsidy argument. That's all this is
21 addressed to in this case.

22 MR. HEILMANN: Let me address the second
23 doctrinal difference between Greenmoss and Dun and
24 Bradstreet's positions. We say this case should be
25 decided under the Court's commercial speech rules.

1 Credit reports share the same earmarks and
2 characteristics of the kind of speech the Court has
3 previously categorized as commercial speech.

4 Now, there is no special or necessary magic in
5 the label "commercial speech." The label is not
6 important. It is the underlying characteristics of the
7 speech which is important. Those characteristics
8 indicate the Gertz rationale doesn't apply here.

9 Indeed, in Virginia Pharmacy, Justice Blackmun
10 anticipated the attributes that may control the
11 resolution of credit report defamation by comparing New
12 York Times with a credit reporting case, Grove versus
13 Dun and Bradstreet. A fuller examination indicates
14 those attributes do govern.

15 Now, our argument starts from the recognition
16 that communications concerning commercial transactions
17 relate to the system of property rights rather than a
18 system of free expression. They therefore operate in a
19 separate realm of social activity.

20 In this connection, the reasons that Dun and
21 Bradstreet advances in support of its claim that it
22 should receive full First Amendment protection under the
23 Constitution can be utilized by the Court in deciding
24 whether to give this form of speech First Amendment
25 protection under the commercial speech cases.

1 What functions do credit reports serve? The
2 answer is, they inform private economic decisions, just
3 like ads. Credit reports don't affect public opinion.
4 Publications which inform and assist private economic
5 decisions have been held by this Court to constitute
6 commercial speech.

7 Credit reports have basic characteristics that
8 the Court has identified concerning commercial speech.
9 First of all, because of their factual nature, they are
10 easily verifiable. Now, as we have heard, there is a
11 critical need for accuracy with credit reports.

12 That is also true with respect to the
13 commercial speech cases, where it is recognized that
14 such speech only assists the consumer in making proper
15 economic decisions when it is true and not misleading.
16 Factual data, like the information here, can be tested
17 empirically and corrected to reflect the truth without
18 jeopardizing free dissemination of thought.

19 D&B has extensive knowledge of the business
20 credit market. It is well situated to evaluate the
21 accuracy of its data.

22 Secondly, credit report speech is hardy and it
23 is durable. Now, in an effort to avoid the application
24 of the commercial speech doctrine, Dun and Bradstreet
25 says, if you are not talking about your own product or

1 service, you can't engage in commercial speech. That is
2 a futile dividing line, because it runs head-on into
3 comparative advertising theories.

4 For example, if Ford Motor Company says, our
5 cars handle better than BMW's, I would suggest that Ford
6 Motor Company probably has bought a BMW and has checked
7 that out. That is comparative advertising, but Ford is
8 speaking about something it doesn't make.

9 The Bolger Youngs Products case expressly
10 disclaims the suggestion that Dun and Bradstreet has
11 made to the Court here.

12 I think as a final point Dun and Bradstreet
13 says that you must look at the interest of the speaker,
14 the interest of the audience, and the interest of the
15 target of this speech. Well, look at the interest of
16 this speaker and ask Dun and Bradstreet why strategic
17 protection should be afforded to this very durable, this
18 very hardy, and this easily verified speech.

19 Look at the interest of the audience. False
20 credit reports are disastrous for the audience. They
21 have no utility at all. Look at the interest of the
22 target. Greenmoss is a company that never participated
23 in the Dun and Bradstreet system, and thus two entities
24 in this triangle cannot tolerate falsehoods.

25 The third entity, D&E, has not shown that its

1 voice will be stilled if First Amendment protection is
2 not extended to it.

3 Thank you.

4 CHIEF JUSTICE BURGER: Very well.

5 Do you have anything further, Mr. Garrett?

6 ORAL ARGUMENT OF GORDON LEE GARRETT, JR., ESQ.,

7 ON BEHALF OF THE PETITIONER - REBUTTAL

8 MR. GARRETT: If I could respond specifically
9 to several points, Your Honor --

10 CHIEF JUSTICE BURGER: You have five minutes
11 remaining.

12 MR. GARRETT: I am sorry?

13 CHIEF JUSTICE BURGER: You have five minutes
14 remaining.

15 MR. GARRETT: Thank you, Your Honor.

16 Quantifying damages in this case is no
17 different for a corporation than in quantifying damages
18 in any tort or other contract case. For example, if a
19 corporation is suing on negligent misrepresentation or
20 fraud, that corporation has to prove actual injury.

21 QUESTION: Suppose Greenmoss had been a listed
22 security on the New York Stock Exchange, and within
23 three or four days after this report there was a wave of
24 selling, and the stock dropped 25 percent. Damage to
25 someone.

1 MR. GARRETT: There may be damage. The
2 question is, did our report cause that damage. And if a
3 recipient of the report says, I sold my stock short
4 because of that report, that is clearly damage, Your
5 Honor.

6 QUESTION: Well, wouldn't a jury be permitted
7 to infer a nexus between the wave of selling and the
8 report if it were shown simply that the stockholders had
9 received the report? Now, that is damage. That doesn't
10 damage Greenmoss directly, but it damages Greenmoss's
11 standing in the business community, and with its bank,
12 and with a lot of other people, doesn't it?

13 MR. GARRETT: It may well, Your Honor, and
14 that evidence can be brought in to show that, and
15 Greenmoss would be entitled to damages for that actual
16 injury, and we have no problem with that.

17 QUESTION: Can you put a caliper on it and
18 measure it in precise dollars?

19 MR. GARRETT: No, but you can bring a witness
20 to court that said he acted adversely because of that.
21 And that is what we think the rule against presumed
22 damages would at least require some causation.

23 QUESTION: What if he did? What if he brought
24 that witness? Then I suppose you would say you still
25 can't award damages without proof of how much.

1 MR. GARRETT: No, Your Honor. We would be
2 perfectly satisfied with whatever the state rules are
3 for awarding damages.

4 QUESTION: Well, just bring in somebody, I
5 have sold my stock because of this report. Now, usually
6 you have to prove how much, don't you?

7 MR. GARRETT: Well, Your Honor, in most
8 injuries for a corporation, that is what damage is all
9 about. They are injured in dollar and cents terms, and
10 it seems to me that that could be proved by having one,
11 an expert testify concerning what the effect was because
12 of that stock --

13 QUESTION: So you would require proof of how
14 much.

15 MR. GARRETT: I am not necessarily saying how
16 much, Your Honor, but there has to be something more so
17 that a jury just doesn't speculate.

18 QUESTION: Here, Mr. Garrett, the Vermont
19 Supreme Court said that after the Dun and Bradstreet
20 report the bank put off any further -- any future
21 consideration of credit to plaintiff until the
22 discrepancy was cleared up. Now, if that is in
23 evidence, do you still say you need a witness to come in
24 and say that the bank's putting off credit to the
25 plaintiff damaged the plaintiff?

1 MR. GARRETT: Your Honor, if putting off the
2 credit in fact damaged Greenmoss, we believe that could
3 be shown.

4 QUESTION: And you don't need to quantify the
5 damage. Why couldn't a jury simply reasonably conclude
6 from the fact that the bank did put off consideration
7 that Greenmoss was damaged?

8 MR. GARRETT: Because a jury would not be
9 allowed to speculate as to that amount any more in this
10 context than any other context involving proof of
11 damage, Your Honor.

12 QUESTION: Speculate as to causation, or
13 speculate as to amount?

14 MR. GARRETT: I don't believe they can
15 speculate under the state law as to either.

16 QUESTION: Well, which do you think they would
17 be speculating about here?

18 MR. GARRETT: In your example, it may well be
19 damages.

20 QUESTION: Certainly there is causation, isn't
21 there?

22 MR. GARRETT: No, Your Honor. I don't believe
23 so. On that one piece of testimony was that it was from
24 the plaintiff's president --

25 QUESTION: Well, which the jury is perfectly

1 entitled to believe.

2 MR. GARRETT: All right. That's correct. And
3 the bank officer, who was the only person that testified
4 at trial, said, and we quote his testimony at length in
5 the reply brief, the day I got the special notice, I
6 didn't believe it, I called in John Flannagan, he told
7 me there's nothing to it, and that is the end of it.

8 QUESTION: Well, but the jury doesn't have to
9 believe the bank officer. It can believe the
10 plaintiff. And the Vermont Supreme Court said the
11 evidence showed that the bank put off any future
12 consideration of credit to plaintiff until the
13 discrepancy was cleared up. I don't see where there is
14 speculation there.

15 MR. GARRETT: It seems to me there is
16 speculation as to proof, Your Honor.

17 If I might make two other quick points,
18 certainly the state doesn't have any more substantial
19 interest in awarding presumed or punitive damages in a
20 defamation case where actual malice is not shown than it
21 does for fraud. In this case, there were five
22 recipients. They could have been called to the stand,
23 and none were.

24 Thank you very much.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

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The case is submitted.

(Whereupon, at 10:58 o'clock a.m., the case in
the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents 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., Petitioners, v. GREENMOSS BUILDERS,
INC., Respondent.

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

BY *Paul A. Richardson*

(REPORTER)

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