Sinkholes and Substantial Rights: North Carolina's Rejection of Enhanced Procedural Protections for Defamation Defendants

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INTRODUCTION

In the summer of 2002, after a heavy rainstorm, the town of Hickory, North Carolina, made national news when a massive sinkhole opened up in the parking lot of a local restaurant, swallowing a car—a Corvette, no less—in the process.¹ A few days later, a local radio broadcaster commented on the air that his investigation had revealed that a local grading company had done the drainage work on the parking lot, work that likely caused the sinkhole.² Unfortunately for the broadcaster, the company in question had, in fact, not done any drainage work on the lot.³ Even worse, the mother of the owner of the grading company happened to be listening to the radio show that morning.⁴

The resulting defamation suit wandered through the North Carolina court system for the next four years. It eventually reached the North Carolina Supreme Court,⁵ before being sent back to the trial court.⁶ For broadcasters and journalists, what began as an interesting news story ended with the North Carolina Court of Appeals having washed away significant First Amendment protections for commentary on issues of

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1. Greg Lacour, Restaurant owner losing battle against sinkholes – Saturday’s downpour in Hickory burst pipe under parking lot, CHARLOTTE OBSERVER, Aug. 20, 2002, at 2B.
3. Id.
4. Id.
public concern. More importantly, the case spotlighted what continues to be a badly splintered area of law nationally—the availability of interlocutory appeals in defamation cases.

In *Neill Grading v. Lingafelt*, the North Carolina Court of Appeals made two key holdings: (1) in defamation claims involving plaintiffs who are private individuals and commentary on an issue of public concern, North Carolina law requires only that plaintiffs show negligence on the part of the defendant; and (2) given the newly-minted negligence standard of fault, there was no substantial constitutional right at issue for the defendant that would justify an interlocutory appeal of the trial court's denial of summary judgment. The decision in *Neill Grading* seemed to confirm an increasing reluctance on the part of North Carolina courts to allow defendants in defamation cases to avoid a full trial, even when the evidence seems weak at best. In fact, between September 2002 and May 2005, the Court of Appeals took appeals in five defamation cases and ruled against the defendant every time. In four of the five cases, the Court of Appeals dismissed interlocutory appeals arising from denials of summary judgment or motions to dismiss because, the court said, no substantial right was at issue.

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8. Interlocutory appeals seek review of a judicial order or decision made before final judgment. *See infra* Part I.
10. *Id.* at 741.
11. *Id.* at 742.
13. The only exception is the first *Boyce & Isley* decision, 568 S.E.2d 893 (N.C. Ct. App. 2002). For a fuller discussion and critique of this decision by one of
This series of decisions would seem, on its face, to be evidence of consistent, settled law. In fact, it is just the opposite. Following the Court of Appeals’ decision in the second case in this series, Priest v. Sobeck, the North Carolina Supreme Court reversed the Court of Appeals, indicating that it had a different view of interlocutory appeals in defamation cases. The Court of Appeals’ dissent in Priest, adopted in its entirety by the Supreme Court, reasoned that an interlocutory appeal of the partial denial of defendant’s motion for summary judgment was proper because the trial court’s ruling, if wrong, “would have a chilling effect on [defendants’] rights of free speech.” While the Supreme Court’s ruling would seem to have carved out a clear right to interlocutory appeal when First Amendment rights are at issue, in the three years since that ruling the Court of Appeals has effectively eviscerated the Supreme Court’s holding.

This is not just an issue in North Carolina. Across the country, states continue to struggle to reconcile their interests in efficiently moving cases through the judicial system and in protecting speech from the potential chilling effect of spurious defamation claims. While many other states have crafted solutions that err on the side of protecting First Amendment rights, North Carolina, it seems, has chosen a different path.

This Note will argue that North Carolina’s approach to this problem, an approach first seen in Neill Grading and confirmed in Boyce & Isley, PLLC v. Cooper and Grant v. Miller, fails


15. Priest, 579 S.E.2d at 250 (adopting in its entirety Judge Greene’s dissent in the Court of Appeals decision).
16. Priest, 571 S.E.2d at 81 (Greene, J., dissenting) (alteration added).
18. See infra Part V.
to adequately acknowledge United States Supreme Court precedent on the scope of First Amendment and procedural protections for free speech and a free press. The result in North Carolina, and other states with a similar view, is that defendants in defamation cases face the risk of having their voices quieted by the fear of protracted and expensive litigation, no matter how weak the claim might be. Part I of this Note examines the availability of interlocutory appeals in North Carolina, both generally and, more specifically, in cases involving the First Amendment. Part II outlines the speech-chilling burdens imposed on defendants by deficient defamation claims, especially in light of frequent errors by judges and juries at the trial level. Part III traces United States Supreme Court defamation jurisprudence and the implications it has for courts deciding whether to grant an interlocutory appeal. Part III also examines how the Supreme Court has struck the balance between adherence to procedural rules and protection of First Amendment rights. Part IV critically analyzes the North Carolina Court of Appeals’ decision in Neill Grading in light of both Priest and United States Supreme Court precedents. Part V examines how other states have addressed the issue of interlocutory appeals in defamation cases. This Note concludes by assessing the alternative frameworks and calling for an approach to interlocutory appeals that more faithfully adheres to the First Amendment values outlined by the United States Supreme Court without unduly delaying legitimate litigation with unnecessary appeals.

I. INTERLOCUTORY APPEALS IN NORTH CAROLINA—THE SUBSTANTIAL RIGHTS DOCTRINE

An interlocutory appeal is any “appeal that occurs before the trial court’s final ruling on the entire case.” These appeals can address either “legal points necessary to the determination of the case” or issues

20. 611 S.E.2d 477 (N.C. Ct. App. 2005). Like Boyce & Isley II, Miller involved a defamation claim arising from a political ad run during an election campaign. In both cases, the loser of the election brought the claim.

21. BLACK’S LAW DICTIONARY 106 (8th ed. 2004). See also Veazey v. City of Durham, 57 S.E.2d 377, 381 (N.C. 1950) (“An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.”).
“wholly separate from the merits of the action.” To be sure, as a general principle, interlocutory appeals in North Carolina and most other jurisdictions are a disfavored action. As North Carolina Supreme Court Justice Ervin said in the landmark interlocutory appeal case, *Veazey v. City of Durham*: “There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” In short, if parties were allowed to immediately appeal every decision made by a trial court, the judicial system might well grind to a screeching halt.

**A. Defining “Substantial Rights”**

Before there were statutory provisions dealing with interlocutory appeals, the common law rule in North Carolina was that interlocutory appeals were not allowed unless delaying “the appeal until final judgment would result in an absolute loss of the right, or unavoidable prejudice to it.” In the 1883 case *Jones v. Call*, the North Carolina Supreme Court acknowledged that “[n]o rule has yet been settled classifying such cases, and perhaps it would be unwise to undertake to settle a rule definitely at this time.” Over time, however, state legislatures and the federal government did attempt to “settle a rule,” by passing statutes defining, and strictly limiting, when parties can appeal interlocutory orders. North Carolina currently has two statutory

22. BLACK’S LAW DICTIONARY, supra note 21, at 106.
23. See, e.g., Goldston v. Am. Motors Corp., 392 S.E.2d 735, 736 (N.C. 1990) (“Generally there is no right of immediate appeal from interlocutory orders and judgments.”); *Veazey*, 57 S.E.2d at 382-83 (holding that the Superior Court retains jurisdiction of a case while a party appeals an interlocutory order to the North Carolina Supreme Court); Jones v. Call, 89 N.C. 188, 189 (1883) (“An action might easily be protracted indefinitely, if an appeal could be taken at once from every order or judgment, however unimportant or inconclusive . . . .”); Moose v. Nissan of Statesville, Inc., 444 S.E.2d 694 (N.C. Ct. App. 1994) (denying an interlocutory appeal of the trial court’s order denying punitive damages).
24. *Veazey*, 57 S.E.2d at 382.
26. Id. (alteration added).
27. See, e.g., 28 U.S.C. § 1292 (2006); N.C. GEN. STAT. § 1-277(a) (2005). The federal statute only allows interlocutory appeals in civil actions when the district
provisions that address appeals of interlocutory judgments. The first provision, which is in the rules of civil procedure, says that:

An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

The second provision, found in the section outlining the administration of the courts, adopts similar language. It allows for an appeal:

From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which (1) Affects a substantial right, or (2) In effect determines the action and prevents a judgment from which appeal might be taken, or (3) Discontinues the action, or (4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

Both statutes make clear that in the absence of a final judgment by the trial court, an interlocutory appeal is only available if a "substantial right" is affected.

31. There is an enormous body of research and case law on what exactly constitutes a final order or judgment. See 4 C.J.S. Appeal and Error §§ 82-84 (2006). In North Carolina, this provision is typically invoked for appeals of the granting of either summary judgment or a Rule 12 motion to dismiss. Though these are not technically "final judgments," the statute allows an interlocutory appeal
However, the statutes themselves do not define what exactly a “substantial right” is, leaving it instead to the courts to create a definition. The problem for North Carolina courts is that the test that has emerged of what makes a substantial right is “more easily stated than applied.” Typically courts do not actually address the question of what makes a right substantial or not, but rather “merely state that a right is or is not substantial.” One court, relying on Webster’s Dictionary, defined a substantial right as “a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.” Most courts that do specifically analyze whether a right is substantial have opted for a deceptively simple two-part test. Under this formulation, for an appeal based on a substantial right to be valid, (1) “the right itself must be substantial,” and (2) “the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment.”

To summarize, the definition of a “substantial right,” it seems, is a right that is substantial and subject to deprivation if not corrected on appeal. This seemingly circular test has the benefit for the courts of giving them vast discretion to choose which appeals they want to hear. The downside, however, is that many parties today have no clearer idea of when an interlocutory appeal might be granted than did the parties in Jones v. Call some 124 years ago. Occasionally, the substantial nature of the right, and therefore the appropriateness of the interlocutory appeal,
is clear—like, for example, when an interlocutory order allows a sheriff to rummage through the defendant's safe.\textsuperscript{39} Most cases are less clear cut.\textsuperscript{40}

In 1984, Willis P. Whichard,\textsuperscript{41} then an associate judge on the North Carolina Court of Appeals and later an associate justice on the North Carolina Supreme Court, examined the development of the "substantial right doctrine" in North Carolina.\textsuperscript{42} Justice Whichard argued that the flexible nature of the substantial rights inquiry employed by courts had resulted in "a disorganized display of case law."\textsuperscript{43} Courts, Justice Whichard said, were deciding whether an interlocutory judgment affected a substantial right "on an almost ad hoc basis" animated more by the desire to "reach an equitable disposition in the individual case than by the coherent application of consistent legal principles."\textsuperscript{44} The courts' most recent substantial rights decisions, at least in the defamation arena, only bolster Justice Whichard's observation.

\textbf{B. The Intersection of Substantial Rights and the First Amendment}

Setting aside for the moment the actual definition of what makes a "substantial right" under North Carolina law, it can hardly be doubted that most people would count freedom of speech and freedom of the press as two of their "substantial rights." In the area of free speech, until recently at least, it seemed that North Carolina courts agreed. In \textit{Kaplan v. Prolife Action League},\textsuperscript{45} decided in 1993, the Court of Appeals granted an interlocutory appeal of a preliminary injunction issued by the trial court restricting an anti-abortion group from protesting in front of the

\textsuperscript{39} Whichard, \textit{supra} note 31, at 152-53 (citing Hooks v. Flowers, 101 S.E.2d 320 (N.C. 1958)).
\textsuperscript{40} See generally Whichard, \textit{supra} note 31. Whichard's work was updated in 1995 by J. Brad Donovan, a staff member at the North Carolina Court of Appeals. See J. Brad Donovan, \textit{The Substantial Right Doctrine and Interlocutory Appeals}, 17 CAMPBELL L. REV. 71 (1995).
\textsuperscript{42} Whichard, \textit{supra} note 31.
\textsuperscript{43} \textit{Id.} at 125.
\textsuperscript{44} \textit{Id.}
plaintiff's house. The court in *Kaplan* said that "given the important First Amendment principles at issue, substantial rights of the defendants have been affected." Five years later, in *Sherrill v. Amerada Hess Corp.*, the Court of Appeals again granted an interlocutory appeal of a gag order imposed by the trial judge on all parties involved with the case. Citing *Kaplan*, the court said flatly that "[a]n order implicating a party’s First Amendment rights affects a substantial right." It should be noted that both of these cases involved prior restraints on speech as a result of the trial courts' actions, and therefore draw much closer scrutiny from appellate courts.

Until *Priest*, however, North Carolina courts had not had the occasion to rule on whether the substantial rights doctrine truly applied to all First Amendment cases or whether the court's analyses in *Kaplan* and *Sherrill* were limited to cases of prior restraint. In *Priest*, the plaintiffs charged that a newsletter produced by their local union and its district representative libeled them by implying that they had been responsible for the hiring of non-union workers. The trial court granted only partial summary judgment to the defendants and certified the case for immediate appellate review under the North Carolina Rules of Civil Procedure. The Court of Appeals held that partial denial of summary judgment was not a final judgment, and therefore could not be immediately appealed unless a substantial right was affected. The court went on to distinguish this case from *Kaplan* and *Sherrill*, pointing out

46. *Id.* at 832.
47. *Id.* at 834 (alteration added) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)).
49. *Id.* at 806-07.
50. *Id.* at 807 (alteration added) (citing *Kaplan*, 431 S.E.2d at 834).
52. Cf. *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.").
53. *Priest*, 571 S.E.2d at 76-77.
54. N.C. GEN. STAT. § 1-1A, Rule 54(b) (2005).
55. *Priest*, 571 S.E.2d at 78-79.
that those cases involved prior restraints, whereas here "the trial court did not impose any preliminary restrictions upon the parties." The court also found defendants’ claims of a potential chilling effect unavailing, saying that, "[a]ny change in defendants’ behavior because of this case is self-imposed."

In his dissent, Judge Greene disagreed with both parts of the majority’s holding. He argued that the trial court’s partial dismissal of summary judgment was indeed an appealable final order, and, in any case, that the partial dismissal did affect a substantial right. In particular, Judge Greene said, the fact that the trial court may have misapplied the fault standard outlined by the United States Supreme Court in the landmark libel case *New York Times Co. v. Sullivan* "would have a chilling effect on [defendants’] rights of free speech."

Unfortunately, Judge Greene’s dissent was not extensive. In fact, the portion dealing with the substantial right doctrine is four sentences long. As a result, six months later, when the North Carolina Supreme Court, reads:

I also disagree with the majority’s conclusion that partial denial of defendants’ summary judgment motion did not affect a substantial right. Defendants contend the trial court misapplied the *New York Times v. Sullivan* “actual malice” standard, infringing on their First Amendment right to free speech. Because misapplication of the actual malice standard, detrimental to defendants, would have a chilling effect on their rights of free speech, the trial court’s order does affect a substantial right. Accordingly, this Court should also address the merits of defendants’ appeal.
Court reversed the Court of Appeals decision, adopting Judge Greene's dissent, observers were given precious little guidance on the intersection of substantial rights and the First Amendment. The per curiam decision did not indicate whether the court was reversing the Court of Appeals' decision that there was no final judgment, its decision that no substantial right was at issue, or both. Even assuming the court was reversing the substantial rights holding, the court left observers wondering whether it disagreed with the Court of Appeals' reading of the limits of Kaplan and Sherrill or whether it found the labor union context in Priest to be dispositive. Those questions aside, however, the reversal at least hinted that the court agreed with Judge Greene that there need not be a prior restraint to implicate a substantial right; rather, even the potential that a trial court ruling might chill First Amendment speech made an interlocutory appeal appropriate.

II. THE IMPORTANCE OF PRIEST

The North Carolina Supreme Court's decision in Priest had potentially huge implications for media defendants in defamation cases. Defamation claims are incredibly expensive to defend for media defendants. As Professor Susan Gilles has pointed out, cost estimates range from $95,000 all the way up to $400,000, not including the time that editors and reporters must spend dealing with the suit. These

Id. (citation omitted).


63. Id.


65. Gilles, supra note 64, at 1780 n.95.

66. Id. at 1780-81.
estimates do not take into account the damage to reputation that journalists suffer when they are forced to defend high-profile defamation suits.\textsuperscript{67}

More importantly, statistics show that most defamation cases are legally deficient from the beginning, and even those cases that result in pro-plaintiff verdicts at trial are overwhelmingly reversed on appeal.\textsuperscript{68} According to Gilles, more than seventy percent of pro-plaintiff verdicts that are appealed are "disturbed" by the appellate court, and more than forty percent of those are outright reversals.\textsuperscript{69} In 2001, the Media Law Resource Center published a comprehensive study of summary judgment decisions in libel cases from 1997 to 2000.\textsuperscript{70} During those four years, the study found that more than three-quarters of all libel claims in state and federal courts against media defendants resulted in summary judgment for the defendant.\textsuperscript{71} Where defendants appealed a denial of summary judgment—and the court granted an interlocutory appeal—the trial court decision was reversed and dismissed by the appellate court nearly seventy-five percent of the time.\textsuperscript{72} The point of these statistics, Gilles argues, is that given the extraordinarily high error rate in libel cases, the more quickly these claims can be heard by an appellate tribunal the better.\textsuperscript{73} Without an avenue for interlocutory appeal, all of those defendants would have been forced to proceed to a full trial before getting a favorable verdict.

Not only is this a waste of judicial resources, it can be economically prohibitive for small-town journalists like the defendant in

\begin{itemize}
\item \textsuperscript{67} Cf. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971) (applying the "actual malice" standard in a suit involving speech on an issue of public concern because to apply a lower fault standard would "create a strong impetus toward self-censorship").
\item \textsuperscript{68} See generally Gilles, supra note 64.
\item \textsuperscript{69} Gilles, supra note 64, at 1781 (citing 10 Years of Appellate Review in Defamation Cases from Bose to Connaughton to the Present, Libel Defense Resource Council Bulletin No. 2 (April 1994)).
\item \textsuperscript{70} 2001 Summary Judgment Study and Supreme Court Report—2000 Term, Libel Defense Resource Center Bulletin No. 3 (August 2001) [hereinafter LDRC Bulletin].
\item \textsuperscript{71} Id. at 37.
\item \textsuperscript{72} Id. at 20.
\item \textsuperscript{73} Gilles, supra note 64, at 1798.
\end{itemize}
Neill Grading. Unless the claim is dismissed early, these defendants are left with just a handful of expensive, potentially debilitating options. They can either go to trial with the understanding that an eventual appeal and remand may be necessary, go to trial and hope that no appeal is needed, or settle. Defendants in this situation will surely be much more reluctant to comment on any important issue when they know the sword of Damocles hangs over their heads. The North Carolina Supreme Court's decision in Priest seemed to recognize this. By acknowledging that the denial of summary judgment in a case with First Amendment implications does constitute a potential infringement of a substantial right, the court seemed to give defendants another crack at disposing of the claims against them before being forced to go to trial.

III. THE CONSTITUTIONAL ARGUMENT FOR PRIEST

The North Carolina Supreme Court's substantial rights holding in Priest is well-supported by more than forty years of United States Supreme Court jurisprudence on the intersection of First Amendment rights and state defamation law. While interlocutory appeals in state court cases are purely a statutory matter, the Supreme Court has consistently highlighted the fundamental nature of First Amendment rights and the danger to those rights that comes with exposing defendants to frivolous and expensive defamation trials. In addition, the Court has made clear in other contexts that where First Amendment rights are at issue, the demands of the Rules of Civil Procedure must not overrun constitutional concerns.

74. Id. at 1780.
75. See, e.g., Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971) ("The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to steer far wider of the unlawful zone . . .") (internal quotation and citation omitted).
77. See, e.g., Rosenbloom, 403 U.S. at 50 (holding that defendants' fear of an erroneous verdict in a defamation case "would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (emphasizing the country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").
A. United States Supreme Court Defamation Jurisprudence

Any discussion of American defamation law must begin with New York Times Co. v. Sullivan.78 New York Times involved a defamation claim by a city commissioner in Montgomery, Alabama, against both the New York Times and civil rights activists who had purchased an ad in the paper criticizing the actions of Montgomery city officials.79 A trial court in Alabama awarded the plaintiff $500,000 in damages, and the Alabama Supreme Court affirmed, based on several inaccuracies in the text of the advertisement.80 The Court, in an opinion authored by Justice Brennan, resoundingly rejected the notion that states could, through their defamation laws, punish speakers who comment on the conduct of public officials simply because the speakers made a mistake or got a fact wrong.81 Instead the Court said, it “consider[ed] this case against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”82 Given this principle, “erroneous statements” must be expected “if the freedoms of expression are to have the ‘breathing space’ that they ‘need[] to survive.’”83 To ensure that “breathing space,” the Court held that the First Amendment required that in order to recover damages, public official plaintiffs in defamation suits must prove with “convincing clarity,”84 that the false “statement was made with . . . knowledge that it was false or with reckless disregard of whether it was false or not.”85 Otherwise, the Court said, “would-be critics of official conduct may be deterred from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the expense of having to do so.”86

79. Id. at 256.
80. Id.
81. Id. at 292.
82. Id. at 270 (alterations added).
83. Id. at 271-72 (alteration added) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
84. Id. at 285-86.
85. Id. at 279-80.
86. Id. at 279 (alteration added).
Seven years later, in *Rosenbloom v. Metromedia, Inc.*, a plurality of the Court extended *New York Times* to cover commentary on any issue "of public or general interest," whether the plaintiff is a public figure or not. The Court said, "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." In that opinion, the Court also offered its clearest statement yet as to the dangers that defamation laws that set a negligence standard pose for the First Amendment. The Court said:

In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.

*Rosenbloom*, however, did not last. Just three years later, in *Gertz v. Robert Welch, Inc.*, another case involving a private-figure plaintiff, the Court muddied the waters considerably. In *Gertz*, the Court held that the *Rosenbloom* extension of *New York Times* to all commentary on issues of public concern failed to "recognize[] the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation." Instead, the Court said, states should be able to define for themselves the appropriate standard of fault that a private figure plaintiff must prove, "so long as they do not impose liability without fault." The Court did hold, however, that to award "presumed or punitive damages," the plaintiff must meet the

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87. 403 U.S. 29 (1971).
88. Id. at 43-44.
89. Id.
90. Id. at 50.
92. Id. at 348 (alteration added).
93. Id. at 347.
“actual malice” standard. In dissent, Justice Brennan, author of both New York Times and the plurality opinion in Rosenbloom, reiterates the concerns he outlined in both cases about the chilling effect a negligence standard would have on speech concerning public issues. Brennan wrote:

Adoption, by many States, of a reasonable-care standard in cases where private individuals are involved in matters of public interest—the probable result of today’s decision—will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable-care standard is “elusive,” it saddles the press with “the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.”

In Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., a case involving a private-figure plaintiff and speech that was not about an issue of public concern, the Court confirmed that, “[i]t is speech on ‘matters of public concern’ that is ‘at the heart of First Amendment protection.’”

Finally, in Philadelphia Newspapers, Inc., v. Hepps, another case involving a private-figure plaintiff and an issue of public concern, the Court held that a state defamation statute that placed the burden of proof on the defendant to prove the truth of his statements was unconstitutional. Coming as it did at the end of a veritable flurry of Supreme Court defamation cases, the language employed by Justice

94. Id. at 348-49.
95. BLACK'S LAW DICTIONARY, supra note 21, at 1061 (defining negligence as the “failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation”).
96. Gertz, 418 U.S. at 366 (Brennan, J., dissenting).
97. Id. (citation omitted) (quoting Time, Inc. v. Hill, 385 U.S. 374 (1967)).
100. 475 U.S. 767 (1986).
101. Id. at 776.
O’Connor in crafting this holding is illustrative, especially in light of the North Carolina Court of Appeals’ holding in *Neill Grading*. She wrote:

> When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, *the Constitution still supplants the standards of the common law*, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.\(^{102}\)

More specifically, Justice O’Connor said, in cases involving private plaintiffs and speech on issues of public concern, “where the scales are in such an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.”\(^{103}\)

The foregoing line of cases can be summarized by a few key principles. Chief among these is that the Court has drawn a clear constitutional line between speech on issues of public concern and speech on private issues. The Court has repeatedly confirmed from *New York Times* to *Hepps* that when the speech in question deals with an issue of public concern, “*the Constitution still supplants the common law,*” meaning that the Constitution requires states to set the standard of fault *at least* at negligence.\(^{104}\) Speech that does not address an issue of public concern warrants far less federal constitutional protection.\(^{105}\) Related to this core principle is the Court’s belief that the constitutional standard, rather than a common-law standard, has two key benefits for First Amendment speech: (1) it protects speakers on issues of public concern from being punished for their speech solely on the basis of minor

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102. *Id.* at 775 (emphasis added).

103. *Id.* at 776.

104. *Id.* at 775 (alteration added). This point tends to be confusing because negligence jurisprudence is usually thought of as a state common-law issue. The point the Court is making is not that the Constitution supplants the common law of negligence but rather that insofar as the state common law of defamation requires something less than negligence for issues of public concern it is unconstitutional. Put another way, the Constitution requires *at least* a negligence standard of fault for issues of public concern, no matter what the state common law standard might previously have been.

105. See, *e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985) (“We have long recognized that not all speech is of equal First Amendment importance.”).
mistakes or fact errors, and (2) it discourages lengthy and expensive defamation trials that inevitably work to chill protected speech.

**B. Reconciling Procedural and First Amendment Demands**

In a separate but related line of cases, the Supreme Court has confirmed its fundamental concerns about the chilling effect of defamation litigation on protected speech. In these cases, the Court has at least indicated that where First Amendment rights collide with rules of civil procedure designed to promote judicial efficiency, First Amendment rights should prevail. Though these cases are not at the heart of defamation jurisprudence, they do provide guidance on how to balance the protection of fundamental free speech rights with courts' interest in administering justice efficiently.

In *Bose Corp. v. Consumers Union of United States, Inc.*, which involved a defamation action by a stereo equipment maker against a magazine that negatively reviewed one of the company's products, the Court was presented with the question of whether the proper standard of appellate review in defamation cases is set by the Rules of Civil Procedure or by the Constitution. More specifically, the Court addressed whether the "clearly erroneous" standard of review outlined in the Rule 52 of the Federal Rules of Civil Procedure limited appellate review where the lower courts had applied the *New York Times* "actual malice" standard. The Court held that it did not. Instead, in cases in which the Constitution provides the appropriate burden of proof at trial,

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106. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" (alteration added) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

107. See, e.g., id. at 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable 'self-censorship.'").

109. Id. at 487.
110. FED. R. CIV. P. 52(a). (setting out the standard of review on appeal for findings of fact made by a judge sitting without a jury).
111. *Bose Corp.*, 466 U.S. at 493.
112. Id. at 514.
such as those applying the “actual malice” standard, judges must independently and fully review the record on a case-by-case basis. Justice Stevens wrote, “[t]his process has been vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment.” Independent review, not limited by the “clearly erroneous” standard, “reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.”

Noted media attorney Lee Levine has argued that Bose stands with New York Times and Gertz as one of the most important defamation cases ever decided. According to Levine, in Bose the Court attempted to address “the growing incidence of defamation litigation and debilitating jury verdicts by placing its imprimatur on the power of appellate courts to reverse many such verdicts.” The problem with Bose, Levine argued, is that by focusing on appellate review, the Court failed to address the “equally compelling necessity of judicial review prior to trial.”

The Court attempted to deal with this very issue two years later in Anderson v. Liberty Lobby, Inc., which involved a libel action brought by a non-profit organization against a magazine and its publisher for a series of articles that portrayed the organization as neo-Nazi. The trial court in that case granted the publisher's motion for summary judgment. In this case, because the standard of fault was “actual malice,” the publisher argued that the trial judge should consider at the summary judgment stage that at

113. Id. at 505.
114. Id. at 503 (alteration added).
115. Id. at 510–11.
117. Id. at 38.
118. Id.
120. Id. at 244–45.
121. FED. R. CIV. P. 56.
122. Liberty Lobby, 477 U.S. at 244.
trial the plaintiff would have to show "clear and convincing evidence" of "actual malice."123 The Court agreed. Although its holding was not specifically limited to First Amendment cases,124 the Court said that "[w]hen determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times."125 In short, the Court made clear that in cases involving the "actual malice" standard, the judge's assessment at the summary judgment stage of whether there is a "genuine issue of material fact"126 must take into account whether "a reasonable factfinder could conclude . . . that the plaintiff had shown actual malice with convincing clarity."127

Taken together, Bose and Liberty Lobby stand for the proposition that in applying the Rules of Civil Procedure, judges must acknowledge fundamental constitutional values.128 More specifically, when First Amendment rights are at issue, courts may have to adjust their enforcement of procedural rules to ensure that rights are protected. As a result, the Court has broadly interpreted its ability, indeed its responsibility, to guard, both at the summary judgment stage and beyond, the rights of those commenting on public issues.129

123. Id.
124. See id. at 258 n.1 (Brennan, J., dissenting).
125. Id. at 254 (majority opinion) (alterations added).
126. Id. at 248.
127. Id. at 252.
129. It should be noted that Justice Rehnquist was a consistent critic of this approach. He argued, in Liberty Lobby as well as in the earlier defamation case Calder v. Jones, 465 U.S. 783 (1984), that injecting First Amendment concerns into procedural questions only confused the analysis of both. See, e.g., Liberty Lobby, 477 U.S. at 269 (Rehnquist, J., dissenting); Calder, 465 U.S. at 790 ("We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry.").
IV. PULLING BACK FROM PRIEST V. SOBECK

The New York Times and Bose lines of cases leave little doubt that fundamental First Amendment rights are implicated when defendants in defamation cases involving speech on an issue of public concern are forced to face trial. New York Times and its progeny made clear that this speech is protected by the Constitution, and Bose and Liberty Lobby confirmed that this protection is paramount, even in the face of standards set by the Rules of Civil Procedure.

With these principles in mind, the outcome of Priest makes perfect sense. It can hardly be argued, after all, that even though a core constitutional right is implicated in cases involving speech on an issue of public concern, there is no substantial right being infringed that might justify an interlocutory appeal. And yet, the North Carolina Court of Appeals in Neill Grading came to this very conclusion.

A. The Neill Grading Decision

Like Priest, Neill Grading involved the denial of a motion for summary judgment made by the defendant—in this case a radio broadcaster defending a defamation claim by a local contractor over comments about a nearby sinkhole.\(^{130}\) The Court of Appeals began its analysis of the substantial right question by assessing whether, as the defendant argued, the claim at issue "implicates the First Amendment guarantees of the United States Constitution, falling outside the rubric of North Carolina's general common law of defamation, and therefore affects a substantial right."\(^{131}\)

In so doing, the court first had to decide what level of fault a defamation plaintiff had to prove in North Carolina in cases involving a private-figure plaintiff and an issue of public concern.\(^{132}\) In the court's

131. Id. at 738.
132. The court held that because the sinkhole had garnered such wide attention, both in the area and nationally, it was clearly an issue of public concern. See id. at 740-41. The court simply asserted, without analysis, that the plaintiff was a private figure. See id. at 740. This conclusion is at least debatable, given that the plaintiff, a corporation, was a well-known contractor in the area with ample means
view, speech that warranted a greater degree of First Amendment protection demanded a higher standard of fault and, therefore, implicated a substantial right. Reviewing the United States Supreme Court defamation jurisprudence outlined above, the court said that two factors control the level of fault required—whether the plaintiff is a public figure or a private figure and whether the speech involved concerned an issue of public concern or not. Where the plaintiff is a public official or public figure, the standard of fault is clearly New York Times' "actual malice." Where the plaintiff is a private figure and the speech does not concern an issue of public concern, the court said, "a state court is free to apply its governing common law without implicating First Amendment concerns." Where, however, the plaintiff is a private figure but the speech is about an issue of public concern, the United States Supreme Court held that states can set their own level of fault, "so long as they do not impose liability without fault."

The court balanced two separate state constitutional mandates, the first in article I, section 18 of the North Carolina Constitution, promising all citizens a legal remedy for "an injury done him in his lands, goods, person, or reputation," with the second in article I, section 14, providing that "[f]reedom of speech and of the press are two great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." In the court's view, the balance was clear—"[o]f premier and fundamental interest to the State of North Carolina is protecting the reputations of its citizens." The court held that the standard of fault in North Carolina for speech

of responding to any falsehoods. In this case, for example, the company sent out a press release responding to the charges in the radio report. Id. at 737.

133. Id. at 738.
134. Id. at 738-39 (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774 (1986)).
135. Id. at 739 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964)).
136. Id. (citing Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 763 (1985)).
137. Id. (quoting Gertz v. Welch, 418 U.S. 323, 347 (1974)).
139. N.C. CONST. art. I, § 14 (alteration added).
140. Neill Grading, 606 S.E.2d at 741 (alteration added).
involving an issue of public concern in a claim by a private figure plaintiff is negligence.\textsuperscript{141} With negligence as the standard, the court found little reason to hear an interlocutory appeal based on the substantial right doctrine. The court pointed out that summary judgment is rarely appropriate in negligence cases, where juries typically are asked to apply the "reasonable person" standard to the facts of the case.\textsuperscript{142} Furthermore, in what is clearly the key passage in the opinion, the court said that even though the United States Supreme Court made clear:

that First Amendment protections supplant a state's common law where the content is a matter of public concern, we do not believe the dissemination of information regarding a "private individual" is of a kind benefitted [sic] by the "uninhibited, robust, and wide-open" speech we see promoted by the "actual malice" standard of fault.\textsuperscript{143}

Having expressed its disapproval of the kind of speech at issue in this case, the court said not only that it was not concerned about a potential chilling effect, but, in fact, that this kind of speech should be

\textsuperscript{141} \textit{Id.} Analysis of this holding is outside the scope of this Note. This is not a controversial position, however. It is the majority rule across the country. See Rodney A. Smolla, \textsc{Law of Defamation} § 3.3 (2d ed. 1994). At last count, six states had elected to require plaintiffs in these cases to prove \textsc{New York Times} "actual malice." See Robert D. Sack, 1 \textsc{Sack on Defamation: Libel, Slander & Related Problems} § 6.3 (3d ed. 1999). New York courts require plaintiffs to prove less than "actual malice" but more than negligence. See \textit{id.} at § 6.4. It is worthwhile to note, at least, that the Court of Appeals essentially elevated one constitutional principle, protection of reputation, above another, freedom of speech. This outcome is by no means self-evident, and, in fact, a reasonable argument could be made that in light of United States Supreme Court defamation jurisprudence and North Carolina Supreme Court precedent on the articles in question the Court of Appeals was overprotective of reputation. See, \textit{e.g.}, Corum v. Univ. of N.C. Through Bd. Of Gov., 413 S.E.2d 276, 289 (N.C. 1992) ("Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected.").

\textsuperscript{142} \textit{Neill Grading}, 606 S.E.2d at 742 (citing Williams v. Carolina Power & Light Co., 250 S.E.2d 255, 257 (N.C. 1979)).

\textsuperscript{143} \textit{Id.} (alteration added) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964)).
The court said, "[t]he negligence standard of fault does, and we believe should, provide its own cooling and deliberative effect on the kind of speech at issue in this case." This suggests that the court did not believe that the defendant had a substantial right at issue at the summary judgment stage that would justify an immediate appeal. The court said that given the negligence standard, as opposed to the New York Times standard, "finding a substantial right ... would not further any First Amendment protection." On appeal, the North Carolina Supreme Court at first granted discretionary review, and then opted to dismiss the appeal as "improvidently allowed."

B. The Disconnect Between Priest and Neill Grading

Given the opportunity in Neill Grading to clarify the extent and true meaning of its decision in Priest, the North Carolina Supreme Court opted to punt, leaving in place a Court of Appeals opinion that casts considerable doubt on the actual reach of the substantial rights holding in Priest. The key sentence in the Neill Grading opinion—recognizing on the one hand that the First Amendment trumps the common law when the speech is on an issue of public concern but deciding on the other that the speech in question is not what the Court in New York Times and its progeny envisioned—seems at least internally inconsistent if not outright defiant.

The point of the United States Supreme Court's consistent rulings protecting potentially false speech on issues of public concern is that they prevent judges and juries from punishing speech simply

144. Id.
145. Id. (alteration added) (emphasis added).
146. Id.
147. Id.
150. See id.
152. Id.
because they do not like its content.\footnote{153}{See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).} Once the North Carolina Court of Appeals recognized that the speech in Neill Grading involved an issue of public concern, it no longer had the job of assessing whether the speech deserved constitutional protection—it clearly does, even if that protection is a negligence standard of fault rather than “actual malice.”\footnote{154}{See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) (holding that the Constitution requires at least a negligence standard of fault for speech involving a private figure and an issue of public concern).} The North Carolina Supreme Court had already said in Priest that forcing a defendant to go to trial to fight a defamation claim governed by the “actual malice” standard infringes on a substantial right of the defendant.\footnote{155}{Priest v. Sobeck, 571 S.E.2d 75, 81 (N.C. Ct. App. 2002) (Greene, J., dissenting) (alteration added), rev’d, 579 S.E.2d 250 (N.C. 2003).} Given that the speech at issue in Neill Grading also involved an issue of public concern, and therefore fell under the constitutional umbrella—albeit at a lower standard of fault—it follows that any ruling forcing the defendant to face a full defamation trial based on the court’s application of a constitutionally-proscribed standard would similarly implicate a substantial right.

Yet, that is not how the North Carolina Court of Appeals ruled in Neill Grading. The court, it appears, was unwilling to find a substantial right at issue unless, as the dissent in Priest indicated, the trial court may have misapplied the New York Times standard.\footnote{156}{Priest, 571 S.E.2d at 81.} This reading of the decision was confirmed several months after Neill Grading when the same court dismissed an interlocutory appeal in Boyce & Isley II.\footnote{157}{Boyce & Isley, PLLC v. Cooper, 611 S.E.2d 175, 178 (N.C. Ct. App. 2005).} There the court confirmed that “misapplication of the actual malice standard on summary judgment could lead to some loss or infringement on a substantial right.”\footnote{158}{Id.} Apparently, in the court’s view, any case not dealing strictly with the actual malice standard, even when the speech is constitutionally protected, does not affect a substantial right.

In moving the speech in Neill Grading outside the realm of constitutional protection, the Court of Appeals pointed to its need to
balance the state interest in protecting the reputation of its citizens.\textsuperscript{159} This may have been the appropriate balance to strike in imposing a negligence standard of fault, but in analyzing the substantial right issue, the reputational interest is simply not relevant. The only state interest in refusing to hear an interlocutory appeal is a generalized concern about "procrastinat[ing] the administration of justice."\textsuperscript{160} In many cases, this state interest may well justify dismissal of an interlocutory appeal, but when weighed against constitutionally-protected speech it likely does not, especially in light of the principles outlined in the \textit{New York Times} and \textit{Bose} lines of cases.

\textbf{C. After Neill Grading—Closing the Floodgates}

The North Carolina Court of Appeals' insistence in \textit{Neill Grading} on narrowly construing both state court precedent in \textit{Priest} and United States Supreme Court precedent in the \textit{New York Times} and \textit{Bose} lines of cases marked more than an aberration. Within six months of dismissing the interlocutory appeal in \textit{Neill Grading}, the court dismissed appeals of denials of a motion for judgment on the pleadings\textsuperscript{161} in \textit{Boyce & Isley II} and a motion to dismiss\textsuperscript{162} in \textit{Grant v. Miller}.\textsuperscript{163} While the procedural differences between these two cases and \textit{Neill Grading}, which concerned a motion for summary judgment, are clearly important, \textit{Boyce & Isley II} and \textit{Miller} are more compelling illustrations in some ways because they involve pure political speech by candidates for public office. In both cases, the losing candidate in an election claimed that their opponents defamed them in a campaign advertisement.\textsuperscript{164}

In \textit{Boyce & Isley II}, the court rested its dismissal on a procedural distinction. It distinguished between denial of summary judgment, which means a full trial or a settlement will happen, and a denial of a

\begin{itemize}
  \item Id. at 741 (alteration added) (quoting Veazey v. City of Durham, 57 S.E.2d 377, 382 (N.C. 1950)).
  \item N.C. GEN. STAT. § 1-1A, Rule 12(c) (2005).
  \item § 1-1A, Rule 12(b)(6).
  \item 611 S.E.2d 477, 478-80 (N.C. Ct. App. 2005).
  \item Boyce & Isley, PLLC v. Cooper, 611 S.E.2d 175, 176 (N.C. Ct. App. 2005); \textit{Grant}, 611 S.E.2d at 478.
\end{itemize}
motion for judgment on the pleadings, which "results in further
discovery and possibly summary judgment or other proceedings."\(^{165}\) In a
motion for judgment on the pleadings, the court reasoned, the judge is
simply assessing whether the pleadings properly allege the elements of
the underlying claim, not assessing whether there is enough evidence
forecast to sustain that claim.\(^{166}\) In this case the court, in ruling on a
motion for judgment on the pleadings, had not actually applied the
"actual malice" standard, it had simply assessed whether the plaintiff had
properly alleged in his claim that defendant had defamed him with
"actual malice."\(^{167}\) Because the trial judge had not literally had to apply
the "actual malice" standard to the case, the Court of Appeals said, \textit{Priest}
was inapplicable.\(^{168}\)

Just a month after \textit{Boyce & Isley II}, the court decided essentially
the same issue in \textit{Miller}. \textit{Miller} was an appeal of the trial court's denial
of a motion to dismiss, but the Court of Appeals said that such a motion
is "more akin to a [North Carolina Rule of Civil Procedure] 12(c) motion
for judgment on the pleadings than a motion for summary judgment."\(^{169}\)
Because the issues in \textit{Miller} and \textit{Boyce & Isley II} were
"indistinguishable," the court said it was bound by the precedent in
\textit{Boyce & Isley II}.\(^{170}\)

While the rule announced in \textit{Boyce & Isley II} and followed in
\textit{Miller} certainly reflects a valid reading of \textit{Priest}, it is without question
the narrowest reading possible. More importantly, it seems to ignore the
broader First Amendment principles outlined by the United States
Supreme Court since \textit{New York Times}. In essence, the court announced
in \textit{Boyce & Isley II} that it chose to interpret \textit{Priest} as applying only
where (1) the standard in question is "actual malice," and (2) that
standard has been \textit{actually applied} to the facts of the case, or at least to
the forecast evidence. Thus, where the standard of fault is negligence,
even for speech on an issue of public concern as in \textit{Neill Grading}, there

\begin{itemize}
\item 165. \textit{Boyce & Isley}, 611 S.E.2d at 178.
\item 166. \textit{Id}.
\item 167. \textit{Id}.
\item 168. \textit{Id}.
\item 169. \textit{Grant}, 611 S.E.2d at 479 (alteration added).
\item 170. \textit{Id} (citing \textit{In re Appeal from Civil Penalty}, 379 S.E.2d 30, 37 (N.C.
1989)).
\end{itemize}
is no substantial right at issue. This despite the fact that the United States Supreme Court made clear in the New York Times line of cases that any speech on an issue of public concern warrants First Amendment protection, even if the standard is negligence and not “actual malice.” Furthermore, unless the “actual malice” standard has been actually applied to the case, the North Carolina Court of Appeals said, there is no substantial right at issue. Left unanswered by the court is the question of whether a substantial right is infringed where the trial court applies a negligence standard even though the defendant asserts that the standard ought to be “actual malice.” By its narrow reading of Priest, the Court of Appeals seems to be indicating that such a case would not implicate a substantial right because the trial court did not literally “misappl[y] the . . . ‘actual malice’ standard,” but rather did not apply it at all.

As the Court of Appeals itself pointed out in Boyce & Isley II, its understanding of the scope of Priest is greatly complicated by the fact that the North Carolina Supreme Court has chosen to give no guidance, aside from its per curiam adoption of Judge Greene’s Priest dissent. The four sentences of that dissent dealing with the substantial right issue are hardly enough to help courts assess whether substantial rights are implicated in First Amendment cases. Faced with a paucity of guidance from the state Supreme Court, the Court of Appeals has chosen to adopt a literalist reading of Judge Greene’s dissent—that it only applies where the “actual malice” standard has been applied wrongly. Given three chances—in Neill Grading, Boyce & Isley II, and Miller—to clarify the intersection of substantial rights appeals and the First Amendment, or at least fully explain the meaning of Priest, the North Carolina Supreme Court has refused every time.

The result of the Court of Appeals’ narrow reading of Priest, and the Supreme Court’s refusal to broaden it, has been to confirm the fears

171. Boyce & Isley, 611 S.E.2d at 178-79.
173. Boyce & Isley, 611 S.E.2d at 178.
175. Boyce & Isley, 611 S.E.2d at 178.
176. See supra note 61.
177. Priest, 571 S.E.2d at 81 (Greene, J., dissenting).
of the United States Supreme Court, expressed in *New York Times*, that commentary on issues of public concern might be chilled by the prospect of expensive litigation. Boyce & Isley has been making its way through the courts for six years, Neill Grading for four years, and Miller for three. Neill Grading is particularly illustrative. The final result of the four-year journey through North Carolina’s courts in that case was a two-day trial that ended with the plaintiff taking a voluntary dismissal.

V. ALTERNATIVE APPROACHES TO INTERLOCUTORY APPEALS

While North Carolina, in the wake of *Neill Grading*, seems to have tipped the balance in favor of judicial economy at the expense of providing First Amendment rights with additional protection, a survey of how other states have addressed the issue of interlocutory appeals in defamation cases shows a deeply divided legal landscape. According to research compiled by the Media Law Resource Center, thirteen states either do not allow any interlocutory appeals at all or have never addressed the question specifically. Nineteen other states allow interlocutory appeals, but have not yet had a case forcing them to decide whether such an appeal is allowed in circumstances like *Neill Grading*. Three states, Arkansas, Texas, and New York, have some sort of

181. Telephone interview with Clerk of Court of Catawba County, in Newton, N.C. (Oct. 25, 2006) (notes on file with author). The parties announced at trial that they had reached a settlement.
182. See generally *Media Libel Law 2005-06*, supra note 17 (surveying state statutory and case law on various aspects of defamation claims, including availability of interlocutory appeals).
183. *Id.* Those thirteen are Colorado, Connecticut, Florida, Kansas, Kentucky, Maryland, Minnesota, Nebraska, North Dakota, Ohio, Oregon, Rhode Island, and West Virginia.
statutory provision that would allow such appeals. Fourteen states have precedents specifically allowing interlocutory appeals in these kinds of cases.

Perhaps the simplest way to bring some uniformity to this area of the law, suggested by Professor Gilles, is to craft a rule allowing appeals of denial of summary judgment in defamation cases. Given the statistics cited by Gilles, an immediate appeal, which would more often than not result in a reversal, would end up “saving plaintiffs, defendants, and the public, the cost of a trial.” Of course, in those cases in which the trial court did correctly rule on summary judgment, this interlocutory appeal would result in increased delay and cost for both parties, but, as Justice O’Connor pointed out in Hepps, “where the scales are in an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech.”

In any case, Gilles argues, several factors should tip the balance in favor of interlocutory appeals. First, the cost of an interlocutory appeal would still be less than the cost of a trial, so the small chance of an unnecessary appeal seems justified. Second, Gilles believes, this sort of rule would affect a small number of cases, because parties already have a right to an interlocutory appeal when summary judgment is granted. Finally, whatever increased cost might result from a few unnecessary appeals must be weighed against the fundamental First Amendment principle that is harmed by a large number of erroneous pro-

185. Id.
186. Id. Those fourteen are Arizona, California, Delaware, Georgia, Indiana, Iowa, Louisiana, Massachusetts, Michigan, New Jersey, Oklahoma, Pennsylvania, Utah, and Washington. Because Priest is still technically good law, North Carolina probably best fits in this category, but the sturdiness of that precedent is certainly questionable. See infra Part IV.
187. Gilles, supra note 64, at 1802. See also Richard N. Winfield, Interlocutory Appeals as of Right: The Time Has Come, 17 COMM. LAW. 18-19 (Spring 1999) (analyzing the success of the Texas statute granting interlocutory appeals to media defendants in defamation cases).
188. See supra notes 64-66 and accompanying text.
189. Gilles, supra note 64, at 1802.
190. Id.
192. Gilles, supra note 64, at 1802.
193. Id. at 1802-03.
plaintiff lower court decisions.\textsuperscript{194} As Gilles points out,\textsuperscript{195} New York’s interlocutory appeal statute allows interlocutory appeals of denial of summary judgment.\textsuperscript{196} Between 1986 and 1994, Gilles says, more than ninety percent of interlocutory appeals of denials of summary judgment resulted in either a full reversal or a partial reversal.\textsuperscript{197}

Texas has adopted a slightly narrower approach to this issue. The Texas statute outlining appeals of interlocutory orders contains a specific provision granting interlocutory appeal to any media defendant denied summary judgment.\textsuperscript{198} The statute reads:

A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . (6) denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution . . . .\textsuperscript{199}

The only limit imposed by the statute is that if the interlocutory order is affirmed on appeal, the media defendant must pay the costs and attorney’s fees of the plaintiff.\textsuperscript{200} This approach has been quite successful in weeding out lower court errors before forcing media defendants to go through a long trial.\textsuperscript{201} By one count, in 1998 alone,
Texas appellate courts reversed six of seven appeals of denials of summary judgment.\textsuperscript{202} The virtue of the Texas statute is that its limited applicability eliminates significant concerns about judicial efficiency that would come with a statute that simply allows interlocutory appeals of denials of summary judgment with no limitation as to the type of defendant or claim. The question is whether it is underinclusive.\textsuperscript{203} The United States Supreme Court has never limited its defamation jurisprudence to media defendants, choosing instead to focus on the speech involved.\textsuperscript{204} A strict reading of the Texas statute would seem to eliminate from its protection commentary on public issues or public officials that does not appear in the print or electronic media, like, for example, the lone protester on the capitol steps or the political candidate issuing a campaign advertisement.

In other states that share North Carolina's more restrictive interlocutory appeals statute, the solution has been left to the courts rather than the legislature. In some such jurisdictions, courts have chosen to strike the balance between judicial efficiency and the First Amendment in favor of the First Amendment. In Arizona, in a case involving a private-figure plaintiff and speech concerning an issue of public concern, the Court of Appeals reversed the trial court's denial of the newspaper defendant's motion for summary judgment.\textsuperscript{205} The court acknowledged at the outset that review "of a trial court's denial of summary judgment is a rarity and shall remain so."\textsuperscript{206} The court continued:

\begin{quotation}
We make an exception in this case in furtherance of the public's significant first amendment interest
\end{quotation}


\textsuperscript{202} Winfield, \textit{supra} note 187, at 19.

\textsuperscript{203} See, e.g., Quebe v. Pope, 201 S.W.3d 166 (Tex. App. 2006) (dismissing interlocutory appeal and holding that the Texas statute applied to non-media defendants only if the statement in question were published in the media).

\textsuperscript{204} See Gertz v. Welch, 418 U.S. 323, 343 (1974) ("We think that [\textit{New York Times} and other previous defamation decisions] are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability.") (alteration added)).


\textsuperscript{206} Id. at 1133.
in protecting the press from the chill of meritless actions.

The absence of merit in plaintiff’s case is plain. By taking jurisdiction at this stage, we relieve the parties and the court of a prolonged, costly, and inevitably futile trial; additionally, and more significantly, we relieve the [defendant] of a potential chilling of its future reporting on activities of organized crime.207

California courts have adopted a similar philosophy. In a libel case where the defendant moved for summary judgment because, it argued, the retractions it printed immunized it from liability, the appellate court reversed the trial court’s denial of the motion.208 Here again, the court struck the balance in favor of the First Amendment. It said, “This question must be examined with special care, for in libel cases a court’s failure to summarily adjudicate factual issues not in material dispute inflicts an unnecessary burden on the strong public interest in journalistic freedom.”209

207. Id. (citations omitted).


While there are clear alternative approaches for summary judgment cases like Neill Grading, cases like Boyce & Isley and Miller involving Rule 12 motions pose a trickier problem. Unlike the Gilles proposal or the Texas statute, the approaches taken by states like Arizona and California can, when circumstances require, be stretched to cover situations like Boyce & Isley II and Miller. To be sure, there are strong arguments for not hearing appeals of denials of motions to dismiss. The defendant, after all, can still file a later motion for summary judgment—and appeal a denial of that motion if allowed—before being forced to go to trial. These arguments, however, fail to account for the sometimes massive expense of discovery imposed on defendants when their motions to dismiss are denied. Insofar as a defamation claim is flawed from the outset, it seems clear that requiring a defendant to pay for a lengthy discovery and deposition process would impermissibly chill protected speech in the same way that a full trial would. Where jurisdictions adopt the Arizona and California view of how to balance First Amendment rights and judicial efficiency, courts would at least have the option to review denial of motions to dismiss defamation claims that are clearly deficient.

If, however, courts are not willing to broaden their view of interlocutory appeals in defamation cases, statutory change may be needed. While the Texas statute is an interesting model, the approach favored by Gilles would be a better balance. Such a statute, limited to claims arising under the First Amendment to the United States Constitution, or under the free speech or free press clauses of state constitutions, would still protect judicial administration but be more inclusive than the Texas statute in its protection of speech.

State Bar, 16 P.3d 1230, 1231 (Utah 2000) (reversing denial of motion to dismiss defamation action).


211. See Gilles, supra note 64, at 1782-83.

212. See id. at 1803 n.199.

CONCLUSION

While none of the approaches outlined here are perfect, they all seem more faithful to the First Amendment vision laid out by Justice Brennan in New York Times. There is unquestionably a balance to be struck between allowing repeated and futile appeals to "procrastinate the administration of justice" and giving speech the "breathing space" it needs to survive. Priest hinted that the North Carolina Supreme Court was attempting to strike this balance by erring on the side of the First Amendment, a balance seemingly in accordance with United States Supreme Court defamation jurisprudence. Unfortunately, the North Carolina Court of Appeals has chosen to read Priest as narrowly as possible, refusing to apply it except in summary judgment cases where the "actual malice" standard has been wrongly applied. This reading is overly solicitous of concerns about judicial efficiency, especially in light of statistics showing that trial courts and juries usually get the law wrong in defamation cases. It has been amply demonstrated elsewhere around the country that either by statute—as in New York and Texas—or by judicial interpretation, courts have been able to spare defamation defendants the expense and time of defending themselves from claims that are impaired from the outset.

It is long past time for the North Carolina Supreme Court to clarify its holding in Priest. If the Court of Appeals’ reading of that decision is indeed overly narrow, the Supreme Court should correct it. If, however, the Supreme Court agrees with that reading, then statutory change may be appropriate. A statute granting interlocutory appeals of all denials of summary judgment could be over-inclusive at the expense of efficiency. Limiting this provision, however, to defamation claims would be narrow enough to keep frivolous interlocutory appeals out of

218. Gilles, supra note 64, at 1781-82.
219. See supra Part V.
the courts while tipping the scales in favor of the First Amendment. More importantly, it would bring some semblance of order and clarity to the substantial rights doctrine in North Carolina, which, until now, has been "a disorganized display of case law."