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THE IMPENDING FEDERALIZATION OF MISSOURI DEFAMATION LAW

I. INTRODUCTION

In *Gertz v. Robert Welsh, Inc.*¹ the United States Supreme Court "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 states."² The Court held that so long as the states do not impose liability without fault, they may choose the standard of liability applicable in an action for defamation brought by a private individual against a news medium.³ This is to be contrasted with the strict liability imposed by the common law.⁴ In addition, the Court held that actual damages may not be presumed and punitive damages may not be awarded to a private defamation plaintiff, at least in the absence of a showing that the defendant acted with knowledge of the falsity of the defamatory statement or in reckless disregard of the truth.⁵ At common law actual damages were presumed in many cases and punitive damages were awarded routinely.⁶

The courts of at least 18 states have had occasion since *Gertz* to consider its application to their defamation law,⁷ but there are no reported Missouri cases on the problem. The purposes of this comment are to provide a summary of existing Missouri defamation law and to explore the potential impact of *Gertz* on that body of law. Part II summarizes Missouri law as it existed prior to the landmark case of *New York Times Co. v. Sullivan*.⁸ The first section of Part III considers *New York Times* and its progeny (including Missouri cases), while the second section of Part III analyzes *Gertz*. Part IV summarizes the response of other states to *Gertz*. Part V considers the potential impact of *Gertz* on Missouri defamation law and includes recommendations.

1. 418 U.S. 323 (1974).

2. *Id.* at 370 (White, J., dissenting).

3. *Id.* at 347.

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 580B, Comment b (Tent. Draft No. 21, 1975).

5. 418 U.S. at 349.

6. W. PROSSER, *supra* note 4, § 112.

7. See Part IV *infra*.

8. 376 U.S. 254 (1964). The reader should keep in mind throughout Part II that its purpose is to consider Missouri defamation law as it existed prior to the impact of *New York Times* and its progeny; as a result, some of the rules stated in Part II are no longer correct, and reference must be made to Part III for the applicable constitutional principles. Footnotes throughout Part II indicate main areas of change resulting from United States Supreme Court cases.

II. MISSOURI DEFAMATION LAW

A. In General

In Missouri, as at common law,⁹ the essence of an action for defamation is damage to reputation in the opinion of others.¹⁰ Thus, to a certain extent, whether a particular statement is defamatory depends upon "the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."¹¹ Since the plaintiff's reputation is at stake, a judgment for nominal damages may be obtained to redeem his reputation despite the fact that actual damages are slight.¹²

Defamation is made up of the twin torts of libel and slander. In general, slander is oral and libel is written; the chief modern distinction is that some defamatory words if written are actionable without proof of actual damage while the same words are not actionable if spoken unless the plaintiff can show special damage.¹³ The law does not always keep pace with technology; it is unsettled in Missouri whether defamation published via radio or television constitutes libel or slander.¹⁴ While

9. W. PROSSER, *supra* note 4, § 111.

10. Harbison v. Chicago, R.I. & P. Ry., 327 Mo. 440, 37 S.W.2d 609 (1931).

11. Lightfoot v. Jennings, 363 Mo. 878, 882, 254 S.W.2d 596, 599 (1953) (dictum) (calling plaintiff a "damned communist" was slanderous per se as imputing that plaintiff advocated the violent overthrow of the United States government, which was a crime under federal and state statutes).

12. See Coats v. News Corp., 355 Mo. 778, 197 S.W.2d 958 (1946) (judgment for \$1 actual and \$1 punitive damages upheld).

13. W. PROSSER, *supra* note 4, § 112 at 752. See more detailed explanation of slander and libel in Part II, §§ B, C *infra*.

14. There appear to be no reported Missouri cases deciding the issue. In McDonald v. R.L. Polk & Co., 346 Mo. 615, 142 S.W.2d 635 (1940), the court cited with approval a Nebraska case, Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82, *appeal dismissed*, 290 U.S. 599 (1932), which held that broadcast defamation is libel where the words are read from a written script. However, the McDonald court was citing Sorensen for the proposition that there is strict liability for publication of defamatory statements. McDonald itself involved a printed letter circulated by a mass mailing company. Coffey v. Midland Broadcast Co., 8 F. Supp. 889 (W.D. Mo. 1934) (applying Missouri law), found that the plaintiff had stated a cause of action for defamation via radio, but did not say whether it was libel or slander. Riss v. Anderson, 304 F.2d 188 (8th Cir. 1962) (applying Missouri law), avoided deciding whether television defamation was libel or slander by holding the remarks in question were defamatory per se in either event.

Most other state courts that have faced the issue have held broadcast defamation is libel, at least where there is a written script. Annot., 50 A.L.R.3d 1311, 1319 (1973). Another modern approach is to designate broadcast defamation as libel on the ground that widespread dissemination makes it more harmful to the plaintiff, a rationale commonly used in distinguishing written from oral defamation. See, e.g., Shor v. Billingsley, 4 Misc. 2d 857, 158 N.Y.S. 2d 476, *aff'd mem.*, 4 App. Div. 2d 1017, 169 N.Y.S. 2d 416, *appeal denied*, 5 App. Div. 2d 768, 170 N.Y.S. 2d 976 (1956).

there may be some modern tendency to blur the distinction, the Missouri Supreme Court has stated recently that libel and slander are distinguishable causes of action in Missouri.¹⁵ An important consequence of this holding is that if the plaintiff misconceives his cause of action and pleads slander when he should have pleaded libel, or vice versa, he will be barred from amending his petition after the running of the statute of limitations because an amended pleading relates back to the time of filing of the original pleading only where the claim stated in the amended pleading is essentially the same as the original claim.¹⁶

Given that the gravamen of defamation is injury to reputation in others' eyes, the cause of action cannot arise without "publication" of the allegedly defamatory statement. In the case of slander, the words must be spoken in the presence or hearing of someone other than the plaintiff and defendant.¹⁷ Apparently the same requirement of publication to a third person applies in libel cases.¹⁸ Although the common law rule

15. *Laux v. Motor Carriers Council of St. Louis, Inc.*, 499 S.W.2d 805 (1973). The reasons given were: libel actions in Missouri are *sui generis* by reason of a constitutional provision that the jury shall judge the law and the facts in libel cases [see Part II, § C *infra*]; libel and slander have different elements and different penalties; the law of slander is narrower in scope; written words are in more permanent form and can be circulated more extensively and do greater injury; and § 559.400, RSMo 1969 makes only certain classes of slander misdemeanors while all libels within § 559.410 are made misdemeanors under § 559.420. 499 S.W.2d at 808.

16. 499 S.W.2d at 807-08.

17. *Lonergan v. Love*, 235 Mo. App. 1066, 150 S.W.2d 534 (St. L. Ct. App. 1941); *Harbison v. Chicago, R.I. & P. Ry.*, 327 Mo. 440, 37 S.W.2d 609 (1931). In *Harbison* a husband and wife were accused of stealing goods from a railroad boxcar, and the court found in the husband's slander action that there was no publication to the wife because she, being jointly accused, was not a third party within the meaning of the law of publication. *Accord*, *Starnes v. St. Joseph Ry., Light, Heat & Power Co.*, 331 Mo. 44, 52 S.W.2d 852 (1932).

18. An early supreme court case, *Landis v. Campbell*, 79 Mo. 433, 440 (1883), stated the common law rule that there must be publication to third persons and that publication to the plaintiff alone will not suffice. However, the Kansas City and St. Louis Courts of Appeals subsequently held that a statute defining publication in criminal libel cases, now § 559.430, RSMo 1969, applied in civil libel actions as well. *Bedell v. Richardson Lubricating Co.*, 226 S.W. 653 (K.C. Mo. App. 1920); *Wright v. Great Northern Ry.*, 186 S.W. 1085 (St. L. Mo. App. 1916); *Houston v. Woolley*, 37 Mo. App. 15 (K.C. Ct. App. 1889). *Contra*, *Howard v. Wilson*, 195 Mo. App. 532, 192 S.W. 473 (Spr. Ct. App. 1917) (dictum).

Section 559.430, RSMo 1969 provides:

No printing, writing or other thing is a libel unless there has been a publication thereof, by delivering, selling, reading or otherwise communicating the same or causing the same to be delivered, sold, read, or otherwise communicated to one or more persons or to the party libeled, or by exposing or exhibiting such libelous thing or matter in some public place, or where it may be seen or observed by the public.

The statute incorporates the criminal libel rule that publication to the person defamed is actionable as tending to provoke breach of the peace. W. PROSSER,

is generally that publication may be made to the defendant's own agents, employees or officers,¹⁹ at least one Missouri case has held that communications between officers of the same corporation in the due course of corporate business or between different offices of the same corporation does not constitute publication to third persons.²⁰ It is clear that republication, *i.e.*, repeating someone else's defamatory remark, is actionable.²¹

Assuming that publication is found, a defamation action requires that the allegedly defamatory remarks refer to the plaintiff. In *Coats v. News Corp.*²² the Missouri Supreme Court embraced the *Restatement of Torts* position that "[a] defamatory communication is made concerning the person who its recipient correctly, or mistakenly but reasonably, understands it as intended to refer."²³ Whether an allegedly defamatory publication refers to the plaintiff is a jury question.²⁴

Before discussing libel and slander in more detail, some procedural points should be noted. There is a two-year statute of limitations for defamation.²⁵ A defamation action abates upon the death of the plaintiff or the defendant.²⁶ Since a cause of action for libel is personal to

supra note 4, § 113. This seems to raise the possibility that a civil libel action might lie where publication is only to the plaintiff.

An opportunity to resolve the question arose in *Jacobs v. Transcontinental and Western Air, Inc.*, 205 S.W.2d 887 (K.C. Mo. App. 1947), where the appeals court again stated that the criminal libel publication statute applied to civil actions. However, the supreme court reversed on other grounds and did not reach the issue. 358 Mo. 674, 216 S.W.2d 523 (1948).

A federal district court has expressed the view that the Missouri Supreme Court would, if directly confronted with the question, declare that publication to the plaintiff alone does not give rise to a libel claim. *Insurance Research Service v. Associates Fin. Corp.*, 134 F. Supp. 54 (M.D. Tenn. 1955) (applying Missouri law).

It should be noted that Missouri's new criminal code, S.B. 60, 79th Gen. Assembly, 1st Reg. Sess., (1977), repeals § 559.430, RSMo 1969, perhaps making it easier for a court to reaffirm the common law rule that publication to the plaintiff alone is insufficient in civil libel cases.

19. W. PROSSER, *supra* note 4, § 113 at 767-68.

20. *Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341 (Mo. 1963). A recent case, *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo. App., D. St. L. 1977), stressed that the communication must be in the due course of the corporate business. The court found sufficient publication where a communication between municipal officials was not in the course of ordinary procedures.

21. *Turnbull v. Herald Co.*, 459 S.W.2d 516 (St. L. Mo. App. 1970); *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (En Banc 1953); § 559.430, RSMo 1969.

22. 355 Mo. 778, 197 S.W.2d 958 (1946).

23. RESTATEMENT OF TORTS § 564 (1934).

24. *Skain v. Weldon*, 422 S.W.2d 271 (Mo. 1967); *Coats v. News Corp.*, 355 Mo. 778, 197 S.W.2d 958 (1946).

25. § 516.140, RSMo (Supp. 1976).

26. § 537.030, RSMo 1969.

the plaintiff, there can be no action for civil libel of the dead.²⁷ The proper venue in a defamation action is the county in which the words first were published.²⁸

B. Slander

The elements of Missouri's criminal slander statute²⁹ have been held inapplicable in civil slander actions.³⁰ In *Kirk v. Ebenhoch*³¹ the Missouri Supreme Court stated the traditional common law rule for civil slander. Defamatory words are actionable per se, *i.e.*, without proof of special damages, if they falsely impute: (1) unfitness for or lack of integrity in office, trade, profession, or business; (2) commission of a crime punishable by imprisonment; (3) a loathsome, contagious disease; or (4) unchastity.³²

If a statement falls within one of these four categories, it is slanderous per se and proof of either actual damages or malice is not required

27. *Bello v. Random House, Inc.*, 422 S.W.2d 339 (Mo. 1967). The court interpreted § 559.410, RSMo 1969, a criminal libel statute which it said also applies to civil libel actions, as not giving rise to a civil cause of action in favor of the surviving relatives and friends for defamation of a dead person; rather, the court said, the statute was intended to incorporate the common law rule that a defamation action is personal to the plaintiff.

28. § 508.010(6), RSMo 1969.

29. § 559.400, RSMo 1969, provides:

Every person who shall falsely and maliciously charge or accuse any female of incest, fornication, adultery or whoredom, by falsely speaking of and concerning such female, in the presence and hearing of any other person or persons, any false and slanderous words which shall impute to her any such offense, or who shall in like manner falsely and maliciously charge any person with incest, or the infamous crime against nature, or with any felony, the commission of which would subject such person to disfranchisement and other degrading penalties, shall be deemed guilty of a misdemeanor.

The statute is repealed effective January 1, 1979 by Missouri's new criminal code, S.B. 60, 79th Gen. Assembly, 1st Reg. Sess. (1977).

30. *Krup v. Corley*, 95 Mo. App. 640, 69 S.W. 609 (St. L. Ct. App. 1902).

31. 354 Mo. 762, 191 S.W.2d 643 (1945).

32. *Id.* at 765, 191 S.W.2d at 644. As to the meaning of special damages, see Part II, § H *infra*.

Brown v. Kitterman, 443 S.W.2d 146 (Mo. 1969) is to the same effect as *Kirk v. Ebenhoch* except that *Brown* refers to imputation of unchastity to a woman as being actionable without proof of special damages. This is consistent with case law in other states to the effect that imputing unchastity to a man is not actionable without proof of special damages. W. PROSSER, *supra* note 4, § 112. This would appear to be incorrect in view of § 537.110, RSMo 1969 which states: "It is actionable to publish falsely and maliciously, in any manner whatsoever, that any person has been guilty of fornication or adultery." *Brown v. Wintsch*, 110 Mo. App. 264, 84 S.W. 196 (K.C. Ct. App. 1904), stated that it is actionable per se under this statute to charge falsely any person capable of committing the sexual act with adultery or fornication.

because the law presumes both.³³ There is strict liability if the plaintiff proves that words slanderous per se were spoken concerning the plaintiff and were heard and understood by a person or persons other than the plaintiff.³⁴ However, there is not strict liability if the publication was accidental; in that event, the plaintiff must show that the defendant was negligent as to the publication—that is, that the defendant reasonably should have known that his words would be heard by a third party.³⁵ In the case of slander not per se, the plaintiff must show in addition that he was damaged by the defamatory statement.³⁶

Many of the Missouri slander per se cases deal with imputations of crime.³⁷ It seems clear that the crime imputed must be one that can result in imprisonment, either in the penitentiary or the county jail.³⁸ If the crime imputed would result only in a fine, there is no slander per se.³⁹ There are also a number of slander per se cases dealing with false statements tending to prejudice the plaintiff in his office, profession, trade, business, or employment; or imputing a lack of integrity, knowledge, capacity, skill, or fitness to carry out that vocation.⁴⁰

C. Libel

A logical starting place in discussing Missouri libel law is the provision in the Bill of Rights of the Missouri Constitution that “in suits and prosecutions for libel the jury, under the direction of the court, shall

33. *Priest v. Central States Fire Ins. Co.*, 223 Mo. App. 122, 9 S.W.2d 543 (Spr. Ct. App. 1928). Note that under *Gertz*, actual damages may not be presumed. See text accompanying notes 178-79 *infra*.

34. MO. APPROVED INSTR. NO. 23.10 (1969 ed.). Note, however, that under *Gertz* the defendant would have to be at least negligent as to the truth or falsity of the defamatory statement. See note 174 and accompanying text *infra*.

35. MO. APPROVED INSTR. NO. 23.10 (1969 ed.). The comments accompanying this instruction indicate there are no Missouri cases on the issue of accidental publication and cite RESTATEMENT OF TORTS § 577 (1934) as authority for the proposition that negligence is necessary for liability in such a case.

36. MO. APPROVED INSTR. NO. 23.09 (1969 ed.).

37. See, e.g., *Barnett v. Schumacher*, 453 S.W.2d 934 (Mo. 1970) (forgery); *Lightfoot v. Jennings*, 363 Mo. 878, 254 S.W.2d 596 (1953) (“damned communist” as imputing statutory crime of advocating violent overthrow of U.S. government); *Lonergan v. Love*, 235 Mo. App. 1066, 150 S.W.2d 534 (St. L. Ct. App. 1941) (thief); *Starnes v. St. Joseph Ry., Light, Heat & Power Co.*, 331 Mo. 44, 52 S.W.2d 852 (1932) (diverting electricity); *Priest v. Central States Fire Ins. Co.*, 223 Mo. App. 122, 9 S.W.2d 543 (Spr. Ct. App. 1928) (defrauding insurance company by arson).

38. *Lightfoot v. Jennings*, 363 Mo. 878, 254 S.W.2d 596 (1953); *Priest v. Central States Fire Ins. Co.*, 223 Mo. App. 122, 9 S.W.2d 543 (Spr. Ct. App. 1928).

39. *Kirk v. Ebenhoch*, 354 Mo. 762, 191 S.W.2d 643 (1945).

40. See, e.g., *Williams v. School Dist.*, 447 S.W.2d 256 (Mo. 1969); *Jacobs v. Transcontinental & Western Air, Inc.*, 358 Mo. 674, 216 S.W.2d 523 (1948); *Heitzeberg v. Von Hoffmann Press*, 340 Mo. 265, 100 S.W.2d 307 (1937). *Jacobs* and *Heitzeberg* also state that such imputations are libelous per se.

determine the law and the facts.”⁴¹ In *Jacobs v. Transcontinental & Western Air, Inc.*⁴² the supreme court stated that the constitutional provision stems from Fox’s Libel Act,⁴³ adopted by the English Parliament in 1792 to correct a practice that had grown up in criminal libel prosecutions whereby the judge would decide whether a statement was defamatory and submit to the jury only issues such as proof of publication. According to the court, Fox’s Act required that “the whole case be left to the jury, just as any other criminal case.” But the act did not deprive the judge of the power to direct the jury to acquit because the statement in question was not defamatory as a matter of law.⁴⁴ The constitutional provision clearly applies to both civil and criminal libel actions. Thus, by analogy to the purpose of the rule in criminal prosecutions, the court has held that the effect is to prevent the judge from directing a verdict for the plaintiff in a civil libel suit.⁴⁵ On the other hand, it consistently has been held that the court may dismiss a petition for failure to state a libel claim and may direct a verdict for the defendant.⁴⁶

From the jurors’ point of view, the only difference the constitutional provision makes is that they are told they “may,” instead of “shall,” find for the plaintiff if they believe the plaintiff has proved the elements of his case.⁴⁷ The net effect of all this would seem to be a slight bias in favor of the defendant in a libel action,⁴⁸ which is perhaps consistent

41. MO. CONST. art. I, § 8.

42. 358 Mo. 674, 216 S.W.2d 523 (1948).

43. 32 Geo. 3, c.60 (1792).

44. *Id.* at 680, 216 S.W.2d at 527.

45. *E.g.*, *Lee v. W.E. Fuetterer Battery & Supplies Co.*, 323 Mo. 1204, 23 S.W.2d 45 (1929); *Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S.W. 60 (1905); Note, *Selected Aspects of the Missouri Law of Defamation: A Plea for Judicial Reform*, 1957 WASH. U.L.Q. 358, 374-75 and cases cited therein.

46. *E.g.*, *Missouri Church of Scientology v. Adams*, 543 S.W.2d 776 (Mo. En Banc 1976); *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955); *Jacobs v. Transcontinental & Western Air, Inc.*, 358 Mo. 674, 216 S.W.2d 523 (1948).

In addition, the court has held that a trial court may grant a new trial on the ground that a verdict for the plaintiff was against the weight of the evidence. *Lupkey v. Weldon*, 419 S.W.2d 91 (Mo. En Banc 1967).

In *Rowden v. Amick*, 446 S.W.2d 849 (K.C. Mo. App. 1969), the court noted that the United States Supreme Court has stated that the courts are duty bound in libel cases to determine whether, under the evidence, the plaintiff has made a submissible case.

47. MO. APPROVED INSTR. No. 23.06 (1969 ed.).

48. *See Ukman v. Daily Record Co.*, 189 Mo. 378, 88 S.W. 60 (1905), stating that:

[A] defendant in a libel suit has two strings to his bow, the one the jury and the other the court, whereas the plaintiff has but one, and, if he succeed, must win a verdict from the jury. Stated in a different way, if the defendant can get either the court or the jury to be in his favor, he succeeds, while the prosecutor or plaintiff cannot succeed unless he gets both the court and the jury to decide for him. From this

with the fact that the constitutional provision in question is part of a section dealing with freedom of speech.

In defining civil libel the Missouri courts have turned to the state's criminal libel statute, which is said to incorporate the common law.⁴⁹ The statute defines libel as "the malicious defamation of a person . . . tending to . . . expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse" ⁵⁰ In applying the statute, the Missouri Supreme Court has fastened upon the words "malicious defamation" and held there must be a "defamation in a libelous sense" in addition to exposing the plaintiff to public hatred, contempt or ridicule, or depriving him of public confidence and social relationships. The seminal case expressing this interpretation is *Diener v. Star-Chronicle Publishing Co.*,⁵¹ which stated the test for "legal defamation": "Defamation includes the idea of calumny, aspersion by lying; the injury of another's reputation in that way. To defame is to speak evil of one maliciously, to dishonor, to render infamous."⁵² By way of explanation, the court gave the example of a person living in a beer and wine drinking community who is called a teetotaler; while this might hold him up to public hatred, contempt, or ridicule, it would not be libelous because there is nothing dishonorable or disgraceful about being a teetotaler.⁵³ This interpretation of the statute has been followed in numerous subsequent cases.⁵⁴ Thus the

condition of things it further follows that the court may direct a non-suit, but cannot coerce a verdict for the plaintiff.

Id. at 390, 88 S.W. at 64 (citations omitted).

49. *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963); *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955); *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930); *Diener v. Star-Chronicle Publishing Co.*, 232 Mo. 416, 135 S.W. 6 (En Banc 1911); *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367 (Mo. App., D. St. L. 1973).

The early cases of *Skelley v. St. Louis & S.F.R.R.*, 176 Mo. App. 156, 161 S.W. 877 (Spr. Ct. App. 1913), and *Kenworthy v. Journal Co.*, 117 Mo. App. 327, 93 S.W. 882 (K.C. Ct. App. 1906) often are cited in subsequent cases for the proposition that what is now § 559.410, RSMo 1969, was intended to incorporate the common law as to civil libel actions and was not intended to make publications libelous that would not have been civilly libelous at common law.

It should be noted that the criminal slander and libel statutes are repealed by the new Missouri criminal code, S.B. 60, 79th Gen. Assembly, 1st Reg. Sess. (1977), which will take effect January 1, 1979. After that time, however, there would be nothing to prevent the courts from applying similar rules to civil libel cases because the criminal libel statute has been interpreted as codifying the common law as to civil libel.

50. § 559.410, RSMo 1969. A related statute, § 559.420, RSMo 1969, makes a criminal libel within § 559.420 a misdemeanor.

51. 232 Mo. 416, 135 S.W. 6 (En Banc 1911).

52. *Id.* at 433, 135 S.W. at 11.

53. *Id.*

54. *E.g.*, *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963); *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955); *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367 (Mo. App., D. St. L. 1973).

Missouri definition of libel appears to be consistent with cases in other states which hold that an essential element of defamation is injury to reputation in a disgraceful or dishonorable sense.⁵⁵

If words do not come within the statutory definition of libel, they are not actionable. On the other hand, any language fairly included within the statutory definition is said to be libelous per se, meaning that the words are actionable and that the plaintiff is not required to plead or prove damages.⁵⁶ It should be noted that in the libel context, the term "per se" simply denotes whether words are actionable at all. This is a different use of the term than in the slander context where "per se" is used to denote the occasions on which a defamatory statement is actionable without proof of special damages.⁵⁷ While slander per se and libel per se do not have the same meanings, the kinds of statements held to be slanderous per se are generally actionable in libel cases.⁵⁸ However, some statements that would not be slanderous per se, *i.e.*, statements that would require proof of special damages in order to be actionable, have been held libelous per se and thus actionable.⁵⁹ Some types of state-

55. W. PROSSER, *supra* note 4, § 111 at 742.

56. See *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955); *Seested v. Post Printing and Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930).

Note that under *Gertz* the plaintiff may not recover without proving actual damages unless the defendant knew the defamatory statement was false or published it in reckless disregard of the truth. See notes 178-81 and accompanying text *infra*.

57. See note 33 and accompanying text *supra*.

58. Imputation of crime is libelous per se. *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (Mo. 1966); *Hall v. Brookshire*, 364 Mo. 779, 267 S.W.2d 627 (En Banc 1954); *Rowden v. Amick*, 446 S.W. 2d 849 (K.C. Mo. App. 1969).

Statements tending to prejudice the plaintiff in his profession, trade, business or office are libelous per se. *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (En Banc 1953); *Kleinschmidt v. Johnson*, 183 S.W.2d 82 (Mo. 1944); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934).

False imputations of fornication or adultery are actionable per se. § 537.110, RSMo 1969.

59. *E.g.*, it is libelous per se to call plaintiff a liar, but this would not be slanderous per se. *Becker v. Brinkop*, 230 Mo. App. 871, 78 S.W.2d 538 (St. L. Ct. App. 1935). The court stated: "Many things are libelous per se, when put in writing and published, that are not slanderous per se, or at all, when spoken by word of mouth. The kernel of the matter in these subtle distinctions lies in the axiom: The spoken word flies; the written letter remains." *Id.* at 877, 78 S.W.2d at 540 (citations omitted).

It also has been held libelous per se to state that the plaintiff was disloyal to the United States during World War I even though the actions charged did not constitute a crime, *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930); to state that plaintiff is "infamous," *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955); and to state that plaintiff should be locked in a cage and exhibited to tourists because such statement implies an illness, *id.*

ments are simply not defamatory at all.⁶⁰ It is clear that the mere falsity of a statement does not make it libelous per se, provided that it is not otherwise defamatory.⁶¹

Certain principles of interpretation are followed by Missouri courts in considering allegedly libelous statements. The court must look at a published article as a whole and give its words their plain, popular, and ordinary meanings.⁶² In the case of an article with a headline, the article and the headline are considered as one document in determining whether the overall effect is defamatory and, if so, of whom.⁶³

If it is found that the defendant published a libel per se concerning the plaintiff to a third person or persons, there is a strict liability unless there is a successful defense.⁶⁴ Again, however, as in the case of slander, if the publication was accidental, then the defendant must be at least negligent as to the act of publication.⁶⁵

There remains to be discussed the curious doctrine of libel per quod, which is analogous to slander *not* per se in that it requires a showing of special damages. Libel per quod exists where extrinsic facts must be pleaded to show the defamatory meaning of the libel. Most states treat libel per quod like slander; that is, if the imputation falls into one of the slander per se categories, it is actionable without proof of special damages, but if it is not within one of those categories, special damage must be pleaded and proved. In any event, the extrinsic facts necessary to make out the defamatory meaning must be pleaded and proved.⁶⁶ The Missouri approach to libel per quod is significantly different, however, in that it requires the pleading and proving of ex-

60. *E.g.*, it has been held not libelous per se to state that plaintiff has failed to pay a debt, at least in the absence of imputations that plaintiff failed to pay due to unreliability, inability to perform a contract or service, or insolvency, *Coonis v. Rogers*, 429 S.W.2d 709 (Mo. 1968); that a clergyman is guilty of heresy, *Creekmore v. Runnels*, 359 Mo. 1020, 224 S.W.2d 1007 (1949); that a state senator changed his mind and decided to vote for a United States Senate candidate for whom he earlier said he could not vote, even though the plaintiff alleged the implication was that he had been bribed, *Branch v. Publishers: George Knapp & Co.*, 222 Mo. 580, 121 S.W. 93 (1909); or that plaintiff owes a debt, *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367 (Mo. App., D. St. L. 1973).

61. *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963); *Davis v. Missourian Publishing Ass'n*, 323 Mo. 695, 19 S.W.2d 650 (1929).

62. *Thomson v. Kansas City Star Co.*, 387 S.W.2d 493 (Mo. 1965); *Jacobs v. Transcontinental & Western Air, Inc.*, 358 Mo. 674, 216 S.W.2d 523 (1948); *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930).

63. *Hylsky v. Globe-Democrat Publishing Co.*, 348 Mo. 83, 152 S.W.2d 119 (1941).

64. MO. APPROVED INSTR. NO. 23.06 (1969 ed.). It should be noted that under *Gertz* most if not all plaintiffs will have to show the defendant was at least negligent. See Part III, § C *infra*.

65. MO. APPROVED INSTR. NO. 23.06 (1969 ed.).

66. W. PROSSER, *supra* note 4, § 112 at 763.

trinsic facts and special damages in all cases where the published words are not libelous per se on the face of the publication.⁶⁷ The Missouri Supreme Court has justified its rule as follows:

When the published words do not constitute libel per se the law does not presume that at least some damage resulted, but "special damages constitute the sole basis for a recovery." . . . If a plaintiff must plead extrinsic facts to show he has been libeled, he should also plead facts to show his damage.⁶⁸

If extrinsic facts are pleaded in a per quod case but special damages are not, the court will ignore the extrinsic facts in determining whether the publication is libelous.⁶⁹ Where extrinsic facts and special damages should have been pleaded but are not, no cause of action is stated and the statute of limitations is not tolled; thus the petition cannot be amended to state a cause of libel per quod after two years from the date of publication.⁷⁰ The nature of special damages is discussed elsewhere.⁷¹

D. Truth Defense

The Missouri Constitution provides that in suits and prosecutions for libel and slander "the truth thereof may be given in evidence" ⁷² The revised statutes also provide that truth "shall constitute a complete defense" ⁷³ Numerous cases have held that truth is an absolute defense to defamation, whether libel or slander.⁷⁴ Because the truth of an allegedly defamatory statement is an affirmative defense, it must be pleaded and proved by the defendant,⁷⁵ such proof to be by a preponderance of the evidence.⁷⁶ However, it is not necessary that the

67. *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385 (Mo. 1963). *Accord*, *Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969); *Dietrich v. Pulitzer Publishing Co.*, 422 S.W.2d 330 (Mo. 1968); *Otto v. Kansas City Star Co.*, 368 S.W.2d 494 (Mo. 1963); *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367 (Mo. App., D. St. L. 1973).

In *Langworthy* the plaintiff pleaded extrinsic facts to show that the alleged defamation tended to prejudice him in his profession as a lawyer, which would fall within one of the traditional slander per se categories, but the court held the petition was insufficient because of failure to allege special damages.

68. *Brown v. Kitterman*, 443 S.W.2d 146, 152-53 (Mo. 1969) (citation omitted).

69. *Langworthy v. Pulitzer Publishing Co.*, 368 S.W.2d 385, 388 (Mo. 1963).

70. *Otto v. Kansas City Star Co.*, 368 S.W.2d 494, 497-98 (Mo. 1963).

71. See Part II, § H *infra*.

72. MO. CONST. art. I, § 8.

73. § 559.440, RSMo 1969.

74. *E.g.*, *Hall v. Brookshire*, 364 Mo. 774, 267 S.W.2d 627 (En Banc 1954) (slander); *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (En Banc 1953) (libel). See also MO. APPROVED INSTR. No. 32.12 (1969 ed.).

75. *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (Mo. 1966); § 509.090, RSMo 1969.

76. *Hall v. Brookshire*, 364 Mo. 774, 267 S.W.2d 627 (En Banc 1954). This is so even where the imputation was that plaintiff was guilty of a crime. *Id.* at 632.

defendant prove the defamatory statement was true in every particular. "Slight inaccuracies of expression are immaterial if the defamatory charge is true in substance."⁷⁷ The falsity of a defamatory publication is presumed and need not be pleaded by the plaintiff.⁷⁸ However, the plaintiff may offer affirmative evidence of falsity.⁷⁹ It is permissible for the defendant to plead truth and qualified privilege in the alternative.⁸⁰

E. Absolute Privilege

Certain occasions which might give rise to defamatory statements are recognized as absolutely privileged on the principle that it is indispensable, or at least advantageous, to the public interest that persons should speak freely and fearlessly, uninfluenced by the possibility of being brought to account in an action for defamation Absolute privilege has been conceded on obvious grounds of public policy to ensure freedom of speech where it is essential that freedom of speech should exist.⁸¹

Judicial proceedings commonly are held to constitute an absolutely privileged occasion during which any of the participants, whether judge, party, attorney, or witness, may utter defamatory matter relevant to the subject of the proceeding without civil liability for defamation.⁸² However, a third party who has procured the utterance of a defamation by a protected party in the judicial proceeding cannot claim the absolute privilege.⁸³ There is dictum to the effect that a similar absolute privilege applies to legislative proceedings, certain executive proceedings, and to publications between husband and wife of defamatory matter regarding third persons.⁸⁴ In addition, the Missouri Supreme Court recently has held that publications made with the consent of the plaintiff

77. *Kleinschmidt v. Johnson*, 183 S.W.2d 82, 86 (Mo. 1944). *Accord*, *Turnbull v. Herald Co.*, 459 S.W.2d 516 (St. L. Mo. App. 1970). *See also* MO. APPROVED INSTR. No. 32.12 (1969 ed.): "Your verdict must be for defendant if you believe that the statement . . . was substantially true."

78. *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (Mo. 1966). However, as a practical matter, *Gertz* may require the plaintiff to show falsity. *See* Part V, § C *supra*.

79. *Hall v. Brookshire*, 367 Mo. 774, 267 S.W.2d 627 (En Banc 1954); *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930).

80. *Trice v. Lancaster*, 270 S.W.2d 519 (St. L. Mo. App. 1954). As to the role of truth in relation to qualified privileges, see Part II, § F *infra*.

81. *Laun v. Union Elec. Co.*, 350 Mo. 572, 577-78, 166 S.W.2d 1065, 1068 (1942).

82. *Id.*; *Wright v. Truman Road Enterprises*, 443 S.W.2d 13 (K.C. Mo. App. 1969). For a more detailed discussion of absolute privilege in judicial proceedings, see *Turley, Defamation—Attorney's Power, Attorney's Nemesis*, 35 MO. L. REV. 130, 135 (1970) and cases cited therein.

83. *Laun v. Union Elec. Co.*, 350 Mo. 572, 582, 166 S.W.2d 1065, 1072 (1942).

84. *Id.* at 578, 166 S.W.2d at 1069.

are absolutely privileged.⁸⁵ While there is a growing trend in other states to expand the number of occasions protected by an absolute privilege,⁸⁶ the tendency in Missouri is to confine absolute privilege to the relatively small number of occasions stated in this section.⁸⁷

There are two miscellaneous absolute privileges provided by statute. Information submitted to the state division of employment security pursuant to the Missouri Employment Security Law cannot be the basis for a libel or slander action.⁸⁸ In addition, broadcasters cannot be liable for defamatory statements uttered via radio or television by a candidate for public office where the statements are not subject to the censorship or control of the broadcaster by reason of any federal statute or ruling or order of the Federal Communications Commission.⁸⁹

F. Qualified Privilege

If defamatory statements are made on a qualifiedly privileged occasion, the defendant will not be liable unless the plaintiff proves that the defendant acted with malice.⁹⁰ The fact that there may be a qualified privilege cannot be determinative on a motion to dismiss for failure to

85. *Williams v. School Dist.*, 447 S.W.2d 256 (Mo. 1969) (plaintiff teacher asked at a school board meeting why she was not being rehired and the school superintendent replied that she had disobeyed school rules and regulations, was insubordinate, and was insufficient and inadequate with her students).

In two earlier cases, *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966) and *Hellen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341 (Mo. 1963), the court established that consent by the plaintiff would give rise to a privilege; however, the court did not decide whether the privilege was qualified or absolute because there was no evidence of malice that would overcome a qualified privilege. See Part II, § G *infra* as to abuse of qualified privilege.

86. Annot., 26 A.L.R.3d 492 (1969).

87. *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo. App., D. St. L. 1977). The court refused to extend an absolute privilege to a memorandum written by the defendant police chief that was critical of the plaintiff patrolman in connection with disciplinary proceedings against the plaintiff. The court noted that while there might have been an absolute privilege for statements made by the defendant in the course of an actual disciplinary hearing provided for under the city's rules, the privilege could not extend to the memorandum which was published out of the ordinary course of disciplinary proceedings. The court justified the difference in treatment of the two situations on the grounds that during a hearing the testimony would be under the control of an independent hearing officer and there would be an opportunity for both sides to explore the truth of the statements. *Id.* at 224.

88. § 288.250, RSMo 1969.

89. § 537.105, RSMo 1969. See generally *W. PROSSER, supra* note 4, § 114 at 785.

90. *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966); *Finley v. Steele*, 159 Mo. 299, 60 S.W. 108 (1900). Technically, malice is an element of the plaintiff's case, but it is presumed unless there is a conditional privilege, in which event the burden shifts to the plaintiff to prove malice. *Id.* at 305-06, 60 S.W. at 109. See also MO. APPROVED INSTR. No. 23.06, Committee's Comment (1969 ed.) and cases

state a claim because the plaintiff may be able to prove abuse of the privilege.⁹¹ While qualified privilege is a defense and generally should be pleaded and proved by the defendant, the privilege may be established by the plaintiff's pleadings and evidence even if the defendant fails to raise the issue.⁹² Whether a qualified privilege exists is a question of law for the court; whether the defendant abused the privilege is an issue of fact for the jury.⁹³

The Missouri courts have tended to define qualified privilege in rather broad terms, thus making it relatively easy for defendants to use the defense. This may account for the large number of cases dealing with qualified privilege.⁹⁴ The following is a typical definition:

[B]efore the defense of qualified privilege is available it must appear that the statements made by the defendant were made in the discharge of some duty, either public or private, either legal, moral, or social, to a person or persons having a corresponding interest or duty, and were spoken in connection with and were relevant and germane to some matter involving such an interest or duty, and that the words were spoken in the interest of or for the protection thereof⁹⁵

Despite this broad definition, the cases tend to fall into certain recognizable factual patterns. A number of cases do involve what the court perceives as a "common interest" of the defendant and the person or persons to whom the defamatory statement is published.⁹⁶ A form of

cited therein. As to the character of the "malice" that will overcome a qualified privilege, see Part II, § G *infra*.

91. *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (En Banc 1955).

92. *Cash v. Empire Gas Corp.*, 547 S.W.2d 830 (Mo. App., D. St. L. 1976).

93. *Estes v. Lawton-Byrne-Bruner Ins. Agency Co.*, 437 S.W.2d 685 (St. L. Mo. App. 1969).

94. See *Manning v. McAllister*, 454 S.W.2d 597 (St. L. Mo. App. 1970) and cases cited therein.

95. *Id.* at 600.

96. *Manning v. McAllister*, 454 S.W.2d 597 (St. L. Mo. App. 1970) (qualified privilege found where defendant police chief told plaintiff's relatives that plaintiff was discharged as a policeman for associating with felons); *Estes v. Lawton-Byrne-Bruner Ins. Agency Co.*, 437 S.W.2d 685 (St. L. Mo. App. 1969) (defendant insurance agency's incorrect notification to policyholder that plaintiff insurance agent had not forwarded a premium payment held qualifiedly privileged); *Trice v. Lancaster*, 270 S.W.2d 519 (St. L. Mo. App. 1954) (statements by branch manager of insurance agency to policyholders concerning premium collections supposed to have been made by plaintiff held qualifiedly privileged).

Occasionally the common interest privilege is found where the third persons receiving the communication would seem to have a very slight interest, if any. *Compare, e.g., Gust v. Montgomery Ward & Co.*, 229 Mo. App. 371, 80 S.W.2d 286 (Spr. Ct. App. 1935) (defendant's store clerk followed plaintiff onto sidewalk and in presence of plaintiff's companions and numerous passersby accused plaintiff of shoplifting) with *Lonergan v. Love*, 235 Mo. App. 1066, 150 S.W.2d 534 (St. L. Ct. App. 1941) (no qualified privilege where defendant accused plaintiff of stealing corn in presence of a neighbor).

common interest privilege also has been found in cases involving communications among members of churches, lodges, societies, labor unions, and other groups.⁹⁷ A few cases suggest that self-defense may give rise to a qualified privilege if the defamatory statement is in response to the statement against which it defends.⁹⁸ Qualified privilege also has been found where the defendant had a legal or moral duty to speak.⁹⁹

Qualified privilege has been found in several cases where a newspaper was the defendant. Privilege attaches to published reports on judicial proceedings so long as the reports are fair and reasonably correct.¹⁰⁰ An early case extended a similar privilege to a governor's

97. *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966) (arguably dictum in this case since court also held plaintiff's consent gave rise to a privilege); *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 78 S.W.2d 404 (1934) (church disciplinary proceedings).

In such cases, for the qualified privilege to arise the communication must be made to the appropriate sub-group within a larger organization if it is the sub-group that has the power to take action on the matter. *Fisher v. Myers*, 339 Mo. 1196, 100 S.W.2d 551 (1936).

98. *Hall v. Brookshire*, 285 S.W.2d 60 (St. L. Mo. App. 1955); *Fish v. St. Louis County Printing & Publishing Co.*, 102 Mo. App. 6, 74 S.W. 641 (St. L. Ct. App. 1903). *Cf.* *Bernhardt v. Armbruster*, 217 S.W.2d 759 (St. L. Mo. App. 1949) (qualified privilege found where election clerk executed affidavit for prosecutor concerning election irregularities involving plaintiff election supervisor).

99. *Williams v. Kansas City Transit, Inc.*, 339 S.W.2d 792 (Mo. 1960) (qualified privilege found where corporation defamed former employee in statutorily required service letter); *Boehm v. Western Leather Clothing Co.*, 161 S.W.2d 710 (St. L. Mo. App. 1942) (qualified privilege under labor contract for president of company to complain about plaintiff employee to employees' shop committee); *Lee v. W.E. Fuetterer Battery & Supplies Co.*, 323 Mo. 1204, 23 S.W.2d 45 (1929) (qualified privilege based on moral duty to public where defendant complained to bar association about plaintiff attorney).

100. *Jones v. Pulitzer Publishing Co.*, 240 Mo. 200, 144 S.W. 441 (1911). The policy behind this privilege is that it is considered in the public interest that the public be informed of judicial proceedings. *Id.* Even if a court's judgment is erroneous, an accurate report of it is privileged and the publisher is under no obligation to go behind the judgment and make an independent investigation of its correctness. *Grossman v. Globe-Democrat Publishing Co.*, 347 Mo. 869, 149 S.W.2d 362 (1941). Likewise, if the publisher does not have actual knowledge of the falsity of a statement made during the course of a judicial proceeding, he may publish a report of the statement without making an investigation of his own. *Spradlin's Market, Inc., v. Springfield Newspapers, Inc.*, 398 S.W.2d 859 (Mo. 1966). If the publisher does undertake to state additional matters based upon his own investigation, such matters are not privileged. *Id.*

An early opinion extended this qualified privilege to published reports of pleadings and depositions filed in a divorce suit in advance of a trial on the merits, apparently on the theory that the papers came within the privilege once there was a preliminary hearing on a plea in abatement. *Jones v. Pulitzer Publishing Co.*, 240 Mo. 200, 144 S.W. 441 (1911). But it is unclear in Missouri to what extent the privilege applies to pleadings and other documents filed in cases where no court action has been taken. *See generally* W. PROSSER, *supra* note 4, § 118 at 830-33.

extradition hearing on the ground that it was quasi-judicial in nature; dictum suggested that the privilege also would be extended to legislative and executive proceedings and investigations.¹⁰¹ Missouri cases also have recognized a qualified privilege for newspaper reports concerning public documents and reasons given for official government actions.¹⁰² An important application of this type of privilege is a qualified privilege for news reports based on official police reports concerning arrests where the report is fair and substantially accurate.¹⁰³ A final area of qualified privilege for news media defendants involves commentary on the actions of public officials relating to matters of public interest.¹⁰⁴

In determining whether a report of a judicial proceeding is reasonably correct, it should be viewed from the standpoint of the reporters whose job it is to prepare such reports for the news media and not from the standpoint of a professional court reporter or a trained lawyer. *Spradlin's Market, Inc., v. Springfield Newspapers, Inc.*, 398 S.W.2d 859 (Mo. 1966).

It should be noted that this privilege area has been taken over to a large extent by constitutional privilege. See Part III, § A *infra*.

101. *Brown v. Globe Printing Co.*, 213 Mo. 611, 112 S.W. 462 (1908).

102. In one case concerning reports of poor conditions in a children's detention home, the court found the privilege apparently to be based upon the fact that there had been grand jury reports concerning the matter. *Merriam v. Star-Chronicle Publishing Co.*, 335 Mo. 937, 74 S.W.2d 592 (1934). The privilege also was found where defendant newspaper published a story concerning an official audit report about irregularities in city council appropriations. *Davis v. Missouriian Publishing Ass'n, Inc.*, 323 Mo. 695, 19 S.W.2d 650 (1929).

103. *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (En Banc 1953); *Turnbull v. Herald Co.*, 459 S.W.2d 516 (St. L. Mo. App. 1970). As with the privilege of reporting on judicial proceedings, however, if the publisher undertakes to state additional matters based on his own investigation, he does so at his peril because the additional matters are not privileged. *Id.*

104. The acts of a public officer are open to fair and just criticism and comment, *Branch v. Publishers: George Knapp & Co.*, 222 Mo. 580, 121 S.W. 93 (1909); but the privilege does not extend to false factual assertions, *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934). The privilege has been extended to quasi-public officials such as the chairman of a state political committee. *Cook v. Globe Printing Co.*, 227 Mo. 471, 127 S.W. 332 (En Banc 1910). Some cases indicate the privilege applies to discussion of any matter of public interest, *id.*; *Cook v. Pulitzer Publishing Co.*, 241 Mo. 326, 145 S.W. 480 (1912), but this appears to be dicta since the cases involved officials. Indeed, later cases phrase the rule in terms of commentary upon public officials relating to a matter of public interest. *State ex rel. Zorn v. Cox*, 318 Mo. 112, 298 S.W. 837 (1927); *McClung v. Pulitzer Publishing Co.*, 279 Mo. 370, 214 S.W. 193 (En Banc 1919).

The privilege also extends to publications regarding candidates for public office. *Kleinschmidt v. Bell*, 353 Mo. 516, 183 S.W.2d 87 (1944); *Walsh v. Pulitzer Publishing Co.*, 250 Mo. 142, 157 S.W. 326 (1913).

Once again, it should be noted that this privilege area has been taken over by the constitutional privilege as to public officials and, to some extent, as to matters of public interest. See Part III, §§ A, B *infra*.

G. Abuse of Qualified Privilege

In general the Missouri cases have held that the plaintiff may overcome a defense of qualified privilege by proving that the defendant published the defamatory statement with malice.¹⁰⁵ Whether such malice exists is a jury question,¹⁰⁶ and the plaintiff has the burden of proof on the issue.¹⁰⁷ Malice generally can be shown by evidence that the defendant published defamatory matter for a motive inconsistent with the principles giving rise to the privilege.¹⁰⁸ Malice also can be shown by the defendant's spite or ill will toward the plaintiff or by an improper motive implying a desire to injure the plaintiff. However, personal hostility is not essential to a finding of malice; it also could be found based on a wanton disregard of the plaintiff's rights and interests, or the intentional doing of a wrongful act without just cause or excuse.¹⁰⁹

Proof of malice need not be by direct evidence of the defendant's motives or feelings, but may be inferred from the relation of the parties, the circumstances surrounding the defamatory publication, and even from the terms of the defamatory statement itself.¹¹⁰ Perhaps the strongest evidence of malice is proof of the falsity of the defamatory statement and the defendant's knowledge of such falsity.¹¹¹ Malice also is shown by intemperate, extravagant, and reckless language which exceeds the necessities of the situation.¹¹² Although the Missouri cases have not focused on excessive publication as evidence of malice, at least

105. *Perdue v. Montgomery Ward & Co.*, 341 Mo. 252, 107 S.W.2d 12 (1937); *Merriam v. Star-Chronicle Publishing Co.*, 335 Mo. 937, 74 S.W.2d 592 (1934); *Estes v. Lawton-Byrne-Bruner Ins. Agency Co.*, 437 S.W.2d 685 (St. L. Mo. App. 1969).

106. Cases cited note 105 *supra*.

107. *Pulliam v. Bond*, 406 S.W.2d 635, 641 (Mo. 1966).

108. *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo. App., D. St. L. 1977); *Boehm v. Western Leather Clothing Co.*, 161 S.W.2d 710 (St. L. Mo. App. 1942).

109. *Trice v. Lancaster*, 270 S.W.2d 519 (St. L. Mo. App. 1954); *Boehm v. Western Leather Clothing Co.*, 161 S.W.2d 710 (St. L. Mo. App. 1942); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934).

110. *Lazier v. Pulitzer Publishing Co.*, 467 S.W.2d 900 (Mo. 1971); *Boehm v. Western Leather Clothing Co.*, 161 S.W.2d 710 (St. L. Mo. App. 1942); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934).

111. *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 78 S.W.2d 404 (1934); *Estes v. Lawton-Byrne-Bruner Ins. Agency Co.*, 437 S.W.2d 685 (St. L. Mo. App. 1969); *Boehm v. Western Leather Clothing Co.*, 161 S.W.2d 710 (St. L. Mo. App. 1942).

112. *Boehm v. Western Leather Clothing Co.*, 161 S.W.2d 710 (St. L. Mo. App. 1942); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934).

two cases have implied that a showing of excessive publication would vitiate a qualified privilege.¹¹³

While it is clear that a showing of the defendant's knowledge of the falsity of his defamatory statement will overcome a qualified privilege, it is uncertain in Missouri whether negligence as to truth or falsity will destroy the privilege or whether recklessness must be shown. A recent supreme court case indicated that negligence might be sufficient to vitiate a privilege.¹¹⁴ However, a subsequent St. Louis Court of Appeals decision specifically held that mere negligence as to truth or falsity would not destroy the privilege.¹¹⁵ To further confuse the situation, a still more recent decision of the St. Louis District of the Missouri Court of Appeals, stated that the Missouri Approved Jury Instruction for submitting the issue of qualified privilege appears to allow a finding of abuse of the privilege by negligence.¹¹⁶ With this unsettled state of af-

113. *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966); *Fisher v. Myers*, 339 Mo. 1196, 100 S.W.2d 551 (1936). See generally W. PROSSER, *supra* note 4, § 115 at 793-94.

114. *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966). The court quoted from 53 C.J.S. *Libel and Slander* § 99, at 156 (1948): "[i]t is generally held that if the communication is a privileged one, made in good faith, without malice, *under probable cause to believe it to be true, and without negligence*, the falsity of the communication does not destroy the privilege." (emphasis added).

115. *Estes v. Lawton-Byrne-Bruner Ins. Agency Co.*, 437 S.W.2d 685 (St. L. Mo. App. 1969). The defendant insurance agency negligently sent a policy cancellation notice to a policyholder erroneously stating that the policy was cancelled for nonpayment of the premium when in fact the premium had been paid by the policyholder to the plaintiff agent, who had relayed the payment to the defendant. In fact, the policy was cancelled under the terms of the contract because the insuring companies no longer wished to carry the risk.

The court noted the implication in *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966), that negligence might be sufficient to destroy a qualified privilege. However, the court pointed out that the footnotes to the statement from C.J.S. quoted in *Pulliam* did not cite any Missouri cases and that no Missouri case had held specifically that negligence alone could overcome a privilege. In any event, the court said, the statement in *Pulliam* was arguably dictum since *Pulliam* involved intentional statements.

Thus, the court concluded:

[N]egligence alone does not constitute the willfulness, or the recklessness, or the wanton disregard of the rights of others required for actual or express malice. Negligence does not imply the actual presence of an improper motive indicating a purpose or desire to injure . . . We thus hold that mere negligence is not sufficient to establish the actual and express malice which is required to overcome or destroy a qualified privilege.

116. *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo. App., D. St. L. 1977). After quoting the language used in MO. APPROVED INSTR. NO. 23.06 to submit the issue of qualified privilege ("that such statement was written knowing it to be false or without knowledge whether it was true or false in reckless disregard for the plaintiff's rights"), the court stated that this language "might be read as inviting a verdict for plaintiff based on defendant's mere negligence. . . ." 550

fairs, it is unclear whether the qualified privilege will retain its vitality in Missouri in cases where *Gertz* is applied. In order to impose liability, *Gertz* requires, at a minimum, proof that the defendant was negligent as to the truth of the allegedly defamatory statement. Thus, if a qualified privilege is vitiated by mere negligence, *Gertz* renders the privilege irrelevant because negligence will have to be proved in any event. However, if the privilege can be vitiated only by recklessness, it will retain its vitality; even though the plaintiff might show the negligence required by *Gertz*, he could not recover unless he went further and showed the recklessness necessary to overcome the privilege.¹¹⁷

It is also unclear whether the Missouri Approved Jury Instructions language for submitting the qualified privilege issue¹¹⁸ is intended to incorporate all of the common law methods of destroying a privilege.¹¹⁹ The language incorporates two of the principles set forth in the cases, *i.e.*, malice shown by defendant's knowledge of the falsity of the statement and malice shown by defendant's reckless disregard of plaintiff's rights. But on its face the language does not refer to either malice in the sense of spite or ill will, or a motive inconsistent with the purposes of the privilege, or so-called "legal malice" in the sense of intentionally doing a wrongful act without just cause or excuse. If the plaintiff concludes that the approved instruction is intended to subsume all the forms of malice, he runs the risk of having his verdict reversed if an appellate court decides the instruction should have been modified to fit the case. On the other hand, if the plaintiff concludes the approved instruction should be modified to fit his case and the appellate court decides the approved instruction includes all the forms of malice, the plaintiff again would lose. *Potter v. Milbank Mfg. Co.*,¹²⁰ one of the few cases to discuss the approved instruction language, did little to resolve the question because the court found that the facts in that case fit literally within the approved language.

It is clear that a qualified privilege will not protect a defamatory publication which includes statements not protected by the privilege. For instance, while newspaper reports based on official police reports are privileged, if the newspaper includes additional statements based on its own investigation, the additional facts are not covered by the privilege.¹²¹

S.W.2d at 226. The court's statement arguably was dictum, however, because the main point of the decision was that the qualified privilege language is inappropriate to submit the issue of "actual malice" in the case of a public official. See Part III, § A.1 *infra*.

117. See Part V *infra*.

118. See note 116 *supra*.

119. See notes 108-13 and accompanying text *supra*.

120. 489 S.W.2d 197 (Mo. 1972).

121. *Moritz v. Kansas City Star Co.*, 364 Mo. 32, 258 S.W.2d 583 (En Banc 1953).

H. Damages¹²²

Where defamation is libelous or slanderous per se, actual damages are presumed, and, insofar as possible, they are to be compensatory for only those injuries actually suffered.¹²³ The defendant may introduce evidence to show that plaintiff was not injured.¹²⁴ Where the defamation is actionable per se, mental suffering resulting from the *publication* of the words (not including suffering arising from the defamatory words themselves) may be recovered as general damages.¹²⁵ The question of such damages is said to be peculiarly within the jury's province and the court will not overturn an award unless "the damages are so unconscionable as to impress the court with its injustice" ¹²⁶ An award of nominal damages may be appropriate to allow the plaintiff to redeem his reputation in a case where the actual damages, if any, are slight.¹²⁷

The amount of punitive damages lies wholly within the discretion of the jury, and the court will not interfere unless it clearly appears that the jury has abused its discretion.¹²⁸ Punitive damages are allowed upon a finding that the defendant's conduct was "willful, wanton or malicious."¹²⁹

Special damages for the purpose of pleading slander not per se and libel per quod are pecuniary losses and consist of such things as a lost contract, sale, or other valuable item; they must be pleaded with particularity.¹³⁰ In the absence of a statute allowing recovery of attorney's

122. It should be noted that the law as to damages for defamation has been changed substantially by *Gertz*. The rules stated in this section are the pre-*Gertz* common law rules as developed in Missouri cases.

123. *Perdue v. Montgomery Ward & Co.*, 341 Mo. 252, 107 S.W.2d 12 (1937); *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930).

124. *Dyer v. Globe-Democrat Publishing Co.*, 378 S.W.2d 570 (Mo. 1964).

125. *Perdue v. Montgomery Ward & Co.*, 341 Mo. 252, 107 S.W.2d 12 (1937); *Anderson v. Shockley*, 159 Mo. App. 334, 140 S.W. 755 (K.C. Ct. App. 1911).

126. *Lonergan v. Love*, 235 Mo. App. 1066, 1074, 150 S.W.2d 534, 539 (St. L. Ct. App. 1941). *Accord*, *Coats v. News Corp.*, 355 Mo. 778, 197 S.W.2d 958 (1946).

127. *See Coats v. News Corp.*, 355 Mo. 778, 197 S.W.2d 958 (1946).

128. *Seested v. Post Printing & Publishing Co.*, 326 Mo. 559, 31 S.W.2d 1045 (1930).

129. *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197 (Mo. 1972); *Delcour v. Wilson*, 241 Mo. App. 951, 245 S.W.2d 467 (Spr. Ct. App. 1952). In *Potter* the court approved the plaintiff's punitive damage instruction which combined Mo. APPROVED INSTR. No. 10.01 on punitive damages for willful, wanton or malicious conduct with Mo. APPROVED INSTR. No. 16.01 defining malice. The malice definition states that malice "does not mean hatred, spite or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse." However, in a discussion accompanying its consideration of the instruction, the court implied that ill will or spite also could give rise to punitive damages for libel. *Potter v. Milbank Mfg. Co.*, 489 S.W.2d at 204-05.

130. *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367 (Mo. App., D. St. L. 1973). *But cf.* Note, *Selected Aspects of the Missouri Law of Defama-*

fees in such a case, the plaintiff cannot bootstrap himself into a cause of libel per quod by pleading attorney's fees relating to the defamatory matter as his only special damage.¹³¹

III. CONSTITUTIONAL PRIVILEGE

A. Prior to *Gertz v. Robert Welch, Inc.*

1. United States Supreme Court Cases

In *New York Times Co. v. Sullivan*¹³² the defendant newspaper published a political advertisement which endorsed civil rights demonstrations by black students in Alabama and which impliedly criticized the performance of local law-enforcement officials. In state court, the plaintiff police commissioner established that the advertisement contained several misstatements which referred to him and which were libelous per se under Alabama law. Neither good faith nor reasonable care protected the publisher from liability under Alabama law, thus leaving the Times with the single defense of truth. The United States Supreme Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter free speech protected by the first amendment.¹³³ The Court announced a constitutional privilege intended to counter that effect:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.¹³⁴

In *New York Times* it was held not to be reckless disregard of the truth where the newspaper had failed to check the accuracy of the advertisement against news stories contained in its own files.¹³⁵

The meaning of the "actual malice" required to overcome this constitutional privilege was made clearer in subsequent cases. *St. Amant v. Thompson* held that, without more, the mere failure to investigate does not establish reckless disregard for the truth. The court equated reckless disregard of the truth with the defendant's subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of

tion: A Plea for Judicial Reform, 1957 WASH. U.L.Q. 358, 370-71, and cases cited therein.

131. *Williams v. Gulf Coast Collection Agency Co.*, 493 S.W.2d 367 (Mo. App., D. St. L. 1973).

132. 376 U.S. 254 (1964).

133. *Id.* at 279.

134. *Id.* at 279-80.

135. *Id.* at 287-88.

his publication . . . ,” and the defendant must act with a “high degree of awareness of . . . probable falsity.”¹³⁶ *Beckley Newspapers Corp. v. Hanks* held that the “actual malice” test did not involve the traditional common law malice elements of ill will or spite.¹³⁷ *Garrison v. Louisiana* made it clear that the *New York Times* standard applied to criminal libel prosecutions as well as civil actions and that the standard governed criticism directed at “anything which might touch on an official’s fitness for office.”¹³⁸ *Rosenblatt v. Baer* held that the designation as a public official “applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”¹³⁹

The *New York Times* standard was extended to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.¹⁴⁰ In these companion cases, “public figures” were defined as persons who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”¹⁴¹

136. 390 U.S. 727, 731 (1968) (plaintiff was a deputy sheriff).

137. 389 U.S. 81 (1968) (criticism of county clerks).

138. 379 U.S. 64, 77 (1964) (criticism of judges).

139. 383 U.S. 75, 85 (1966) (plaintiff was the former supervisor of county ski recreation area).

Other Supreme Court cases where plaintiffs were found to be public officials include *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971) (mayor); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (deputy chief of detectives); *Henry v. Collins*, 380 U.S. 356 (1965) (county attorney and chief of police).

The Supreme Court cases have focused on defamatory statements about public officials in their public capacity, so it would seem possible that a defamatory statement relating to a public official in his purely private capacity might be actionable without proof of *New York Times* malice. RESTATEMENT (SECOND) OF TORTS § 580A, Comment b (Tent. Draft No. 21, 1975), suggests the result should depend on the nature of the office and its responsibilities weighed against the nature of the private conduct and its bearing on fitness for office, giving this example: “Thus a statement that the governor drinks himself into a drunken stupor at home every night much more clearly affects his qualifications than a statement that a tax assessor keeps a secret collection of pornographic pictures.” At least two state cases have found that the *New York Times* standard is inappropriate where a defamatory statement involves the private life of a public official: *Tucker v. Kilgore*, 388 S.W.2d 112 (Ky. Ct. App. 1964) (policeman libeled as to acts at private fraternity gathering); *Aku v. Lewis*, 52 Haw. 366, 477 P.2d 162 (1970) (policeman libeled as to his private fund-raising activities for a boys’ athletic team).

140. 388 U.S. 130 (1967). The plurality opinion by Justice Harlan said the standard of liability in cases involving public figures should be “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.* at 155. However, five Justices adhered to the *New York Times* standard of actual malice. As to the definition of “public figure,” see Part III, § C *infra*.

141. 388 U.S. at 164 (Warren, C.J., concurring in result).

In 1971 the plurality in *Rosenbloom v. Metromedia, Inc.*¹⁴² extended the *New York Times* rule to cases involving private plaintiffs where the defamatory falsehood concerns matters of public or general interest, reasoning that “[I]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”¹⁴³

Also in 1971 the Court clearly indicated in *Time, Inc. v. Pape* that the *New York Times* standard would apply to reports of public proceedings.¹⁴⁴ Subsequently, in *Cox Broadcasting Corp. v. Cohn*, a nondefamation case involving the closely related tort of invasion of privacy, the Court held that the Constitution requires an absolute privilege for publication of truthful information contained in public court records open to public inspection.¹⁴⁵ These holdings were limited, however, in *Time, Inc. v. Firestone*, which appeared to require substantial accuracy in reports of judicial proceedings.¹⁴⁶ The *Firestone* rule is the same as the common law rule in Missouri.¹⁴⁷

2. Missouri Cases

Relatively few Missouri cases have dealt with *New York Times* and its progeny. Apparently the first to do so was *Walker v. Kansas City Star Co.*,¹⁴⁸ one of a series of suits including that which led to the U.S. Supreme Court’s decision in *Associated Press v. Walker*.¹⁴⁹ In the Missouri case, the Missouri Supreme Court held that the plaintiff’s petition was sufficient to overcome a motion to dismiss for failure to state a claim even if the plaintiff was subject to the *New York Times* rule since the plaintiff had pleaded sufficient facts to put the question of “actual malice” in issue.¹⁵⁰ In *Skain v. Weldon* the Missouri court held that the issue of “actual malice” in the *New York Times* sense is a jury question and cannot be declared by the court as a matter of law.¹⁵¹

An interesting case applying the *New York Times* standard to a minor public official is *Rowden v. Amick*.¹⁵² The defendant, a private indi-

142. 403 U.S. 29 (1971).

143. *Id.* at 43.

144. 401 U.S. 279 (1971).

145. 420 U.S. 469 (1975).

146. 424 U.S. 448 (1976).

147. See Part II, § F *supra*.

148. 406 S.W.2d 44 (Mo. 1966).

149. 388 U.S. 130 (1967). See notes 140-41 and accompanying text *supra*.

150. 406 S.W.2d at 56.

151. 422 S.W.2d 271 (Mo. 1967).

152. 446 S.W.2d 849 (K.C. Mo. App. 1969). In holding that the plaintiff was a public official for *New York Times* purposes, the court stated:

Of course, he was not a President, a governor, mayor of a metropolitan city, or even a deputy sheriff. He was not a candidate for any of

vidual, accused the plaintiff of perjury and sought his removal as Lake Tapawingo deputy marshal. The court stated that the defendant admitted malice in the sense of seeking the plaintiff's removal from office, but that this did not constitute "actual malice" in the sense of knowledge of the falsity of the defamatory statement or reckless disregard of its truth or falsity.¹⁵³ The court also stated that an instruction that the jury could find for the plaintiff if the defendant acted "with reckless disregard of plaintiff's rights, and with intent to damage the plaintiff" was incorrect because these elements are not part of the *New York Times* test.¹⁵⁴

The *New York Times* test was applied to another minor public official, the director of a county detention facility, in *Whitmore v. Kansas City Star Co.*¹⁵⁵ The court stated that in first amendment cases "constitutional facts," in the sense of facts determinative of whether the *New York Times* standard is met, require *de novo* consideration by the appellate court; in such consideration the court will defer to the trial court's findings on disputed fact questions involving the credibility of witnesses and will not disturb the trial court's ruling unless it is clearly erroneous.¹⁵⁶

In *Woolbright v. Sun Communications, Inc.*¹⁵⁷ the Missouri Supreme Court apparently followed the *Rosenbloom* theory (although it did not cite *Rosenbloom*) and held that the *New York Times* standard applies where a private plaintiff is involved in a matter of "public concern."¹⁵⁸

Two other post-*New York Times* Missouri cases are worthy of mention on the public figure-public official question. In *Brown v. Kitterman*, the court stated in dictum that the plaintiff, the manager of a government-funded community center, was a public official in the *New York Times* sense.¹⁵⁹ In *Lazier v. Pulitzer Publishing Co.* the court found that the

these positions. He was just a deputy marshal in a village of some 1,000 persons, but insofar as the 250 families residing in Lake Tapawingo were concerned, his actions and activities were of real concern. The range of official activities, personal and official acts taken by him, were probably of more direct concern to the persons residing in his jurisdiction than were the doings of the Director of the F.B.I.

Id. at 857.

A more recent case finding a police patrolman a public official for purposes of applying the *New York Times* rule is *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo. App., D. St. L. 1977).

153. 446 S.W.2d at 858 (defendant accused plaintiff of perjury).

154. *Id.* at 853.

155. 499 S.W.2d 45 (Mo. App., D.K.C. 1973).

156. *Id.* at 49.

157. 480 S.W.2d 864 (Mo. 1972).

158. *Id.* at 867. The plaintiff was an auctioneer. Defendant newspaper published a statement by a county prosecuting attorney to the effect that plaintiff was a "known check forger" who was "apparently using the names and bank account numbers of purchasers [at an auction] to forge checks."

159. 443 S.W.2d 146, 155 (Mo. 1969).

plaintiff, whose byline had appeared on over 600 cooking columns in the *St. Louis Post-Dispatch*, was not a public figure because she did not have access to public communications in the way that a true public figure would have and she had not drawn herself into the midst of any public controversy.¹⁶⁰

The most recent Missouri Supreme Court application of the *New York Times* rule came in *Glover v. Herald Co.*¹⁶¹ The plaintiff, a St. Louis city alderwoman, was quoted by the *St. Louis Globe-Democrat* as saying she had had an abortion. In fact, the statement had been made by another alderwoman, but a newspaper rewrite man mixed up the two names in taking the information from the reporter who attended the meeting at which the statement was made. The supreme court held that the *New York Times* standard applied because the plaintiff was a public official and reversed a plaintiff's judgment because there was no finding the defendants were anything more than negligent.

B. *The Gertz Case*

In *Gertz v. Robert Welch, Inc.*¹⁶² a 5-4 majority of the U.S. Supreme Court backed away from the plurality position in *Rosenbloom*¹⁶³ that the *New York Times* standard should be applied to private defamation plaintiffs involved in a matter of public or general interest. Plaintiff Elmer Gertz was an attorney retained by the family of a youth who had been shot to death by a Chicago policeman named Nuccio. Gertz was retained to prosecute a civil action against Nuccio and had no substantial connection with a successful state prosecution of Nuccio for second-degree murder. Defendant Robert Welch, Inc. was the publisher of *American Opinion*, the monthly magazine of the John Birch Society. In March, 1969 the magazine published an article headlined, "FRAME-UP: Richard Nuccio and the War on Police," which purported to show that testimony at Nuccio's criminal trial was false and his prosecution was part of a Communist conspiracy against the police. Plaintiff Gertz was portrayed in the article as an architect of the frame-up. The article also stated that Chicago police had a file on Gertz that took a "big, Irish cop to lift." Gertz further was alleged to have been a member and officer of various Communist-front organizations, including one group that allegedly planned an attack on police during the 1968 Democratic National Convention in Chicago, and was described as a "Leninist" and a "Communist-fronter." Published with the article was a photograph of Gertz with the caption, "Elmer Gertz of the Red Guild harasses Nuccio." The

160. 467 S.W.2d 900, 905 (Mo. 1971).

161. 549 S.W.2d 858 (Mo. En Banc 1977).

162. 418 U.S. 323 (1974).

163. 403 U.S. 29 (1971).

evidence in Gertz' libel action was that the allegations were false and that the defendant had not checked the accuracy of the story. Anticipating the *Rosenbloom* holding, the trial judge entered judgment n.o.v. for the defendant on the ground that the *New York Times* standard should apply because the publication concerned a matter of public interest. The appeals court affirmed, citing *Rosenbloom* which was handed down in the interim.¹⁶⁴

The United States Supreme Court reversed and ordered a new trial. In withdrawing from the *Rosenbloom* theory, the Court held that so long as they do not impose liability without fault, the states may choose their own standard of liability in an action for defamation brought by a private individual against a news medium.¹⁶⁵ The Court also held that actual damages may not be presumed and punitive damages may not be awarded to a private defamation plaintiff, at least in the absence of a showing of *New York Times* malice.¹⁶⁶

The Court noted that the legitimate state interest underlying the law of libel is "the compensation of individuals for the harm inflicted on them by defamatory falsehood" The *New York Times* standard has been applied, in the case of public officials and public figures, as an accommodation between the interests of the state and the interests of the news media in order to assure freedom of speech.¹⁶⁷ However, the states have a greater interest in protecting private individuals for two reasons: first, private persons do not have access to channels of public communication to defend themselves; and second, public officials and most public figures assume the risk of defamatory statements concerning their public lives, but private individuals cannot be said to have assumed such a risk.¹⁶⁸ The Court found that, because the states have a greater interest in protecting private persons from defamation, the *Rosenbloom* theory would restrict the state interest to an unacceptable degree. Further, the *Rosenbloom* theory would occasion "the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not We doubt the wisdom of committing this task to the conscience of judges" ¹⁶⁹

Taking all these factors into consideration, the Court held that so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual At least this conclusion obtains

164. 418 U.S. at 325-32.

165. *Id.* at 347.

166. *Id.* at 349.

167. *Id.* at 341-43.

168. *Id.* at 344-45.

169. *Id.* at 346.

where, as here, the substance of the defamatory statement makes substantial danger to reputation apparent Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential¹⁷⁰

There are several points to be noted about this holding. First, it is clearly meant to apply only to a news media defendant.¹⁷¹ Apparently, a state court would be able to impose strict liability upon a private defendant sued by a private plaintiff.¹⁷² The *Restatement (Second) of Torts*, however, takes the view that the principle of *Gertz* is broad enough to cover this situation and that strict liability does not apply in any case.¹⁷³ A second point is that the holding seems to require a minimum standard of negligence, but does not preclude the states from selecting a higher standard of liability such as recklessness.¹⁷⁴ Further, the *Gertz* holding applies to libel; the *Restatement* expresses the view that most states will apply it to slander as well.¹⁷⁵ Another point to note is the Court's statement concerning a "factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." This apparently is a reference to the doctrine of libel per quod. Justice White, in a dissenting opinion, concluded that the Court, if faced with such a case, would apply a *New York Times* actual malice standard.¹⁷⁶ A final point is that requiring the plaintiff to prove the defendant was at least negligent could have the effect of rendering the common law conditional privileges nugatory, at least in states where negligence has been held sufficient to overcome such privileges.¹⁷⁷

A second major holding in *Gertz* concerned damages. The Court stated that the state interest in compensating private persons for reputation injury due to defamation "extends no further than compensation for actual injury." Thus the Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not

170. *Id.* at 347-48.

171. Where it speaks of the standard of liability, the opinion is liberally sprinkled with references to "publishers," "newspapers," "broadcasters," and the "press and broadcast media." Of course, any reference to nonmedia defendants would be dictum because the case involved a magazine publisher.

172. Indeed, some states have done so since *Gertz*. See Part IV, § B *infra*.

173. RESTATEMENT (SECOND) OF TORTS § 580B, Comment d (Tent. Draft No. 21, 1975).

174. Some states have applied a higher standard than negligence as to truth or falsity in defamation actions brought by private individuals. See Part IV, § B *infra*.

175. RESTATEMENT (SECOND) OF TORTS § 580B, Comment d (Tent. Draft No. 21, 1975).

176. 418 U.S. at 389 n.27.

177. This point is discussed in more detail in Part V *infra*.

based on a showing of knowledge of falsity or reckless disregard for the truth.”¹⁷⁸ As additional justifications for this rule, the Court stated that the uncontrolled discretion of juries to award damages absent actual injury inhibits free speech, and that the doctrine of presumed damages allows juries to punish unpopular opinions rather than merely compensate the plaintiff for his injuries. Thus, defamation plaintiffs are restricted to compensation for actual injury, which is not limited to out-of-pocket loss but may include “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” Juries must be limited by appropriate instructions on damages, and damage awards “must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.”¹⁷⁹ As to punitive damages, the Court expressed dismay that juries are allowed to assess such damages in “wholly unpredictable amounts bearing no necessary relation to the actual harm caused,” and that such damages were used by juries to punish unpopular views. Like the doctrine of presumed damages, punitive damages may lead to media self-censorship. Thus, the Court concluded that “the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.”¹⁸⁰ The Court discarded the common law rule that punitive damages may be awarded on a showing of ill will or reckless indifference to consequences.¹⁸¹

It is unclear if these holdings as to presumed and punitive damages were intended to apply to nonmedia defendants as well as media defendants; the language in this area of the opinion makes only one reference to media—when it says punitive damages may lead to media self-censorship. Limiting *Gertz* to its facts, the holding would apply only to media defendants, but the Court seems to have intended that it apply to all defamation cases involving private plaintiffs.¹⁸²

A remaining question is whether the Court, in listing the types of injury for which damages may be recovered, intended to intimate that damages for such things as personal humiliation and mental suffering may be recovered without proof of injury to reputation, which, after all, is the essence of defamation. Commentators have read the holding as

178. 418 U.S. at 349.

179. *Id.* at 350.

180. *Id.*

181. *Id.* at 395-96 (White, J., dissenting).

182. RESTATEMENT (SECOND) OF TORTS § 621 (Tent. Draft No. 21, 1975), takes the position that the holding as to actual damages should apply in all cases, expressing the view in Comment b that it is unlikely the states will apply a different rule in the case of nonmedia defendants. The rationale that a state has no interest in securing gratuitous awards unrelated to actual injury for a private plaintiff would seem to apply whether the defendant is media or nonmedia.

affirming the common law rule: that recovery for emotional injuries is precluded except as "parasitic" damages once injury to reputation is shown.¹⁸³ Note, however, that in a subsequent case the Court found that a state may permit a plaintiff to base a defamation action on grounds other than injury to reputation.¹⁸⁴

The other major holding in *Gertz* related to the definition of a public figure. The Court discussed two alternative bases for finding a person to be a public figure. He may "achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." In either event, "such persons assume special prominence in the resolution of public questions."¹⁸⁵ Hypothetically, the Court stated, it may be possible for someone to become an involuntary public figure, but such instances would be "exceedingly rare."¹⁸⁶

Applying these standards in *Gertz*, the Court found that although the plaintiff was well known in legal circles, he "had achieved no general fame or notoriety in the community." None of the prospective jurors had ever heard of him. The Court said it would not lightly assume an individual's participation in professional and civic affairs would make him a public figure for all purposes and that it is preferable to look at an individual's participation "in the particular controversy giving rise to the defamation." The Court found that *Gertz* was not a public figure for purposes of this action: "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."¹⁸⁷

This holding demonstrated an intent to narrow the definition of "public figure," an intent which was reasserted in *Time, Inc. v. Fire-*

183. See, e.g., Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 472 (1975), where the author states that this conclusion follows "from the Court's insistence that the states not transcend their legitimate interest in compensating for actual injury to reputation. . . . To permit recovery for emotional injuries when no actual injury to reputation exists would subvert the 'actual loss' requirement."

184. *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). This apparently resulted from Florida law which permitted a defamation plaintiff to recover for other injuries where damage to reputation is not claimed.

One commentator has suggested that this holding in *Firestone* could have two results: converting the defamation action into something resembling the common law tort of intentional infliction of mental distress, and returning to the pre-*Gertz* rule of presumed damages. Note, 43 BROOKLYN L. REV. 123, 137-38 (1976).

185. 418 U.S. at 351.

186. *Id.* at 345.

187. *Id.* at 352.

stone.¹⁸⁸ In that case the plaintiff was the socially prominent wife of the heir to a tire manufacturing fortune, and the controversy revolved around her suit for divorce. Even though there was a great deal of public interest in the divorce action, the Court found that she was not a public figure, partly on the ground that a marriage dissolution "is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."¹⁸⁹ The Court found that the fact that Mrs. Firestone had held several press conferences during the divorce proceedings did not render her a public figure. The interviews were not an attempt to influence the result of the divorce dispute and were not used by the plaintiff to inject herself into some unrelated public controversy.¹⁹⁰ In a strong dissent, Justice Marshall suggested that the Court's conclusion that a marriage dissolution is not a "public controversy" would result in reinstating the *Rosenbloom* theory and resurrecting "the precise difficulties that . . . *Gertz* was designed to avoid."¹⁹¹ A complete discussion of the public figure issue is beyond the scope of this comment, but a number of cases have dealt with the issue since *Gertz*, and it is certain to be the subject of continuing litigation.¹⁹²

IV. REACTION OF OTHER STATES TO *GERTZ*

The courts of at least 18 states have had occasion to apply *Gertz* to their defamation law, and the substantial majority has picked negligence as the appropriate standard of liability. Several states have conditioned liability on a showing of something more than negligence where the defamation of a private plaintiff concerns a matter of public interest. At least one state appears to have concluded that the common law still applies in the case of the private plaintiff and the private defendant. The cases in two states defy categorization.

188. 424 U.S. 448 (1976).

189. *Id.* at 454.

190. *Id.* at 454-55 n.3.

191. *Id.* at 487 (Marshall, J., dissenting).

192. Despite the restrictive definition in *Gertz* and *Firestone*, lower courts have continued to find plaintiffs to be public figures. See, e.g., *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976) (alleged Mafia figure with substantial prior publicity in relation to underworld ties and relationship with Teamsters president Fitzsimmons); *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975), *rev'd on other grounds*, 551 F.2d 910 (2d Cir. 1977) (author of *Papa Hemingway, a Personal Memoir*, in connection with defendant's book about Hemingway); *James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976) (belly dancer in connection with interview granted to newspaper). See also Note, *supra* note 184; RESTATEMENT (SECOND) OF TORTS § 580A, Comment c (Tent. Draft No. 21, 1975).

A. Negligence Standard

The most thoughtful and scholarly state court opinion applying *Gertz* is the Maryland Court of Appeals decision in *Jacron Sales Company v. Sindorf*.¹⁹³ The court first noted that, on its facts, *Gertz* applied only to libel cases involving private plaintiffs and media defendants. The court also noted that discussion of important issues may occur in non-media contexts, and therefore the free speech rationale of *Gertz* would seem to apply to nonmedia defendants as well. The court held that the *Gertz* ruling should apply to both libel and slander and to media and nonmedia defendants alike.¹⁹⁴ As a further justification for this holding the court stated that any other approach would complicate further an already confused area of the law.¹⁹⁵ The Maryland court adopted the negligence standard of liability stated in the *Restatement (Second) of Torts*¹⁹⁶ and held that the burden of proving falsity rests on the plaintiff, because under such standard he is required to establish negligence with respect to falsity.¹⁹⁷ The level of proof of fault was held to be a preponderance of the evidence.¹⁹⁸ The court also considered the relationship between the negligence fault standard and the common law qualified privileges. It concluded that such privilege is still viable because Maryland law requires reckless disregard of the truth to overcome the privilege.¹⁹⁹ Thus, where a qualified privilege is found, the lower negligence standard is subsumed in the reckless disregard standard and the fact that the plaintiff may leap the lower hurdle of negligence is of no consequence.²⁰⁰

Besides Maryland, the courts of Hawaii,²⁰¹ Illinois,²⁰² Kansas,²⁰³

193. 276 Md. 580, 350 A.2d 688 (1976).

194. *Id.* at 592, 350 A.2d at 695.

195. *Id.* at 593, 350 A.2d at 696.

196. RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975).

197. 276 Md. at 597, 350 A.2d at 698.

198. *Id.*

199. *Id.* at 599-600, 350 A.2d at 699. The court noted that several commentators have suggested that a negligence standard would render the common law qualified privileges obsolete because one way of overcoming a conditional privilege would be to prove negligence on the defendant's part, the standard adopted by many states as well as the RESTATEMENT OF TORTS § 601 (1938), and RESTATEMENT (SECOND) OF TORTS § 580B, Comment k (Tent. Draft No. 21, 1975).

200. 276 Md. at 600, 350 A.2d at 700.

201. *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975) (negligence standard as to all private plaintiffs; higher standard for matters of public interest specifically rejected).

202. *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975) (negligence standard applied to all cases involving private defendants; higher standard for matters of public interest specifically rejected; absolute and qualified privileges may be applied as the facts warrant).

203. *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975) (negligence standard where private plaintiff sues media defendant).

Massachusetts,²⁰⁴ North Carolina,²⁰⁵ Ohio,²⁰⁶ Oklahoma,²⁰⁷ Tennessee,²⁰⁸ Texas,²⁰⁹ and Washington²¹⁰ have adopted a negligence standard in one form or another.

B. Special Standards For Matters of Public Concern

Courts in four states have determined that a standard of liability higher than negligence is appropriate where a private plaintiff is defamed as to a matter of public interest or concern. An Indiana intermediate appeals court adopted the *Rosenbloom* theory and held that a private plaintiff who was defamed concerning a matter of public interest must prove that the statement was published with knowledge of its falsity or in reckless disregard of its truth or falsity.²¹¹ The court justified its holding primarily on the ground that a negligence standard would lead to media self-censorship. It also expressed the view that the *Gertz* prohibition on punitive damages would not alleviate the uncertainties of a negligence standard, and that the Supreme Court's broad definition of actual damages in *Gertz* would not significantly decrease the risk of capricious jury verdicts.²¹²

The Colorado Supreme Court arrived at a similar holding in *Walker v. Colorado Springs Sun, Inc.*²¹³ It, too, held that a private plaintiff defamed by the news media as to a matter of public interest must prove

204. *Stone v. Essex County Newspapers, Inc.*, 1975 Mass. Adv. Sh. 1704, 330 N.E.2d 161 (1975) (negligence standard for all private persons; punitive damages not allowed even upon showing of *New York Times* malice).

205. *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (1976) (negligence standard as to all private plaintiffs).

206. *Thomas H. Maloney & Sons, Inc., v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975) (private plaintiff must prove defendant was negligent or acted with common law malice).

207. *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976) (private plaintiffs defamed by news media must prove negligence; statutory presumptions of malice and damages ruled unconstitutional).

208. *Nichols v. Memphis Publishing Co.*, No. 3 (Tenn., *cert. granted* May 2, 1977) (private plaintiff must prove newspaper defendant "did not act with reasonable care under all the circumstances").

209. *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977) (private plaintiff defamed by news medium must prove negligence; no liability for a factual misstatement whose content would not warn a defendant of its defamatory potential).

210. *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976) (private plaintiff defamed as to matter of public interest must prove negligence; punitive damages not allowed under any circumstances).

211. *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976).

212. *Id.* at 588-89. The court's strong protective attitude toward freedom of the press was engendered, in part, by provisions of the Indiana state constitution.

213. 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

New York Times malice. However, the court said the *New York Times* rule should be interpreted without the *St. Amant* gloss "since the term 'reckless disregard' has had rather frequent usage in the tort field in this state."²¹⁴ This court also justified its decision primarily on the ground that a lesser standard of liability would chill freedom of the press.²¹⁵

An Arizona intermediate appeals court held that a private plaintiff defamed by a news medium concerning a matter of public interest may recover only upon a showing of *New York Times* malice or common law express malice in the same sense of spite or ill will towards the plaintiff.²¹⁶

Finally, the New York Court of Appeals has held that where a private plaintiff is defamed by a news medium as to a matter which is "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," the plaintiff may recover only upon a showing that the publisher acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."²¹⁷ The standard seems to be an intermediate between simple negligence and *New York Times* recklessness and is reminiscent of the plurality standard in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.²¹⁸

C. Miscellaneous Holdings

In a decision notable for its opacity, the Wisconsin Supreme Court apparently has decided that *Gertz* does not apply in a case involving a private plaintiff and a private defendant.²¹⁹ Additionally, the court allowed recovery of punitive damages upon a finding of common law express malice instead of *New York Times* malice;²²⁰ this holding is seemingly erroneous under *Gertz*.

In a Virginia case the court found that it did not need to determine the appropriate standard of liability in a defamation case involving a private plaintiff because the plaintiff had proved *New York Times* malice in any event. Rather, the issue was whether the plaintiff could recover punitive damages even though actual damages were neither proved nor found. The court stated:

214. *Id.* at 99, 538 P.2d at 457.

215. *Id.* at 99, 538 P.2d at 458.

216. *Peagler v. Phoenix Newspapers, Inc.*, 26 Ariz. App. 274, 547 P.2d 1074 (1976).

217. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

218. 388 U.S. 130 (1967).

219. *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

220. *Id.* at 509, 228 N.W.2d at 750.

We find nothing in *Gertz* that prohibits an award of punitive damages in the absence of actual or compensatory damages. Thus, we hold that punitive damages may be awarded without actual or compensatory damages if a plaintiff shows *per se* defamation by the media and meets by clear and convincing evidence the *New York Times* standard of actual malice.²²¹

Two decisions by different intermediate appeals courts in Louisiana appear to be in conflict. One impliedly embraces a negligence standard for private plaintiffs,²²² and the other impliedly endorses a *New York Times* malice standard for private plaintiffs.²²³ However, neither case purported to adopt a standard for the state.

V. POTENTIAL IMPACT OF *GERTZ* ON MISSOURI LAW

A. *Status of the Parties*

Considered on only its facts, *Gertz* seems to require that Missouri no longer impose strict liability for a defamatory falsehood concerning a private plaintiff where the defendant is a news medium; strictly speaking, it does not require a departure from common law strict liability where a private plaintiff sues a private defendant. While such a narrow reading may be technically correct, it is believed not to be the best approach for a number of reasons. The Missouri Supreme Court should apply *Gertz* to all defamation cases involving private plaintiffs whether or not the defendant is a news medium.

One reason for applying *Gertz* to nonmedia defendants is that the constitutional right being protected is freedom of speech, not just freedom of the press.²²⁴ If the rationale of *New York Times, Curtis v. Butts*, and *Gertz* is that the defense of truth is insufficient by itself to protect free discussion of important issues, then the *Gertz* principle should be extended to cases involving nonmedia defendants; such issues must be discussed freely in nonmedia as well as in media contexts. If it is important for a writer to express freely his ideas on a newspaper editorial page, it is equally important for a speaker to be able to speak without fear whether he is addressing a crowded auditorium or conversing with a neighbor in his living room. The progeny of *New York Times* provide an instructive analogy in this regard. *New York Times v. Sullivan* arose in a media context, but it was not limited to media defendants; indeed, later cases have applied the *New York Times* standard in nonmedia cases.

221. *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, 224 S.E.2d 132, 136 (1976).

222. *Wilson v. Capital City Press*, 315 So. 2d 393 (La. App. 1975).

223. *LeBoeuf v. Times-Picayune Publishing Corp.*, 327 So. 2d 430 (La. App. 1976).

224. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341-43.

In *Garrison v. Louisiana*²²⁵ the defamatory remarks were made during a press conference; in *St. Amant v. Thompson*²²⁶ they were made during a televised speech. In these cases the media merely served as vehicles for defamatory statements by the nonmedia defendants, and the Supreme Court focused on the issues of free speech and public debate rather than protection of the news media. In this regard the strongest argument for Missouri applying *Gertz* to nonmedia defendants is *Rowden v. Amick*,²²⁷ a Missouri case which applied the *New York Times* standard to a private defendant sued by a minor public official. A further reason for not distinguishing between media and nonmedia defendants is that the Supreme Court recently has rejected the proposition that the media enjoy any greater rights than the public at large.²²⁸

Apart from constitutional considerations, there are state law principles which favor the application of *Gertz* to nonmedia as well as media defendants. Holding the media liable for negligence while imposing strict liability on private defendants would be an incongruous result in terms of the usual tort law argument for strict liability, *i.e.*, that it spreads the cost of injury over all users of a given product.²²⁹ Perhaps a better reason for applying *Gertz* to nonmedia defendants, however, is that it would be a salutary move toward simplifying a field of law which already is overly complex.²³⁰ If *Gertz* is limited to media defendants,

225. 379 U.S. 64 (1964).

226. 390 U.S. 727 (1968).

227. 446 S.W.2d 849 (K.C. Mo. App. 1969). The defendant, a private citizen of Lake Tapawingo, mailed allegedly defamatory letters concerning the plaintiff to all other homes in the village as part of his effort to have the plaintiff removed from his position of deputy marshal.

228. *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974). The Court disagreed with a newspaper's contention that it had a constitutional right to interview inmates of a state correctional system despite a regulation prohibiting such contacts.

229. Comment, *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 148 n.52 (1974). The commentator states: "Further, an individual's defamatory statement is, on the whole, likely to create a smaller risk of harm than a media publication. Finally, the media are more likely to be aware of the risk of liability, and thus more likely to insure against it. . . ."

230. The common law defamation actions developed according to no particular plan, and

there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue.

W. PROSSER, *supra* note 4, § 111 at 737.

three tests of liability would be required: (1) a strict liability test for private plaintiffs versus nonmedia defendants; (2) a negligence (or other non-strict liability) test for private plaintiffs versus media defendants; and (3) the *New York Times* test for public officials or public figures versus media and nonmedia defendants. In contrast, only two tests would be required if *Gertz* is applied to nonmedia as well as media defendants.

B. Libel and Slander

If *Gertz* is read narrowly, it will apply to cases of libel, but not to slander cases. It is submitted that this is too narrow a view, for the same reasons cited in the preceding section. The freedom being protected is freedom of speech, and not just freedom of the press.²³¹ It seems inconceivable that the United States Supreme Court would hold that a private plaintiff could recover on a strict liability basis for a slander published by a radio or television station. However, that situation could arise in Missouri as there is no authority whether radio or television defamation constitutes libel or slander.²³² Failing to extend the *Gertz* holding to slander cases would add one more complexity to an already complicated body of law.

C. Standard of Liability

As noted earlier²³³ *Gertz* appears to require a minimum standard of negligence but does not preclude the states from selecting a higher standard of liability such as recklessness. It is suggested that the negligence standard is appropriate for most cases since it is closest to the common law strict liability and because it can serve the function of balancing the demands of free speech against the reputational right of private individuals. By adopting a negligence standard, Missouri would be consistent with the majority of state courts that have considered the question.²³⁴

231. The rationale for applying *Gertz* to nonmedia defendants and to slander as well as libel is stated aptly in RESTATEMENT (SECOND) OF TORTS § 580B, Comment e (Tent. Draft No. 21, 1975):

As the Supreme Court declares, the protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests which must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing must greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

232. See note 14 and accompanying text *supra*.

233. See notes 170-74 and accompanying text *supra*.

234. See Part IV *supra*.

There is, however, precedent in Missouri for applying the *New York Times* standard to cases where a private plaintiff is defamed by a media defendant as to a matter of public interest.²³⁵ This is, of course, the *Rosenbloom* approach which was rejected in *Gertz*. All the arguments set forth in *Gertz* against this approach would apply. While the approach does offer more protection for freedom of the press, it would add another layer of complexity to defamation law. It also could be argued that a negligence standard will achieve the same goal sought by the *Rosenbloom* approach, *i.e.*, in balancing the gravity of the harm to a private plaintiff against the utility of a defendant news medium's publication, an issue of public concern would weigh on the defendant's side of the scale. A counter-argument is that a negligence standard will inhibit publication on matters of public interest because of the editor's or broadcaster's inability to guess whether or not a jury would balance the issues in favor of him in a particular case. On balance, and considering the difficulty in defining what is a matter of public interest or concern, the Missouri Supreme Court should apply a negligence standard in all cases involving a private plaintiff and a media defendant.

It would be helpful for trial courts and the practicing bar if the Missouri Supreme Court would set forth some guidelines for applying a negligence standard to defamation cases. In this regard, the *Restatement (Second) of Torts* may provide some assistance. According to the *Restatement* draftsmen, the general standard of care applied to the news media would be the skill and experience normally possessed by members of the journalism profession, and expert testimony would be appropriate to establish this standard.²³⁶ Among factors to be considered in deciding whether the defendant acted reasonably in investigating and publishing an item would be the publication schedule (*e.g.*, daily, weekly, monthly), the nature of the interests the defendant sought to promote, and the extent of damage to the plaintiff's reputation.²³⁷

It should be noted that, as a practical matter, the plaintiff will have to prove the defendant's negligence as to the falsity of the publication and therefore will be forced to plead and prove the falsity of the defamation. In this regard, the courts will have to decide on the appropriate burden of proof. While a public figure or official must prove *New York Times* "actual malice" by clear and convincing proof,²³⁸ nothing in *Gertz* seems to require that level of proof in a negligence context. It is suggested that Missouri continue to give the standard burden of proof

235. *Woolbright v. Sun Communications, Inc.*, 480 S.W.2d 864 (Mo. 1972).

236. *RESTATEMENT (SECOND) OF TORTS* § 580B, Comment f (Tent. Draft No. 21, 1975).

237. *Id.*, Comment h.

238. The test derives from the *New York Times* requirement of "convincing clarity," 376 U.S. at 285-86. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971).

instruction²³⁹ in defamation cases involving a negligence standard because this is more apt to be understood by the jury and is the standard applied in other negligence cases.

D. Damages

Under *Gertz* the plaintiff must prove actual damages in order to recover, and the jury must be instructed appropriately as to the allowable elements of damage (injury to reputation and emotional injuries). Damages may not be presumed, and punitive damages may not be awarded in the absence of a showing of *New York Times* malice.²⁴⁰ As noted earlier,²⁴¹ it is unclear whether these holdings as to damages are applicable to all defamation cases, but once again it is submitted that they should be applied across the board in the interest of simplicity. One way of achieving this would be to make damage to the plaintiff's reputation a separate paragraph in the verdict-directing instructions for libel and slander, and allow emotional injuries as an optional additional submission. In conjunction with the general damage instruction,²⁴² this would seem to meet *Gertz*' requirement as to actual damages. Of course, counsel should be permitted in closing argument to elaborate on the allowable elements of damage.²⁴³ Assuming there is at least some slight damage to the plaintiff's reputation, there does not seem to be any language in *Gertz* that would halt the practice of allowing nominal damages to redeem reputation.

It should be noted that the currently approved instruction for punitive damages in defamation cases²⁴⁴ probably runs afoul of *Gertz* by not requiring a finding of *New York Times* malice.

Another problem in the damages area is whether to continue the common law requirement that special damages must be pleaded and proved in cases of libel per quod and slander not per se. It is submitted that it would be valid to continue this additional protection for the defendant in such cases, though the Missouri Supreme Court could choose to let the *Gertz* actual damage requirement provide this type of protection in all defamation cases in the interest of simplifying the law.

E. Qualified Privileges

The supreme court will need to consider the interrelationship of the standard of liability with common law qualified privilege. This will require resolution of the uncertainty whether mere negligence as to truth

239. MO. APPROVED INSTR. No. 3.01 (1969 ed.).

240. See notes 178-81 and accompanying text *supra*.

241. See note 182 and accompanying text *supra*.

242. MO. APPROVED INSTR. No. 4.01 (1969 ed.).

243. See notes 125, 179 and accompanying text *supra*.

244. See note 129 *supra*.

or falsity destroys the privilege, or whether recklessness is required.²⁴⁵ If it is decided that negligence will overcome the privilege, the entire law of qualified privilege would be irrelevant in cases where *Gertz* applies because in proving negligence, the plaintiff will not only have met the *Gertz* test, but also will have overcome any possible qualified privilege. On the other hand, if it is decided that recklessness as to truth or falsity is necessary to vitiate a qualified privilege, that privilege would retain its vitality even after *Gertz*. In this case, even though the plaintiff might be able to prove the negligence required by *Gertz*, he still would fail to recover if he could not go a step further and prove recklessness to overcome the privilege.

As a matter of simplifying the law, it could be decided that negligence will overcome qualified privileges, thus rendering the privileges nugatory. In that event the balancing process described by the law of qualified privilege would be taken over by the balancing process associated with all negligence determinations.

F. *Summary of Recommendations and Unresolved Issues*

A negligence standard should be applied to all defamation cases involving private plaintiffs whether the defendant is a news medium or a nonmedia defendant and whether the action is libel or slander. Guidelines should be developed for applying the negligence standard. The *Gertz* holdings on damages should be applied to all defamation cases. Whether qualified privilege should retain its vitality must be decided.

Beyond the above more easily addressed questions, a number of questions and problems await further development in federal and state cases. For instance, *Gertz* raised but did not answer the question of the appropriate standard of liability in cases of libel per quod. It may be that the United States Supreme Court will require a showing of *New York Times* malice in such a case. Further, it is unclear whether the Supreme Court will allow presumed and punitive damages on a showing of *New York Times* malice. The definition of a public figure will require development, and the question of the proper standard of liability for defamation of a public figure or official in relation to his private life also requires an answer.

An area that merits consideration by the courts and the legislatures is the development of alternative remedies for defamation. One promising possibility would be a declaratory judgment to vindicate the plaintiff's reputation.²⁴⁶

245. See notes 114-16 and accompanying text *supra*.

246. See RESTATEMENT (SECOND) OF TORTS, Special Note on Remedies for Defamation Other Than Damages, at 81 (Tent. Draft No. 21, 1975).

As judges and legislators ponder the problems in this area, the two guiding lights upon which they should fix their eyes are the sometimes competing, sometimes compatible interests of free speech and the individual's right to privacy.

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