The Law of Defamation: An Arkansas Primer

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**COMMENT**

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March, 1989, marked the twenty-fifth anniversary of the landmark Supreme Court decision in *New York Times Co. v. Sullivan.*1 With its initial foray into what was once solely a common law domain, the *New York Times* Court imposed a higher fault requirement in defamation suits brought by public officials.2 In so doing, it also opened something of a Pandora's Box in attempting to balance both first amendment interests in free speech3 and an individual's interest in his or her reputation.4 Since *New York Times,* the constitutional cases seeking to accommodate these competing interests have considered not only the status of defamation plaintiffs,5 but

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3. The Court has recognized two primary functions of the first amendment: self-fulfillment and enlightenment. See, e.g., Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-04 (1984) (speaking of the first amendment in terms of "an aspect of individual liberty" and as "essential to the common quest for truth and the vitality of society as a whole").
4. The Arkansas Constitution implicitly recognizes this interest in providing: "The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right." Ark. Const. art. 11, § 6 (emphasis added). See generally Comment, Defamation and State Constitutions: The Search for a State Law Based Standard After Gertz, 19 Williamette L. Rev. 665 (1983) (discussing how state constitutions frequently attempt to accommodate the competing interests, apart from consideration of the U.S. Constitution).
also the status of defendants, and the subject matter of the defamatory speech.

As first amendment litigation has proliferated in the modern era of defamation law since New York Times, the governing constitutional doctrines have only become more complex. While the Court has answered some questions, it frequently has raised others. Meanwhile, the states have been forced to reckon with the evolving constitutional rules and to reconcile them with their own common law doctrines. Some states—Arkansas among them—have been reticent to abandon common law principles and terminology. This insistence on clinging to the practices of the past frequently has contributed to the confusion and complexity of the constitutional era of defamation law.

This comment analyzes the development of Arkansas's defamation law vis-a-vis New York Times and its progeny and explores other state defamation law principles which are less

6. Because Gertz arguably left unanswered the issue of whether its holding as to private plaintiffs applied in nonmedial cases, several state courts indicated their prerogative to set different fault standards in media and nonmedia cases. See, e.g., Ikani v. Bennett, 284 Ark. 409, 682 S.W.2d 747 (1985); Hogue v. Ameron, Inc. 286 Ark. 481, 695 S.W.2d 373 (1985); cf. Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 634 S.W.2d 135 (1982) (apparently applying strict liability in a nonmedial slander case). Other states have gone a step further in adopting different standards in private plaintiff cases depending upon whether the defendant is a media or nonmedia entity. See, e.g., Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 75, 461 A.2d 414, 418 (1983) (distinguishing the case from Gertz because of the nonmedia defendant), aff'd on other grounds, 472 U.S. 749 (1985); Rowe v. Metz, 195 Colo. 424, 425-26, 579 P.2d 83, 84-85 (1978) (Gertz does not preclude presumed damages when private plaintiff sues nonmedia defendant).


directly related to constitutional considerations. Although first amendment jurisprudence has permeated to varying degrees all aspects of defamation law, among those elements more profoundly affected are fault, damages, falsity, and certain privileges. On the other hand, state common law, with a few notable exceptions, has retained the final word regarding matters of defamatory meaning, identification, publication, and certain other privileges.

Several recent Supreme Court rulings have led some commentators to speculate that the high court is retreating somewhat from its superimposition of constitutional principles upon common law defamation. Justice White and then-Chief Justice Burger, in separate concurrences in a 1985 defa-


mation case, expressed doubts as to the soundness of *New York Times.* If indeed the Supreme Court has become predisposed to return to the states a greater measure of autonomy to decide various defamation-related issues, Arkansas law on those matters takes on additional significance. And as the importance of state law grows, it should be clarified, and in some instances, reconsidered.

I. THE PRIMA FACIE CASE

A plaintiff bringing a cause of action for defamation must establish six elements to state a prima facie case. These elements are:

A. The *defamatory* nature of the statement of fact.
B. The offending statement’s *identification* of or reference to the plaintiff.
C. The defendant’s *publication* of the statement.
D. The defendant’s *fault* in publishing the statement.
E. The *falsity* of the offending statement.
F. The *damage(s)* caused to the plaintiff by the statement’s publication.

These six elements, as defined and construed in Arkansas law, are fully discussed in this comment. Although the plaintiff may face additional proof burdens in rebutting defenses raised by the defendant, those requirements are discussed below in connection with various affirmative defenses.


13. Some authors have listed other “elements” as necessary to a defamation cause of action. *See* e.g., R. *Smolla, Law of Defamation § 1.08* (1986) [hereinafter *Smolla*].

14. While the other five elements have traditionally been part of the plaintiff’s burden, see W. *Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts § 116* (5th ed. 1984) [hereinafter *Prosser and Keeton*], the falsity element only recently shifted from its previous status as an affirmative defense to be established by the defendant, to the element of the plaintiff’s prima facie case. The shift was mandated by Philadelphia Newspapers Inc. v. *Hepps*, 475 U.S. 767 (1986), where the Court held that the U.S. Constitution requires that the burden of proof as to falsity be the plaintiff’s, at least in some types of cases. *Id.* at 780. *See infra* notes 293-99 and accompanying text for a full discussion of *Hepps* and its implications.

15. *See Restatement (Second) of Torts § 558 & comments* (1977) [hereinafter *Restatement (Second)*].

16. *See infra* note 480 and accompanying text.
A. Defamatory Statements of Fact

While some states have developed their own phraseology in articulating extensive definitions of what constitutes defamation, most jurisdictions have recognized that a single definition cannot enumerate all the specific indicia of defamatory meaning. States in this latter category have settled for broad definitions which are adaptable on a case-by-case basis. So, too, has the Restatement (Second) of Torts opted for a broad definition, providing that "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the esteem of the community or to deter third persons from association or dealing with him." Whatever terminology is used, the touchstone of defamatory meaning is the same: a statement that causes injury to reputation.

No Arkansas case from the last several decades has even attempted to enunciate a comprehensive definition of defamatory meaning. The best recent indication came in a 1983

17. See, e.g., Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933) ("words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"), quoted in, Smolla, supra note 13, at § 4.01. See also RESTATEMENT (SECOND), supra note 15, at § 559 annotations.

18. RESTATEMENT (SECOND), supra note 15, at § 559.

19. See generally PROSSER AND KEETON, supra note 14, at § 111.

20. Perhaps the most comprehensive definition in an older case was stated in Sinclair Refining Co. v. Fuller, 190 Ark. 426, 79 S.W.2d 736 (1935), where the pleadings alleged a defamatory communication as one "impeaching [plaintiff's] honesty, integrity, veracity and reputation, and expos[ing] him to public hate, contempt, and ridicule . . . ." Id. at 427-28, 79 S.W.2d at 737.

A 1989 Arkansas Supreme Court decision, Navarro-Monzo v. Hughes, 297 Ark. 444, 763 S.W.2d 635 (1989), stated a definition of slander as "speaking of false and malicious words concerning another, whereby injury results to his reputation." Id. at 446, 763 S.W.2d at 636 (citing BLACK'S LAW DICTIONARY (5th ed. 1979)). However, a definition of "slander" is not necessarily synonymous with a definition of "defamatory" because the former emphasizes the element of communication/publication by speech, while the latter should emphasize the character/nature of the communication and its effect on the subject/plaintiff's reputation.

Similarily, an old Arkansas criminal statute defined libel as "a malicious defamation, expressed either by writing, printing or by signs or pictures or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, veracity, virtue or reputation, or to publish the natural defects of one who is living, and thereby expose him to public hatred, contempt and ridicule." CRAWFORD & MOSES' DIGEST, § 2390, quoted in Rachels v. Deener, 182 Ark. 931, 933, 33 S.W.2d 39, 40 (1930).
case, *Little Rock Newspapers, Inc. v. Dodrill*21 (*Dodrill II*) where the Arkansas Supreme Court, in the context of a damages discussion, wrote simply that a defamation action “turns on whether the communication or publication tends or is reasonably calculated to cause harm to another’s reputation.”22

Perhaps the absence of a clear and comprehensive common law definition explains the omission of any defamation instruction from the Arkansas Model Jury Instructions.23 Nevertheless, the lack of a definitive common law standard is not a significant impediment in discerning the law on defamatory meaning because specific examples in the case law are illustrative, and because Arkansas has retained to some extent the traditional per se and per quod classification scheme whereby certain communications are deemed defamatory as a matter of law.

1. The Per se/Per quod Distinction

Although the use of the per se and per quod classifications with regard to defamatory meaning dates back to the state’s earliest recorded slander suits,24 the terminology re-

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Again, while there is some emphasis on the publication element, other language is instructive as to what type of communication is considered defamatory.

Finally, the Arkansas criminal statute on slander may also be instructive as to what is defamatory. The statute makes criminal utterances or publications of allegations of adultery, fornication, false swearing, cowardice for failure to accept a challenge, a criminal act, or dishonesty in business. *Ark. Code Ann.* § 5-15-102 to -105 (1987). The statute provides more generally that it is also criminal slander to “[b]ring into disrepute the good name or character of [a] person...” *Id.* § 5-15-105(a)(3). Of course, these definitions are not controlling in civil actions. In fact, the constitutionality of this statutory scheme is highly suspect in light of its lack of fault requirements rising to the level of those constitutionally required, see infra notes 125-55 and accompanying text. See generally Editorial: The U.S. Supreme Court Declared Criminal Libel Unconstitutional in 1964 but the Word Hasn’t Reached South Carolina and 24 Other Jurisdictions, 12 News Media & L. 1 (Summer 1988). A 1975 case, Weston v. State, 258 Ark. 707, 528 S.W.2d 412 (1975), held a similar statutory scheme on criminal libel, *Ark. Stat. Ann.* § 41-2401, unconstitutional on those grounds. The statute had previously been held constitutional when attacked on grounds of vagueness, State v. Weston, 255 Ark. 567, 501 S.W.2d 622 (1973), appeal dismissed, 418 U.S. 907 (1974).

22. *Id.* at 28, 660 S.W.2d at 935 (citing Restatement (Second) of Torts § 559; 50 Am. Jur. 2d Libel and Slander §§ 1, 337).
24. See, e.g., McGough v. Rhodes, 12 Ark. 625 (1852) (accusation of false swearing is actionable per se only where an oath is required under law); Carllock v. Spencer, 7...
mains confusing in several respects. The primary confusion results from an early merging of libel (written communication/publication) and slander (spoken communication/publication) with respect to the per se and per quod categories. At early common law, slander was divided into two categories: per se, meaning actionable without proof of special harm, and per quod, requiring proof of special harm. A statement was slander per se if it was within one of four somewhat arbitrary categories: (1) imputations of criminal conduct; (2) imputations of a loathsome disease; (3) imputations of adultery; and (4) accusations injurious to the plaintiff in his or her trade, business, or profession. All other types of spoken injurious allegations were classified as slander per quod.

Libel, on the other hand, was divided into the per se and per quod categories on bases different than those used for slander. When defamatory meaning was apparent on the face of a communication, it was classified as libel per se. When extrinsic evidence was introduced to establish the defamatory character of the statement, it was called libel per quod. Hence, because per se and per quod carried different meanings under the twin torts of libel and slander, the groundwork was laid for ensuing confusion.

Some states have maintained the four distinct categories; others apparently have not, but instead generally rely upon the four traditional slander per se categories for both libel and slander. Although a few very early cases evinced adherence to the two different classification systems, Arkansas has more recently appeared to abandon them. Unlike most

Ark. 12 (1846) (accusation of having “sworn falsely” is actionable per se under Arkansas criminal libel statute).

25. The traditional distinction between libel and slander is actually more complex than this. For a thorough discussion, see L. ELDRIDGE, THE LAW OF DEFAMATION § 12, at 77 (1978) [hereinafter ELDRIDGE]; SMOLLA, supra note 13, § 1.04, at 1-8. See also infra notes 96-106 and accompanying text.

26. See H. BRILL, ARKANSAS LAW OF DAMAGES § 31.7, at 97 (Supp. 1988) [hereinafter BRILL]; SMOLLA, supra note 13, at § 7.05.

27. SMOLLA, supra note 13, at §§ 7.07-.08.

28. In Obaugh v. Finn, 4 Ark. 110 (1842), the Arkansas Supreme Court wrote that it would maintain the distinction between libel and slander, a distinction by which a libel action could be brought for particular written words, even though the same words, if only spoken, would not support a slander action. Id. at 120-21.
states, however, Arkansas has not merely applied the four slander per se categories to both libel and slander. Instead, Arkansas has followed a hybrid scheme, using terminology from both classification systems to categorize both libel and slander.

Due to Arkansas’s indiscriminate use of the terms, it is permissible to refer to the per se and per quod terms as interchangeable between libel and slander cases. Accordingly, throughout the remainder of this comment’s discussion of Arkansas law, libel per se and slander per se are generally re-

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29. See SMOLLA, supra note 13, at § 7.07(1).
30. Arkansas’s indiscriminate use of the four terms—slander per se, slander per quod, libel per se, and libel per quod—is evinced in several cases. For purposes of defamatory meaning, some libel cases have said that the per se designation indicates that the communication is deemed defamatory as a matter of law where it alleges criminal activity, see, e.g., Luster v. Retail Credit Co., 575 F.2d 609, 617 (8th Cir. 1978), or relates matters injurious to a plaintiff in his or her business or profession, see, e.g., State Press Co. v. Willett, 219 Ark. 850, 853, 245 S.W.2d 403, 404 (1952) (newspaper article alleging pastor’s dishonesty and his maligning his own followers held actionable per se); Ottinger v. Ferrell, 171 Ark. 1085, 1087, 287 S.W. 391, 392 (1926) (charges that teacher was incompetent or immoral held actionable per se); Simonson v. Lovewell, 118 Ark. 81, 86, 175 S.W. 407, 409 (1915) (newspaper article alleging public official’s dishonesty held libelous per se). These cases, although libel actions, are suspiciously reliant upon the slander per se categories.

In other cases, however, the Arkansas Supreme Court has spoken of libelous communications as defamatory on their face, so that the introduction of extrinsic evidence is unnecessary to make them actionable. See McGough v. Rhodes, 12 Ark. 625 (1852). See also W. PROSSER, HANDBOOK ON THE LAW OF TORTS 763 (4th ed. 1971); infra note 38 and accompanying text (distinguishing between cases which admit extrinsic evidence to establish that a communication is within one of the four traditional per se categories, and those admitting it to establish defamatory meaning generally). Furthermore, cases explaining libel per quod use still different terminology. They state that when a matter is not defamatory on its face and thus is libel per quod, the focus shifts to whether the plaintiff can prove special damages or special harm caused by the communication. See, e.g., Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 345 S.W.2d 34 (1961) (libel per quod supports only specific damages, not general damages). The implication of these cases is two-fold: (1) the proof of the harm done also proves the defamatory nature of the communication, and (2) Arkansas still retains some of the traditional view of the true libel per se/libel per quod distinction.

As for the separate problem of reconciling the judicial explanations of libel per se and libel per quod, the extrinsic evidence which is unnecessary to establish defamatory meaning in a libel per se case may be considered exactly what is needed to establish the defamatory character of a statement in a libel per quod case. The purpose of that extrinsic evidence may be to show that the plaintiff was harmed or damaged, thereby establishing that the communication was indeed defamatory. Unfortunately, the cases do not clearly establish this point, and any attempt at a true understanding of the concepts is further impaired by Arkansas’s imprecise reference to the once distinct categories of libel per se and slander per se.
ferred to as defamation per se or actionable per se. Likewise, defamation per quod refers to libel per quod and slander per quod.

a. *Per se Defamation in Arkansas*

Under Arkansas law, several types of statements are deemed defamatory per se not only in very old cases, but also in some relatively recent decisions. These include charges of criminal activity, 31 adultery, 32 "contagious distemper," 33 or dishonesty, 34 as well as any charge which injures the plaintiff in his or her trade, business, or profession. 35 The similarities


32. See, e.g., Thiel v. Dove, 299 Ark. 601, 604, 317 S.W.2d 121, 122-23 (1958) (implying adultery is in per se category, though not expressly stating it); Jackson v. Williams, 92 Ark. 486, 489, 123 S.W. 751, 752 (1909); Roe v. Chitwood, 36 Ark. 210, 215 (1880); cf. Hollowell v. Arkansas Democrat Newspaper, 293 Ark. 329, 737 S.W.2d 646 (1987) (although defamatory meaning was not at issue, court did not use per se language with respect to a male deputy sheriff accused of having sex with known prostitutes).

On the point of adultery, fornication, and rape as actionable per se, it is important to note that because the recipient’s reaction to information is the “test” for defamatory meaning, whether or not accusations of adultery constitute defamatory speech may change over time. Similarly, their character may vary from one locale to another, depending upon societal mores and values. See generally Smolla, supra note 13, at § 7.05. Perhaps it is telling on this point that most Arkansas cases holding such communications to be libelous per se are relatively old and, accordingly, may be outdated by current norms.

33. See, e.g., Wirges v. Brewer, 239 Ark. 317, 320, 389 S.W.2d 226, 228 (1965) (citing Studdard v. Trucks, 31 Ark. 726 (1877)); Reese v. Haywood, 235 Ark. 442, 443, 360 S.W.2d 488, 489 (1962) (same). It is permissible to assume that, in light of the traditional slander per se categories and the use of the adjective “contagious,” “distemper” as used in these cases refers to a disease, rather than to one of its alternate meanings, “bad temper.” Webster’s II New Riverside University Dictionary 390 (1984).

34. See, e.g., State Press Co. v. Willett, 219 Ark. 850, 853, 245 S.W.2d 403, 404 (1952) (statements charged pastor with accepting money in return for “maligning his own people”) (citing Studdard v. Trucks, 31 Ark. 726 (1877) (outlining only the traditional four categories) and Restatement of Torts § 569, comment g (accusations of untruthfulness or dishonesty are libelous per se)). See also Reese v. Haywood, 235 Ark. 442, 443, 360 S.W.2d 488, 489 (1962) (suggestion of “a dishonest or fraudulent refusal to pay” makes an imputation of insolvency, not otherwise actionable per se, libelous per se).

35. See, e.g., Luster v. Retail Credit Co., 575 F.2d 609 (8th Cir. 1978) (applying Arkansas Law); Lloyd v. Gerber Prods. Co. 260 F. Supp. 735 (W.D. Ark. 1966) (apply-
to the original four slander per se categories are obvious.

At least one specific matter has expressly been held not to be actionable per se: an imputation of insolvency. However, the Arkansas Supreme Court has noted a caveat to this proposition: where the plaintiff is a “trader or one in whose business credit is an important asset,” a contrary rule controls, and such an allegation is actionable per se.

One of the rules, which is employed in Arkansas and else-

ing Arkansas law); Waters-Pierce Oil Co. v. Bridwell, 103 Ark. 345, 147 S.W. 64 (1912).

The tort of personal defamation as linked to the plaintiff’s trade, business or profession may be distinguished from the related torts of injurious falsehood, interference with prospective advantage, unfair competition, and slander of title. See generally R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS §§ IX.8.2, -8.6, -11. (1980) [hereinafter SACK]. Injurious falsehood is “publication of matter falsely derogatory to the plaintiff as to his property, its quality, his personal affairs, of a kind calculated to prevent others from dealing with him, or otherwise to interfere with his relations with others to his disadvantage.” Scholtes v. Signal Delivery Serv., Inc., 348 F. Supp. 487, 496 (W.D. Ark. 1982) (applying Arkansas law; citing W. PROSSER, THE LAW OF TORTS § 122 (4th ed. 1971)).

Scholtes also discussed, in the employment context, the tort of interference with prospective advantage. The court defined it as “intentional conduct designed to interfere and prevent another from obtaining a prospective pecuniary advantage which proximately causes such prevention, to plaintiff’s detriment. Any manner of intentional invasion of the plaintiff’s interests may be sufficient if the purpose is not privileged.” Id. (citing PROSSER, THE LAW OF TORTS § 124). The tort in this employment setting is closely related to defamation’s qualified privilege for the employer to share information with certain interested parties. See infra notes 462-68 and accompanying text. See also Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969).

Unfair competition is also closely related to defamation, as illustrated in Hueur v. Basin Park Hotel and Resort, 114 F. Supp. 604 (W.D. Ark. 1953) and Esskay Art Galleries v. Gibbs, 205 Ark. 1157, 172 S.W.2d 924 (1943). Both cases involved plaintiffs’ requests for injunctions against the unfair competition of the defendant competitor, and both courts denied the requests. The Esskay court wrote,

It is settled . . . that where no breach of trust or of contract appears, equity will not enjoin libelous or slanderous statements injurious to plaintiff’s business, trade, or profession, or which operate as a slander of his title to property, but the complainant will be left to his remedy at law . . . .

Esskay, 205 Ark. at 1163, 172 S.W.2d at 927 (quoting 28 AM. JUR. 119).

Finally, slander to title has been discussed in several Arkansas decisions. Malice is the most litigated requirement of the cause of action. See Elliot v. Elliot, 252 Ark. 966, 482 S.W.2d 123 (1972); Hicks v. Early, 235 Ark. 251, 357 S.W.2d 647 (1962); Sinclair Refining Co. v. Jones, 188 Ark. 1075, 70 S.W.2d 562 (1934).

36. See, e.g., Rachels v. Deener, 182 Ark. 931, 933, 33 S.W.2d 39, 40 (1930); Honea v. King, 154 Ark. 462, 243 S.W. 74 (1922).

37. Reese v. Haywood, 235 Ark. 442, 443, 360 S.W.2d 488, 489 (1962) (dicta). See also First Nat’l Bank v. N.R. McFall & Co. 144 Ark. 149, 222 S.W. 40 (1920) (where merchant’s or trader’s check wrongfully dishonored, damage is conclusively presumed).
where, with regard to words actionable per se is easily confused with the per quod category of defamation in light of the original distinction between the two classifications. This rule, established by an early Arkansas criminal libel case and followed by at least one federal court sitting in diversity in a civil case, allows the introduction of evidence to establish that a communication is defamatory per se. The rule illustrates that, while "per se" frequently refers to a statement actionable as a matter of law, the initial inquiry as to whether it is defamatory per se is a question of fact for the jury. In other words, the communication and the context in which it was made are considered by the jurors, who make the determination of whether, for example, it alleges criminal activity and is therefore actionable per se. This use of extrinsic evidence should be distinguished from the use of such evidence in per quod classification cases. In the latter cases, the evidence is used to establish the defamatory character of the communication generally, not to place the communication in one of the traditional per se categories.

b. *Per quod* Defamation in Arkansas

Examples of libel per quod are a little more difficult to discover because the cases seldom expressly refer to it by that label. Rather, they simply exhibit its attributes, including the introduction of explanatory extrinsic evidence and proof of


39. The case of *Wirges v. Brewer*, 239 Ark. 317, 389 S.W.2d 226 (1965), may be such a per quod case. In *Wirges* the county clerk of Conway County sued the editor of the *Morrilton Democrat* for defamation as the result of a news story and an editorial. Both pieces covered lawsuits which attacked school board elections on the basis of illegal absentee votes, and discussed the circumstances surrounding the suits. However, neither article mentioned the plaintiff or his office. *Id.* at 321, 389 S.W.2d at 227-28. At trial, the plaintiff was allowed to introduce evidence of the newspaper's past articles criticizing various county officials, as well as evidence of his office's responsibility for conducting elections. The court noted that because the words were not libelous per se, the evidence was admissible in attempting to show that the plaintiff was in fact defamed. Although the court couched its opinion in terms of defamatory meaning, the case seems more accurately characterized as an identification case. *See infra* notes 73-92 and accompanying text.
special damages. Therefore, pure libel per quod suits are rarely found.

Most cases have placed greater emphasis on the per quod distinction as it relates to the plaintiff’s damages. Reese v. Haywood, for example, involved the imputation of an individual’s insolvency—a matter expressly not actionable per se. The Reese court held that, for the plaintiff to win the suit, he would have to introduce extrinsic evidence that established his actual damages.

2. Other Indicia of Defamatory Meaning

Although Arkansas clearly retains at least remnants of the per se and per quod categories, numerous defamation cases—in particular many decisions of the past decade—make no reference whatsoever to the terms. These decisions, while still not articulating a comprehensive definition for defamatory meaning, speak in terms of various rules of construction to be utilized, usually by the jury, in determining whether a given statement of fact is defamatory.

Determinations made on a case-by-case basis, because they are questions of fact, are not controlling in subsequent actions. It is interesting, however, to note that Arkansas juries have found the following false communications defamatory: that the plaintiff, a suspended lawyer, failed the bar examination; that the plaintiff committed “specified immoral acts” and that the plaintiff committed a criminal act.

40. See infra notes 371-77 and accompanying text; see also Lloyd v. Gerber Prods. Co., 260 F. Supp. 735, 739 (W.D. Ark. 1966) (applying Arkansas law; noting that because statement is not libel per se, burden shifts to the plaintiff to establish damages; citing Reese and Studdard).


42. Reese, 235 Ark. at 444, 360 S.W.2d at 489 (plaintiff’s general testimony about humiliation and embarrassment insufficient; court suggested proof of impairment of credit would be appropriate).


44. Nance v. Flaugh, 221 Ark. 352, 253 S.W.2d 207 (1952). While the opinion repeatedly used the quoted language to describe the objectionable statement, it did not reveal precisely what the allegations were.

Although some of these cases were reversed on other grounds at the appellate level, they are nonetheless indicative of the sort of statements which juries often recognize as detrimental to reputation.

Many defamation suits never get to the jury because they are decided on directed verdict or summary judgment motions. While most are dismissed for other reasons, some are dismissed on the basis of the trial judge's application of various rules of construction related to defamatory meaning. Dispositions of this nature further reduce the opportunity for the development of enlightening precedent.

3. Rules of Interpretation

Extrinsic evidence introduced to establish the defamatory character of the communication may not be used to "enlarge or change the plain meaning of the language." Whether the evidence is introduced to bring the communication within one of the four traditional per se categories, to establish that it is libel per quod, or to prove defamatory meaning in a case where the classification scheme is not utilized at all, the function of the evidence is simply to explain. As numerous cases have reiterated, the words are to be taken according to their plain, ordinary meaning, and according to the sense in which they appear to have been used. Furthermore, it is clear that an allegedly defamatory statement is to be considered in context. That is, it is to be read in light of the entire article or document of which it is a part.

The emphasis with regard to this element is not on the intent of the communicator, but is instead on the meaning

47. See supra note 38 and accompanying text.
48. See supra notes 39-42 and accompanying text.
49. See supra notes 43-45 and accompanying text.
50. Wirges, 239 Ark. at 321, 389 S.W.2d at 228 (citing RESTATEMENT OF TORTS § 563).
53. See SMOLLA, supra note 13, at § 4.02. Cf. Roberts v. Love, 231 Ark. 886, 890-93, 333 S.W.2d 897, 900-01 (implying that the intent of the communication was relevant
inferred by the recipient. Under the traditional American view, the standard by which the perception is judged is less than objective. The communication is not judged by how a "right-thinking" person would perceive it, rather, the test is whether "a substantial and respectable minority" of the plaintiff's community or associates would consider it defamatory.

It is difficult to determine how closely Arkansas adheres to this rule. The cases send conflicting signals, using various such phrases as the understanding of the words by "courts and juries as other people would understand them" or the understanding of the "reader or hearers, taking into consideration accompanying explanations and the surrounding cir-

to determine if it were defamatory by stating that allegations as to the "design" to defame were relevant and should not have been struck from the pleadings), cert. denied, 364 U.S. 825 (1960).

54. See, e.g., Goodman v. Phillips, 218 Ark. 169, 235 S.W.2d 537 (1951); Greer v. White, 90 Ark. 117, 118 S.W. 258 (1909). See also SACK, supra note 35, at § II.4.2; SMOLLA, supra note 13, at § 4.02.

55. See SMOLLA, supra note 13, at § 4.02[3] (contrasting the American view with the English "reasonable" or "right-thinking" person approach discussed in § 4.02[2]). See also ELDREDGE, supra note 25, § 9, at 45-47 (not referring to the doctrine as the American Rule, but explaining the same principle nonetheless).

56. The American rejection of a "right-thinking" person standard is based in part on constitutional considerations which mandate that regulation of free speech always be content-neutral. For an excellent overview of the first amendment considerations on this point, see SMOLLA, supra note 13, § 4.02[3].

57. RESTATEMENT (SECOND), supra note 15, at § 559 comment e, at 157.

58. The RESTATEMENT (SECOND) further provides that, of the substantial minority, the plaintiff must show that it reached one or more of them, and that exposure is presumed if the statement was published in a newspaper. While perception of defamatory meaning is not a matter of public opinion, neither is it a matter of what an anti-social, non-mainstream substantial minority believes. Finally, even if the particular recipient regards a statement as innocuous, it is still defamatory if the community would view it as such. Id.

The RESTATEMENT (SECOND)'s extensive provisions on this matter are considered its way of responding to the constitutional dictates which arguably affect the identification element. See generally SMOLLA, supra note 13, at § 4.09[4]. That is, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), is considered by many to have superseded the common law position that a defamation defendant was liable for even an accidental reference to the plaintiff. Gertz is seen as imposing its fault mandate on all elements, not just falsity. Accordingly, the RESTATEMENT (SECOND) allows liability for an unintended reference only if the recipient's understanding is reasonable. RESTATEMENT (SECOND), supra note 15, at § 564 comment f, at 167.

cumstances ... known to the hearer or reader."60 While the former phrase implies an objective reasonable person standard, the latter implies an absolutely subjective standard which considers whether individual perceivers—being aware of the surrounding circumstances or understanding the true implication of the statement—considered the communication defamatory. Furthermore, at least in the older cases, the Arkansas Supreme Court applied these standards in different types of cases. The objective standard was applied to publications generally circulated, like newspaper articles, while the subjective standard was applied in limited publication cases, where the reader was more likely to know the surrounding circumstances and therefore grasp the implications of the communication.61 Thus, Arkansas may be said to follow a dual standard as to recipient perception.

4. Defamation by Innuendo

A related matter in semantic construction and interpretation is the concept of defamation by innuendo. Arkansas case law applies the doctrine when allegedly libelous words are susceptible to two meanings—one defamatory and one harmless.62 Like defamation per quod, it is a doctrine which applies when extrinsic evidence may prove a statement's defamatory nature.63 In fact, some commentators have equated


61. Note, Defamatory Innuendo, supra note 10, at 495-96 (discussing Skaggs v. Johnson, 105 Ark. 254, 150 S.W. 1036 (1912); Greer v. White, 90 Ark. 117, 118 S.W. 258 (1909)).

62. See, e.g., Pritchard v. Times Southwest Broadcasting, Inc., 277 Ark. 458, 461, 642 S.W.2d 877, 878 (1982) (county sheriff sued alleging that the reporter implied that a grand jury, which was investigating the sheriff, was doing so on matters other than those which actually were its subject); Wortham v. Little Rock Newspapers, Inc. 273 Ark. 179, 182, 618 S.W.2d 156, 157 (1981) (tavern owner sued because newspaper articles stated that his tavern had been issued an illegal license by the Alcoholic Beverage Control Board); Roberts v. Love, 231 Ark. 886, 890-93, 333 S.W.2d 897, 900-02 (attorney sued based on newspaper account that he had sent his criminal defendant client to the State Hospital for a psychiatric examination on a "legal technicality," thus implying the attorney's use of trickery or chicaneity), cert. denied, 264 U.S. 825 (1960). See generally B. Sanford, Libel & Privacy, The Prevention and Defense of Litigation §§ 4.7, 4.11 (Supp. 1987) [hereinafter Sanford].

63. See Pritchard, 277 Ark. at 461, 642 S.W.2d at 878.
the two concepts.\textsuperscript{64}

The 1960 case of Roberts \textit{v.} Love\textsuperscript{65} illustrates the doctrine. The plaintiff, Roberts, was an attorney appointed to defend a man accused of rape. Shortly after his appointment, the plaintiff successfully moved that his client be committed to the state hospital for observation. Subsequently, the local newspaper ran a story stating that Roberts had used a “legal technicality” which forced the judge to send the criminal defendant, who had already confessed to the crime, to the state hospital.\textsuperscript{66} In response, Roberts sued the newspaper for defamation, but the trial court dismissed the matter. On appeal, the Arkansas Supreme Court rejected Roberts’ claim but noted that, because the newspaper story was not libelous per se, it required innuendo to establish “the libelous sense in which the words were intended.”\textsuperscript{67} The court said the burden of proof could be met by “reference to facts stated in the inducement,” the injurious sense imported by the charge.\textsuperscript{68} The gist of the article, Roberts alleged, was that he had used “trickery” or “chicanery” to thwart justice, in spite of the fact that his client had a “substantive right” to an observation period at the state hospital.\textsuperscript{70} In the final analysis, however, the

\begin{footnotesize}
\begin{enumerate}
\item[$\textsuperscript{64}$] Brill, \textit{supra} note 26, § 31.7, at 98.
\item[$\textsuperscript{65}$] 231 Ark. 886, 333 S.W.2d 897, cert. denied, 264 U.S. 825 (1960).
\item[$\textsuperscript{66}$] Id. at 888, 333 S.W.2d at 898.
\item[$\textsuperscript{67}$] Id. at 890, 333 S.W.2d at 899. It is odd that the court here chose the word “intended” because, as already discussed, see \textit{supra} notes 53-54, the intent of the communicator is not determinative as to whether a statement is defamatory.
\item[$\textsuperscript{68}$] “Inducement” in this context refers to a preliminary statement, pled before the complaint for defamation under common law pleading, alleging the existence of extrinsic facts which explained the meaning of the communication or its reference to the plaintiff. Similarly, “innuendo” was something of a term of art in the early pleadings rules. In addition to the verbatim recital of the objectionable statement, the “innuendo” portion of the complaint explained its meaning. Finally, a third pleading phase called “colloquium” which was used, as necessary, to establish the reference to the plaintiff. Smolla, \textit{supra} note 13, § 4.05[2] (citing Davis \textit{v.} RKO Radio Pictures, 191 F.2d 901 (8th Cir. 1951); Ten Broeck \textit{v.} Journal Printing Co., 166 Minn. 173, 207 N.W. 497 (1926); Pfeiffy \textit{v.} Henry, 269 Pa. 533, 112 A. 768 (1921); Kee \textit{v.} Amstron, Byrd & Co., 75 Okla. 84, 182 P. 494 (1919); McLaughlin \textit{v.} Fisher, 136 Ill. 111, 24 N.E. 60 (1890)).

In spite of the dual meaning of these various terms as they also apply to special common law pleadings rules for defamation suits, for purposes of Arkansas law, “innuendo” may be given its ordinary meaning—that the implication of the communication, in context, was defamatory.
\item[$\textsuperscript{69}$] Roberts, 231 Ark. at 890, 333 S.W.2d at 899-900 (citing 53 C.J.S. \textit{Libel and Slander} § 162b 2(a), at 249).
\item[$\textsuperscript{70}$] Id. at 891-92, 333 S.W.2d at 900-01.
\end{enumerate}
\end{footnotesize}
court said that the newspaper article did not convey such a meaning to the general public. The court upheld the dismissal of the case, saying that the phrase "legal technicality" is not defamatory and connotes to laypersons only that the case was decided on grounds "other than the merits."\footnote{Id. at 892, 333 S.W.2d at 901 (emphasis deleted).}

As the foregoing discussion indicates, Arkansas law on even the most basic of defamation issues—what constitutes "defamatory meaning"—can be quite confusing. Arkansas's part-time use of the per se and per quod labels has only exacerbated the problem. Confusion mounts as the court vacillates between the use of these arcane legal classifications and the more modern, simplistic analysis of defamatory meaning on a case-by-case basis. Furthermore, the shifting practice leaves litigants with little solid guidance as to when extrinsic evidence will be needed to prove the element; when their allegations will be considered defamatory as a matter of law; and when the jury will decide the matter as a simple question of fact.

Arkansas courts should therefore abandon altogether the outdated classification scheme and declare a comprehensive definition which can be incorporated into a general jury instruction on defamation and which a jury can then apply to any allegedly defamatory communication. Meanwhile, it is strategic for the defamatory plaintiff to cover all bases up front at the pleadings stage—alleging that the offensive statement is actionable per se but preparing to offer extrinsic evidence of the context of the communication and of the special harm incurred as necessary.\footnote{See authorities cited at supra note 68 (discussing traditional defamation pleadings rules).}

\section*{B. Identification}

In order to establish a prima facie case of defamation, a plaintiff must establish not only that the communication was of a defamatory nature, but also that he or she was the person defamed.\footnote{See generally ELDREDGE, supra note 25, at § 10; SMOLLA, supra note 13, at § 4.09.} In many cases, this requirement is not an issue; a defamatory communication frequently refers to the plaintiff
by name. In other cases, however, identification is a much more difficult issue because the plaintiff need not be expressly identified in order to state his or her case. The Restatement (Second) of Torts states: "A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer." As this statement indicates, because defamation law is recipient-oriented, neither the plaintiff's own understanding of the communication nor the conveyor's intent is controlling. It logically follows that a number of the rules of interpretation which are used to determine whether a statement is defamatory are also used to determine when a given communication is of and concerning the plaintiff.

The general Arkansas rule expressed in Pigg v. Ashley County Newspaper, Inc., is that the statement, "by proper inducement and colloquium" may be said to apply personally to [the plaintiff]. In Pigg the defendant newspaper published an unsigned letter alleging several acts of wrongdoing, including indecent exposure, against the Crossett Police Department as a group. The writer went on to state that she would not buy anything from Crossett merchants until Pigg, who happened to be a Crossett police officer, was removed from the city's police force. Pigg sued the paper, alleging that

75. RESTATEMENT (SECOND), supra note 15, at § 564.
76. See supra notes 53-54 and accompanying text.
77. See supra notes 46-61 and accompanying text.
78. RESTATEMENT (SECOND), supra note 15, at § 564 comments a & b.
79. 253 Ark. 756, 489 S.W.2d 17 (1973).
80. See supra note 68 (explaining the common law significance of these terms).
81. Pigg, 253 Ark. at 757, 489 S.W.2d at 18 (quoting, in part, Come v. Cruz, 85 Ark. 79, 107 S.W. 185 (1908)).
82. A newspaper or other publication is liable for whatever it publishes, even signed and unsigned letters to the editor. See generally Bland v. Verser, — Ark. —, 1989 WL 76716 (July 10, 1989 Ark.) (citing Cepeda v. Cowles Magazines and Broadcasting, Inc., 328 F.2d 869 (9th Cir. 1964)); Nance v. Flaugh, 221 Ark. 352, 253 S.W. 2d 207 (1952); Prosser and Keeton, supra note 14, § 113 at 810; Smolla, supra note 13, at §§ 4.13, 5.12.
83. The matter of group libel is outside the scope of this paper except as it relates to the element of identification. For a general discussion of group libel, see Prosser and Keeton, supra note 14, § 111, at 783-85; Smolla, supra note 13, at § 4.10. See also Come v. Cruz, 85 Ark. 79, 107 S.W. 185 (1908); Restatement (Second), supra note 15, at § 564A.
the writer’s charge of indecent exposure was a specific reference to him. The trial court granted the defendant’s demurrer, and the Arkansas Supreme Court affirmed, declaring that it was “sheer speculation” that, of the various charges made by the writer, the indecent exposure allegation specifically referred to the plaintiff. Still, the court neither articulated a test for identification nor indicated whether its determination is to be based on the understanding of any or all recipients of the information or only on that of recipients with knowledge of the surrounding facts.

Earlier cases had stated inconsistent answers to the question. In Wirges v. Brewer, a case involving a generally distributed newspaper, the court implied that the plaintiff had the burden of proving that someone—anyone—understood the communication as a reference to the plaintiff. On the other hand, in Thiel v. Dove no evidence was presented and apparently none was required that anyone at all identified the plaintiff. In Thiel the defendant claimed to have observed a city policeman in a state of undress in an apartment with a nude woman; he purportedly had seen enough of their conduct to indicate that the two engaged in sexual intercourse. When the defendant brought the incident before the city’s police committee and later before a well-attended meeting of the city council, he described not only the incident, but also the exact location of the apartment. The married woman who lived in the apartment subsequently sued the defendant for slander, but she apparently produced no evidence that anyone had actually identified her as the policeman’s adulterous lover. In response to the defendant’s argument on appeal that he did not defame the plaintiff because he never identified her by name, the court simply responded that the appropriate test was whether her identity was “ascertained or ascertainable.”

While the Arkansas Supreme Court has sent somewhat conflicting signals with regard to who must identify the plain-

84. Pigg, 253 Ark. at 757-58, 489 S.W.2d at 18.
85. 239 Ark. 317, 389 S.W.2d 226 (1965).
86. Id. at 322, 389 S.W.2d at 229 (“[T]here is no indication in the proof that the [alleged defamation] was understood by anyone as a reference to the [plaintiff] alone.”).
87. 229 Ark. 601, 317 S.W.2d 121 (1958).
88. Id. at 603, 317 S.W.2d at 123 (emphasis added).
tiff as having been defamed by a widely distributed communication, the court has not given any indication as to who the determinative audience is when publication is more limited. However, if the court truly requires that only one person perceiving a generally distributed communication understand the reference to the plaintiff, arguably the court will require the same when the communication is more limited, such as by letter. The requirement is logical because the recipient of a more limited communication would be more likely to know the context in which the statement was made and the person to whom it refers.

A final Arkansas case illustrates, in a different context, the point that a plaintiff need not be named in order to be identified with a defamatory communication. In *KARK-TV v. Simon* 89 the plaintiffs, who were reported by a false and defamatory news broadcast to have been arrested for attempted robbery, were not identified by name. However, the film accompanying the narrative news report showed both plaintiffs being placed into a police car. 90 Although the identification element was not addressed in the court’s opinion, the case nevertheless indicates the sufficiency of visual identification alone.

The Arkansas Supreme Court has also noted that in deciding the identification issue, the defamatory document is to be considered in its entirety. 91 Once again, as in construing defamatory meaning, any extrinsic evidence introduced to establish the defamatory link to the plaintiff may not expand the plain meaning of the language used. 92

C. Publication

The third requisite element for a defamation suit is publi-
cation. "Publication" is a term of art not necessarily synonymous with the common understanding and mass media connotations of the word. Quite simply, publication is the intentional or negligent communication of a defamatory matter to a third party—one other than the person defamed. The defamation need not be made known to the public generally, and it is immaterial whether the defamed person is present at the time of the publication. However, it is necessary, due to the recipient orientation of defamation law, that the third-party recipient of the communication understand the statement.

1. The Libel/Slander Distinction

In essence, the form of publication is the distinguishing factor between the twin torts of defamation: libel and slander. The common law originally differentiated more significantly in its treatment of the two causes of action, apparently because of the reverence for the printed word in a largely illiterate society and the indelible nature of the harm it was perceived to cause. Arkansas seems to have abandoned most significance attendant the distinction some time ago. Thus, whether a defamatory communication is classified as libel or slander is largely immaterial in Arkansas defamation jurispru-

96. The most significant element of the differing treatment was that a cause of action for slander, unless per se, required the pleading and proof of special harm or special damages, a term of art referring to actual pecuniary loss. On the other hand, originally no libel actions, whether per se or per quod, required an averment of special damages. See generally PROSSER AND KEETON, supra note 14, § 112, at 785-86; RESTATEMENT (SECOND), supra note 15, at § 575 comment b; SMOLLA, supra note 13, at § 1.04[5].
97. While one very early Arkansas case appeared to adhere to this distinction, Obaugh v. Finn, 4 Ark. 110 (1842), it has been implicitly abandoned by the indiscriminate judicial use of libel per se and slander per se.
98. See generally SACK, supra note 35, at § II.3; SMOLLA, supra note 13, at § 7.04.
99. See supra note 30 and accompanying text; see also Note, Distinction Between Libel and Slander, supra note 10.
dence. In fact, recent Arkansas cases have frequently referred just to the tort of defamation and not specifically to either libel or slander.

For whatever purposes a court may deem it relevant, the distinction between the torts is fairly simple. Slander is usually published by the speaking of words, although transitory gestures may also constitute publication. Publication of libel may be by written or printed words, or by communication embodied in some other tangible or physical form. A modern problem of classification has arisen with the development of broadcast media. On one hand, both television and radio convey the spoken word; on the other, such defamatory communications are conveyed to a great number of people—much like a printed libelous account in a newspaper. A number of jurisdictions have decided this issue based on whether a broadcast report was read from a script, in which case it was

99. The distinction is still important with regard to some procedural issues, including the applicable statute of limitations. See infra notes 557-58.

Another point on which the distinction may retain some significance is with regard to criminal slander. The Arkansas criminal slander statutes, Ark. Code Ann. §§ 5-15-101 to -109 (1987), send mixed signals about whether some of all provisions apply to libel as well as slander. Several of the individual sections use the verbs "utter" and "publish." Id. §§ 5-15-102, -103, -105. Whether these are intended to be redundant (with "publish" used as a term of art indicating that the utterance is to a third party) or alternatives (with "utter" meaning to speak and publish meaning to print) is determinative of whether the statute applies to both torts. Interestingly, one of the statutory sections seems to specifically address libel, providing liability for any person in "any newspaper or handbill or other advertisement, printed or written" publishes or proclaims any other person as a coward. Id. § 5-15-104. As noted earlier, Arkansas formerly had a criminal libel statute which subsequently was declared unconstitutional in 1975. See supra note 20. Therefore, it is particularly unusual that the criminal slander provisions would also provide for criminal liability for some written forms of defamation.


102. See generally SMOLLA, supra note 13, at § 1.04[1] (noting as examples of other tangible embodiments such items as signs, pictures, statutes, motion pictures, and hanging in effigy of the plaintiff).
classified as libel rather than slander.103 Based on the great capacity for harm, other jurisdictions and the Restatement (Second) have taken the position that all defamatory broadcasts constitute libel, whether or not the defamatory words are spoken extemporaneously or read from a script.104 Arkansas cases seem to have intentionally avoided the issue, as all broadcast media cases have simply labeled the objectionable communication "defamatory," rather than libelous or slanderous.105 Perhaps the court's aversion to deciding the issue stems from the lack of necessity to do so under Arkansas's hybrid view of libel and slander.106

2. The Requisite Standard of Care

As the definition of publication indicates, the act of publication requires an accompanying mental state of intent or negligence. This is an important requirement because it prevents liability for unforeseen or unintentional conveyance to a third party. The case of Farris v. Tvedten107 demonstrates Arkansas's adherence to the rule. In Farris the defendant-physician wrote a letter to the plaintiff-nurse, Mrs. Farris, who worked with him. The letter strongly criticized her and implied that she had substituted a patient's medication, thereby committing a criminal act. The defendant addressed the letter to Mrs. Farris at her home. However, the letter was opened by the plaintiff's husband, and she sued the doctor for libel.108 Although it did not speak in specific terms of willful or negli-

103. See, e.g., Bishop v. Wometco Enters., Inc., 235 So. 2d 759, 761 n.2 (Fla. 1970) (dicta); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 610-12, 116 A.2d 440, 443 (1955). The first Restatement also took this position. RESTATEMENT OF TORTS § 568 comment f (1938).


106. See supra note 30 and accompanying text (discussing Arkansas's hybrid view).


108. Id. at 186, 623 S.W.2d at 206.
gent publication, in deeming that no publication had occurred, the court noted that the defendant could not have "known or . . . foreseen" that anyone other than the addressee would open the letter.\textsuperscript{109} Certainly the court's verb choice refers to intentional and negligent mental statues.\textsuperscript{110}

3. Publication and Privileges

Not every communication of a defamatory matter to a third party is a "publication" because some communications are privileged. The point may be stated two ways: (1) the communication is not within the meaning of the term of art "publication" because it is privileged, or (2) the communication is a publication, but the defense of a privilege serves to nullify liability. Arkansas cases have variously expressed the matter both ways.\textsuperscript{111} Among the types of communications which are not considered publications (or which constitute privileges) are dictation to a stenographer\textsuperscript{112} and communication of a defamatory matter to one with a common interest.\textsuperscript{113} These, along with other communications which may variously be referred to as privileged, are discussed further in Section II on privileges.\textsuperscript{114}

4. Republication

When a defamatory statement is repeated by someone other than the original speaker or publisher, the repetition

\textsuperscript{109} Id. at 187, 623 S.W.2d at 207 (emphasis added).
\textsuperscript{110} See generally Prosser and Keeton, supra note 114, § 8, at 34 (discussing knowledge with regard to the intentional mental state); § 32, at 185 (discussing knowledge with regard to the negligent mental state); § 33, at 197 (noting foreseeability's relation to negligence).
\textsuperscript{111} Compare Farris v. Tvedten, 274 Ark. 185, 186, 623 S.W.2d 205, 206 (1981) (because the matter was covered by a qualified privilege, the communication was not a publication) with Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 306-08, 634 S.W.2d 135, 136-37 (1982) (speaking of privilege as a defense to the publication of the defamatory matter). See also Navarro-Monzo v. Hughes, 297 Ark. 444, 448-49, 763 S.W.2d 635, 637 (1989) (discussing this duality of reference/terminology).
\textsuperscript{113} See authorities cited at infra notes 447-54.
\textsuperscript{114} See infra notes 404-543 and accompanying text.
may give rise to liability for the second publisher, as well as to additional liability for the first publisher. As to the second publisher, the republication is considered a separate tort. By repeating the statement, he or she is deemed to have adopted it as his or her own. The only additional requirement is that the republisher also acted with the requisite degree of fault, under New York Times and its progeny.

As for the increased liability of the initial publisher, however, most jurisdictions have held that it depends on the foreseeability of the republication. While no Arkansas court has expressly adopted this rule, a federal court, sitting in diversity and making an Erie guess about Arkansas law, adopted the "reasonably foreseeable" test with regard to the original publisher's liability for republication.

D. Fault

In order to incur liability for a defamatory statement, a

115. See Nance v. Flaugh, 221 Ark. 352, 353-54, 253 S.W.2d 207, 208 (1952) (it was "equally a defamation whether [defendant] had fabricated the accusations himself or was simply repeating what he had heard").

116. See generally Eldredge, supra note 25, at § 46; Smolla, supra note 13 at § 4.13 (citing RESTATEMENT (SECOND) OF TORTS § 587 (1977)).


118. See infra notes 125-55 and accompanying text (discussing the requisite mental states). See generally RESTATEMENT (SECOND), supra note 15, at § 576 & comments; Smolla, supra note 13, at § 4.13[2].


120. One Arkansas case had addressed republication as it related to establishing aggravating circumstances which may affect damages. Jones v. Commercial Printing Co., 249 Ark. 952, 463 S.W.2d 92 (1971), involved the same defendant newspaper's publication of a second article which summarized legal actions taken by the plaintiff as a result of a first allegedly libelous article. The plaintiff alleged that the second article constituted a republication of the initial allegedly defamatory article, even though the second piece apparently did not restate any of the content of the first. The plaintiff argued that the account of the pretrial proceedings had the purpose of further impressing upon the public the original defamation. The court acknowledged such a possibility, finding that, on remand, the second article should be made available for the jury's consideration in the event they found that the first publication was defamatory. Id. at 957-58, 463 S.W.2d at 95-96.

Of course, Jones is an atypical republication case in that it did not discuss the issue of increased liability for the initial publisher when a second publisher communicates the same defamation.

121. Luster v. Retail Credit Co., 575 F.2d 609, 613 (8th Cir. 1978).
communicator must have acted with the requisite standard of fault. Because it has been the primary target of the first amendment jurisprudence, the fault element of defamation is undoubtedly the most complex. Traditionally, the states imposed strict liability upon defamation defendants.\textsuperscript{122} Then, with \textit{New York Times} in 1964, the Supreme Court brought constitutional concerns into the picture, addressing those concerns by raising the fault requirements with respect to certain plaintiffs.\textsuperscript{123} Although, the twenty-five years since \textit{New York Times} have brought continued refinement of the fault principles, many questions remain unanswered, and the present court's stance on these first amendment issues remains to be seen.\textsuperscript{124}

Over the years the Court has opted for a number of classifications for assigning fault standards. The Arkansas judicial response to and interpretation of these classifications is addressed below. Additionally, suggestions are made for clarification of the law, and solutions are proposed to questions as yet unanswered.

1. An Overview of the Constitutional Fault Doctrines

The Supreme Court's initial differentiation among fault standards was made on the basis of the plaintiff's classification as a public official. In \textit{New York Times Co. v. Sullivan}\textsuperscript{125} the Supreme Court held that in order to prevail in a libel suit, a plaintiff who is a public official must establish a defendant's actual malice—that is, that the falsehood was published "with knowledge it was false or with reckless disregard of whether it was false or not."\textsuperscript{126}

Of course, much of the impact of \textit{New York Times} was dependent on the interpretation of the public official concept,

\textsuperscript{122} The strict liability standard of fault was not quite as harsh as it might seem at first glance because of the operation of various common law privileges. \textit{See infra} notes 404-542 and accompanying text.
\textsuperscript{123} \textit{See authorities cited at supra} note 2.
\textsuperscript{124} \textit{See Smolla, New Analytic Primer, supra} note 9, at 1571, Table 1 (summarizing the positions, inasmuch as they are known, of the current Supreme Court Justices).
\textsuperscript{125} 376 U.S. 254 (1964).
\textsuperscript{126} \textit{Id.} at 279-80. \textit{See also infra} notes 237-71 and accompanying text (discussing the precise meaning of the standard).
and the Court in the 1966 case of *Rosenblatt v. Baer*\(^{127}\) stated its first general definition. Although the Court remanded on the issue of whether Frank Baer, supervisor of a county recreational ski center, was within the category, it enunciated the black letter law on public officials as including “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.”\(^{128}\)

Since *Rosenblatt*, most other indications from the Supreme Court about who is a public official have come in dicta.\(^{129}\) In *Gertz v. Robert Welch, Inc.* the Court expressly included in the category those who seek governmental office,\(^{130}\) and in *Hutchinson v. Proxmire* the Court noted that the category does not include all public employees.\(^{131}\) Because the U.S. Supreme Court has given limited guidance on the issue, the courts which have delineated the boundaries of the category generally have been the circuit, district and state courts. In spite of *Hutchinson*’s caveat, they generally have maintained the category’s breadth.\(^{132}\)

Shortly after *New York Times*, in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,\(^{133}\) the Court made the logical extension of the actual malice fault standard, beyond public officials, to “public

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\(^{128}\) Id. at 85 (footnote omitted).

\(^{129}\) But see Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (holding that candidates for public office are public officials).

\(^{130}\) 418 U.S. 323, 344 (1974).

\(^{131}\) 443 U.S. 111, 119 n.8 (1979).

\(^{132}\) See SANFORD, *supra* note 62, at § 7.2.2 .3; SMOLLA, *supra* note 13, at § 2.25-26 (collecting cases).

\(^{133}\) 388 U.S. 130 (1967). In actuality, the vote on the public figure fault standard was 4-3-2. Four Justices voted for a standard articulated as “unreasonable conduct constituting an extreme departure from the standards of investigation and reporting adhered to by reasonable publishers.” Id. at 155. Three Justices voted for the actual malice standard, id. at 162, and two voted for absolute press immunity. Id. at 170-72. However, because five of the Justices opted for at least an actual malice standard, the lower courts applied that standard. E.g., Cepeda v. Cowles Magazines and Broadcasting, Inc., 392 F.2d 417 (9th Cir.), cert. denied, 393 U.S. 840 (1968); News-Journal Co. v. Gallagher, 233 A.2d 166 (Del. 1967). Subsequent Supreme Court cases have clearly adopted the actual malice standard for public figures. See, e.g., Gertz v. Robert Welch, Inc. 418 U.S. 323, 336 n.7 (1974); Greenbelt Cooperative Publishing Ass’n v. Bresler, 398 U.S. 6 (1971).
figures."\textsuperscript{134} The Court continued to expand the application of the actual malice standard through its 1971 decision in \textit{Rosenbloom v. Metromedia, Inc.}\textsuperscript{135} There, in a plurality opinion, the Court extended the actual malice fault standard to any private individual "involve[d] in an event of public or general interest."\textsuperscript{136} In doing so, the Court seemed to be shifting its focus from the classification of the plaintiff to the nature of the speech itself, noting that a matter does not suddenly become less a matter of public interest just because a private individual is involved.\textsuperscript{137} The \textit{Rosenbloom} shift, however, proved short-lived, as the 1974 case of \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{138} halted the extensions of the actual malice standard.

The \textit{Gertz} case settled several issues related to the availability of damages in defamation cases, holding that damage to reputation would no longer be presumed and that private plaintiffs would have to prove actual malice in order to recover punitive damages.\textsuperscript{139} However, it is perhaps most noteworthy for its decision with regard to the standard of fault required in private plaintiff libel suits. \textit{Gertz} maintained the \textit{New York Times} fault standard for public officials and public figures,\textsuperscript{140} while setting negligence as a minimum standard in private plaintiff cases.\textsuperscript{141} The consequence of the Court's neg-

\textsuperscript{134} The plaintiff in \textit{Butts} was Wally Butts, University of Georgia football coach, who was accused of fixing a football game in a story by the \textit{Saturday Evening Post}. \textit{Butts}, 380 U.S. at 135. The plaintiff in \textit{Walker} was retired U.S. Army General Edwin Walker, who had been in charge of federal troops assisting in the desegregation of Little Rock Central High School in 1957. However, in a wire story which was run by the defendant Associated Press, Walker was reported to have helped resist attempts to integrate the University of Mississippi. \textit{Id.} at 140.

\textsuperscript{135} 403 U.S. 29 (1971), noted in Note, \textit{New Public Interest Test, supra} note 10.

\textsuperscript{136} \textit{Id.} at 31-32 (emphasis added).

\textsuperscript{137} \textit{Id.} at 43.

\textsuperscript{138} 418 U.S. 323 (1974).

\textsuperscript{139} For additional discussion of the impact of the \textit{Gertz} decision on damages, see \textit{infra} notes 319-21, 329-34, 378-83 and accompanying text.

\textsuperscript{140} \textit{Gertz}, 418 U.S. at 343. It should be noted that the \textit{Gertz} Court may have implicitly limited its requirement of actual malice to cases involving media defendants, because it spoke only in terms of such defendants. More recently, however, in \textit{Dun \\& Bradstreet, Inc. v. Greenmoss Builders, Inc.}, 472 U.S. 749 (1985), the Court clearly abandoned the media/nonmedia distinction, and instead limited \textit{Gertz} to speech involving matters of "public concern."

\textsuperscript{141} \textit{Id.} at 347. The \textit{Gertz} fault standard is reflected in the \textit{Restatement} which provides:

One who publishes a false and defamatory communication concerning a pri-
ligence minimum was to give the states leeway in setting their own fault standards for private plaintiffs. A great majority of states, including Arkansas,\textsuperscript{142} have adopted the simple negligence standard for such plaintiffs.\textsuperscript{143} Other states have opted for higher standards.\textsuperscript{144}

In providing the option of greater protection for private plaintiffs, \textit{Gertz} relied on rationales linked to two perceived distinctions between public and private figures: degree of access to the media\textsuperscript{145} and a so-called "assumption of risk."\textsuperscript{146} Furthermore, the Court envisioned two subcategories of public figures. The first group was referred to variously as "universal," "unlimited," or "pervasive" public figures—those who have achieved such a significant role in issue resolution that their conduct is a matter of legitimate public interest, particularly as related to credibility and trustworthiness.\textsuperscript{147} The second category, "limited" or "vortex"\textsuperscript{148} public figures, has

\begin{itemize}
\item vate person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness, or role in his capacity,
\item is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or
\item acts negligently in failing to ascertain them.
\end{itemize}

\textbf{RESTATEMENT (SECOND), supra note 15, at § 580B.}

\textsuperscript{142} See \textit{Dodrill v. Arkansas Democrat Co.}, \textit{(Dodrill I)}, 265 Ark. 628, 590 S.W.2d 840 (1979).

\textsuperscript{143} See \textit{generally Sack, supra note 35, at § V.9.1; Sanford, supra note 62, at § 8.3.1; Smolla, supra note 13, § 3.10 (collecting cases from various states adopting the negligence standard).}


\textsuperscript{145} \textit{Gertz}, 418 U.S. at 344. The Court reasoned that public figures have greater access to the media so that they communicate statements of rebuttal and correction when necessary. \textit{Id.}

\textsuperscript{146} Several scholars have referred to the Court's second rationale, that public figures must accept heightened public scrutiny as part of the price paid for their prominence and influence, as analogous to assumption of the risk, even though the Court did not use that specific terminology. See, e.g., \textit{Sanford, supra note 62, at § 7.4.1; Smolla, supra note 13, at § 2.06.}

\textsuperscript{147} \textit{Gertz}, 418 U.S. at 336. For a sampling of the types of persons who have been considered all-purpose public figures, see \textit{Smolla, supra note 13, at § 2.23 and authorities cited.}

\textsuperscript{148} \textit{Gertz}, 418 U.S. at 352.
engendered a great deal more litigation, controversy, and discussion. Limited public figures are those who have “thrust themselves to the forefront of particular controversies” of importance to the general public, with the purpose of influencing their outcome. They are within the actual malice standard only when the defamation is related to the particular controversy. Thus, as state courts undertook the post-Gertz task of deciding what standard of fault to apply in private plaintiff suits, the Supreme Court continued to refine the meaning of public figure, particularly the limited variety.

Numerous federal district and circuit courts have also attempted to delineate clearer rules to apply in determining who is a limited public figure in a variety of situations. In doing so, these courts frequently have ignored the Supreme Court’s directives to focus on the true voluntariness of the plaintiff’s involvement. Professor Rodney Smolla has compiled a list of factors that courts have generally considered in making the private figure versus limited public figure distinction.

1. the extent to which the “controversy” preexisted the defamatory speech . . .;
2. the effect of the “controversy” on the interests of nonparticipants;
3. the level of voluntariness in the plaintiff’s involvement in the controversy;
4. the plaintiff’s access to channels of communication for counter-speech;
5. the degree of public divisiveness concerning the controversy;
6. the extent of the plaintiff’s prominence in the controversy;
7. the extent of the plaintiff’s efforts to attempt to influence resolution of the controversy;
8. the extent to which the plaintiff’s public figure status continued to exist at the time of publication;

149. Id. at 345.
150. Id. at 349.
151. See Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader’s Digest Ass’n, 443 U.S. 157 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); see generally Eldredge, supra note 25, at § 52(d); Prosser and Keeton, supra note 14, § 113, at 806-07; Smolla, supra note 13, at § 2.08 -21.
152. See supra note 149 and accompanying text; see also authorities cited at supra note 151.
the extent to which the allegedly defamatory speech
is geographically or institutionally limited to the area
in which the plaintiff had achieved public figure
status.\textsuperscript{153}

Of course, not every factor is relevant to a given case, and the
strength of one or two particular factors is frequently dispo-
sitive of the classification issue.\textsuperscript{154}

2. Arkansas Plaintiff Classifications

As noted previously, Arkansas falls within the sizeable
majority of states which have chosen the most plaintiff-orien-
ted \textit{Gertz} option: a negligence standard of fault in private
plaintiff defamation suits. The standard, however, has two
key definitional elements which make a tremendous difference
in terms of its meaning and scope. The first goes back to the
difficult question of the breadth of the public official and pub-
lic figure concepts. Although these two categories overlap to
some extent and are subject to the same fault standard, they
are discussed separately here because the Arkansas Supreme
Court has retained the distinction.\textsuperscript{155} “Public official” implicates those formally involved in governmen,
\textsuperscript{156} while “public figure” connotes those less formally involved, although fre-
quently as influential, in societal decisionmaking.\textsuperscript{157} The sec-
ond definitional issue goes to the standard to be employed in
the negligence determination, that is, either the familiar rea-
soneable person test or a professional negligence standard.\textsuperscript{158}

\begin{flushleft}
\textsuperscript{153} SMOLLA, supra note 13, at § 2.09[4].
\textsuperscript{154} Id.
\textsuperscript{155} Drew v. KATV Television, Inc. 293 Ark. 555, 556 n.1, 739 S.W.2d 680, 681
that police officer may be classified as either a public official or a public figure and
therefore that the distinction may be moot); Smolla, \textit{Evolving Doctrines}, supra note 10,
at 51-52 (discussing \textit{Gallman}, a public official case, in connection with the public figure
analysis).
\textsuperscript{156} See generally ELDREDGE, supra note 25, at § 52; SMOLLA, supra note 13, at
§ 2.25 -.26.
\textsuperscript{157} See generally ELDREDGE, supra note 25, at § 52(d); SMOLLA, supra 13, at
§ 2.02 -.23.
\textsuperscript{158} See infra notes 272-88 and accompanying text.
\end{flushleft}
The 1979 case of *Dodrill v. Arkansas Democrat Co.* (Dodrill I) is the post-Gertz case which adopted the negligence standard in Arkansas private-plaintiff libel cases; thus, it is an appropriate starting point for sorting through the state’s handling of the public figure/private figure dichotomy. In *Dodrill I* an attorney sued the *Arkansas Democrat* on the basis of a story it ran stating incorrectly that he had failed the Arkansas Bar Examination. Louis Dodrill’s license to practice law previously had been suspended, and one of the requirements for reinstatement of the license was that he again take and pass the bar exam. Dodrill did so, but when the Bar Examiners supplied their usual list of passing applicants to the *Arkansas Gazette* and *Arkansas Democrat* newspapers, they omitted his name from the list, apparently because they were continuing their investigation. From the omission of Dodrill’s name, the *Democrat* inferred that he had not passed the examination, and they published a story to that effect. The trial court granted the *Democrat*’s motion for summary judgment, finding that Dodrill had become a public figure because of “litigation and publicity surrounding his suspension from the practice of law” and that the allegedly defamatory article contained information of “general and public concern, namely, requirements for admission to the bar and efforts for readmission to the bar by a previously suspended lawyer.” Because Dodrill had not established the requisite actual malice standard of fault, the trial court concluded that summary judg-

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159. 265 Ark. 628, 590 S.W.2d 840 (1979) (Substituted Opinion), cert. denied, 444 U.S. 1076 (1980). NOTE: The printing of *Dodrill I* in the Southwest Reporter is not the substituted opinion of the court, which opinion does appear at page 628, volume 265 of the official Arkansas Reports. The substituted opinion deletes some significant language from the opinion appearing in the Southwest Reporter. Accordingly, only the official Arkansas Reports should be relied upon.

160. *Id.* at 631, 590 S.W.2d at 841.

161. *Id.* at 631-33, 590 S.W.2d at 841. The *Democrat* also ran a second story when, in response to the first story, Dodrill filed a writ of mandamus, seeking to have the State Board of Bar Examiners report his scores. The second article, in addition to summarizing the efforts of the Board to have the suit dismissed, also recounted the history of the controversy, including the absence of Dodrill’s name from the list of successful examinees. *Id.* at 632 & n.1, 590 S.W.2d at 842 & n.1.
ment was appropriate.\textsuperscript{162}

On appeal, the Arkansas Supreme Court reversed the lower court on the issue of Dodrill's status. Finding that Dodrill was a private figure for defamation law purposes, the court focused on the lack of voluntariness of his involvement in a matter which it characterized as devoid of public controversy.\textsuperscript{163} The court found that Dodrill's taking the bar examination in compliance with the sanctioning court's mandate failed to confer upon him public figure status.\textsuperscript{164}

Contrary to the Dodrill I majority's implication, the case really is not such an easy one. In fact, in several cases from other jurisdictions, attorneys have been considered limited public figures—particularly when they exceed the scope of usual representation and seek to exert influence upon controversies connected to matters being litigated.\textsuperscript{165} Of course, Dodrill was not involved in any sort of representation, but he was, nonetheless, involved in a matter of some public concern, in particular, the proper discipline of a member of a profession.

\textsuperscript{162} Id. at 633-34; 590 S.W.2d at 842.

\textsuperscript{163} Id. at 636, 590 S.W.2d at 843 (citing Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976)).

\textsuperscript{164} Dodrill I, 265 Ark. at 636-37, 590 S.W.2d at 843. The court compared Louis Dodrill's circumstances to those of Mary Alice Firestone in Time, Inc. v. Firestone, 424 U.S. 448 (1976), whose "widely publicized activities" failed to promote her to public figure status because they were not voluntary. The court also noted that Elmer Gertz, the plaintiff in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), also an attorney whom the court deemed a private figure was representing the parents of a young man who had been killed by the Chicago police. \textit{Cf.} Wortham v. Little Rock Newspapers, Inc., 273 Ark. 179, 618 S.W.2d 156 (1981). The Wortham majority opinion did not reach the issue of public versus private figure status, instead deciding the case on altogether different grounds. However, in a concurring opinion, Justice Dudley stated that one who holds a public liquor or beer license, like the plaintiff, is a public figure. In reaching the conclusion, Justice Dudley enumerated the steps which an applicant for such a license must take before the license is issued, noting that printed notices in newspapers were required, as was in some instances, a public hearing. Perhaps he intended to imply that such application satisfies the voluntariness requirement. As for the public concern element, he also made reference to the need for free "discussion of public affairs," apparently considering liquor licenses within the scope of that category. Id. at 183-84, 618 S.W.2d at 158 (Dudley, J., concurring).

“imbued with special standards of public trust.” Justice Hickman, dissenting in Dodrill I, argued the public concern point, noting that Dodrill was not an “ordinary professional minding [his] own business,” but was instead one who had breached the public trust and was now about to resume his former role. Furthermore, the point should be made that Dodrill could be considered as having acted voluntarily because whatever he initially did to provoke his suspension, he did of his own volition.

The Dodrill I majority’s interpretation of the limited public figure concept adhered closely to the Supreme Court’s limitations, not only those expressed in the cited case, Time, Inc. v. Firestone, but also in two decisions announced by the Supreme Court a few months after Dodrill I. This adherence is made more remarkable by virtue of many states’ disregard of such limitations, and its significance is amplified by virtue of the importance of the category’s breadth. That is, the Butts/Walker extension in application of the actual malice standard of fault expands only as far as does the public figure concept. Thus, Arkansas’s conformity with the Supreme Court’s narrow view of the public figure doctrine constricts the scope of first amendment protection in Arkansas, and it shifts the balance in favor of private reputational interests.

Another case exploring this issue is Lemmer v. Arkansas Gazette Co., where the Gazette published an allegedly defamatory story about the plaintiff’s involvement with the FBI in undermining the effectiveness of the Vietnam Veterans

166. Smolla, Evolving Doctrines, supra note 10, at 50.
167. Id. at 640-41, 590 S.W.2d at 846 (Hickman, J., dissenting).
168. But see Littlefield v. Fort Dodge Messenger, 614 F.2d 581 (8th Cir.) (holding that attorney was a public figure when he practiced law in violation of his criminal probation), cert. denied, 445 U.S. 945 (1980).
169. 424 U.S. 448, 454 (1976) (plaintiff who resorted to the court system to obtain a divorce did not voluntarily place herself in the controversy by doing so).
170. Wolston v. Reader’s Digest Ass’n, 443 U.S. 157, 166 (1979) (failure to appear before a grand jury did not confer public figure status; plaintiff “was dragged unwillingly into the controversy”); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (plaintiff, a behavioral scientist who received some public funding for his research, did not assume “any role of public prominence”); discussed in Smolla, Evolving Doctrines, supra note 10, at 50.
171. See generally SMOLLA, supra note 13, at § 2.09 - 14.
Against the War (VVAW). The article reported that Lemmer, a former member of the VVAW, had betrayed the group by portraying its members as dangerous men. It also spoke of his lying and manipulation of others, and it compared him to a murderer who had similarly been “misguided and misused by [his] FBI controllers.” In defense to the suit, the Gazette argued that Lemmer was a public figure, if not for all purposes, at least for the limited purpose of discussing the VVAW. The Gazette asserted that Lemmer therefore had to establish actual malice. In support of its argument, the Gazette noted (1) that several newspaper articles in the early 1970s had referred to Lemmer as a local anti-war activist with the VVAW, (2) that Harper’s magazine had disclosed in 1972 his status as an FBI informant, and (3) that Lemmer had testified for the government in the “Gainesville Eight” trial in August, 1973, when eight VVAW members were tried for conspiracy. After considering this evidence, the court wrote:

Lemmer was, if not a public figure for all purposes, indeed, as a matter of law, a public figure with reference to the limited issue of the [VVAW], and the activities described in the . . . article. The court also holds that there was a public controversy with reference to the [VVAW] and the activities described in the . . . article; and that the degree and extent of Lemmer’s involvement in this public controversy overwhelmingly demonstrates that Lemmer voluntarily injected himself in this controversy.

173. Id. at 1333-34.

174. Although the Lemmer court did not mention the factor, some courts and commentators have noted that the passage of time may or should affect public figure status. See generally SANFORD, supra note 62, at § 7.6; SMOLLA, supra note 13, at § 2.19; Annotation, Libel and Slander: Who is a Public Official or Otherwise within the Federal Constitutional Rule Requiring Public Officials to Show Actual Malice, 19 A.L.R.3d 1391, at § 6 (1968). For the most part, courts have been reluctant to allow a person, once he or she has attained public figure status, to lapse back into anonymity. But cf. Rosenblatt v. Baer, 383 U.S. 75, 87 n.14 (1966) (appearing to recognize that public officials may eventually become so removed from their authority roles that comment about them no longer merits “actual malice” protection).

175. Cf. Dodrill II, 281 Ark. 25, 34-35, 660 S.W.2d 933, 938 (1983) (if newspaper articles sought to be submitted were to go to the issue of plaintiff’s status as a limited purpose public figure, the trial court correctly refused them).


177. Id. at 1335.
The court emphasized both the existence of a public controversy and Lemmer's voluntary participation in it—the same elements that were emphasized but found lacking in Dodrill I. The two cases are also distinguishable because Lemmer involved a pre-publication, existing controversy— the FBI's undermining of the VVAW—whereas Dodrill I featured no such existing debate. Instead, the article about Louis Dodrill had created it.

b. Public Officials in Arkansas

Arkansas cases delineating the boundaries of the public official classification are more plentiful than those interpreting the public figure concept. Various Arkansas cases have summarily held that police officers, sheriffs and their deputies, a professor and assistant dean at a state law school,

178. See generally Smolla, supra note 13, at § 2.10.
179. See, e.g., Lancaster v. Daily Banner-News Publishing Co., 274 Ark. 145, 147, 622 S.W.2d 671, 672 (1981). See also Hogue v. Ameron, Inc., 286 Ark. 481, 484, 695 S.W.2d 373, 374 (1985) (implying that a state trooper may be characterized as either a public official or public figure, and therefore, that any distinction between the two categories may be moot).
180. See, e.g., Hollowell v. Arkansas Democrat Newspaper, 293 Ark. 329, 737 S.W.2d 647 (1987). But see Cornett v. Prather, 293 Ark. 108, 737 S.W.2d 159 (Substituted Opinion, October 5, 1987) (treating the determination of captain/chief deputy of sheriff's department status as public official as one of mixed law and fact, and thereby indicating that the standard does not always apply to such officers as a rule of law). See also Mysinger v. Foley, 651 F. Supp. 328 (W.D. Ark. 1987) (sheriff accused of libeling his deputy was a public official and therefore could be found liable only if he acted with actual malice; case appears to be an improper application of the public official doctrine which considers the status of the plaintiff, not that of the defendant).
181. Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973). In Gallman an assistant dean at the University of Arkansas at Fayetteville School of Law, James Gallman, sued the Arkansas Gazette for a news story which commented on his qualifications as a professor and scholar. Id. at 988-89, 497 S.W.2d at 48-49. The Arkansas Supreme Court expressed "no hesitancy in holding that [Gallman], as assistant dean and professor in our University Law School, is a 'public official' " who must show actual malice in order to recover in a defamation suit under the New York Times rule. Id. at 992, 497 S.W.2d at 50.

However, Gallman was a pre-Gertz case, and the court appeared to rely rather heavily on the case of Rosenbloom v. Metromedia, 430 U.S. 29 (1971), which was subsequently modified by Gertz. See supra notes 135-38 and accompanying text. The Gallman opinion, quoting Rosenbloom, said that communications related to the dean's qualifications as a scholar and teacher were "matters of public or general concern" and therefore entitled to first amendment protection. Gallman, 254 Ark. at 992, 497 S.W.2d at 50.
and the director of a state agency\textsuperscript{182} are all public officials within the scope of \textit{New York Times} and its progeny. None of these cases comes as any great surprise because decisions from other jurisdictions have ruled similarly on such public employees.\textsuperscript{183}

While these Arkansas decisions were made without explanation, other jurisdictions have been more forthcoming about the factors to be considered in making the closer calls about who is and who is not a public official. Such cases usually speak in terms of the plaintiff's level of policy-making authority\textsuperscript{184} and visibility to the public\textsuperscript{185} as two important factors. However, status as a public official, like that of a public figure, cannot be thought of in a vacuum. The degree to which the defamatory communication relates to the plaintiff's duties and character as a public official must also be considered. The general rule—that anything touching on the official's fitness for office is fair game for comment\textsuperscript{186}—seems tailored to the purposes of the actual malice standard as applied to public officials. The enlightenment function of the first amendment is best served by open and robust discussion about those formally responsible for governing. This is so even where information about fitness for office—about dishon-

\textsuperscript{182} Saxton v. Arkansas Gazette Co., 264 Ark. 133, 569 S.W.2d 115 (1978).

\textsuperscript{183} See generally Eldredge, \textit{supra} note 25, at \S\ 51(d); Smolla, \textit{supra} note 13, at \S\ 2.25-26.


\textsuperscript{185} See, e.g., Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) ("cop on the beat is a member of the department who is most visible to the public").

\textsuperscript{186} See, e.g., Garrison v. Louisiana, 379 U.S. 64, 77 (1964).
esty, malfeasance, motivation—is also indicative of private character. 187

Professor Smolla, in comparing the public official and public figure jurisprudence, has observed that the courts, while limiting New York Times-protected comment about public officials to that regarding official performance or fitness for office, have broadly construed the requirement of a relationship or nexus about what is relevant to such fitness. 188 Furthermore, this nexus requirement is less stringent for officials at the top end of the hierarchy so that almost anything can be related to fitness for office, and those public officials closely resemble all-purpose public figures. 189 On the other hand, for those in the lower echelons of public service, the nexus requirement narrows so that, in order to be protected under New York Times, comment must be directly related to the official’s job performance or fitness for it. 190 Thus, the less influential, lower-end-of-the-scale public official looks a lot like the limited or vortex public figure, about whom the subject matter of protected comment is more restricted.

Some cases, like Saxton v. Arkansas Gazette Co., 191 are easily demonstrative of the nexus, while not specifically discussing it. Saxton was a suit by the executive director of the Arkansas Soil and Water Commission based upon a newspaper report that he had falsified minutes of the Commission’s meeting. Finding that the plaintiff, as a public official, had to prove the defendant’s actual malice in order to recover, the court stated simply that, unless he establishes actual malice,

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187. See id.; see generally Eldredge, supra note 25, at § 51(c); Restatement (Second), supra note 15, at § 580A comment b; Smolla, supra note 13, at § 2.27.
188. See Smolla, supra note 13, at § 2.27[2].
189. See supra notes 147 and accompanying text (defining all-purpose public figures).
190. See, e.g., Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977) (civil engineer engaged in private practice and doing the majority of the county’s private consultation work did not have authority to act for the county or expend public funds and accordingly was not a public official in relation to that work); Clasow v. Longview Publishing Co., 91 Wash. 2d 408, 589 P.2d 1223 (1979) (administrator of county motor pool was public official for purposes of report which alleged that he purchased automobile parts at county expense to repair automobile owned by sheriff’s son; administrator had unsupervised power to expend public funds and so the alleged defamation was directly related).
191. 264 Ark. 133, 569 S.W.2d 115 (1978).
“a public official is prohibited from recovering . . . for a defamatory falsehood relating to his official conduct.” 192 Saxton was an easy decision, and one where the court at least recognized the need for a link between the public official’s conduct and the subject of the comment before the actual malice protection is conferred upon the defendant.

Not all Arkansas cases discussing the public official category, particularly the closer ones, clearly reflect this spectral theory. In a 1987 case, Drew v. KATV Television, Inc., 193 the Arkansas Supreme Court was even less forthcoming about the nexus requirement. Drew, a Lake Village attorney and Chairman of the Board of Chicot County Memorial Hospital, sued KATV for defamation after it mistakenly reported that he had been charged with a felony and also made allegations which implied that he was involved in a drug investigation related to the hospital. 194 Although the trial judge found that Drew was a public figure, the Arkansas Supreme Court classified him instead as a public official. The appellate court noted that while members of both categories must show actual malice in order to prevail, the terms have distinct meanings in defamation law, and the trial judge may have “been using the term ‘public figure’ loosely, intending it to encompass ‘public official,’ too.” 195

In its rationale for characterizing Drew as a public official, the supreme court noted that he was “a lesser one, perhaps, but nonetheless, one of sufficient importance that the public had an interest in his position and the manner in which he performed it.” 196 In classifying him as a public official, the

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192. Id. at 137, 569 S.W.2d at 117 (punctuation omitted, emphasis added).
194. Id. at 555-56, 739 S.W.2d at 681.
195. Id. at 556 n.1, 739 S.W.2d at 681 n.1. In his concurrence, Justice Purtle opined that Drew was neither a public figure nor a public official, simply because the facts did not support a finding of either status. He stated no specific rationale, but he did note that it was the sole province of the trial court to determine a plaintiff’s classification for fault standard purposes. Id. at 557, 739 S.W.2d at 682 (Purtle, J., concurring) (citing Rosenblatt v. Baer, 383 U.S. 75 (1966); Cornett v. Prather, 293 Ark. 108, 737 S.W.2d 159 (Substituted Opinion, October 5, 1987)). However, Justice Purtle concurred in the result, saying that because there was no genuine issue on defamation, the fault standard was not an issue. Id.
196. Id. at 556; 739 S.W.2d at 681 (citing Rosenblatt v. Baer, 383 U.S. 75 (1966)). The court also cited to various Arkansas cases making the public official determination,
court emphasized that Drew's position was one of "considerable public responsibility,"197 and that the county hospital was a "publicly owned and operated" institution. The court acknowledged that the hospital operated on its own revenues, but said that this was too fine a distinction to have precluded the defendant's summary judgment.198

Interestingly, the Drew court did not even mention a nexus requirement. Perhaps the court overlooked the need for such a link, or perhaps such a nexus was implicit in the court's view of the facts. For instance, one of the allegedly defamatory statements concerned Drew's "involvement in a drug investigation" at the hospital.199 Although the court did not articulate it as such, perhaps this allegation established the link. After all, involvement in a hospital drug problem would certainly go to his fitness to serve on the hospital's governing board, particularly if somehow Drew had used his position to initiate the involvement. Conversely, the television station's allegations indicated no link between Drew's felonious activi-

including Dodrill I, 265 Ark. 628, 590 S.W.2d 40 (1979) (cited for proposition that lawyer is not a public official, although Dodrill I is actually a public figure case); Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973) (law school dean is public official); Hollowell v. Arkansas Democrat Newspaper, 293 Ark. 329, 737 S.W.2d 646 (1987) (city police officer is public official); Lancaster v. Daily Banner-News Publishing Co., 274 Ark. 145, 622 S.W.2d 671 (1981) (deputy sheriff is public official).

Interestingly, the court also cited Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978), an Oklahoma case holding that a grade school wrestling coach is a public official. Perhaps the citation to a case, which, of course, is not binding precedent for Arkansas courts, nevertheless indicates a willingness to extend the public official concept to even such lower level educators. Other than in Gallman, see supra discussion at note 181, Arkansas has not addressed the issue of educators as public officials. However, surely a law school dean has more decisionmaking authority than an elementary teacher. The majority of jurisdictions have expressed a willingness to consider various public school teachers, administrators, and even school board members public officials. See Sanford, supra note 62, at § 7.2.3.4; Smolla, supra note 13, at § 2.26[4] and cases cited.

197. Drew was appointed as Chairman of the Board of Governors of the hospital by the county judge, and it was a position which he had held for fifteen years. Drew, 293 Ark. at 556, 739 S.W.2d at 681.

198. Id.

199. Id. at 555-56, 739 S.W.2d at 681. The court simply uses the terms "involvement" and "drug investigation"; it gives no more detail about the nature of the allegations so one can only speculate about the underlying facts. Perhaps Drew was allegedly involved with an illegal drug ring. Or perhaps Drew's "involvement" was in the nature of initiating the investigation based on his own suspicions, although it is difficult to imagine how the latter would have been defamatory of Drew.
ties and his position as chairman of the hospital’s Board of Governors, although such a nexus certainly might have existed. In truth, Drew had not been charged with a felony, but with two misdemeanor counts of solicitation to tamper with evidence. Ultimately, the charges were dismissed. It seems highly probable that these charges may have arisen out of a matter wholly unrelated to the hospital. After all, Drew was an attorney, and he was likely handling any number of cases to which the evidence could have been linked.

A third case which is somewhat probative of Arkansas’s requirement of a link between a public official’s role as such and the subject of comment about him or her is *Hogue v. Ameron, Inc.* 200 *Hogue* involved a police officer’s allegedly illegal conduct which was the subject of a defamatory letter to his supervisor. The defendant letter writer argued that Officer Hogue was a public official or public figure and moved for summary judgment on that basis because Hogue could not establish actual malice. 201 The trial court denied the motion because it did not consider the accusations of criminal conduct to be directed at Hogue’s official conduct as a policeman. Although the summary judgment was not an issue on appeal, Justice Newbern, writing for the court, questioned the trial court’s reasoning on the matter. He noted that the letter was the basis of the plaintiff’s suit, and it had been sent only to his state police supervisor. “It was clearly an attempt to call attention to the alleged incidents because they were unworthy of a state policeman rather than because they were crimes to be investigated and prosecuted as such.” 202 Justice Newbern apparently recognized that any allegations of criminal conduct, even those occurring when off duty, are probative of fitness to serve as an officer of the peace. 203 The *Hogue* dicta seems to

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201. Id. at 484, 695 S.W.2d at 374.
202. Id.
203. Interestingly in light of his comments, Justice Newbern declined to say whether the summary judgment had been improperly denied, noting that the real issues for consideration on the motion for summary judgment were whether the communication was privileged as a criticism of an officer, and whether the privilege was exceeded by some showing of actual malice. *Hogue*, 286 Ark. at 484, 695 S.W.2d at 374. The manner in which Justice Newbern framed the issues echoes back to common law doctrines of privilege, much of which was superseded and restated by the constitutional doctrines of *New York Times* and its progeny. See infra notes 528-42 and accompany-
establish a fairly broad nexus requirement for police officers, who are generally seen as important by virtue of their authority to deprive citizens of their civil rights by “directly and personally affect[ing] individual freedoms.”

On the preliminary issue of whether a particular plaintiff is a public official, Arkansas’s development has been quite normal and generally consistent with those principles espoused by the Supreme Court. It is the issue of linkage between a public official’s position and the subject matter of the defamatory report which poses the thorniest problems for the courts. Courts addressing this issue in the future should be more attentive to the nexus requirement, explain its breadth or narrowness for different levels of public officials, and expressly state in each case precisely what it considers the nexus to be.

3. The Media/Nonmedia Distinction and the New Public Concern Test in Arkansas

The most recent installment in the continuing development of the Supreme Court’s fault requirement plan is the 1985 case of Dun & Bradstreet, Inc. v. Green Moss Builders, Inc. While Gertz had left unanswered its applicability to nonmedia defendants by making only specific references to media defendants in its holding, Dun & Bradstreet rejected

ing text. In other words, what was once considered a privilege to comment about a public official’s job performance or fitness for office, which privilege was exceeded if the speaker’s malice was demonstrated, is now discussed in terms of the plaintiff’s status as a public official and the accompanying actual malice standard of fault.

204. Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir. 1977). See generally authorities cited at supra note 180.
206. See, e.g., RESTATEMENT (SECOND), supra note 15, at § 580B comment e, § 613 comment j (1977) (indicating that Gertz is limited to “statement[s] published by the communications media and in other cases, “States will be free to apply their own rules” which may or may not be the traditional common law ones). For additional discussion of the ambiguity left by Gertz, see generally Brosnahan, Ten Years of Balancing Libel Law and the First Amendment, supra note 2; Shiffrin, Defamatory Non-Media Speech and First Amendment: Methodology, 25 UCLA L. REV. 915 (1978) (hereinafter Shiffrin, Defamatory Non-Media Speech); Stewart, Or of the Press, 26 HASTINGS L.J. 631 (1975); Watkins & Schwartz, Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges, 15 TEX. TECH L. REV. 823 (1984) (hereinafter Watkins & Schwartz, Gertz and the Common Law); Note, Mediaocracy and Mistrust: Extending New York Times Delegation Protection to Non Media Defendants, 95 HARV. L. REV. 1876 (1982).
a media/nonmedia distinction, opting for a "public concern" test. Noting that the Court had never addressed the applicability of Gertz when defamatory statements involved no issue of "public concern," Justice Powell, writing the plurality opinion, spoke in terms of the public concern element as the differentiating factor. Finding that matters of "purely private concern" merit less constitutional protection, he clearly focused on the enlightenment function of the first amendment and the need to protect ideas tending to effect political change. Perhaps most significantly for plaintiffs, Justice Powell's opinion reverted to the old common law rule allowing both presumed and punitive damages, even absent actual malice. In the case's narrowest reading, this reversion applies to cases where the objectionable speech is about a private plaintiff and involves no matter of public concern.

Not surprisingly, Dun & Bradstreet created as many or more questions than it answered. First, the plurality's language failed to set a definitive standard for the "matters of public concern" concept, stating that such characterization is "determined by [the communication's] content, form, and context." However, in considering the particular facts of Dun & Bradstreet and its specific determination that the defamatory credit report at issue was of no public concern, the plurality opinion focused on the narrow interest of the speaker, the limited audience, the lack of necessity for "free

207. Dun & Bradstreet, 472 U.S. at 757.
208. Id. at 757.
209. Justices Rehnquist and O'Connor concurred in Powell's opinion. They, along with Justice White and then Chief Justice Burger, who each wrote individual concurrences, were the five members of the Court voting to affirm the Vermont Supreme Court, albeit on differing grounds. Id. at 750.
210. Id. at 758-59 (citing Connick v. Myers, 461 U.S. 13 (1983)).
211. Id. at 761. For additional discussion of the import of Dun & Bradstreet in the damages context of defamation law, see infra notes 321, 325, 378-83 and accompanying text.
213. The defamatory credit report was made available to only five subscribers who could not, under the agreement with Dun & Bradstreet, disseminate it to others. Id. at 762.
flow of [such] commercial information, and the absence of any effect on the debate of public issues which would result from the denial of first amendment protection. As commentators have been quick to point out, the Dun & Bradstreet "public concern" concept is synonymous with neither the old Rosenbloom "general or public interest" test nor the "public controversy" prong of the Gertz limited public figure test. Whereas the public controversy formulation requires the plaintiff to voluntarily step into the public arena, the Dun & Bradstreet analysis emphasizes more the speech itself than the plaintiff's activity in provoking it. Thus, under Dun & Bradstreet, some private figures may be defamed by speech about matters of public concern.

Examination of the Rosenbloom and Dun & Bradstreet tests reveals a much closer comparison. In fact, it is difficult to discern much of a distinction, semantically or otherwise, between matters of "general or public interest" and those of "public concern." While the former case used the test to expand first amendment protection, via the actual malice requirement, to all "matter[s] of public or general interest; the latter used its test to confine such protection by limiting the application of Gertz's restrictive liability and damage rules to only those matters involving such "public concern[s]." Accordingly, the implication may be that the Dun & Bradstreet test is narrower.

Dun & Bradstreet has also led commentators to posit that the Court has abandoned the need to prove fault for publishing defamatory communication which is about private plaintiffs and which does not involve matters of public concern.

216. See SMOLLA, supra note 13, at § 3.03; Smolla, New Analytic Primer, supra note 9, at 1540-42; Note, Defining a Public Controversy in the Constitutional Law of Defamation, 69 Va. L. Rev. 931 (1983).
217. Smolla, New Analytic Primer, supra note 9, at 1541.
218. Id.
In essence, it has resurrected the old strict liability standard for a specific category of cases. This inference is drawn because when the case specifically abolished the Gertz presumed and punitive damages rules in these types of cases, it arguably also abolished the accompanying fault requirements. Finally, because it may have imposed a “public concern” requirement upon all defamation cases, some commentators have speculated that even public figures and public officials may be exempted from the actual malice standard where the absence of public concern can be established.

Between Gertz in 1974 and Dun & Bradstreet in 1985, Arkansas, like other states, struggled with the relevance of the media/nonmedia distinction. As noted previously, Gertz

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220. By citing to two post-Gertz state court decisions applying strict liability in private figure suits against nonmedia defendants, the plurality opinion by Justice Powell hints at the abandonment of the Gertz fault requirement in this category of cases. 472 U.S. at 759-60 (quoting primarily Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977); citing with approval Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982)). Additionally, Justice Powell approached the damages rule with a balancing test, considering the significance of the speech as weighed against the states’ interests in applying their common law rules. It seems at least he would apply the same test to the fault rules, where the significance-of-the-speech part of the balance would still be light. Surely the states’ interests in applying their fault requirements would be as weighty as their interest in applying their damages rules. For additional debate on the implication of the plurality opinion, see SMOLLA, supra note 13, at § 3.02[3].

Other Justices were more straightforward about what they considered the implications to be. Justice Brennan pointed out in his dissent that the question before the court was limited to the damages issue. Dun & Bradstreet, 472 U.S. at 781. Chief Justice Burger and Justice White, on the other hand, advocated a return to the common law fault rules. Id. at 773 (White, J., concurring).

221. Of course, cases where there is no public concern about comments concerning public figures and public officials would surely be few and far between. Besides, it seems apparent that the public concern prong of Dun & Bradstreet does not mesh well with the public official and public figure concepts. For an excellent discussion of this problem, see Smolla, New Analytic Primer, supra note 9, at 1542-45; see also Note, Does Actual Malice Standard Apply to Speech on Matters of Purely Private Concern?, supra note 219, at 355. For a concise summation of the categories of plaintiffs, speech, and the accompanying fault requirements, see SMOLLA, supra note 13, at § 3.05, reprinted in Smolla, New Analytic Primer, supra note 9, at 1572, Table 2.

222. See generally Shiffrin, Defamatory Non-Media Speech, supra note 206; Smolla, Evolving Doctrines, supra note 10, at 52-53; Watkins & Schwartz, Gertz and the Common Law, supra note 206, at 831-44. Interestingly, the Vermont Supreme Court had held, in Greenmoss Builders, Inc. v. Dun & Bradstreet, 143 Vt. 66, 461 A.2d 414 (1983), that because Dun & Bradstreet was not a member of the media, it was not subject to the same federal constitutional protections that had been provided by Gertz. Id. at 75, 461 A.2d at 418.
had implied the relevance of such a distinction by qualifying its holding with the term "media defendant." In the wake of Gertz, various Arkansas decisions seemed to pick up on its implicit limitation, frequently ignoring Gertz completely in nonmedia cases. Then, in 1985, two Arkansas Supreme Court cases stated in dicta that the applicability of the Gertz rule to nonmedia defendants remained an open issue in Arkansas.

With Gertz now modified by Dun & Bradstreet, and the constitutional focus now shifted from the media/nonmedia issue to a public concern test, it appears that more, or at least different, options are available to the states in terms of what they may require—or more significantly, not require—in the way of fault standards. Arkansas has not yet explicitly decided whether it will take the opportunity, although it has had occasion to settle the issues left open by Dun & Bradstreet. For example, in Flynn v. McIlroy Bank & Trust Co., a case decided by the Arkansas Supreme Court a few months after Dun & Bradstreet, the court continued to adhere to the line of cases in which Arkansas courts simply ignored the Gertz fault

223. In addition to confining its holding to media defendants, the plurality opinion repeatedly used the terms “publisher or broadcaster” and “news media.”

224. See, e.g., Flynn v. McIlroy Bank & Trust Co., 287 Ark. 190, 194-95, 697 S.W.2d 114, 116 (1985) (stating an “ill will, malice or bad intent” standard for punitive damages, but apparently imposing no fault standard for the defamatory statement); Dillard Dep’t Stores, Inc. v. Felton, 276 Ark. 304, 634 S.W.2d 135 (1982) (nonmedia defendant case which failed to even mention Gertz or to articulate any standard of fault); Partin v. Meyer, 277 Ark. 54, 58, 639 S.W.2d 342, 344 (1982) (relying on presumed malice and damages, both prohibited by Gertz, in nonmedia defendant case).

In Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc., 280 Ark. 420, 658 S.W.2d 397, Justice Hays opined, in dissent, that Gertz was clearly applicable only to media defendants. Id. at 434, 658 S.W.2d at 404 (Hays, J., dissenting; quoting from Gertz the “publisher” or “broadcaster” language; citing Schomer v. Smidt, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (1980); Shiffrin, Defamatory Non-Media Speech, supra note 206).

225. Hogue v. Ameron, Inc., 286 Ark. 481, 695 S.W.2d 373 (1985); Ikani v. Bennett, 284 Ark. 409, 682 S.W.2d 747 (1985). Although Hogue was actually decided a couple of months after the Supreme Court decided Dun & Bradstreet and thereby nullified the media/nonmedia distinction, the Arkansas Supreme Court adhered to the outdated distinction and made no mention of Dun & Bradstreet.

Although it does not appear to be a salient distinction, it is worth noting that the cases implicitly applying strict liability were slander cases, whereas Hogue was a libel case. However, Ikani, too, was a slander case.

226. 287 Ark. 190, 194-95, 697 S.W.2d 114, 116 (1985) (citing Dillard Dep’t Store, Inc. v. Felton, 276 Ark. 304, 634 S.W.2d 135 (1982)).
requirement in nonmedia cases,227 not even acknowledging that Dun & Bradstreet had changed the rules.228

If Arkansas takes the clear step of imposing strict liability on defendants who defame private figures with regard to matters of no public concern, the scope of the public concern element will become quite significant. As noted earlier, the Dun & Bradstreet public concern element departs from both Rosenbloom’s “general or public interest” test, and the “public controversy” prong of the Gertz public figure analysis.229 In fact, the Dun & Bradstreet element is probably narrower than either. Nevertheless, Arkansas’s interpretation of those earlier standards may be relevant to the Arkansas Supreme Court’s future determination of the scope of the Dun & Bradstreet test. The only Arkansas case interpreting the Rosenbloom criterion found that it encompassed a faculty dispute at a state university.230 The legal commentary on the Gertz public controversy element is not much more extensive.231 The Arkansas Supreme Court has determined that a suspended attorney’s compliance with the mandate of a sanctioning court was not a public controversy.232 However, a federal district court found that the FBI’s investigation and alleged infiltra-

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227. See supra notes 224-25.

228. However, in his concurrence in Drew v. KATV-Television, Inc., 293 Ark. 555, 739 S.W.2d 680 (1987), Justice Purtle cited Dun & Bradstreet for the proposition that “a media defendant stands in no better position than any other defendant in a defamation action.” Id. at 558, 739 S.W.2d at 682 (Purtle, J., concurring). Apparently, then, Justice Purtle recognizes that Dun & Bradstreet obliterated the media/nonmedia distinction.

229. See supra note 149 and accompanying text.

230. Gallman v. Carnes, 254 Ark. 987, 991, 497 S.W.2d 47, 50 (1973) (citing Rosenbloom and Sanders v. Harris, 213 Va. 369, 192 S.E.2d 754 (1972) (finding same as Gallman on similar facts, relying upon Rosenbloom)). Note that in KARK-TV v. Simon, 280 Ark. 228, 656 S.W.2d 702 (1983); Justice Dudley, in a concurring opinion, denied that Arkansas had ever embraced the Rosenbloom philosophy. Id. at 237, 656 S.W.2d at 707 (Dudley, J., concurring) (citing Jones v. Commercial Printing, Co., 249 Ark. 952, 463 S.W.2d 92 (1971)). Rather, Justice Dudley opined that Gallman had followed Rosenbloom only as a “federal dictate[].” Id.

231. See also State Press Co. v. Willett, 219 Ark. 850, 245 S.W.2d 403 (1952). In the context of the fair comment privilege, (see infra notes 530-35 and accompanying text), a decade before the constitutional era of defamation law, the Arkansas Supreme Court referred to a newspaper’s comments about the treatment of a congregation by its pastor as a “matter of public concern.” 219 Ark. at 853, 245 S.W.2d at 405.

tion of an antiwar organization was a public controversy.\textsuperscript{233}

In light of its veiled response to the question left open by \textit{Gertz} fifteen years ago,\textsuperscript{234} it seems likely that the Arkansas Supreme Court eventually may take the opportunity to re-
claim whatever authority is given it to set fault standards in defamation cases. The court's track record portends a likely reversion to strict liability in private plaintiff cases where no matter of public concern is involved. However, before Arkan-
sas takes such a step, the court should carefully consider the alternatives and their underlying policies.\textsuperscript{235} The Arkansas Supreme Court should be mindful of the proper balance struck by a negligence standard in private plaintiff cases—
even those involving no matter of public concern where \textit{Dun & Bradstreet} has arguably given the states an option. Arkansas's history of cases applying the negligence standard has proven that the standard is hardly an insurmountable burden for the defamation plaintiff.\textsuperscript{236} It strikes a favorable balance, and accordingly, it should be retained.

4. The Standard of Fault

As noted earlier, in addition to significance of the plaintiff classifications and the nature of the speech, the doctrines of the constitutional era of libel law are given meaning by the interpretation of the fault standards. In Arkansas, these standards are actual malice and negligence.

a. The Meaning of Actual Malice

\textit{New York Times Co. v. Sullivan}\textsuperscript{237} defined actual malice as publishing "with knowledge [the statement] was false or with reckless disregard of whether it was false or not."\textsuperscript{238} Fur-

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\textsuperscript{234} See supra notes 172-78 and accompanying text.
\textsuperscript{235} See generally Shiffrin, First Amendment Methodology, supra note 206, at 930-
35; Smolla, New Analytic Primer, supra note 9, at 1545-61; Watkins & Schwartz, Gertz
and the Common Law, supra note 206, at 849-55.
\textsuperscript{236} See infra notes 272-86 and accompanying text.
\textsuperscript{237} 376 U.S. 254 (1964).
\textsuperscript{238} Id. at 279-80. In applying the standard to the facts of \textit{New York Times}, the
Court found it insufficient to establish such malice that the newspaper failed to check
the objectionable ad against its own records. \textit{Id.} at 287.
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thermore, *New York Times* mandated that such actual malice had to be established with convincing clarity.239 Later the same year, in *Garrison v. Louisiana*,240 the Court elaborated on the standard when it invalidated a Louisiana criminal libel statute in which the mens rea requirement fell constitutionally short of actual malice. The Court articulated the standard as making a communication with "a high degree of awareness of [its] probable falsity."241

The 1968 decision in *St. Amant v. Thompson*242 remains the most frequently cited case defining the constitutional actual malice standard. *St. Amant* rejected any comparison to negligence-type "reasonably prudent man standard," stating that, instead, the standard was a subjective one.243 "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."244 Conceding that the standard tended to encourage feigned ignorance by the journalist who was not encouraged to inquire, the Court nevertheless viewed the standard's limitation on recovery as consonant with the *New York Times* goal of preventing self-censorship. Additionally, the Court added the caveat that mere "[p]rofessions of good faith" would not convince a court where objective evidence indicated that fabricated or wholly unverified information formed the basis of the report.245

The Supreme Court and lower courts have continued to focus upon the subjectivity element of the *St. Amant* explication, as well as upon the virtual necessity of objective evidence to prove such a state of mind.246 In reality, a court "typically will infer actual malice from objective facts" which are

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241. *Id.* at 74.
243. *Id.* at 731.
244. *Id.*
245. *Id.* at 732.
246. In the most recent Supreme Court installments on the matter, *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984), and *Herbert v. Lando*, 441 U.S. 153 (1979), the Court reiterated the subjective nature of the standard. For a comprehensive discussion of the development of the actual malice standard since *St. Amant*,
presented as evidence in a given case. As a result, both subjective circumstances and objective facts are utilized in determining actual malice.

Actual malice has never been found in any Arkansas case. In fact, the question of its existence has never even gone to a jury. All such cases have been settled on defendants' summary judgment motions. Some cases have considered carefully the evidence presented, while others have summarily concluded that the evidence was simply insufficient. One case in which the "reckless disregard" standard was discussed indicates a strong tolerance for failure to investigate. In Gallman v. Carnes evidence indicated that the defendant Gazette's state editor had come into possession of reports from the Faculty Tenure and Promotion Committee of the University of Arkansas School of Law. The reports were apparently very critical of James Gallman, a professor and assistant dean at the school. Although the editor had no knowledge of the falsity of any of the documents, he testified that he was aware of accusations that some of the statements made in the reports were false and that the committee had been referred to as a "lynch mob and pack of wolves out to castrate" the plaintiff. He also admitted that he knew the reports were "emotionally tinged" and that the persons involved 'were at each other's throats, tooth and toenail.'

The editor assigned a reporter, who also knew of the

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252. See supra note 180 (also discussing the Gallman facts).

253. Id. at 992, 497 S.W.2d at 50 (apparently quoting the editor's testimony).
highly emotional nature of the committee reports, to write a story about them. The reporter testified in her deposition that she had been instructed by the editor to discern the truth or falsity of the documents. She interviewed the dean of the law school, the president of the university, and several members of the tenure committee. 254 Apparently, the only comment which might have put her on notice as to their falsity was the university president's comment that he had been misquoted. However, the opinion does not report whether the misquote was one material or relevant to the objectionable statements about the plaintiff, assistant dean. In spite of all these items which might have raised a red flag with regard to the accuracy of the report, the Arkansas Supreme Court focused on the sworn statements of both the reporter and the editor stating that neither had actual knowledge of any falsity. 255 The court summarized by noting that the reporter had "met the required investigatory standards as prescribed by the controlling decisions interpreting the First Amendment," and therefore the reporter's failure to investigate did not establish actual malice. 256

In light of the indicia of falsity surrounding the documents, the Gallman court seemed quite tolerant of the reporter's failure to investigate further. Ignoring such indicia arguably constituted reckless disregard for the truth, if not knowing falsity. 257 Although the presence of such doubt-provoking information would, at the very least, seem to preclude the granting of a summary judgment motion, the fact that actual malice must be proven with clear and convincing evi-

254. The reporter also attempted to interview the vice president of the university and the plaintiff, but she was unable to reach either. Id. at 993, 497 S.W.2d at 50.

255. Id. In discussing the editor's sworn affidavit, the court used the phrase "actual knowledge of any falsity ... of the documents" whereas in discussing the reporter's affidavit, the court used the language "never had any knowledge of the falsity of any statement made in the news article." Id. (emphasis added).

256. Id. at 994, 497 S.W.2d at 51 (citing St. Amant). Interestingly, the court mentioned only the reporter's conduct and in its conclusion ignored that of the editor. Id.

257. Cf. Cunningham v. Skaggs Companies, Inc., 729 F.2d 1156, 1158 (8th Cir. 1984) (applying Arkansas law) (equating ill-will malice with "actual malice" and defining the two terms to include "reckless disregard of the rights of another; court then noted that "insufficient investigation of the facts underlying the defamatory statement, failure to confront the defamed party with the charges prior to publication, and past similar reckless statements" were probative of such recklessness).
dence may have prevented the plaintiff from getting to the jury, even with such damaging information. After all, it is difficult to imagine that neither the reporter nor the editor entertained the St. Amant-type of "serious doubt."

A second particularly interesting case on Arkansas's application of the actual malice standard is Saxton v. Arkansas Gazette Co. The case is unique in Arkansas because it also involved the issue of the reporter's requirement to disclose her sources. Disclosure is relevant to an actual malice determination because of the related issue of those sources' reliability. The reporter had been sent an anonymous tip alleging that the plaintiff, executive director of a state commission, had falsified the minutes of a commission meeting. After the reporter's investigation, the details of which are not disclosed in the opinion, she published a series of articles alleging the falsification. In upholding the trial court's summary judgment for the defendant, the Arkansas Supreme Court noted that even the plaintiff admitted that he could "only suppose" malice, and that the reporter might have thought her article was correct. The defendant reporter also testified that she believed the contents of her article were true.

One consideration in evaluating the defendant's conduct in a number of media cases has been the reliability of the journalist's source. The lack of finding of actual malice in Saxton may have been because, although the reporter's investigation followed an anonymous tip, it was not based solely upon it. In any event, the court never discussed the original source as relevant to the actual malice determination.

258. 264 Ark. 133, 569 S.W.2d 115 (1978).
260. Saxton, 264 Ark. at 138-39, 569 S.W.2d at 118.
261. Id. at 139, 569 S.W.2d at 118.
b. The Difference Between Actual Malice and Common Law Malice

Although I joined the Court's opinion in *New York Times*, I have come greatly to regret the use in that opinion of the phrase "actual malice." For the fact of the matter is that "malice" as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood. In common understanding, malice means ill will or hostility [but *New York Times* actual malice] has nothing to do with hostility or ill will.263

As Justice Stewart's statement in a 1979 defamation case indicates, one problem which has arisen in applying the constitutional actual malice standard is confusion between the constitutional term of art considering whether the defendant suspected the story's falsity, and the ill-will malice standard, a common law term used to describe the defendant's personal feelings toward the plaintiff.264 While ill will, hatred, or spite will not, in and of itself, establish the constitutional actual malice standard, there is a relationship between the two concepts. Although ill will is not an element of the actual malice term of art, evidence of such ill will is clearly admissible to determine "whether [the] defendant possessed a state of mind highly conducive to reckless disregard of falsity."265

Arkansas is among the jurisdictions which have had difficulty putting the ill-will malice standard to rest. As a result, Arkansas case law is frequently confusing.266 Although several Arkansas decisions evince a clear understanding of the constitutional actual malice standard,267 the ill-will language

264. This ill-will malice standard was important at common law, as it described the mental state which had to be established for defendant's loss of a common law privilege. *See infra* notes 481-500 and accompanying text (discussing the interplay between the fault standards associated with common law privileges and their constitutionality as determined by *New York Times* and its progeny).
continues to be used in some Gertz-controlled defamation cases. However, the common law standard is not used to assess the defendant's behavior under the basic fault requirement. Rather, it is utilized as the standard which (1) justifies an award of punitive damages,268 or (2) causes loss of a common law privilege.269 Judicial recognition of these categories of cases where the distinct ill-will malice standard is properly applied is important to avoid confusion between it and the constitutional standard which, by contrast, is not controlled by the defendant's subjective bad feelings toward, dislike or hatred of, or desire to harm the plaintiff.

While the Arkansas courts have done an admirable job of distinguishing the two malice standards and of applying the appropriate one, some ambiguous cases270 illustrate the desirability of a single actual malice standard. This standard would be applicable to all elements which discern the defendant's standard of care with regard to both the subject matter of what is being communicated and the individual subject of that communication.271 Of course, the meaning of that standard would necessarily be that of the constitutional term of art first enunciated in New York Times.

c. The Meaning of Negligence

With the Gertz decision in 1974 and the ensuing state decisions adopting various standards of care for private plaintiff libel suits, the common law's reasonable person entered the

S.W.2d 877 (1983) (summarizing that the plaintiff's claims about the defendant's sources were of "questionable relevancy" in terms of credibility, but were "not of the magnitude of 'serious doubt.' And if only some doubt is raised, failure to investigate will not establish bad faith.") (citing Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968)); Lancaster v. Daily Banner-News Publishing Co., 274 Ark. 145, 622 S.W.2d 671 (1981) (emphasizing that "actual malice is more than a negligent act" and that "ill will is irrelevant when the constitutional standards are applied") (citing St. Amant v. Thompson, 390 U.S. 727 (1968); Garrison v. Louisiana, 379 U.S. 64 (1964)).

268. See infra notes 381-94 and accompanying text.
269. See, e.g., Luster v. Retail Credit Co., 575 F.2d 609, 618-19 (8th Cir. 1978) (applying Arkansas law); McClain v. Anderson, 246 Ark. 638, 439 S.W.2d 296 (1969). For a complete discussion of Arkansas's common law privileges and the mental states which caused them to be lost, see infra notes 481-504 and accompanying text.
270. See infra notes 391-94 and accompanying text.
271. For a thorough discussion of this issue and a cogent argument advocating a single actual malice standard, see Smolla, Evolving Doctrines, supra note 10, at 54-55.
realm of defamation law. As noted earlier, Arkansas, in *Dodrill I*, joined the majority of states in adopting simple negligence as the standard of care for which a defendant in a private plaintiff suit would be held liable.\textsuperscript{272} Subsequent cases clarified that negligence need be proven only by a preponderance of the evidence.\textsuperscript{273} Clear and convincing evidence is required only when establishing actual malice.\textsuperscript{274}

The question remained, however, whether negligence referred to the true ordinary, reasonable man standard\textsuperscript{275} or the reasonable professional journalist standard. Despite the apt comparison to other professionals, the *Restatement (Second)*'s adoption of such a professionally relative standard,\textsuperscript{276} and Supreme Court intonations favoring such a professional standard,\textsuperscript{277} Arkansas joined a minority of states which have opted for the ordinary, reasonable man standard.\textsuperscript{278} Relying upon *Dodrill I*'s earlier adoption of the negligence standard in private plaintiff suits, in *KARK-TV v. Simon*\textsuperscript{279} the Arkansas Supreme Court in 1983 approved the trial court's jury instruction on an ordinary negligence standard. However, the court also implicitly sanctioned the jury's consideration of evidence about a professional journalist's task—the time constraints and other exigencies.

The court instructed the jury here that the defendant was held to the standard of care a reasonably careful person would exercise under circumstances similar to those shown by the evidence. Nothing suggests that the defendant was prevented from showing what the standard in the industry is and such proof would be evidence the

\textsuperscript{272} 265 Ark. 628, 590 S.W.2d 840 (1979).
\textsuperscript{273} See, e.g., *Dodrill II, KARK-TV*.
\textsuperscript{274} See authorities cited at supra note 239.
\textsuperscript{275} See generally PROSSER AND KEETON, supra note 14, at § 32.
\textsuperscript{276} *Restatement (Second)*, supra note 15, at § 580B comment g.
\textsuperscript{277} The Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), said that states could not, in establishing the liability standard for private plaintiff cases, purport to "condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." *Id.* at 348 (emphasis added). Similarly, in Associated Press v. Walker, 388 U.S. 130 (1967), the Court, in finding the defendant not negligent, focused upon the "necessity for rapid dissemination" and noted that "nothing in [the] series of events [have] the slightest hint of a severe departure from accepted publishing standards." *Id.* at 159.
\textsuperscript{278} See SMOLLA, supra note 13, at § 3.26.
\textsuperscript{279} 280 Ark. 228, 656 S.W.2d 701 (1983), noted in 38 ARK. L. REV. 181 (1984).
jury could use in making their determination of whether there was a breach of the duty owed. 280

Additionally, in what represents a severe blow to Arkansas media defendants, the KARK-TV court failed to find the defendant broadcast station not negligent as a matter of law. 281 "KARK based its report on eyewitness observations of an experienced reporter and footage filmed by a camera crew. The reporter and producer attempted to obtain further details from the police, who refused comment, and the incident was a 'breaking news' story that occurred 'on deadline.'" 282 However, the court, after acknowledging the reporter's and broadcaster's time constraints, nevertheless said the issue of negligence was properly submitted to the jury. 283

Other Arkansas private plaintiffs, under a burden to show a media defendant's negligence, have similarly demon-


281. See supra notes 89-90, infra notes 335-38, 516-21 and accompanying text (discussing the facts of KARK-TV).

282. See Note, Fair Report, supra note 10, at 197.

283. KARK-TV, 280 Ark. at 232, 656 S.W.2d at 704. Although application of the professional standard is generally considered beneficial to journalists because it considers the deadline and other pressures attendant the job, see generally Note, Fair Report, supra note 10, at 197-99; Smolla, supra note 13, at § 8.10, Justice Dudley in his KARK-TV concurrence viewed it as detrimental to their interests. Justice Dudley, perhaps attempting to compensate for the majority opinion's lack of rationale, argued in a detailed discussion that application of an ordinary, reasonable man standard—as opposed to a professional journalist standard—creates more certainty for the journalist and therefore less self-censorship by the press. KARK-TV, 280 Ark. at 240, 656 S.W.2d at 708 (Dudley, J., concurring). He speculated about the unfortunate possibility of different standards for broadcast entities, newspapers, and the ordinary individual, stating that such a variety of standards was inconsistent with the section of the Arkansas Constitution providing that persons who freely write and publish their sentiments are responsible when they abuse the right. Justice Dudley also noted possible problems with differing standards in different parts of the state, again creating inconsistencies under one constitutional provision. Id. at 239, 656 S.W.2d at 708 (quoting Ark. CONST. art. II, § 6, quoted in full at supra note 4). The concurrence concluded with a proposal that, in determining the negligence of the journalist, the jury should be allowed to consider only that information which was available to the journalist when the communication was prepared. Id. at 241, 656 S.W.2d at 709 (quoting Roth, In Defense of Fault in Defamation Law, 88 YALE L.J. 1735, 1747-49 (1978)).
strated a greater ability to reach the jury on the fault issue—particularly compared to those public plaintiffs attempting to establish actual malice. These private plaintiffs have also been able to persuade those juries of a media defendant’s negligence. Of course, such Arkansas jury decisions represent no precedent, whereas other jurisdictions have been slightly more willing to deem certain types of behavior negligent as a matter of law, allowing for the greater possibility of summary judgment for the defendant. Among the actions which have insulated the media from liability for negligence are reliance on an official source and the drawing of reasonable inferences from undisputed facts. On the other hand, several jurisdictions have concluded that it is negligent as a matter of law for a journalist or publisher not to investigate further when a reasonable person would have done so. Finally, when a journalist’s or publisher’s behavior is not assessed as a matter of law, these factors and others—including reliance on unofficial sources, negligence in taking notes, deadline considerations and time constraints, and compliance with self-imposed internal policies and procedures—are considered by the

284. See Dodrill II, 281 Ark. 25, 660 S.W.2d 933 (1983). Louis Dodrill’s victory before the jury in Dodrill II proved a hollow one as the Arkansas Supreme Court reversed the jury’s award of $40,000 compensatory damages, and remanded for a third trial. The damages award represented compensation solely for Dodrill’s mental suffering, but without reputational injury underlying that award, the court held that it could not stand. Id. at 32, 660 S.W.2d at 937.

Of course, private plaintiffs faced with proving such negligence have almost exclusively sued media defendants. As noted earlier, Arkansas courts have ignored the Geriz mandate in cases involving nonmedia defendants, instead apparently reverting to the common law rules and imposing strict liability in those cases. See supra notes 222-25 and accompanying text. However, a federal district court which applied Arkansas law in a diversity case, Thornton v. Equifax, Inc., 467 F. Supp. 1008 (E.D. Ark. 1979), appeared to impose a negligence standard against a nonmedia defendant. Although Thornton was complicated by the duality of the counts in that case, one under Arkansas libel law and other under the Fair Credit Reporting Act, 15 U.S.C.A. §§ 1681-1681t (1970), the court noted the evidence of “lack of investigative controls, reliance on superficial assertions, and publication” in upholding the jury verdict of liability. Thornton, 467 F. Supp. at 1010. The court gave no further details of what the nonmedia defendant had done, or failed to do, to provoke the verdict.


jury in its judgment on the defendant’s behavior.\footnote{288}

E. Falsity

In the very early days of criminal defamation law, the maxim “the greater the truth, the greater the libel” prevailed.\footnote{289} However, in tort law, truth has been almost universally accepted as a defense to libel and slander.\footnote{290} While tort law has been more steadfast as to the importance of truth or falsity of a communication,\footnote{291} the burden of proof with regard to this element, a very important practical consideration, has

\footnote{288. See Smolla, supra note 13, at §§ 3.28–35 (collecting cases).
289. Eldredge, supra note 25, at 324 (attributing the saying to Lord Mansfield). The rationale for the rule was apparently that the publication of a truthful statement was more likely to provoke the defamed person to breach the peace. Id. at 325. For a concise discussion of the early history of the relevance and role of truth in defamation law, see Eldredge, supra note 25, at §§ 64–66.
291. But see Roberts v. Love, 231 Ark. 886, 333 S.W.2d 897, cert. denied, 364 U.S. 825 (1960). In Roberts the Arkansas Supreme Court, discussing the relevance of the truth element wrote:

[T]hough the factual report appearing in the article was admittedly true (except that the [plaintiff] alleged the term "legal technicality" to be false), our conclusions [of no defamation] are not based upon that premise, for we do not say unequivocally or dogmatically that one can never be libeled by a statement, even though true. Rather, we determine this litigation on the basis of the fact that when this article is construed as a whole, considering the words in their plain and natural meaning, according to the sense in which they appear to have been used, and the ideas such words would convey to those who read them—the article is not libelous. Id. at 895–96, 333 S.W.2d at 902–03.

As discussed previously, see supra notes 65–71 and accompanying text, Roberts was a case of alleged defamation by innuendo. The lawyer plaintiff sued the newspaper which reported that he had his client sent to the state mental hospital on a "legal technicality." The plaintiff complained that the communication implied chicanery. However, in discussing the bottom-line issue of liability, the court’s dicta attempted to clarify that just because the communication was true (with the court’s noted possible exception of the "legal technicality" language) the plaintiff’s case did not fail on that basis. Rather, his case failed because he did not establish the defamatory meaning element; the article was not "susceptible of a defamatory meaning." Id. at 896, 333 S.W.2d at 903.

It seems that the court’s point may be one unique to defamation by innuendo cases. This is because such statements, reliant upon extrinsic evidence to establish their defamatory character, see supra note 63 and accompanying text, may be not only facially innocuous, but may also be true.}
gradually shifted in recent years, finally taking on constitutional dimensions.

1. The Plaintiff's Burden of Proof

Several Supreme Court cases since and including New York Times Co. v. Sullivan foretold constitutional implications of the burden of proof allocation in defamation cases. The 1986 Supreme Court decision in Philadelphia Newspapers, Inc. v. Hepps finally confirmed that the plaintiff carries the burden of proof in establishing the falsity of an allegedly defamatory statement. In doing so, Hepps altered the traditional common law rule, formerly followed in Arkansas, which had considered truth an affirmative defense to be proven by the defendant. The Hepps holding was a narrow one, limited to communications of public concern, made by media defendants about private plaintiffs. Hepps therefore implicitly left open questions regarding cases that involve other combinations of plaintiff classifications, defendant classifications, and communication subjects. Nevertheless, the Hepps holding was significant because of the onerous nature of the burden of proof on this element. Essentially, when the evidence reveals a tie on the truth/falsity issue, the defendant must win.

No Arkansas case has discussed Hepps or attempted to settle the remaining burden-of-proof issues which it left. Nevertheless, as a constitutional mandate, the Hepps burden-of-proof shift adds yet another element to the Arkansas plaintiff's prima facie case.

293. See Eldredge, supra note 25, at § 63; Sanford, supra note 62, at § 6.3.2; Smolla, supra note 13, at § 5.02-.04.
296. See, e.g., Prosser and Keeton, supra note 14, § 116, at 839; Sack, supra note 35, at III.3.1; Sanford, supra note 62, at § 6.3.1; Smolla, supra note 13, at § 5.01.
298. For a thorough discussion of the questions left open by Hepps, see Smolla, New Analytic Primer, supra note 9, at 1525-29.
2. The Meaning of “Truth”

While truth seems to be a simple enough concept, the courts have injected some degree of complexity into even this element of the defamation cause of action.\textsuperscript{299} Of particular importance is the substantial truth theory, one which serves to protect defendants from inconsequential errors. The doctrine of substantial truth is an important corollary to the truth/falsity element in defamation law, and it is one which arises with some frequency. The essence of the doctrine is that minor or slight inaccuracies are tolerated so long as the “gist” or “sting” of the communication is true.\textsuperscript{300}

Several cases have discussed the substantial truth doctrine,\textsuperscript{301} but the best Arkansas illustration of it is \textit{Pritchard v.}...

\textsuperscript{299} For example, Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 345 S.W.2d 34 (1961), illustrates the “non-literal” meaning of truth. In \textit{Robinson} the defendant credit-reporting agency distributed a report stating: “It is currently reported [Joe Robinson/plaintiff] discontinued operations.” \textit{Id.} at 170, 345 S.W.2d at 35. In fact, the plaintiff was still in business, and he brought a defamation suit based on the report. Dun & Bradstreet defended by arguing that the company had indeed received such a report of cessation of business operations; thus, the report was true. The Arkansas court’s response illustrates well the non-literal meaning of truth in relation to defamation law. See Eldredge, supra note 25, at § 44, at 233; cases cited at Smolla, supra note 13, at 5-17 n.93. The court noted that truth as a defense referred to the accuracy of the \textit{substance} of the report, and that the fact such a report had been made was no defense. In quoting the Restatement, the court lapsed into the related realm of republication.

When one person repeats a defamatory statement which he attributes to some other person, it is not enough for the person who repeats it to prove that the statement was made by the other person. [The defendant] must prove the truth of the defamatory charges which he has thus repeated. \textit{Robinson}, 233 Ark. at 173, 345 S.W.2d at 37 (quoting \textit{RESTATEMENT OF TORTS} § 582(d)). As the court noted, such a rule is demanded by plain logic. And, the rule is related, particularly with regard to media defendants, to the so-called “fair report” privilege, see infra notes 306-27 and accompanying text, a defense which in some instances mitigates the operation of the rule enunciated in \textit{Dun & Bradstreet, Inc. v. Robinson}.

\textsuperscript{300} Pritchard v. Times Southwest Broadcasting, Inc., 277 Ark. 458, 463, 642 S.W.2d 877, 879 (1982) (citing \textit{W. Prosser, HANDBOOK OF THE LAW OF TORTS} 798-99 (4th ed. 1971)). See also Eldredge, supra note 25, at § 71; \textit{Sanford, supra} note 62, at § 6.4.1; \textit{Smolla, supra} note 13, at § 5.08.

\textsuperscript{301} See, e.g., Dun & Bradstreet, Inc. v. Nicklaus, 340 F.2d 882, 885 (8th Cir. 1965). The case of \textit{KARK-TV v.} Simon, 280 Ark. 228, 656 S.W.2d 702 (1983), discussed the related doctrine of substantial accuracy, a component of the fair report defense. However, because of \textit{KARK-TV}’s reliance upon the test of Pritchard \textit{v.} Times Southwest Broadcasting, 277 Ark. 458, 642 S.W.2d 877 (1982), a case clearly discussing and applying the “substantial truth” doctrine, and because \textit{KARK-TV} used the “substantial truth” and “substantial accuracy” terms interchangeably, discussion of \textit{KARK-TV} is appropriate here. In \textit{KARK-TV} the plaintiffs sued a Little Rock television station...
Times Southwest Broadcasting, Inc. 302 Pritchard involved a statement about a sheriff, the defamation plaintiff, who allegedly hit a citizen, one of the defamation defendants, in the head with his pistol. 303 However, that particular statement was made in the context of a communication describing an argument and generally violent exchange between the two men. The plaintiff sheriff did not dispute the fact that he had fought physically with the defendant, but he maintained that he had not hit the defendant in the head with a gun. The court, in determining substantial truth, wrote: "the substance of the story is corroborated by the [plaintiff sheriff] himself and represents admitted misconduct on his part. Whether or not the [plaintiff sheriff’s] pistol actually came in contact with [the defendant’s] head, does not alter the gist or the sting of the statements." 304 Thus, the substantial truth defense prevailed.

In those cases governed by the Hepps mandate, 305 the burden of proof on substantial truth (or what more aptly would be called substantial falsity) rests with the plaintiff. 306 This is to say, while the defendant may present evidence that the allegedly defamatory statement was substantially true, the plaintiff must then rebut that evidence and meet the ultimate burden of persuasion on the issue.

F. Damages

Like the element of fault, the rules regarding damages in defamation law have undergone continual change in the past

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303. Id. at 656 S.W.2d at 703.
304. Id. at 656 S.W.2d at 703.
305. See supra note 294-98 and accompanying text.
306. See generally Smolla, New Analytic Primer, supra note 9, at 1525-31.
two and half decades. From *New York Times* to *Dun & Bradstreet*, the fault requirements and burdens of proof for both compensatory and punitive damages have been altered. Yet, as with fault, a number of constitutional questions remain unanswered.307

1. The Categories of Damages and Their Accompanying Constitutional Rules

In sorting through the constitutional principles applicable to the law of damages, it is best first to understand the various categories of damages, some of which are unique to defamation law if not in name, in application. Furthermore, while courts frequently indiscriminately use the terms, it is important that damages be classified with a reasonable degree of precision and accuracy.

a. Nominal Damages

At the very minimum, a successful defamation plaintiff is entitled to nominal damages, either because they are all he seeks or because they are all a jury deems him to deserve. The *Restatement (Second)* notes that a jury usually makes such a nominal award based upon “the insignificant character of the defamatory matter,” “the plaintiff’s bad character,” or the lack of “substantial” or “serious” harm.308 By and large nominal damages, because they are more closely akin to a declaratory judgment than to true damages, are not subject to the constitutional mandates applicable to other classifications of damage awards.309

Although nominal damages occasionally have been awarded in Arkansas defamation suits,310 there is little state law which sets forth legal principles with regard to this type of award. Essentially, the Arkansas Supreme Court has held only that failure to award even nominal damages in the face of

307. See *SMOLLA*, *supra* note 13, at § 9.09 (summarizing and discussing the likely answers to some of these questions).
309. See *ELDREDGE*, *supra* note 25, at § 95(b) (discussing constitutional implications attendant nominal damages); *SMOLLA*, *supra* note 13, at § 9.02[2] (same).
310. See, e.g., *Armitage v. Morris*, 215 Ark. 383, 221 S.W.2d 9 (1949) (nominal damages only appropriate award where plaintiff attorney could not show alleged libel injured his reputation).
a finding of liability is not reversible error\textsuperscript{311}

\textbf{b. Compensatory Damages}

"Compensatory damages" is the broad label given to several subcategories of damages, all of which seek simply to compensate the plaintiff, as opposed to punitive damages which punish the defendant.\textsuperscript{312} Each of the subcategories and its accompanying constitutional requirements are discussed below, along with Arkansas cases in which awards of these damages have been upheld.

\textbf{i. General Damages}

In other areas of the law, the term general damages, as distinct from "special" or "consequential" damages, refers to some specific pecuniary loss measured in terms of value. Moreover, general damages usually flow from the substantive wrong done by the defendant.\textsuperscript{313} In the law of defamation, however, the term takes on a slightly different meaning. It refers to a more abstract harm to reputation, one compensable even absent actual proven pecuniary loss.\textsuperscript{314} In fact, general damages in defamation law may be said to include all compensatory damages \textit{except} pecuniary losses, which are categorized as special damages.\textsuperscript{315} The purpose of general damages is to provide compensation for the harm done to personal dignity and reputation, and the rules regarding this category recognize the intangible nature of that harm. Within the subcategory of general damages are actual and presumed damages. Each type is affected to varying degrees by constitutional principles. Because of the preferability of the more specific labels, Arkansas case law has for the most part abandoned the terms "general" and "compensatory," opting instead for the constitutionally generated terms "actual" and "presumed."\textsuperscript{316}

\textsuperscript{311} Reese v. Haywood, 235 Ark. 442, 444, 360 S.W.2d 488, 490 (1962) (citing Wells v. Adams, 232 Ark. 873, 340 S.W.2d 572 (1960)).

\textsuperscript{312} See \textit{generally} RESTATEMENT (SECOND), \textit{supra} note 15, at §§ 621-22 & comments; SMOLLA, \textit{supra} note 13, at § 9.03 – 07.

\textsuperscript{313} See D. DOBBS, \textit{HANDBOOK ON THE LAW OF REMEDIES} § 3.2 (1973) [herein-after DOBBS].

\textsuperscript{314} \textit{Id.} § 7.2, at 513.

\textsuperscript{315} See SMOLLA, \textit{supra} note 13, at § 9.04[1].

\textsuperscript{316} See, \textit{e.g.} KARK-TV v. Simon, 280 Ark. 228, 656 S.W.2d 702 (1983); Little
(A) Presumed Damages

Presumed damages represent an arcane oddity of defamation law. Premised on the basic assumption that every plaintiff has a good reputation, these damages represented compensation for the presumed harm resulting from the very fact of a defamatory publication. Essentially, the jurors were left to arbitrarily assign a dollar amount to the reputational harm that they perceived that the plaintiff had suffered. Before the constitutionalization of defamation law, numerous cases awarded presumed damages, because they were available on a simple showing of liability for defamation per se.

Like a number of other common law standards, however, the availability of presumed damages has been profoundly affected by constitutional principles. Under Gertz, actual malice is a prerequisite for presumed damages. Thus, a public plaintiff can recover presumed damages if he or she makes the necessary showing to establish liability. Private plaintiffs who need only prove negligence to hold the defendant liable must meet the more stringent actual malice standard in order to obtain presumed damages. If, however, the defamatory


317. See SMOLLA, supra note 13, at § 9.05[1] (citing McCormick, The Measure of Damages for Defamation, 12 N.C.L. REV. 120, 127 (1934)).

318. See, e.g., Braman v. Walthall, 251 Ark. 582, 590, 225 S.W.2d 342 (1949) (where words are actionable per se, law implies malice and jury can award only compensatory damages); Barnett v. McClain, 133 Ark. 325, 240 S.W. 415 (1922) (slander per se entitles plaintiff to substantial compensatory damages, even absent evidence of actual harm); Taylor v. Gumpert, 96 Ark. 354, 131 S.W. 968 (1910) (substantial compensatory damages allowed as a matter of law for slander per se; evidence of actual damages not required); cf. Armitage v. Morris, 215 Ark. 383, 221 S.W.2d 9 (1949) (evidence of actual damage to attorney’s reputation required for anything more than nominal damages).

319. See SMOLLA, supra note 13, at § 9.05[2][a].

320. See supra notes 142-43, 272-73 and accompanying text (discussing Arkansas’s adoption of the negligence standard in private-plaintiff suits). It should be noted on this point that if a state requires even private plaintiffs to meet an actual malice standard of proof, see SMOLLA, supra note 13, at § 3.11 (collecting cases), those private plaintiffs, like public figures and public officials, are also eligible to recover presumed damages. By the same token, if a private figure plaintiff in Arkansas goes above and beyond the negligence standard and in fact establishes actual malice, he, too, can recover punitive
statement about the private plaintiff does not involve a matter of public concern, presumed damages are available under the rule of *Dun & Bradstreet*. Because no Arkansas plaintiff, public or private, has ever crossed the actual malice threshold, presumed damages have never been awarded in a constitutional era defamation suit in the state.

Even after the advent of the constitutional era of defamation law, presumed damages have continued to be awarded in those cases which Arkansas law apparently perceived as exempt from the constitutional mandates of *Gertz*. These are per se-type cases such as *Partin v. Meyer*, where the court upheld a jury instruction stating, in part: "In such [slander per se] cases, a person slandered is entitled to compensatory damages as a matter of law and such plaintiff is not required to introduce evidence of actual damages. . . ." Although the court used the "compensatory damages" label, by reference to the entitlement as a matter of law and by noting the lack of a requirement that evidence establish such damages, it is clear that the court referred to the more precise subcategory of compensatory damages known as presumed damages.

Of course, after *Dun & Bradstreet* the availability of presumed damages in Arkansas is arguably a moot point because in that case the Supreme Court obliterated the media/nonmedia distinction. On the other hand, *Dun & Bradstreet*
left another category exposed to the whim of the state common law: private figure cases involving no matter of public concern.\textsuperscript{325} Thus, it is quite likely that Arkansas will, for better or worse, reserve its presumed damages bonus for those particular plaintiffs.

(B) Actual Damages

"Actual damages" include two types of nonpecuniary damages, both of which must be established by evidentiary proof. One component of actual damages might be considered the constitutional counterpart of presumed damages because it is allowed in cases where presumed damages are constitutionally prohibited.\textsuperscript{326} Still, it compensates for nonpecuniary injury to reputation like presumed damages.\textsuperscript{327} A second component represents compensation for the plaintiff’s mental suffering and humiliation.\textsuperscript{328} Although the former category is subject to constitutional scrutiny, the latter is left to the discretion of the states.

(1) Reputational Injury

Actual damages for reputational harm come into play in those cases governed by the rules of \textit{Gertz}: private plaintiffs who are involved in matters of public concern.\textsuperscript{329} From these plaintiffs, \textit{Gertz} requires that compensatory damage awards "be supported by competent evidence concerning the injury," but it does not require specific evidence "assign[ing] an actual dollar value to [it]."\textsuperscript{330} Several Arkansas cases illustrate the type of evidence required.

Although the plaintiff in \textit{Dodrill II}\textsuperscript{331} was not awarded

\textsuperscript{325} See supra notes 208-10 and accompanying text.
\textsuperscript{326} See, e.g., \textit{Dodrill I}, 265 Ark. 628, 637, 590 S.W.2d 840, 844 (1979) (citing \textit{Gertz}: "recovery must be limited to actual damages").
\textsuperscript{327} See generally \textit{Smolla}, supra note 13, at § 9.06. Professor Smolla notes that "relational interests" for which the actual harm rule seeks to compensate include: (1) interference with existing relations; (2) interference with future relations; (3) destruction of favorable public image; and (4) negative public image. \textit{Id.} § 9.06[6]. See also \textit{Restatement (Second)}, supra note 15, at § 621 & comment a.
\textsuperscript{328} See generally \textit{Smolla}, supra note 13, at § 9.06[5].
\textsuperscript{329} See supra notes 205-21 and accompanying text (discussing the impact of \textit{Dun & Bradstreet} and the categories of plaintiffs to whom the \textit{Gertz} rules still apply).
\textsuperscript{331} 281 Ark. 25, 660 S.W.2d 933 (1983).
any compensatory damages, the court discussed several principles relevant to their availability. Chiefly in the context of rejecting the plaintiff’s claim for mental suffering damages, the court noted the Gertz goal: to prevent the “gratuitous awards of money damages far in excess of any actual injury.” Noting that at trial the plaintiff had introduced no evidence tending to show damage to reputation, and that there was no indication of actual malice, the Arkansas Supreme Court said that the matter should never have gone to the jury. However, because the record did not clearly indicate a lack of reputational injury, and because the rules regarding such damages had been blurred by changing Supreme Court doctrines, instead of dismissing the action, the court remanded so that the plaintiff could attempt to establish the requisite actual injury.

The case of *KARK-TV v. Simon* evinces a somewhat liberal view of the type of evidence required to establish actual injury. On the basis of testimony of viewers of the broadcast who shared their reaction to it, as well as the plaintiffs’ testimony as to their own reaction, the jury awarded each plaintiff $12,500 in compensatory damages. The defendant protested on appeal, arguing that not only was no legally compensable injury proven by such testimony, but also that the jury instructions failing to specify that damages awarded must be for actual injury constituted reversible error. The court rejected both arguments, noting that Gertz did not limit actual injury to out-of-pocket expenses but that it did require competent evidence of any actual damages. The court dismissed the inadequacy of evidence argument by noting that damages could include “impairment of reputation and standing in the community” as well as “personal humiliation and mental anguish and suffering” and that the evidence of those matters

332. See infra notes 358-66 and accompanying text (discussing this independent claim for actual damages).
333. *Dodrill II*, 281 Ark. at 31, 660 S.W.2d at 936.
334. *Id.* at 33-34, 660 S.W.2d at 937.
335. 280 Ark. 228, 656 S.W.2d 702 (1983). See supra notes 89-90, 279-83, 516-21 and accompanying text (also discussing the facts of *KARK-TV*).
336. *KARK-TV*, 280 Ark. at 230, 234, 656 S.W.2d at 703, 705. The case was reversed and remanded on other grounds.
was competent.\footnote{\textit{Id.} at 233, 656 S.W.2d at 705 (quoting \textsc{Restatement (Second) of Torts} § 621(b)) (punctuation omitted). \textit{See also} Hogue v. Ameron, Inc., 286 Ark. 481, 483, 695 S.W.2d 373, 374 (1985) (noting that plaintiff’s evidence of reputational harm, his own testimony and that of a witness that his “reputation changed for the worse at about the [relevant] time” was sufficient to get actual damages issue to the jury).} As for the jury instructions, the court said that because they clearly indicated that damages could not be presumed and further, that plaintiffs had the burden of proving such damages, they were not constitutionally infirm.\footnote{\textit{Id.} at 233, 656 S.W.2d at 705.}

Just one month after \textit{KARK-TV}, in \textit{Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc.},\footnote{\textit{Id.} at 230, 658 S.W.2d at 397 (1983).} the Arkansas Supreme Court was less flexible about the evidence required to establish compensatory damages. In \textit{Wasp Oil} third-party plaintiff Dale Braden, an attorney and the president of Arkansas Oil and Gas, sued Wasp Oil on the basis of a defamatory letter which Wasp Oil sent to the American and Arkansas Bar Associations. Wasp Oil also had recorded the letter in the public records of Yell County, Arkansas. The letter asserted that Braden had lied, stolen, and acted fraudulently in his capacity as president of his company, which was involved in an oil and gas lease dispute with Wasp Oil. The court observed, “it is obvious that one purpose of the letter was to complain about [Braden] to the professional legal associations.”\footnote{\textit{Id.} at 428, 658 S.W.2d at 401.} However, Braden did not seek damages related to reputational harm; instead, he sought loss of income damages which he asserted resulted when a third company, Texas Oil, decreased its business with him because of the letter. Although, the court recognized that the standard for exactitude with respect to proving reputational and mental anguish types of harm was relaxed in defamation suits, it maintained a higher standard for the loss of income element and said recovery was not allowable on speculative or conjectural evidence.\footnote{\textit{Id.} at 429, 658 S.W.2d at 401-02.} Because specific computations were never introduced into evidence, and because the president of Texas Oil testified that other factors prompted him to decrease business with Arkansas Oil, the court reversed the $59,500 compensatory damages award and re-
manded for additional proceedings.342

Wasp Oil was narrowly decided, and the court was sharply divided in its damages discussion. Justice Hays, writing for a three-justice dissent, disagreed about the rules regarding availability of damages. He apparently relied on the fact that Wasp Oil was a nonmedia defendant and therefore not governed by Gertz.343 Reverting back to the traditional common law terminology, the dissent took the position that because the letter was actionable per se, general damages were available and special damages need not be proven. Therefore, the compensatory damage award should have been upheld.344 Interestingly, the majority opinion never seemed to consider the implications of the nonmedia status of Wasp Oil. However, if indeed Arkansas formally did exempt nonmedia defendants from Gertz’s requirements, the dissenters’ analysis seems more nearly correct and more consistent with Arkansas precedent.

Luster v. Retail Credit Co.,345 like the Wasp Oil dissent, relied to some extent upon the per se-based general damages/special damages dichotomy. In Luster the defendant published to subscribers an erroneous credit report about the plaintiff. Although in noting that libel per se justified general damages, thus implying the significance of such a classification of the defamatory communication,346 in discussing the damages awarded, the court abandoned such terminology. In addition to $100,000 in punitive damages,347 the court upheld

342. Id. at 430-31, 658 S.W.2d at 402-03. Interestingly, the $59,500 compensatory damage award was set by a chancellor, not a jury, because the defamation action was heard as a third-party claim joined with a suit in equity brought by Wasp Oil against Arkansas Oil to quiet title on an oil lease. Id. at 425-27, 658 S.W.2d at 398-400. As the Arkansas Supreme Court noted, even with the figures available, the gross loss was only $25,943.55, far short of the chancellor’s award. Furthermore, as even Dale Braden wrote in his brief, it was not clear “how the learned chancellor arrived at the figure . . . .” Id. at 432, 658 S.W.2d at 403.

343. See supra notes 224-25 and accompanying text.


345. 575 F.2d 609 (8th Cir. 1978).

346. Id. at 616-17.

347. See infra note 396 and accompanying text (noting reversal of the Luster award of punitive damages).
$50,000 in compensatory damages, apparently including compensation for loss of credit,\textsuperscript{348} mental anguish and embarrassment,\textsuperscript{349} and injury to reputation.\textsuperscript{350}

In the 1980 case of \textit{Lile v. Matthews},\textsuperscript{351} the full Arkansas Court of Appeals reversed the compensatory damages portion of a slander case jury award which had included $14 in general damages, $30,000 in compensatory damages, and $20,000 in punitive damages. The reversal was based upon the court's perceived uncertainty as to what constituted the basis for the compensatory damages award. As Judge Newbern noted in his opinion for the majority, the plaintiff's only proof of actual damages was $12 in medical expenses. The plaintiff also introduced evidence at trial, which was declared inadmissible as hearsay on appeal, that the defamatory communication made to a potential employer had hurt her career.\textsuperscript{352}

The court did not say that it was improper for the jury to presume damages in the case, but only that, given the instructions provided, they were unsure whether the instructions had confused the jury. The instructions allowed the jury to presume damages by virtue of the statement's communication, apparently because the statement was slanderous per se. The instructions labeled such damages as "general damages."\textsuperscript{353} Another paragraph of the instructions provided that the plain-

\begin{itemize}
\item \textsuperscript{348} \textit{Luster}, 575 F.2d at 615 (acknowledging plaintiff's ability to obtain credit was seriously impaired, but noting that the proximate cause issue was for the jury to determine).
\item \textsuperscript{349} \textit{Id.} at 614 (again, the proximate cause issue is in the jury's domain).
\item \textsuperscript{350} \textit{Id.} at 615 (noting that whether defamatory statement is believed by recipients is relevant to issue of damages mitigation, but mere fact of publication injures reputation to some degree regardless of degree of belief).
\item Interestingly, the jury instruction, which was upheld by the appellate court, allowed the jury to consider the following elements of damage: (1) injury to reputation; (2) pain, suffering, mental anguish, humiliation and embarrassment; (3) value of monetary losses actually suffered; (4) injury to credit rating; and (5) value of loss of credit presently and in the future. \textit{Id.} at 614-15 n.5.
\item \textsuperscript{351} 268 Ark. 980, 598 S.W.2d 755 (Ark. App. 1980).
\item \textsuperscript{352} \textit{Id.}
\item \textsuperscript{353} \textit{Id.} at 988, 598 S.W.2d at 759. The relevant portion of the jury instruction provided: "[I]f the plaintiff has proven the foregoing element [the false statement], she is entitled to recover general damages." An amendment to the jury instruction added:
\begin{itemize}
\item By general damages, I mean that even if plaintiff proves no actual damages, she is entitled to reasonable damages if the words accuse her of a crime or are of the type likely to injure a person in a profession or trade, damage to reputation from such words is presumed.
\end{itemize}
\end{itemize}
tiff could also receive “compensatory damages” for those damages, such as embarrassment or mental anguish, which the plaintiff proved by a preponderance of the evidence.\footnote{354} In reversing the $30,000 compensatory award, the court wrote:

Given these instructions, we cannot tell if it was the duty of the jury to determine actual loss to the plaintiff as "compensatory damages" and the kind of presumed damages attendant upon loss of or injury to reputation as "general damages," or vice versa. We cannot say what the jury intended when it awarded $30,000 in "compensatory damages" and $14 as "general damages." . . .

[Although we might surmise the jurors' intent, we should not.\footnote{355}]

Clearly, the court's quarrel was not with the excessiveness of the award.\footnote{356} Instead, it was with the jury's apparent confusion over what element was represented by what label in the admittedly hopeless, confusing, and repetitive instructions. However, a two-judge dissent was willing to infer a logical result from the semantic confusion.\footnote{357} Perhaps in the final analysis, \textit{Lile} is most useful for its illustration of the confusing and overlapping nature of the various damages category labels.

(2) Emotional Distress Damages

While the actual harm contemplated by \textit{Gertz} referred to reputational harm, a separate type of harm frequently suffered

\footnotesize
\begin{itemize}
\item \textit{Id.} Thus, the instructions clarified that general damages were equivalent to presumed damages.
\item \textit{354. Id.} The relevant paragraph of the instruction provided: "[I]n addition to general damages, plaintiff is entitled to receive compensatory damages, that are proven by a preponderance of the evidence, such as embarrassment and mental anguish." \textit{Id.} An additional instruction as to punitive damages was also given, but it is, of course, irrelevant to the debate in \textit{Lile}, which was confined to the compensatory versus general damages issue.
\item \textit{355. Id.}
\item \textit{356.} In fact, the appellant/defendant had pled only general excessiveness as her objection to the trial court award. \textit{Id.} at 987, 598 S.W.2d at 759. However, obviously the court discussed much more than excessiveness in terms of errors with regard to the damages award.
\item \textit{357. Id.} at 989, 598 S.W.2d at 760. The dissent focused upon the availability of presumed damages in defamation cases, noting that "defamation [per se] need not be dependent on specific evidence of pecuniary loss." -the dissent did not address the issue of the jury’s apparent confusion as to the different elements of damages, but did note that the impropriety of the instructions had not been raised specifically on appeal. \textit{Id.} at 989-90, 598 S.W.2d at 760.
\end{itemize}
by defamation plaintiffs is emotional distress. Unlike damages for harm to reputation—harm reliant upon and seeking to measure the changing perception of others—emotional distress damages seek to compensate the defamation plaintiff for his or her own mental anguish and suffering. Accordingly, such damages logically constitute a separate element of actual damages in defamation cases. As such, this element has remained strictly controlled by state law, and it has become something of a method by which presumed damages may be won through the “back door” in cases where they are not otherwise available.

Arkansas has taken a different approach to emotional distress damages in Gertz-controlled defamation cases. In Dodrill II the Arkansas Supreme Court chose to treat a mental anguish claim as “parasitic,” that is, as available only where proof of harm to reputation has also been established. The court’s opinion focused upon the primary goal of defamation law: protection of reputation and good name. Quoting Gertz, the court wrote that allowing recovery in defamation suits “where the primary element of the cause of action is missing... substantially undercuts the impact Gertz seeks to effect.” Therefore, any attempt to maneuver an otherwise unavailable presumed damages award is

359. See generally Brill, supra note 26, § 31.10 at 482; Dobbs, supra note 313, § 7.3, at 528-31.
360. See generally Smolla, supra note 13, at § 9.06[5].
364. Id. at 28-29, 660 S.W.2d at 935; see generally Smolla, supra note 13, at § 9.06[4].
366. Id. at 31, 660 S.W.2d at 936 (acknowledging, however, that neither Gertz nor Time, Inc. v. Firestone, 424 U.S. 448 (1976), requires damage to reputation as a prerequisite to recovery for mental suffering).
thwarted by Arkansas’s mental anguish/emotional distress rule.

ii. Single Recovery Rule for Defamation/Invasion of Privacy

Because of the close relationship between the torts of defamation and the false light variety of invasion of privacy, the two causes of action are sometimes brought in response to the same objectionable communication. Due to this duality and the policy against a double recovery for one injury, the Arkansas Supreme Court has indicated, in dicta, its adoption of a single recovery rule. In Dodrill I the plaintiff lawyer sought recover for both defamation and false light invasion of privacy in response to the defendant newspaper’s report that he had failed the bar exam. Temporarily ignoring the merits of the respective tort claims, the court noted that it would allow only one recovery per communication, regardless of the theory. Although it is not a universal rule, several other states have adopted such a limitation.

c. Special Damages

As with other areas of damages law, “special damages,” as used in reference to defamation law, indicates the types of consequential damages which may be unanticipated by the defendant because they are unique to the plaintiff. However, the term special damages also carries a unique meaning with respect to defamation law—one related to the traditional defamation per se/per quod distinction. The importance of

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367. See generally PROSSER AND KEETON, supra note 14, § 117, at 864; SMOLLA, supra note 13, at § 10.02[2].
368. See generally BRILL, supra note 26, § 1-10 at 19-20; DOBBS, supra note 313, § 1.5 at 13-14.
369. 265 Ark. 628, 590 S.W.2d 840 (1979). For a full discussion of the Dodrill I facts, see supra notes 160-71 and accompanying text.
371. See generally DOBBS, supra note 313, § 3.2, at 138; § 7.2, at 520.
372. See supra notes 24-30 and accompanying text (discussing the traditional distinction and its maintenance, to some extent, as regards defamatory meaning in Arkansas).
common categories as related to damages law may be stated quite simply: if a statement was not defamatory per se, the plaintiff had to prove special harm or special damages in order to establish his or her case. As noted previously, the court seemed to view the plaintiff’s ability to prove some resultant pecuniary loss as indicative of the harmful character of the statement that was not otherwise defamatory on its face. Thus, the defamatory meaning and damages prongs in per se and per quod classifications are intertwined.

The rules regarding special damages hardly reach the realm of first amendment implication; thus Arkansas’s continued reliance on the per se and per quod terminology does not create a problem of constitutional magnitude. Once actual general damages are established as necessary to comply with Gertz in the appropriate cases, or actual malice is established to comply with New York Times and justify presumed general damages in the appropriate cases, requiring proof of special damages is gratuitous. When such damages are proven, they represent an award above and beyond the general damages otherwise proven as constitutionally required.

The Arkansas Supreme Court has decided a number of cases, both before and since New York Times, which have adjudicated the appropriateness of special damages in particular instances. Among these are cases sanctioning recovery, with requisite proof, for items such as loss of credit, loss of business, and loss of employment. Again, the court appears

373. Smolla, Evolving Doctrines, supra note 10, at 56.
374. See e.g., Luster v. Retail Credit Co., 575 F.2d 609, 615, 619 (8th Cir. 1977) (upholding $50,000 compensatory damages award apparently for several types of harm, including mental anguish, embarrassment, and injury to reputation; but also specifically discussing plaintiff’s loss of credit); Dun & Bradstreet, Inc. v. Nicklaus, 340 F.2d 882, 886 (8th Cir. 1965) (applying Arkansas law; two of the plaintiff’s suppliers apparently responded to the defamatory credit report, thereby leaving the plaintiff’s business short of supplies); Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 186, 345 S.W.2d 34, 44 (1961) (evidence included testimony that some creditors were less willing to extend credit to plaintiff because of defendant’s erroneous credit report).
375. See e.g., Nicklaus, 340 F.2d at 886 (applying Arkansas law; plaintiff lost customers who subscribed to the defendant’s credit reporting service, along with two others whose needs could no longer be served by the plaintiff when suppliers received the defamatory reports); Robinson, 233 Ark. at 179-81, 345 S.W.2d at 40-41 (some testimony indicated that customers and shippers treated plaintiff/business less favorably as a result of the incorrect credit report, although others testified to the contrary). Cf. First Nat’l Bank v. N.R. McFall & Co., 143 Ark. 425, 222 S.W. 40 (1920) (defendant bank’s
to be flexible with regard to the type of the evidence required. As a general rule, a plaintiff need not pinpoint with great specificity the monetary loss suffered, and evidence of a decrease in gross volume of business, for example, is sufficient.\textsuperscript{377}

d. PUNITIVE DAMAGES

Imposition of constitutional doctrines upon defamation law has rendered the matter of punitive damages rather simplistic. After Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.\textsuperscript{378} essentially only two rules must be remembered. The first is that for those categories of cases governed by Dun & Bradstreet (private figure, no matter of public concern), the standard of fault is that which existed at common law.\textsuperscript{379} The second rule is that for all other plaintiffs, in order to recover punitive damages, the defendant's actual malice must be proved with convincing clarity.\textsuperscript{380}

The more difficult matter is delineating the common law malice standard applicable in the Dun & Bradstreet-type situation. In Arkansas, the standard was generally stated in terms of "ill-will, malice or bad intent,"\textsuperscript{381} or similar language ex-

\textsuperscript{376} See, e.g., Cunningham v. Skaggs Cos., 729 F.2d 1156, 1158 (8th Cir. 1984) (applying Arkansas law; upholding $10,000 in compensatory damages for elements including plaintiff's change in employment status in response to the defendant's defamatory report about him; evidence specifically showed $4000 in income was lost when the soft drink merchandiser's employee was removed from his route). See also Lile v. Matthews, 268 Ark. 980, 986-87, 598 S.W.2d 755, 757 (Ark. App. 1980) (damages awarded altered on appeal, in part because hearsay evidence of employer's promise of future modeling work for the plaintiff was excluded as hearsay).

\textsuperscript{377} Robinson, 233 Ark. at 184, 345 S.W.2d at 43 (affirming $10,000 "special past compensatory damages" and $20,000 in "future special compensatory damages").

\textsuperscript{378} 472 U.S. 749 (1985).

\textsuperscript{379} Id. at 763.

\textsuperscript{380} See generally Sanford, supra note 62, at § 9.2.2; Smolla, supra note 13, at § 9.08[2]. Arkansas cases applying the constitutional standard include Dodrill II, 281 Ark. 25, 34, 660 S.W.2d 933, 938 (1983) (where evidence of actual malice is insufficient to support punitive damages, the issue should not go to jury); KARK-TV v. Simon, 280 Ark. 228, 234, 656 S.W.2d 702, 705 (1983) (where evidence of actual malice not clear and convincing, error to submit punitive damages issue to jury); Dodrill I, 265 Ark. 628, 637, 590 S.W.2d 840, 844 (1979) (punitive damages precluded absent showing of actual malice).

\textsuperscript{381} E.g., Flynn v. McIlroy Bank & Trust Co., 287 Ark. 190, 194-95, 697 S.W.2d 114, 116 (1983).
pressing the same idea. In spite of the fact that the constitutional term of art “actual malice” might have superseded that standard when both New York Times and Gertz were decided, Arkansas managed to keep alive its common law variety of malice by applying it in that category of cases which, between Gertz and Dun & Bradstreet, was arguably not within their constitutional purview (private figures suing nonmedia defendants).

Arkansas cases applying the common law malice standard therefore become significant, and several in particular are indicative of the underlying requirement. In Dillard Department Stores, Inc. v. Felton the court spoke in terms of malice as requiring evidence of “ill-will harbored by” the defendants, or that the defamatory statements were motivated by “malice or bad intent toward the [plaintiff].”

A 1958 decision, Thiel v. Dove, is similarly illustrative of common law malice in some respects, but it also reveals a conflict with respect to the true meaning of the standard. In Thiel the jury had been instructed that malice might be inferred from “the falsity and absence of probable cause [for defendant’s belief of the defamatory allegations] or other

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382. See, e.g., Luster v. Retail Credit Co., 575 F.2d 609, 619 (8th Cir. 1978) (applying Arkansas law; requiring “actual ill will or evil intent”); Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 311, 634 S.W.2d 135, 138 (1982) (requiring “express malice” which it referred to in terms of ill will and which could be inferred from the circumstances); Braman v. Walthall, 215 Ark. 582, 591, 225 S.W.2d 342, 348 (1949) (requiring proof of “express malice,” apparently referring to the opposite term, “implied malice” which was a term sometimes used to refer to the malice which was assumed when words actionable per se were published, see Gaines v. Belding, 56 Ark. 94, 19 S.W. 236 (1892)); Thiel v. Dove, 229 Ark. 601, 604, 317 S.W.2d 121, 123 (1958) (jury instruction that actual malice could be inferred from falsity of statements, and from lack of probable cause to support the defamatory allegation, constituted reversible error); cf. State Press Co. v. Willett, 219 Ark. 850, 853, 245 S.W.2d 403, 405 (1952) (speaking of “actual malice” as the standard for defeating the fair comment privilege and justifying punitive damages; term was not defined, nor was there any indication of what evidence was presented of such “actual malice” to support the $1400 punitive damages award which was upheld). See also supra notes 263-71 and accompanying text (discussing more fully the meaning of this common law ill will type of malice as compared to the constitutional term of art, actual malice).

383. See supra notes 222-25 and accompanying text (discussing the reading which a number of states, including Arkansas, gave Gertz prior to its clarification by Dun & Bradstreet).

384. 276 Ark. 304, 634 S.W.2d 135 (1982).

385. 229 Ark. 601, 317 S.W.2d 121 (1958). See supra notes 87-88 and accompanying text (discussing the facts of Thiel).
relevant circumstances . . ." 386 The court reversed a punitive damages award because it considered the jury instruction to be a comment upon the weight of the evidence. 387 The court noted that it is solely for the jury to determine "whether the particular inference should be drawn from all the proof in the case . . ." 388

In spite of its reversal on the basis of the instruction, the Thiel court discussed the adequacy of evidence otherwise supporting a punitive damages award and found it sufficient. In so finding, the court acknowledged that the defendant could not have been acting out of ill will toward the plaintiff specifically because he did not even know her identity. Nevertheless, the court said that malice may be shown by the manner of publication—in particular, the Thiel defendant's conscious indifference to the potential harm to an innocent party in reporting the defamatory allegation without supporting probable cause. 389 Thus, the Arkansas Supreme Court in Thiel did not clearly establish that common law malice refers to the defendant's subjective desire to harm the specific plaintiff. In fact, the Thiel discussion, albeit dicta, indicates an alternate standard quite similar to the constitutionally based "actual malice." While they have not specifically noted that similarity, federal courts applying Arkansas law have affirmed this alternate meaning of common law malice. 390

In the most recent case on point, Flynn v. McIlroy Bank & Trust Co., 391 decided by the Arkansas Supreme Court in 1985 shortly after the U.S. Supreme Court decided Dun &

386. Id. at 604, 317 S.W.2d at 123.
387. Id.
388. Id. at 605, 317 S.W.2d at 124 (emphasis original).
389. Id. at 604, 317 S.W.2d at 123 (quoting Gaines v. Belding, 56 Ark. 94, 19 S.W. 236 (1892); citing Greer v. White, 90 Ark. 117, 118 S.W. 258 (1909)).
390. See, e.g., Cunningham v. Skaggs Cos., 729 F.2d 1156 (8th Cir. 1984) (applying Arkansas law). The court in Cunningham, unlike any Arkansas state court, even used the term "actual malice" to refer to "spite, hatred, or vindictiveness," as well as "reckless disregard of the rights of another, as to constitute the equivalent of ill will." Id. at 1158 (citing Dun & Bradstreet, Inc. v. Robinson, 238 Ark. 168, 345 S.W.2d 39 (1961). The court noted that failure to investigate the facts, failure to confront the defamed party with the allegation, and the making of past similar reckless statements as probative of the defendant's recklessness. Id. (citing Andrews v. Mohawk Rubber Co., 474 F. Supp. 1276, 1283 (W.D. Ark. 1979) (applying Arkansas law)).
391. 287 Ark. 190, 697 S.W.2d 114 (1985).
Bradstreet and obliterated the media/nonmedia distinction, the Arkansas court said that "[i]n order to support an award of punitive damages in a non-media slander case involving a private figure there must be ill-will, malice or bad intent on the part of the defendant towards the plaintiff."392 The Flynn reference to the mens rea requirement for punitive damages may be construed in several ways. The first and most probable reading is that the court, overlooking the Dun & Bradstreet opinion which had been handed down only a few months earlier, was following suit with its earlier cases which ignored the Gertz fault requirements for both liability and damages where the plaintiff was a private figure and the defendant was a nonmedia entity.393 This construction is supported by the court's citation to one of those earlier cases, Dillard Department Stores, Inc. v. Felton.394

Arkansas courts have evinced a willingness to uphold punitive damage awards when the only alleged error went to

392. Id. at 194-95, 697 S.W.2d at 116 (citing Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 634 S.W.2d 135 (1982)).

393. A second potential reading of Flynn is that the court simply confused the distinction between the constitutional actual malice standard and the common law ill-will malice standard. This does not seem likely because of the court's ability to distinguish between the two in previous cases. See supra note 270 and accompanying text. Nor does it seem likely in light of the court's reliance on Felton, a case which relied upon the ill-will terminology in establishing the requisite standard of fault to support punitive damages where a defendant had lost his common law qualified privilege by exceeding its scope. Felton, 276 Ark. at 311, 634 S.W.2d at 138. Again, it seems the court simply ignored any constitutional implications, instead lapsing into the common law jargon of ill will and bad intent-type malice.

A third and most unlikely possibility is that the court, while not expressly acknowledging the then-recent Dun & Bradstreet abandonment of media/nonmedia distinctions, in fact responded to it. That is, the Flynn court may have been taking advantage of Dun & Bradstreet's arguably open door to strict liability for matters not of public concern. Flynn probably did not involve a matter of public concern because the defendant bank made the allegedly defamatory communication to the plaintiff's employer, accusing the plaintiff employee of involvement in a fraudulent check cashing scheme. Therefore, the matter was one seemingly of interest only to the parties and to the recipient of the communication, the employer. On the other hand, it could be construed as one of public concern if the scheme were widespread and therefore of general interest and concern. Flynn, 287 Ark. at 192, 975 S.W.2d at 115. However, if this were the case, the court would not have bothered to impose the common law ill-will requirement with the strict liability option arguably available, thanks to Dun & Bradstreet. This analysis leaves a number of questions unanswered, and it is somewhat refuted by the court's use of the Gertz private figure and nonmedia terminology, and the failure to mention Dun & Bradstreet.

394. 276 Ark. 304, 634 S.W.2d 135 (1982).
their excessiveness. Instances in which punitive damages have been reversed have generally been where insufficient proof existed on the requisite mental state or where some other accepted principle of damages law controlled.

2. Mitigation and Aggravation of Damages

As with damages law related to other causes of action, a number of factors which may decrease or increase the amount of an award may be considered by a jury. Among the items which Arkansas has deemed appropriate for jury consideration as mitigating factors are the plaintiff's bad reputation, the fact that the defendant was merely answering an inquiry rather than actually volunteering the defamatory information, and the fact that the defamatory statement was not

395. See, e.g., State Press Co. v. Willett, 219 Ark. 850, 53, 245 S.W.2d 403, 405 (1952) (upholding award of $1400 in punitive damages, noting that this is largely a matter for the jury's determination); Braman v. Walthall, 215 Ark. 582, 590, 225 S.W.2d 342, 347 (1949) (amount of exemplary damages is within the province of the jury, given proper instructions, and damage verdicts are set aside on appeal as excessive only if shown that "jury was actuated by prejudice, passion or corruption in fixing the amount").

396. See, e.g., Luster v. Retail Credit Co., 575 F.2d 609, 618-19 (8th Cir. 1978); Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 311, 634 S.W.2d 135, 138 (1982).

397. See, e.g., Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc., 280 Ark. 420, 432, 658 S.W.2d 397, 403 (1983) where the punitive damages award was not affirmed because the award of compensatory damages was reversed (citing Winkie v. Grand Nat'l Bank, 267 Ark. 123, 601 S.W.2d 559 (1980)). The court skirted the issue of whether a chancery court may award punitive damages by noting that the issue had not been properly preserved at trial. See Wasp Oil, 280 Ark. at 429, 658 S.W.2d at 401 (citing Stolz v. Franklin, 258 Ark. 999, 531 S.W.2d 1 (1975) for the proposition that a plaintiff who enters a court of equity waives the possibility of recovering punitive damages).

398. See, e.g., Dadrill II, 281 Ark. 25, 35, 660 S.W.2d 933, 938 (1983) (because "damage to the plaintiff's character and reputation is an essential element of proof, evidence of a lack of good character and reputation is admissible on behalf of the defendant); McDonald v. Louthen, 136 Ark. 368, 370, 206 S.W. 674, 675 (1918) (stating that while it cannot be a complete defense to a defamation suit, plaintiff's bad reputation may be considered as a mitigating circumstance); cf. Dunagan v. Upham, 214 Ark. 66, 67, 214 S.W.2d 786, 787 (1948) (clarifying that evidence of plaintiff's bad reputation generally may be introduced as a mitigating circumstance in defamation suit, but that evidence of specific acts may not be; citing Simonson v. Lovewell, 118 Ark. 81, 175 S.W. 407 (1915)).

399. See, e.g., Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 311, 634 S.W.2d 135, 138 (1982) (with respect to punitive damages, fact that objectionable statement was made in response to question and was not volunteered was an "important element in mitigation"); see also Karr v. Townsend, 606 F. Supp. 1121, 1131 (W.D. Ark. 1985) (noting that fact defendant was simply responding to media questions had implications in construing the "qualified privilege afforded public officials" under Arkansas law).
believed by all recipients. Additionally, in a 1920 case, the Arkansas Supreme Court held that although damages are presumed with regard to a statement actionable per se, the defendant may introduce proof that no evidence was sustained in mitigation of the presumed damages. At the other end of the spectrum, with regard to aggravation of damages, an Arkansas court has also allowed jury consideration, solely as related to the damages award, of a newspaper defendant’s news report about the defamation suit. The defendant claimed that the subsequent report was within the fair report privilege to cover the judicial proceedings, but the plaintiff asserted that the news story was a reaffirmation of the defendant’s own original defamatory statements. The court allowed the report in as relevant only to the issue of damages.

II. DEFENSES

The plaintiff who states a prima facie case of defamation, establishing all six elements including the constitutional fault requirements as discussed above, is still not ensured a recovery. Long before the constitutional doctrines came to the aid of the defamation defendant, the common law had developed its own battery of safeguards—known collectively as privileges—to protect free speech. The modern defamation plaintiff still must reckon with these and other defenses, such as the fact/opinion distinction. The privileges may be divided into two broad categories: absolute and qualified. A third classification of defenses, including privileges formerly within the qualified category, includes those privileges/defenses which are now clearly constitutionally grounded, including the fair report privilege, and the fair com-

400. See e.g., Luster v. Retail Credit Co., 575 F.2d 609, 615 (8th Cir. 1978) (applying Arkansas law; stating that whether a defamatory statement is believed by those who hear it may be a mitigating factor but is not a complete defense to the suit).
403. Id. at 958, 463 S.W.2d at 96.
404. See generally Prosser and Keeton, supra note 14, at §§ 114-115; Sanford, supra note 62, at ch. 10; Smolla, supra note 13, at ch. 8.
405. See, e.g., Sanford, supra note 62, at § 10.2; Sowle, Defamation and the First
ment privilege with its closely related fact/opinion dichotomy.

A. Absolute Privileges

Like the constitutional balance represented by New York Times and its progeny, the common law privileges sought to balance interests in free speech against individual reputational rights. In fact, some communications were, and still are, considered so important to the free flow of information about official and government activity that they have been given absolute protection. Even when such statements are made with knowledge of their falsity or with intent to harm the plaintiff, the speaker is immune from liability. These communications include statements made as part of judicial and legislative proceedings, as well as those statements of executive and administrative officials which are made within the scope of their duties.\textsuperscript{407} Additionally, for entirely different policy reasons, communications between spouses\textsuperscript{408} and communications to which the subject party consents\textsuperscript{409} are also completely privileged.

1. Judicial Proceedings

The only category of absolutely privileged communications which has been exhaustively discussed in Arkansas is that related to judicial proceedings. The privilege protects participants in judicial proceedings, not the news media and others who recount those proceedings.\textsuperscript{410} Following the traditional rules regarding the privilege,\textsuperscript{411} Arkansas cases have held statements made in pleadings,\textsuperscript{412} as well as in a proceed-

\begin{flushleft}
\textit{Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. Rev. 469 (1979).}
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407. See id. § 8.03-.05.
408. See Eldredge, supra note 25, at § 72.
409. See Smolla, supra note 13, at § 8.02.
410. See Eldredge, supra note 25, at § 73; Smolla, supra note 13, at § 8.03. See infra notes 506-27 and accompanying text (discussing fair report privilege which may protect the media's report of such events).
411. See generally Eldredge, supra note 25, at § 73; Sanford, supra note 62, at § 10.4.2; Smolla, supra note 13, at § 8.03.
412. See, e.g., Gilpin v. Tack, 256 F. Supp. 562, 566 (W.D. Ark. 1966) (statements of physicians in official interrogatories related to lunacy hearing were privileged); Pogue v. Cooper, 284 Ark. 202, 205, 680 S.W.2d 698, 700 (1984) ("statements in pleadings in
ing itself, privileged. Furthermore, where applicable, the privilege specifically has been applied to protect attorneys, parties, judges, and witnesses. In accord with its traditional scope, surely it also extends to judicial personnel and jurors.

Although it is an “absolute” privilege and the speaker’s malice or ill will is irrelevant, as is the truth of the statement, the privilege is not of unlimited application. The more difficult questions with regard to the privilege deal with its scope. The appropriate section of the Restatement (Second) and its comment, which have been cited with approval in Arkansas, enunciate the scope of the privilege as

appl[ying] only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.

Thus, the privilege is effective, even prior to the filing of the

judicial proceedings are absolutely privileged as long as the statements are relevant and pertinent to the issues raised in the case; quoting Westridge v. Wright, 466 F. Supp. 234 (E.D. Ark. 1979) (applying Arkansas law); Howard v. Ward, 238 Ark. 514, 517-18, 383 S.W.2d 107, 109 (1964) (libelous language in motion to dismiss was absolutely privileged because relevant to the divorce proceeding).

413. See, e.g., Johnson v. Dover, 201 Ark. 175, 143 S.W.2d 1112, (1940).
414. See, e.g., Pogue v. Cooper, 284 Ark. 202, 205, 680 S.W.2d 698, 700 (1984) (same privilege that covers pleadings extends to the attorneys who prepare them; citing Restatement (Second) § 586); see also Note, Lawyer’s Privilege, supra note 10.
415. See, e.g., Selby v. Burgess, 289 Ark. 491, 495, 712 S.W.2d 898, 900 (1986) (client not liable for statements made by attorney in pleadings; however, as to statements made by client to other persons, privilege did not apply).
416. See, e.g., Roberson v. Harris, 393 F.2d 123 (8th Cir. 1968) (applying Arkansas law) (dicta noted the Arkansas Supreme Court’s judicial immunity); Simpson v. Langston, 281 Ark. 458, 664 S.W.2d 872 (1984).
417. See, e.g., Gilpin v. Tack, 256 F. Supp. 562, 566 (W.D. Ark. 1966) (applying Arkansas law) (citing Johnson v. Dover, 201 Ark. 175, 143 S.W.2d 1112 (1940)). In Johnson the Arkansas Supreme Court noted that the privilege is more extensive where the witness is responding to a question than if he or she simply volunteers it, and that it also protects the witness who responds to a question with an immaterial answer. Johnson, 201 Ark. at 176, 143 S.W.2d at 1113.
418. See Smolla, supra note 13, at § 8.03.
420. Id.
422. Restatement (Second), supra note 15, at § 568 comment e.
suit, to provide immunity for the party’s communications with his or her attorney,423 as well as for the attorney’s communication relative to a proposed judicial proceeding.424

With regard to both such pre-commencement statements, as well as to those made after the proceeding is officially under way, the test is stated in terms of “pertinency” and “relevancy” to the proceeding.425 This threshold issue is determined by the court as a question of law rather than by the jury as a question of fact.426 Arkansas has applied this all-important pertinency and relevancy test quite liberally. For example, a 1988 case, Pinkston v. Lovell,427 stated that the privilege fails to cover only those matters with “no connection whatever with the litigation” and that comments need not be “strictly relevant” to an identifiable issue in order to enjoy the

423. In Lile v. Matthews, 268 Ark. 980, 598 S.W.2d 755 (Ark. App. 1980), the Arkansas Court of Appeals noted in dicta that the privilege which protects communications between client and attorney is not an evidentiary privilege. Id. at 986, 598 S.W.2d at 758.

424. The privilege between attorney and client may be distinguished from the privilege of the attorney to publish defamatory information as part of a proposed judicial proceeding of which he is a participant or has some relation. This distinction was clarified in Pinkston v. Lovell, 296 Ark. 543, 548-49, 759 S.W.2d 20, 22 (1988) (citing Selby v. Burgess, 289 Ark. 491, 712 S.W.2d 898 (1986); RESTATEMENT (SECOND) OF TORTS § 568 comment e). In Pinkston the comments made by the defendant attorney were about another attorney’s competency, and those comments were made to the defendant’s clients, who had formerly been the plaintiff attorney’s clients. The court said that the matters were privileged, although it was by virtue of this attorney privilege, one distinguishable from the basic attorney-client one.

Furthermore, the Arkansas Supreme Court noted in Selby v. Burgess, 289 Ark. 491, 712 S.W.2d 898 (1986), that while the attorney is immune from defamation liability under this privilege, he still may be subject to professional discipline where appropriate. Id. at 495, 712 S.W.2d at 900 (citing Theiss v. Scherer, 396 F.2d 646 (6th Cir. 1968) (applying Ohio law)).


426. See, e.g., Pogue, 284 Ark. at 205, 680 S.W.2d at 700 (quoting Westridge v. Wright, 466 F. Supp. 234 (E.D. Ark. 1979) (citing Mauney v. Millar, 142 Ark. 500, 219 S.W. 1032 (1920)); Howard v. Ward, 238 Ark. 514, 383 S.W.2d 107 (1964) (quoting Busse witz v. Wisconsin Teachers’ Ass’n, 188 Wis. 121, 205 N.W. 808 (1925)).

427. 296 Ark. 543, 759 S.W.2d 20 (1988). It should be noted that the slander action in Pinkston was apparently brought as a criminal suit, pursuant to ARK. CODE ANN. § 16-56-104 (1987), the criminal slander statute. Although as noted earlier this statute is likely unconstitutional, see supra 20, its probable unconstitutionality has no bearing on the issues with regard to which the case is discussed here.
protection. In Pinkston the defendant attorney's comments to his client related to a contemplated legal malpractice suit against the plaintiff attorney, who had previously represented that client. Most of the conversation between the defendant attorney and his client was clearly related to the potential malpractice suit. However, one comment which the defendant attorney made gave the court pause. That apparently defamatory statement concerned testimony which the plaintiff attorney had given at a previous judicial proceeding—one wholly unrelated to any of the client's dealings with her former attorney. Nevertheless, the court deemed the comment relevant to the contemplated malpractice suit because it was consideration of that suit that prompted the defendant attorney to share the statement with his new client. Similarly, most Arkansas cases have had little difficulty in protecting appropriate comment within this privilege.

Furthermore, in Mock v. Chicago, Rock Island and Pacific Railroad Co., the Eighth Circuit Court of Appeals, speculating about Arkansas law, extended the absolute privilege attendant judicial proceedings to "quasi-judicial" administrative proceedings. The court stated a two-part test for the privilege's application: (1) that the administrative proceeding be "quasi-judicial" in nature and (2) that the defamatory statement be "in some way relevant to the issues involved in [the] proceeding."


429. Id. at 548-49, 759 S.W.2d at 23.

430. Perhaps the only case where the defense was argued but failed was Miller v. Nuckolls, 77 Ark. 64, 91 S.W. 759 (1905), where the defendant sent a letter to a justice of the peace stating that the plaintiff, an unmarried woman, had given birth to a child which she subsequently secretly buried. The letter urged an investigation of the allegations. Id. at 66-67, 91 S.W. at 760. The court held that the statement was not privileged as one made in the course of a judicial proceeding, noting that it was not contained in any affidavit or paper filed in such a proceeding. Id. at 72, 91 S.W. at 761. The court did note that if the statement had been made with a good faith belief in its truth and in the interest of justice, it would have been privileged. Id. at 72, 91 S.W. at 760.

431. 454 F.2d 131 (8th Cir. 1972) (applying Arkansas law).

432. Id. at 133-34 & n.1 (citing Mauney, Gilpin, Howard, and others).

433. Id. at 134.
2. Executive, Administrative, and Legislative Privileges

The legislative privilege in Arkansas, like that in most states, is one of constitutional magnitude. The Arkansas Constitution contains what is commonly known as a speech and debate clause which protects state legislators from liability for anything which they say during a meeting of the General Assembly. This constitutional provision has never been the subject of litigation.

As applied in most jurisdictions, the executive/administrative privilege protects only high-ranking state officials. In other states, all executive and administrative officers enjoy immunity for statements which they make in their official capacity, while still others provide absolutely no protection for any executive/administrative officials. No Arkansas case has explored executive privilege. However, if raised in the appropriate case, the Arkansas Supreme Court might well provide such immunity to at least the state's constitutional officers. Arkansas does provide statutory protection for a narrow group: school board members. All Arkansas board of education members, teachers, superintendents, and certain others are immunized from liability for defamation with regard to statutorily required deliberations and reports.

On the other hand, cases have explored privileges applicable to a mayor, school board members, and a police

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434. "[F]or any speech or debate in either house [the members of the General Assembly] shall not be questioned in any other place." ARK. CONST. art. 5, § 15.
435. See SMOLLA, supra note 13, at § 8.05[2][b].
436. For example, all federal executive and administrative officials enjoy such absolute immunity. See Barr v. Matteo, 360 U.S. 564 (1959).
437. SMOLLA, supra note 13, at § 8.05[2][c].
438. Although it did not decide the executive privilege issue, the court in Brandon v. Gazette Publishing Co., 234 Ark. 332, 352 S.W.2d 92 (1961), had the opportunity to do so. The Brandon court focused upon the privilege of the Gazette to cover the governor's report. See infra notes 514-15 and accompanying text.
439. ARK. CODE ANN. § 6-18-304(b) (1987). The statute provides:

No board of education or any member thereof, nor any district or county employee or the superintendent thereof, or any teacher shall be answerable to any charge of libel, slander, or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statement made in the course of proceedings of deliberations provided for under this subchapter.
440. See Baker v. Mann, 276 Ark. 278, 634 S.W.2d 125 (1982).
officer speaking before a police committee and later before a public hearing of the city council.\footnote{442} Although all three cases arguably involved at least low-level executive or administrative officials, in each the court applied a conditional rather than an absolute privilege.\footnote{443} In fact, only in the final case was the possibility of an absolute privilege discussed, and there the court summarily dismissed the argument. Thus, Arkansas appears willing to protect only upper echelon officials with an absolute privilege.

3. Other Absolute Privileges

Other privileges provide absolute protection for entirely different policy reasons. First, those communications to which the subject-plaintiff consents are completely protected on the theory that "to one who is willing, no wrong is done."\footnote{444} This privilege has been discussed in at least three Arkansas decisions.\footnote{445} Second, the spousal privilege applies to protect communication between spouses,\footnote{446} not to immunize one spouse from liability for defaming the other. To put it another way, communication of a defamatory statement to one’s spouse does not constitute publication in the legal sense. This privilege has apparently never been applied in Arkansas.

B. Qualified Privileges

The second category of privileges applies to communications which the common law affords less protection. As the

\footnote{443} See infra notes 473-75 and accompanying text.
\footnote{444} The latin maxim reads "volenti non fit injuria," and it represents a prevalent tort principle. Because the consent is frequently constructive or implied, the doctrine as applied to defamation law may be more aptly described as assumption of the risk. See Smolla, supra note 13, at § 8.02.
\footnote{445} See Mechanics Lumber Co. v. Smith, 296 Ark. 285, 289, 752 S.W.2d 763, 765 (1988); Brandon v. Gazette Publishing Co., 234 Ark. 332, 352 S.W.2d 92 (1961); Arkansas Assoc. Telephone Co. v. Blankenship, 211 Ark. 645, 201 S.W.2d 1019 (1947). In Blankenship the Arkansas Supreme Court affirmed the trial court’s ruling that there was insufficient evidence for the jury even to consider the implied consent defense. Id. at 653-54, 201 S.W.2d at 1023.
\footnote{446} Restatement (Second), supra note 15, at § 592; see also id. § 595(2)(b) (noting that existence of a family relationship is one element to consider when determining if a qualified privilege has been exercised "within the generally accepted standards of decent conduct").
terms "qualified" and "conditional" imply, these privileges are lost if abused. Most of the qualified privileges recognized at common law have been addressed and defined, in some context, by Arkansas courts. Among those specifically noted in Arkansas are statements made: (1) in furtherance of a shared or common interest, (2) to protect the publisher/communicator's interest, (3) to protect the interest of the recipient or another person, and (4) to protect the public good. These categories, which frequently overlap, are discussed initially, followed by a general discussion of the ways in which any qualified privilege may be defeated.

1. The Common Interest Privilege

A very flexible defense and one widely used in Arkansas, the common interest privilege protects communications between persons who share a common concern or interest. Arkansas courts have found a number of relationships within this privilege, including the common business interest between a company's officers and its shareholders, the shared interest of supervisors in the same subject or employee's activities relating to job performance, the common interest of an agent and his principal relative to the subject matter of the agency, and the "common cause" of airport commissioners and city officials with regard to airport contracts. One commonly recognized shared interest which has not been expressly acknowledged in Arkansas is that existing between a member of a family and a third party when the two share a common concern about a family member. Those sharing

447. See Restatement (Second), supra note 15, at § 596; see generally Eldredge, supra note 25, at § 87; Sanford, supra note 62, at § 10.5.3.3; Smolla, supra note 13, at § 8.08[3].
449. See Ikani v. Bennett, 284 Ark. 409, 682 S.W.2d 747 (1985); Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 634 S.W.2d 135 (1982).
452. See Restatement (Second), supra note 15, at § 597. Although the shared interest/family relation privilege has not been expressly recognized, the Arkansas Supreme Court in Felton, 276 Ark. 304, 634 S.W.2d 135 (1982), acknowledged that an employer's communication to the wife of a terminated employee was privileged. Id. at 309, 634 S.W.2d at 137. However, this privilege resembles that which is applicable to
such interests can communicate with impunity, but only about the matter of common interest and only in a reasonable manner as necessary to promote that interest.\textsuperscript{453} Excessive publication, that is, communication to persons other than those "whose hearing is necessary and useful for the furtherance of [the] interest" defeats the privilege.\textsuperscript{454}

2. The Privilege to Protect the Publisher's Interest

The privilege which allows a communicating party to make defamatory statements in order to protect his or her own interest\textsuperscript{455} has been the subject of relatively little Arkansas litigation. This privilege is analogous to the common law tort concept of self-defense.\textsuperscript{456} If a party reasonably believes that he or she must do so in order to protect his or her interest, a qualified privilege exists to defame another.\textsuperscript{457}

Arkansas cases applying the privilege have varied little in terms of facts or legal rules. \textit{Braman v. Walthall}\textsuperscript{458} is representative. The court wrote:

A defamatory communication \textit{when necessary to protect one's own interest} is privileged, when made to persons who also have a duty or interest\textsuperscript{459} in respect to the matter. In such a case, however, it must appear that [the publisher/
communicator] was compelled to employ the words complained of. If he could have done all that his duty or interest demanded without [defaming] the plaintiff, the words are not privileged.460

Braman involved an employer’s slander of two employees when, in the presence of other employees, he accused the two of theft. The defendant employer arguably felt he was protecting his own interest. The problem was that he exceeded his right to do so with impunity by accusing the plaintiffs in the presence of other uninvolved and disinterested parties who could in no way be expected to help him protect that interest.461

3. The Privilege to Protect the Interest of Another

The qualified privilege to communicate a defamatory statement which protects the interest of another462 is a variant of the general tort law defense which allows use of force to protect another.463 As with the common law defense, this privileged defamation may not exceed that which is necessary to protect the third party’s interest.464 Furthermore, it may be relevant to preserving the privilege that the objectionable information was provided in response to a request of the third-party recipient.465 Two of the more common and traditional applications of the privilege are seen in Arkansas law.

Several privileges were discussed in Dillard Department Stores, Inc. v. Felton.466 Specifically, the privilege to protect the interest of another arose when the defendant employer published a defamatory statement about a former employee to

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460. Braman, 215 Ark. at 589, 225 S.W.2d at 346 (emphasis added; quoting Arkansas Associated Telephone Co. v. Blankenship, 211 Ark. 645, 201 S.W.2d 1019 (1947) (quoting Sinclair Refining Co. v. Fuller, 190 Ark. 426, 79 S.W.2d 736 (1935))).

461. See also Arkansas Associated Telephone Co. v. Blankenship, 211 Ark. 645, 201 S.W. 1019 (1947) (applying the privilege on similar facts).

462. See generally Eldredge, supra note 25, at § 86; Sanford, supra note 62, at § 10.5.3.2; Smolla, supra note 13, at § 8.08[2].

463. See Sanford, supra note 62, at § 10.5.3.2; Smolla, supra note 13, at § 8.08[2][a].

464. See id.

465. See Dillard Dep’t Stores, Inc. v. Felton, 276 Ark. 304, 308, 634 S.W.2d 135, 136 (1982) (quoting Restatement (Second) of Torts § 595 (1965)); see generally Smolla, supra note 13, at § 8.08[2][b] (noting that this consideration is consistent with the common law’s general disdain for officious intermeddlers).

466. 276 Ark. 304, 634 S.W.2d 135 (1982).
the Employment Security Division, which had requested the information. The court wrote that the employer enjoyed a qualified privilege to share that information "in good faith with reasonable grounds for believing them to be true." Other cases have similarly applied this privilege in appropriate instances.

The other archetypal situation in which this qualified privilege is applied is where a defendant credit rating agency supplies a credit report about a plaintiff customer to a third-party subscriber who anticipates doing business with the plaintiff. As illustrated in Dun & Bradstreet, Inc. v. Robinson, the mercantile rating agency is protected by a qualified privilege relative to those reports furnished to interested subscribers.

4. The Privilege to Protect a Public Interest

Statements protected by this privilege include those communications made to a proper authority so that an investigation in the public interest may proceed into suspected wrongdoing or crime. Numerous Arkansas cases have explored this privilege. These cases have lent conditional immunity to communications by a city mayor and several aldermen.

467. Id. at 309, 634 S.W.2d at 137. The court discussed the privilege as applying to one with "a public or private duty to a person having a corresponding duty." Therefore, while Felton appears to be a special case where the privilege protects the interest of a third party, the court lapsed into the related area of duty-motivated speech which is also qualifiedly privileged. See infra notes 472-78 and accompanying text.


469. These credit reporting cases, of course, reflect the basic fact pattern of Dun & Bradstreet, Inc. v. Green moss Builders, Inc., 472 U.S. 749 (1985). See supra notes 205-21 and accompanying text (discussing fully the details and implications of the case). While Dun & Bradstreet does not directly affect the scope of this common law privilege, it does send a signal that the Supreme Court finds very little value in this type of speech. Accordingly, it is conceivable that the common law privilege may eventually be restricted in response to Dun & Bradstreet. See Smolla, supra note 13, at § 8.08[2][c][iii].


471. Id. at 174-75, 345 S.W.2d at 38. See also Luster v. Retail Credit Co., 575 F.2d 609 (8th Cir. 1978) (applying Arkansas law in rejecting summarily the conditional privilege defense because of the defendant agency's malice).

472. See generally Eldredge, supra note 25, at §§ 89-90; Sanford, supra note 62, at § 10.5.3.4; Smolla, supra note 13, at § 8.08[4].
to the prosecuting attorney about the police chief's suspected malfeasance; to statements made by a witness at a police committee investigatory hearing and later before a public city council meeting; to discussion of the conduct of a school teacher by school board members at a meeting where his discharge was considered; to statements about an employee's termination, made by the former employer to the Employment Security Division; and to a communication by an employee to his superior when he suspected fellow employees of illegal activity. As noted earlier, this privilege frequently takes effect to protect the statements of low-level public officials who might otherwise (but in Arkansas apparently do not) enjoy absolute immunity simply by virtue of their positions.

5. Loss of the Privilege

Qualified or conditional privileges are most frequently lost when abused in one of two ways: by publication with "malice" and by excessive publication. Essentially, the "immunity is lost if the utterances go outside the bounds of reason and the purpose for the making of the statement." The ultimate burden of proof to establish that a privilege has been exceeded or abused rests on the plaintiff. Therefore, although the defendant raises the qualified privilege as a defense, the defamed party must satisfy the burdens of both pro-

476. See Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 309, 634 S.W.2d 135, 137 (1982).
477. See Ikani v. Bennett, 284 Ark. 409, 682 S.W.2d 747 (1985). Actually, the nature of the conditional privilege which was applied in Ikani was unclear. However, the court spoke in terms of the communicating party's "duty, either legal, moral, or social, if made to a person having a corresponding interest or duty....." Id. at 411, 682 S.W.2d at 749 (quoting Merkel v. Carter Carburetor Corp. 175 F.2d 323 (8th Cir. 1949)). Thus, while the communicator's intention was apparently to prompt an investigation, the court spoke in language indicative of a shared interest between the communicating parties.
478. See supra notes 435-43 and accompanying text.
479. Navarro-Monzo v. Hughes, 297 Ark. 444, 452, 763 S.W.2d 635, 639 (1989) (citing Dillard Dep't Stores, Inc. v. Felton, 276 Ark. 304, 309, 634 S.W.2d 135 (1982)).
480. See Ikani v. Bennett, 284 Ark. 409, 682 S.W.2d 747 (1985) (quoting Merkel v. Carter Carburetor Corp., 175 F.2d 323 (8th Cir. 1949)).
duction and persuasion on elements which defeat the privilege.

a. Malicious Intent

One of the most significant differences between qualified and absolute privileges is that the former may be lost if the objectionable communication is made maliciously, while the latter protects in spite of admitted ill will.\textsuperscript{481} The type of "malice" at issue is, again, not \textit{New York Times} actual malice.\textsuperscript{482} Discerning precisely what type of malice causes the loss of a qualified privilege is a difficult task because the opinions indicate differing standards from case to case. The most recent pronouncement of the Arkansas Supreme Court came in \textit{Navarro-Monzo v. Hughes},\textsuperscript{483} a case involving the common interest qualified privilege. In \textit{Navarro-Monzo} the court spoke of "malice" as connoting more than "fictitious 'legal malice' which is 'implied' in order to impose strict liability in the case of an unprivileged communication."\textsuperscript{484} The court went on to say, however, that "[i]t may mean something less than 'express malice,' or ill-will."\textsuperscript{485} The court quoted with approval the comments of Dean Prosser:

[I]t is the better and perhaps more generally accepted view that the mere existence of such ill will does not necessarily defeat the privilege. If the privilege is otherwise established by the occasion and a proper purpose, the addition of the fact that the defendant feels indignation and resentment towards the plaintiff and enjoys defaming him will not always forfeit it. Perhaps the statement which best fits the decided cases is that the court will look to the primary motive or purpose by which the defendant apparently is motivated.\textsuperscript{486}

The court analyzed the facts of the instant case, where the defendant, president of a corporation stated at a corporate board meeting that the plaintiff, manager of the corporation's

\textsuperscript{481} \textit{See supra} notes 407-09 and accompanying text.
\textsuperscript{482} \textit{See supra} notes 237-71 and accompanying text (distinguishing common law malice from the constitutional standard).
\textsuperscript{483} \textit{Id.} at 450, 763 S.W.2d at 635.
\textsuperscript{484} \textit{Id.} at 450, 763 S.W.2d at 635.
\textsuperscript{485} \textit{Id.} (quoting \textit{PROSSER AND KEETON, supra} note 14, at § 115).
\textsuperscript{486} \textit{Id.}
enterprise, had mishandled a large sum of money. Rather than truly looking to the primary motivation of the speaker, the court summarily concluded that the comments had not been "motivated by spite or revenge. The statements were more in line with [those] made by an investor who fears his investment is going down the drain." Thus, in the final analysis, the court's focus was on subjective ill will—but apparently not a state of mind as offensive as express malice or hatred.

Earlier cases have focused more particularly on the speaker's state of mind, apparently ignoring other factors which may have motivated the speaker. For instance, some opinions have spoken simply in terms of a "good faith" requirement in exercising a qualified privilege, while others have articulated the requisite mental state as the traditional common law "spite or ill-will." In one such case in the latter category, the court expanded on the meaning of the phrase, holding that the defendants' ill will was not proven by their exhibited indignation with the plaintiff.

Others have articulated standards seemingly more tailored to the privilege at issue. For example, in several cases where the defendant claimed the qualified privilege for acting in the public interest, the test was whether the speaker was "motivated by malice rather than by the public interest that creates the privilege."

The most troublesome cases, however, state a definition of malice which borders quite closely on the constitutional "actual malice" standard. As noted earlier, that term of art means a knowing or reckless disregard of the truth, which turns not on the defendant's personal ill will toward the plain-

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487. Id. at 453, 763 S.W.2d at 639.
489. See, e.g., McClain v. Anderson, 246 Ark. 638, 643, 439 S.W.2d 296, 299 (1969) (citing RESTATEMENT OF TORTS § 603 comment a (1938)).
490. Id. at 643, 439 S.W.2d at 299.
tiff, but rather on whether the defendant doubted or reasonably should have questioned the truthfulness of the statement.\textsuperscript{492} Several of the Arkansas cases implicating such a standard were discussed earlier with regard to the requisite standard of care necessary to support an award of punitive damages,\textsuperscript{493} and that same, or a very similar, dual standard also appears in connection with several cases adjudicating the loss of a privilege.

The 1961 Arkansas Supreme Court decision in \textit{Dun & Bradstreet, Inc. v. Robinson}\textsuperscript{494} was apparently the first case to state such a standard in the privilege context.\textsuperscript{495} The court, holding that it would not require "malice in the moral sense . . . to overcome the privilege," noted that "negligent investigation is sufficient to destroy the qualified privilege."\textsuperscript{496} The court used the term "constructive malice," defining it as "reckless disregard of the rights of another as to constitute the equivalent of ill-will."\textsuperscript{497} The court concluded that the conditional privilege failed in the case because the defendant's failure to investigate the truthfulness of its comments amounted to "conscious indifference and reckless disregard of the rights" of the plaintiff.\textsuperscript{498} Thus, the court's focus on the defendant's failure to investigate when it might have suspected the inaccuracy of its report makes the behavior look even more like that prohibited by the \textit{New York Times} actual malice standard.

Additionally, federal courts sitting in diversity and applying Arkansas law have relied upon \textit{Robinson} in situations where the defendant could easily have investigated the truthfulness of an allegation or confronted the defamed party prior to making the objectionable statement.\textsuperscript{499} Unfortunately, at

\textsuperscript{492} See \textit{supra} notes 237-47 and accompanying text.
\textsuperscript{493} See \textit{supra} notes 381-94 and accompanying text.
\textsuperscript{494} 233 Ark. 168, 345 S.W.2d 34 (1961).
\textsuperscript{495} The qualified privilege applicable in \textit{Robinson} was that covering statements made to protect a third party's interest. See \textit{supra} notes 462-71 and accompanying text.
\textsuperscript{496} \textit{Robinson}, 233 Ark. at 176, 345 S.W.2d at 39.
\textsuperscript{497} \textit{Id.} at 177, 345 S.W.2d at 39 (quoting ABC Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d 775 (2d Cir. 1957)). The court contrasted with this "constructive malice" what it referred to as "actual malice." However, all indications are that its reference to "actual malice" meant common law, ill-will type malice.
\textsuperscript{498} \textit{Id.} at 178, 345 S.W.2d at 40.
\textsuperscript{499} See, \textit{e.g.}, Cunningham v. Skaggs Cos., 729 F.2d 1156 (8th Cir. 1984) (applying
least one of these courts used the "actual malice" term to refer to the requisite degree of fault. This will almost certainly lead to confusion with the comparable, but non-identical constitutional standard.

In light of this ambiguous fault standard for loss of a privilege, one final point should be made. If the common law standard for loss of privilege equates to no more than negligence, the privilege is meaningless in light of Gertz's negligence degree of fault minimum. In other words, because there is no liability unless negligence is established (in private plaintiff cases), the privilege only becomes relevant when the defendant's negligence is proven. Therefore, because of the partial duplication of functions of constitutional fault requirements and common law privileges, if a privilege lends no more protection to the defendant than the constitutional fault requirement, it is essentially worthless. Thus, the cases speaking of "good faith," and even those interpreting reckless disregard as a mere failure to investigate, are arguably of no benefit to the defendant as they require no greater degree of culpability than simple negligence. The exception to this rule is the category of cases which, after Dun & Bradstreet, arguably are open to the application of strict liability—private figure cases involving no matter of public concern. In those cases, even privileges defeasible by a showing of simple negligence are valuable to the defendant.

b. Excessive Publication

The other manner by which qualified privileges may be lost is through excessive or inappropriate publication. The following statement from an early Arkansas case summarizes well the principle as it applies to the various qualified privileges:

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500. Cunningham, 729 F.2d at 1158 (citing Bohlinger v. Germania Life Ins. Co., 100 Ark. 477, 140 S.W. 257 (1911)).

501. See supra note 141 and accompanying text.

502. See Sanford, supra note 62, at § 10.6.1; Smolla, supra note 13, at § 8.07[3][c]; Smolla, Evolving Doctrines, supra note 10, at 54-55.

503. 472 U.S. 749 (1985); see also supra text accompanying notes 205-21.

504. See supra text accompanying notes 207-09.
The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther [sic] than his interests or his duties require. Where a party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected... even though he acted in good faith.505

C. The Fair Report Privilege

The common law fair report privilege represents an exception to the rule that one who republishes a libel adopts it as his or her own and also becomes liable for defamation.506 The privilege, applicable primarily to the news media, protects accurate reports of various government proceedings, including judicial proceedings; public records; law enforcement activity; and legislative, administrative, and executive proceedings and activity.507 Assertion of this defense shifts the focus away from the truth or falsity of the statement to its accuracy and fairness,508 as it endorses the media function of serving as the eyes and ears of the public.509 Furthermore, the test for accuracy includes a "substantial accuracy" component. Like the substantial truth doctrine,510 it focuses upon the "gist" or "sting" of the report of the proceeding or event, not upon its inconsequential details.511 Unlike other qualified privileges, it is unaffected by the communicator's bad faith or malice, so long as the report is "complete, impartial, and accurate."512

The fair report privilege generally has been invoked only

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505. Arkansas Associated Telephone Co. v. Blankenship, 211 Ark. 645, 651, 201 S.W.2d 1019, 1022 (1947) (quoting Sinclair Refining Co. v. Fuller, 190 Ark. 426, 79 S.W.2d 736 (1935)).
506. See generally Eldredge, supra note 25, at § 79; Sack, supra note 35, at § VI.3.7; Sanford, supra note 62, at § 10.2; Smolla, supra note 13, at § 8.10.
507. See text at supra note 410.
508. See Restatement (Second), supra note 15, at § 611.
509. See id. at comment f.
510. See supra notes 299-306 and accompanying text.
511. See Restatement (Second), supra note 15, at § 611 comment f.
512. See Jones v. Commercial Printing Co., 249 Ark. 952, 955, 463 S.W.2d 92, 94-95 (1971) (expressly rejected the New York Times "actual malice" standard as applicable to the exercise of the privilege). Additionally, other cases discussing the privilege have not imposed a "no ill-will" requirement, although some have imposed a good faith
by defendants covering judicial proceedings, and those cases are usually simple in terms of the application of the privilege. However, inconsistent application of the privilege is reflected in comparing a 1961 case where the privilege applied to coverage of a governor's press release, with a 1983 decision where the privilege failed to protect a media defendant covering an apparent arrest.

In the former case, Brandon v. Gazette Publishing Co., the Arkansas Supreme Court extended the fair report privilege to cover the Gazette's publication of an official report from Governor Faubus. The report covered an official investigation into state nursing homes and apparently contained some defamatory statements. The case may be viewed as a liberal application of the fair report privilege because the newspaper technically was not covering official records or events as is generally the case. Instead, the news story was based upon a press release issued by the governor, who was specifically seeking press coverage. The court wrote: "The fact that the Governor's report was given to the press, rather than filed with an agency of the state government (where reporters could have copied the contents), is of no moment. It was still an executive report . . ." in which the public had an interest.

In the latter case, KARK-TV v. Simon, the Arkansas Supreme Court rejected the defense because it found that the defamatory report was not substantially accurate. Here the

requirement, see, e.g., Brandon v. Gazette Publishing Co., 234 Ark. 332, 334, 352 S.W.2d 92, 93 (1961).

Although the first Restatement of Torts imposed a requirement that the publication not be made "solely for the purpose of causing harm to the person defamed," Restatement of Torts § 611, at 293, quoted in Brandon, 234 Ark. at 334, 352 S.W.2d at 94, the current Restatement (Second) allows for no such defeasance of the privilege, Restatement (Second) of Torts § 611, at 134 (App. 1981) (reporter's note).

514. 234 Ark. 332, 352 S.W.2d 92 (1961).
515. Id. at 335, 352 S.W.2d at 94.
517. The court incorrectly spoke in terms of "substantial truth," see supra notes 299-306 and accompanying text, a defense entirely separate from the fair report privilege which encompasses the "substantial accuracy" element. See Note, Fair Report, supra note 10, at 193 & n.53.
restriction on the privilege was not imposed by virtue of the event being covered, as it could have been in Brandon. Rather, the restriction resulted from an apparent misunderstanding of the “substantial accuracy” concept.

KARK reported that two male plaintiffs attempted a robbery and subsequently were arrested by the police. KARK cameramen filmed the two handcuffed men being placed in a squad car shortly after police stormed and evacuated the store which the men reportedly attempted to rob. In fact, there was no attempted robbery at all; the police were simply responding to a store clerk’s alarm at the suspicious activity of the men. The plaintiffs were only briefly detained by police until they determined that no crime had been committed or attempted. Unfortunately, the KARK reporter and crew had left the scene of the event before the men were released, and the television station aired the story of the attempted robbery a few hours later.518

KARK argued that the broadcast report was a substantially accurate account of the event—that is, of the police detention of the men. The television station had reported essentially what the police had done, and KARK maintained that the police’s subsequent discovery of their own mistake should not cause the station’s liability for coverage of the action.519 However, the court rejected the applicability of the privilege, focusing on the fact that the men were not actually arrested and that, therefore, the report was not substantially true.520 The court seemed unable to distinguish the fair report privilege from the substantial truth doctrine, where the truth of the underlying facts, not of what is reported or appears to take place, is the key.521 Thus, the fair report privilege in Arkansas remains in something of a state of confusion.522

Post-New York Times comment on the fair report privilege has addressed its constitutional dimensions and basis.523 New York Times afforded constitutional protection for cover-
age of public officials' actions, and later Supreme Court decisions have recognized constitutional protection for news coverage of official proceedings. Circuit and district courts have picked up on the Court's signals and have begun to develop a broader constitutional privilege similar to the common law fair report privilege. This new privilege, referred to as the "neutral reportage" privilege, recognizes that the public has an interest in being fully informed about controversies related to sensitive issues. The privilege allows the media to report in a disinterested manner the details of such controversies. It recognizes that the very fact that the original speaker makes an allegation, whether or not that allegation is true, is newsworthy. Many jurisdictions which have considered the neutral reportage privilege since its original adoption in the Second Circuit in 1977 have rejected it. In light of Arkansas's present narrow reading of the fair report privilege, it is unlikely that the Arkansas Supreme Court will adopt this broader privilege unless and until it is constitutionally mandated by the Supreme Court.

D. Fact, Opinion, and the Fair Comment Privilege

Currently, one of the most litigated issues in defamation law is the fact/opinion dichotomy. If the defendant can establish that his statement was merely opinion, rather than fact, then as a constitutional matter no liability may attach. A closely related defense which was the forerunner of this constitutional fact/opinion distinction, the "fair comment" privi-

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Constitutional Privilege of Fair Report, supra note 405; Note, Fair Report, supra note 10, at 188-89.


528. See SMOLLA, supra note 13, at § 6.03 (discussing the Supreme Court's approach as a non-mechanistic, totality of the circumstances approach).
lege,\textsuperscript{529} is discussed first.

1. The Fair Comment Privilege

The protection provided by the early fair comment privilege was of modest dimensions. Originally developed in England to protect literary, music, and art critics,\textsuperscript{530} the common law privilege never protected \textit{all} opinions.\textsuperscript{531} In fact, the first \textit{Restatement of Torts} provides that an expression of opinion, if injurious to reputation, is actionable.\textsuperscript{532} Eventually, the privilege developed to encompass comment about a broad range of plaintiffs—a category at least as broad as those persons protected by \textit{Gertz}.\textsuperscript{533} However, the privilege was still closely constrained by the requirement of fairness, generally meaning that the underlying facts had to be fully disclosed.\textsuperscript{534}

Arkansas has little track record with the fair comment privilege. In fact, the defense has been raised in only one case, and there it was summarily dismissed by the court.\textsuperscript{535} However, in light of the constitutional implications of the fact/opinion dichotomy, the common law privilege is of little consequence. The important consideration now is how Arkansas draws the all-important fact/opinion distinction.

2. The Fact/Opinion Dichotomy

In order for a defendant to incur liability for a defamatory communication, the statement must be fact, not opinion.\textsuperscript{536} The fact/opinion dichotomy took on constitutional dimensions in 1974 when the \textit{Gertz} Court stated:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges

\textsuperscript{529} See generally \textit{Sack}, supra note 35, at § IV.3; \textit{Sanford}, supra note 62, at § 5.2; \textit{Smolla}, supra note 13, at § 6.02.


\textsuperscript{531} See \textit{Smolla}, supra note 13, at § 6.02(1); see generally \textit{Note, Fair Comment, supra note 10; Note, Justifiable Inference, supra note 10.}

\textsuperscript{532} \textit{Restatement (Second) of Torts} § 566 comment a (1976).

\textsuperscript{533} See \textit{Smolla}, supra note 13, at § 6.02(2).

\textsuperscript{534} \textit{Id.} § 6.02(3).

\textsuperscript{535} \textit{State Press Co. v. Willett}, 219 Ark. 850, 245 S.W.2d 403 (1952).

\textsuperscript{536} \textit{Restatement (Second), supra note 15, at §§ 565-566. For a comprehensive discussion of the fact/opinion dichotomy and its attendant constitutional issues, see \textit{Sanford}, supra note 62, at ch. 5.}
and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.\footnote{Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974).}

While the meaning of the distinction has been widely litigated elsewhere, it was only recently addressed by the Arkansas Supreme Court.\footnote{Bland v. Verser, —Ark.—, S.W.2d—, 1989 WL 76716 (July 10, 1989 Ark.). Several earlier Arkansas defamation cases, including Wirges v. Brewer, 239 Ark. 317, 589 S.W.2d 226 (1965), and West Memphis News v. Bond, 212 Ark. 514, 206 S.W.2d 449 (1948), involved comments made in newspaper editorials, generally a forum for opinion. However, apparently neither defendant raised the fact/opinion issue. But see State Press Co. v. Willett, 219 Ark. 850, 245 S.W.2d 403 (1952) (discussing cursorily the related matter of the fair comment privilege).}

Before considering that case, it may be helpful to consider the fact/opinion framework developed in the Restatement (Second).

Rather than abide by a black-and-white distinction, the Restatement (Second), like numerous jurisdictions and other authorities,\footnote{See generally SMOLLA, supra note 13, at § 6.05-08 (discussing the classification schemes of various jurisdictions and commentators). One of the most popular analyses currently is that enunciated in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984). The Ollman court rejected the Restatement's notion of the dichotomy, adopting instead a four-part test, including analyses of (1) the common usage or meaning of the specific language; (2) the statement's verifiability; (3) the full context of the statement; and (4) the broader context or setting in which the statement appears. See also generally Gleason, The Fact-Opinion Distinction in Libel, 10 COMM/ENT. 763 (1988); Spellman, Fact or Opinion: Where to Draw the Line, 9 COMM. & L. 45 (1987); Note, The Fact-Opinion Determination in Defamation, 88 COLUM. L. REV. 809 (1988); Note, Illinois' Innocent Construction Rule Prevails over the Constitutional Privilege for Expression of Opinion, 21 J. MARSHALL L. REV. 427 (1988).} recognizes multiple categories of "opinion"—some actionable and others not. The Restatement (Second) utilizes two categories: "pure" and "mixed" opinion. The "pure opinion" label given the first category may be somewhat misleading. Even though a statement also conveys the facts underlying the opinion (or alternatively the recipient of the communication already knows those facts), the opinion remains protected so long as the communicator makes clear that his or her opinion is just that and is not an assertion of additional facts.\footnote{Involves a "mixed opinion," the statement does not disclose the factual predicate of the opinion, but implies the existence of underlying defamatory facts. Accordingly, it is not protected.}

Accordingly, it is not protected.
In the 1989 case of *Bland v. Verser*, the Arkansas Supreme Court outlined four factors which it considered relevant in drawing the line between fact and opinion. The items included: (1) the precision and specificity of the statements; (2) the verifiability of the statements; (3) the statement's context, including tone, use of cautionary language, and forum; and (4) the statement's "public context," including whether it concerned a public or private figure. The court's analysis of the *Bland* facts, utilizing the four factors, was rather cursory, as it apparently applied only some of the factors to the allegedly defamatory statement in that case. Nevertheless, *Bland* is important as an indication of the future course the Arkansas Supreme Court will take with regard to the increasingly significant fact/opinion dichotomy.

III. PROCEDURAL ISSUES

Because it was a traditionally disfavored cause of action in American jurisprudence, a number of unique procedural rules developed with respect to defamation suits. Two of the most prevalent, and still prominent, are a shorter statute of limitations for the cause of action and the procedural re-

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542. — Ark. —, — S.W.2d —, 1989 WL 76716 (July 10, 1989 Ark.). It is interesting to note that the Arkansas Supreme Court cited the Eighth Circuit decision in Jan-klow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986), as authority for the four factors relevant to the fact/opinion determination. In turn, *Janklow* had relied upon four somewhat similar factors outlined in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). See supra note 539 (reciting the *Ollman* factors).

543. Much of the disfavored status of defamation was the result of differences in American and English culture. Americans, made wary by memories of the English Star Chamber and more tolerant of the incidents of freedom of speech and of the press, have traditionally exhibited a degree of ambivalence toward the cause of action. See generally *Smolla*, supra note 13, at § 1.02(2); *Leflar, Legal Liability*, supra note 10, at 166-77; *Lovell, The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962).

544. Evidence of the disfavored status of the twin torts may be seen in Arkansas's survival of actions statute. The statute provides that a decedent's estate may sue any wrongdoer against the decedent, except that causes of action for libel and slander are specifically precluded. Ark. Code Ann. § 16-62-101(b) (1987).


545. See generally *Sanford*, supra note 62, at § 13.2.4.
qurement that it be pled with particular specificity.\textsuperscript{546} Other procedural matters, including the availability of summary judgment and the distinction between questions of law and questions of fact, are at least indirectly related to the first amendment jurisprudence which has permeated defamation law. Finally, as in any suit, jurisdiction and venue issues must initially be resolved.

A. Jurisdiction and Venue

Jurisdiction and venue are frequently simpler matters in state court than in federal court.\textsuperscript{547} For instance, Arkansas circuit courts naturally have subject matter jurisdiction over defamation actions.\textsuperscript{548} One reason for such jurisdiction is the long-standing desire to have juries decide the factual issues arising in defamation suits,\textsuperscript{549} and the Arkansas Supreme Court has recognized that a defendant in such a suit cannot "interpose defenses and cause a transfer to a court of chancery" so as to deprive the defamation plaintiff of that right.\textsuperscript{550}

\textsuperscript{546} In spite of the federally prompted trend toward notice pleading, the defamatory communication generally must be specifically pled in defamation actions. See SMOLLA, supra note 13, at § 12.05[1] (citing Haub v. Friermuth, 1 Cal. App. 556, 82 P. 571 (1905)).

Early Arkansas cases required that pleading of slander include the precise words set forth in the complaint. Rapp v. Parker, 128 Ark. 236, 193 S.W. 535 (1917). Whether this requirement still applies today is uncertain. However, in a recent case, Joey Brown Interest, Inc. v. Merchants Nat'l Bank, 284 Ark. 418, 683 S.W.2d 601 (1985), the Arkansas Supreme Court upheld the trial court's dismissal of the plaintiff's counterclaim for defamation. The grounds stated for the dismissal were that the pleadings failed to allege, among other things, that the communication was untrue. \textit{Id.} at 421, 683 S.W.2d at 603 (citing ARK. R. CIV. P. 8(a), 12(b)(6)).


\textsuperscript{548} See Southern Lumber Co. v. Axley, 187 Ark. 292, 59 S.W.2d 591 (1933); Axley v. Hammock, 185 Ark. 939, 50 S.W.2d 608 (1932); cf. Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc., 280 Ark. 420, 658 S.W.2d 397 (1983) (chancery court with jurisdiction over quiet title action heard third-party complaint for libel).

\textsuperscript{549} This tradition apparently originated with Fox's Libel Act, 52 Geo. 111, ch. 60 (1792), an English statute which gave the jury power to decide both issues of fact and issues of law in these suits. See Sedler, \textit{Injunctive Relief and Personal Integrity}, 9 ST. LOUIS U.L.J. 147, 155 (1964).

\textsuperscript{550} Axley, 185 Ark. at 947, 50 S.W.2d at 611 (defendant was able to have suit transferred to chancery court when he counterclaimed, seeking an accounting in alleging that the plaintiff had wrongfully appropriated the defendant's money, property, and
In essentially the opposite situation, a 1983 Arkansas case affirmed chancery court jurisdiction to hear a cause of action for libel when brought by a third-party plaintiff.551 The difference between the two cases easily can be linked to the permissive nature of the latter claim where, rather than attempting to manufacture equitable jurisdiction, the complaining third-party plaintiff was settling for it, with its attendant absence of a jury and preclusion of punitive damages.552

Arkansas law includes no specific venue statute for defamation actions. Rather, venue for libel and slander claims is governed by the statutory provision for “Other Actions,” which provides that venue lies wherever the defendant “resides or is summoned.”553 Defamation actions are not localized by statute and, therefore, venue is determined by “general principles” applicable to such “transitory” actions.554 An early case, McGill v. Miller,555 is illustrative. There the Lafayette County plaintiff had attempted to sue the Arkansas Gazette in Lafayette County Circuit Court, although the paper’s “usual place of abode” was Pulaski County. The court dismissed on the basis of improper venue.

B. Statute of Limitations

A number of jurisdictions still provide a shorter statute of limitations for defamation causes of action in an attempt to

551. Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc., 280 Ark. 420, 658 S.W.2d 397 (1983). Although the Arkansas Supreme Court had no difficulty in letting the chancellor decide the issues, it may have relied to some extent on the voluntary nature of the claim. In other words, if the third-party plaintiff had wanted a jury trial, or the possibility of punitive damages which are unavailable in equity, he could have simply brought an independent cause of action in a court of law.

552. Id. at 429, 658 S.W.2d at 401 (citing Stolz v. Franklin, 258 Ark. 999, 531 S.W.2d 1 (1975)).


554. Baker v. Fraser, 209 Ark. 932, 193 S.W.2d 131 (1946). See also Tilmon v. Perkins, 292 Ark. 553, 731 S.W.2d 212 (1987) (venue for tort action alleging similar intangible type injury, for emotional distress, mental suffering, fear and apprehension, did not lie in county where injured person resided, but rather where tortfeasor resided).

555. 183 Ark. 585, 37 S.W.2d 689 (1931); see also Gallman v. Carnes, 254 Ark. 987, 497 S.W.2d 47 (1973) (portion of suit against individual defendants was dismissed because only proper venue for them was in the county of their individual residences).
prevent the staleness of such claims.\textsuperscript{556} Arkansas imposes a 
one-year statute of limitations for slander claims,\textsuperscript{557} and a 
three-year statute of limitations for libel.\textsuperscript{558} Arkansas's statute 
of limitations for various other torts similarly ranges from one 
to three years.\textsuperscript{559} The time period begins to run at the time of 
publication\textsuperscript{560} and is tolled when the claim is filed.\textsuperscript{561} 

Arkansas apparently adheres to the "single publication" 
rule, which has been adopted in a majority of states.\textsuperscript{562} This 
means that, contrary to the common law rule by which each 
individual copy of an offensive communication gave rise to a 
separate cause of action, the plaintiff has only one cause of 
action no matter how many individual copies of the matter are 
distributed.\textsuperscript{563}

C. Question of Law/Question of Fact

The respective roles of judge and jury are quite well-de\- 
dined with regard to some defamation law issues. For exam-

\textsuperscript{556} See Sanford, supra note 62, at \S 13.2.4.

201), discussed in Pinkston v. Lovell, 296 Ark. 543, 759 S.W.2d 20 (1988); Parkman v. 
Hastings, 259 Ark. 59, 531 S.W.2d 481 (1976).

206), discussed in Gilpin v. Tack, 256 F. Supp. 562 (W.D. Ark. 1966) (applying Arkans-
as law).

\textsuperscript{559} See Ark. Code Ann. \S S 16-56-104 to -105 (1987) (one-year limitation on ac-
tion for criminal conversation, alienation of affections, assault and battery, false imprison-
ment; three-year limitation on actions for trespass, taking or injuring goods, fraud 
and deceit, personal injury).

\textsuperscript{560} See Pinkston v. Lovell, 296 Ark. 543, 548, 759 S.W.2d 20, 22 (1988).

\textsuperscript{561} Gilpin, 256 F. Supp. at 565 (under Arkansas law, the statute "continued to run 
until the date of the filing of the... complaint alleging libel") (citing Bridgman v. Drill-
ing, 218 Ark. 772, 238 S.W.2d 645 (1951); Love v. Couch, 181 Ark. 994, 28 S.W.2d 
1067 (1930)).

\textsuperscript{562} See Murray v. Galbraith, 86 Ark. 50, 109 S.W. 1011 (1908). Murray involved 
two publications, the second being "in a sense a repetition of the [first] libel, and in 
another sense an explanation justifications of why the first article was published..." 
Id. at 56, 109 S.W. at 1013. Although it apparently considered the two articles at issue 
ot identical, the court wrote in dicta, "The law seems settled that a repetition of an 
identical libel is not a new cause of action, but an aggravation of the pre-existing 
cause..." Id. See also Horton v. Jackson, 87 Ark. 528, 113 S.W. 45 (1908) (two 
defamatory notices were separate and distinct, and defendants who were involved 
with the second had no responsibility for the first because when it was published, that 
wrong was complete).

\textsuperscript{563} See generally Sanford, supra note 62, at \S 13.2.4; Smolla, supra note 13, at 
\S 4.13[4]; Leflar, The Single Publication Rules, 25 Rocky Mt. L. Rev. 263 (1953); 
ple, the jury determines whether the plaintiff is identified in the objectionable communication, as well as whether the statement carries defamatory meaning and is therefore actionable. Under the traditional categories, when a jury determines that a statement is within one of the per se categories, then it is defamatory and actionable as a matter of law.

It is also generally considered the sole province of the trial judge to determine whether a privilege is applicable to particular facts. Similarly, the Supreme Court in *Rosenblatt v. Baer* said that the judge has responsibility for the decision as to public official status—a sort of "constitutional privilege." The decision is actually a mixed one of law and fact, frequently more simply labeled one of pure law to designate the court's authority to decide it.

This imprecise nomenclature has caused some confusion for the Arkansas Supreme Court. In a 1987 case, *Cornett v. Prather*, the court clarified the matter, exhibiting a true understanding of the issue. The court wrote: "Whether an individual is a 'public official' may be a mixed question of fact and law, but it is a matter which should be determined by the trial court before the case is submitted to the jury." There should have been little question as to the issue in *Cornett* because the plaintiff was a deputy sheriff, a person almost universally recognized as a public official.

The United States Supreme Court has left more flexibility with regard to the public figure/private figure determination, having never expressly declared that the determination is one

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566. See supra text accompanying note 426.
570. Id. at 110-11, 737 S.W.2d at 160 (citing Rosenblatt v. Baer, 383 U.S. 75 (1966)). Perhaps not understanding the subtlety of the distinction, Justice Hickman, in his concurrence, stated that the plaintiff "was and is a 'public official' as a matter of law and that ought to be that." *Cornett*, 293 Ark. at 112, 737 S.W.2d at 161 (Hickman, J., concurring).
571. See authorities cited at supra notes 179-80.
solely for the trial judge.\textsuperscript{572} Nevertheless, as with the public official determination, Arkansas courts have consistently left the issue to the trial judge.\textsuperscript{573}

D. Summary Judgment

The imposition of the actual malice standard in public official and public figure cases has increased considerably the use of summary judgments in defamation suits. As noted earlier, every Arkansas defendant facing a public plaintiff has prevailed on summary judgement motion.\textsuperscript{574} Thus, the issue of the proof of actual malice with the requisite clear and convincing evidence has been kept from the jury. Allegations of defendant negligence in private plaintiff actions, on the other hand, have consistently gone to the jury. No trial judge has been willing to settle the issue on summary judgment motion, and it is unlikely that any will in light of such precedent.\textsuperscript{575}

Recent developments in federal summary judgment practice may make it easier still for defendants to obtain such favorable pre-trial resolution. The Supreme Court in a 1986 case, Anderson v. Liberty Lobby, Inc.,\textsuperscript{576} ruled that, under Federal Rule of Civil Procedure 56, a trial judge ruling on a summary judgment motion should consider the applicable “clear and convincing evidence” standard. The Court wrote that the “inquiry involved in a ruling on a motion for summary judgement or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.”\textsuperscript{577} As the Court noted, it makes little sense to “say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations,” which standards are manifested in the eviden-

\textsuperscript{572} See generally Smolla, supra note 13, at § 2.29[2].

\textsuperscript{573} See, e.g., Drew v. KATV Television, Inc., 293 Ark. 555, 739 S.W.2d 680 (1987) (necessarily adjudicating this issue before granting summary judgment); Dondrill I, 265 Ark. 628, 590 S.W.2d 840 (1979) (same).

\textsuperscript{574} See supra note 248 and accompanying text. Cf. Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (“The proof of ‘actual malice’ calls a defendant’s state of mind into question, and does not readily lend itself to summary disposition.”).

\textsuperscript{575} See supra notes 278-83 and accompanying text (discussing KARK-TV).


\textsuperscript{577} Liberty Lobby, 477 U.S. at 262.
tiary requirements.\textsuperscript{578}

Arkansas summary judgment practice is, of course, governed by neither the Federal Rules of Civil Procedure nor its judicial interpretations. Rather, Arkansas Rule 56, which is modeled after its federal counterpart, controls.\textsuperscript{579} In spite of the technical distinction between the two sets of rules, a number of Arkansas cases applying Arkansas Rule 56 have relied upon federal court interpretations of Federal Rule 56.\textsuperscript{580} More importantly and more specifically in the defamation context, the Arkansas Supreme Court in a 1987 case, \textit{Drew v. KATV Television, Inc.},\textsuperscript{581} cited \textit{Liberty Lobby} with approval. The \textit{Drew} court incorporated the heightened "clear and convincing evidence" element in upholding the trial judge's grant of defendant's motion for summary judgment against a public official plaintiff.\textsuperscript{582} Arkansas's adoption of the \textit{Liberty Lobby} interpretation of Rule 56(c) portends an even more difficult burden for public official and public figure plaintiffs.

\section*{IV. CONCLUSION}

Much about the future course of defamation law is unsettled. State courts remain in the dark as to precisely what of their state common law they can and cannot change without violating constitutional mandates. In addition, enormous jury awards to defamation plaintiffs have sparked a growing national trend toward wholesale reform of the defamation area of tort law.\textsuperscript{583} In the past few decades, Arkansas has seen neither an incredible proliferation of defamation litigation nor the frequently accompanying massive damage awards. Therefore, the state legislature and courts apparently have not ex-

\begin{itemize}
  \item \textsuperscript{578} \textit{Id.} at 254-55.
  \item \textsuperscript{579} \textit{Ark. R. Civ. P.} 56(c). As the Arkansas Supreme Court wrote in \textit{Short v. Little Rock Dodge, Inc.}, 297 Ark. 104, 106, 759 S.W.2d 553, 554 (1988), the rules are identical "in every material respect."
  \item \textsuperscript{580} \textit{See, e.g., Short}, 297 Ark. at 106, 759 S.W.2d at 554 (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986) where the Court interpreted Federal Rule 56(c) as permitting a summary judgment "when a plaintiff cannot offer proof of a material element of the claim").
  \item \textsuperscript{581} 293 Ark. 555, 739 S.W.2d 680 (1987).
  \item \textsuperscript{582} \textit{Id.} at 557, 739 S.W.2d at 681-82.
  \item \textsuperscript{583} \textit{See generally Smolla, Suing the Press}, supra note 8, at ch. 11; \textit{Reform Libel Law?}, 75 A.B.A. J. 42 (Apr. 1989); Smolla, \textit{Rejuvenation of Libel Law}, supra note 8.
\end{itemize}
explored statutory remedies which would address such problems.\footnote{Such remedies include right-to-reply and retraction statutes. See generally SMOLLA, \textit{supra} note 13, at § 9.12-13.} Nevertheless, like other jurisdictions, Arkansas has faced with the task of determining exactly what options the first amendment jurisprudence leaves it and then responding accordingly.

On the matter of public figures and public officials, Arkansas courts are to be commended for their restraint. The Arkansas Supreme Court has adhered closely to the Supreme Court decisions delimiting the boundaries between public figures and private figures, thus providing protection to the reputations of private figure plaintiffs to the extent the high court has deemed appropriate under the first amendment. The Arkansas court has also refrained from expanding the degree of protection of which the actual malice standard deprives public officials by recognizing that a wide range of commentary is protected, particularly with regard to higher echelon officials.

The most important matter awaiting eventual adjudication by the Arkansas Supreme Court is whether, in response to \textit{Dun & Bradstreet}, it will impose strict liability in private plaintiff suits where no matter of public concern is at issue. An assertion of state authority in response to the superimposition of a framework of constitutional doctrines might have provoked the Arkansas Supreme Court's past decisions. Arkansas responded to the implicit option of \textit{Gertz} by imposing strict liability, albeit perhaps unwittingly, in cases where private plaintiffs sued nonmedia defendants. However, Arkansas should be more reticent to revert to the common law, no-fault standard in response to \textit{Dun & Bradstreet}.

Finally, the Arkansas Supreme Court should make a conscious effort to clarify various other issues to provide legal guidance and certainty. In particular, the court should consider complete abrogation of common law ill-will malice as it presently applies in the context of abuse of privilege and punitive damage awards. Should the court decline to abandon altogether the common law standard, it must at the very least clarify the meaning of the standard—whether it carries impli-
cations of both constitutional-type actual malice and ill-will, hatred, spite-type malice, or only the latter.

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