Obsolete On Its Face: The Libel Per Quod Rule (with R. Meslar)

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I. INTRODUCTION

Jackie Sauerhoff and a female co-worker purchased a raffle ticket for $10, orally agreeing to split the $4,000 prize if they won. They won, she reneged; he sued. The Baltimore News American commented on the litigation:

Boyfriend Sues for Raffle Prize
$$ Sweeter Than Love?

Although Lady Luck apparently favored Jackie R. Sauerhoff, his girlfriend appears to have soured on him, according to a suit filed in Circuit Court Tuesday.

Jackie Sauerhoff, who was married, had another suit to file. This one was for libel. According to Sauerhoff, the article defamed him by attacking his reputation and morality. He claimed that as a result of the article, his wife had left him, he had suffered both mental and physical injuries, and he had lost the esteem of his friends, family, and community.¹

Imagine you were representing Sauerhoff. Would these allegations be enough to prevail? Obviously you have a problem because the statement is not clearly defamatory on its

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¹ The appellate court opinion in Sauerhoff’s case elaborated on what Sauerhoff alleged:
At the time of the press account, plaintiff was happily married, but upon reading it, his wife became convinced that her husband had been unfaithful to her. In this conviction she wallpapered the kitchen of their home with the papers containing the story. Immediately thereafter she left her husband and has never returned, at present her whereabouts not being known.
face. This, of course, is the libel per quod problem. As you would inevitably conclude in Sauerhoff’s case, your approach depends on which state’s law is applied. What you could not conceivably know is the number and diversity of approaches that the states take in this situation.

If you were suing in Oregon, for example, you would only need to prove Sauerhoff’s initial allegations to recover damages. It would be irrelevant that Sauerhoff’s own attorney had misinformed the reporter that the co-worker was Sauerhoff’s girlfriend or that the reporter innocently believed that Sauerhoff was single. In short, the fact that the reporter took the utmost care is irrelevant.

If you were suing in Massachusetts, the reporter’s conduct would make a difference. You would have a case only if the reporter was negligent in not checking Sauerhoff’s marital status or his relationship with his co-worker before identifying her as a girlfriend.

If you were suing in Texas, it would not matter if the reporter knew that Sauerhoff was married and had fabricated the extramarital relationship out of whole cloth simply to make the story more appealing to the paper’s readers. Instead, you would need to show that Sauerhoff suffered pecuniary damages because of the story, such as if his wife had been the primary source of the household income. If you do not plead and prove some specific economic damages, it would not matter how devastated he was by his wife’s departure or how contemptuous his relatives and friends were of his apparent infidelity. Your case would not survive a summary judgment motion.

If you were suing in Illinois, you would have to show both negligence on the part of the reporter and specific economic damages to prevail. Neither element alone, no matter how convincing, would be sufficient.

These are just some of the approaches that states have taken in a case such as Sauerhoff’s. They demonstrate what has—and has not—happened to this beclouded corner of com-

2. Statements libelous per quod, such as the one about Sauerhoff, are “those expressions which are not actionable upon their face, but which become so by reason of the peculiar situation or occasion upon which the words are written.” BLACK’S LAW DICTIONARY 916 (6th ed. 1990). See infra text accompanying notes 37-43.
mon law libel since the Supreme Court brought the First Amendment into play over a quarter century ago.

For the most part, the constitutional protection for defamatory statements established by the Supreme Court has dramatically altered the landscape of the common law torts of libel and slander—a landscape overgrown with arcane and illogical rules from four centuries of evolution. An area of this landscape in particular that would appear to be ripe for change is the requirement in many states that special damages must be pleaded and proved for statements that are only libelous per quod rather than libelous on their face.

Over seventeen years ago, Gertz v. Robert Welch, Inc. imposed a fault requirement for certain kinds of defamation actions brought by those who are not public figures. In par-


[The English law of defamation ... is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.

Id.

4. Special damages are direct pecuniary losses that have to be specifically pleaded and proved. See discussion infra note 32.


6. The defendant in Gertz was a publisher of a periodical, and the Court in its opinion consistently used the terms "publishers" and "broadcasters" in referring to the defendants in this type of case. See, e.g., id. at 325, 332, 340, 341, 343, 347, 348, 350. This language prompted extensive law review commentary as to whether the constitutional provisions should extend to nonmedia defendants. See, e.g., David W. Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 Tex. L. Rev. 199, 215-20 (1976); John J. Watkins & Charles W. Schwartz, Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges, 15 Tech. L. Rev. 823 (1984); Glen S. Dresser, Note, First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants, 47 S. Cal. L. Rev. 902 (1974); Note, Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants, 95 Harv. L. Rev. 1876 (1982). Several commentators argued that it would be incongruous to grant greater protection to statements made by publishers and broadcasters than to the same statements made by individual citizens:

It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person,
ticular, *Gertz* indicated that strict liability would no longer be appropriate for statements whose defamatory potential was not apparent on their face. In effect, this caveat extended a fault requirement to the defamatory language element of the tort, eliminating the principal modern justification for the retention of the special damages requirement in libel per quod cases.  

It would follow that courts, particularly in those states applying *Gertz* to all private plaintiff cases, would have found the fault rule more appropriate for imposing liability than the presence or absence of a special damages rule in libel per quod cases. The special damages rule in libel per quod cases can unfairly bar deserving plaintiffs from recovering for legitimate injuries in some cases and expose innocent defendants to potential liability for an unintended libel in other cases. However, very few courts have recognized this fact. And, in light of *Dun & Bradstreet, Inc. v. Greenmoss Builders,* which de-

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7. See infra text accompanying notes 59, 62.
8. See infra notes 44, 115.
9. Such as would happen to Sauerhoff in the Texas hypothetical. See also infra note 116.
10. This would have been the case in the Oregon example. See also infra text accompanying notes 68-69.
11. See infra text accompanying note 88.
12. 472 U.S. 749 (1985). In *Dun & Bradstreet,* a construction contractor sued a credit reporting agency for erroneously reporting that the contractor had filed for bankruptcy. The Supreme Court upheld an award of presumed and punitive damages because the statements did not involve "a matter of public concern." Id. at 763. Given the broad language of the Court's opinion and its analysis of *Gertz,* an argument can be made that not only the actual injury requirement but also the fault requirement of *Gertz* is mandated only for matters of public concern. Id. at 773-74 (White, J., concurring); *Mutafls v. Erie Ins. Exch.,* 775 F.2d 593 (4th Cir. 1985); see also *RODNEY A. SMOLLA,* LAW OF DEFAMATION § 3.02(3) (1986); Patrick J. McNulty, The *Gertz Fault Standard*
clined to extend the *Gertz* damages rules to a substantial area of state defamation law, states probably will be no more inclined to adopt a fault requirement for cases on matters not involving public concern than they were to adopt one for nonmedia defendants prior to *Dun & Bradstreet*. As of yet,

*and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation*, 35 Drake L. Rev. 51, 83 (1986). On the other hand, the facts indicate that fault was readily established in the case itself—the false report resulted from information provided to Dun & Bradstreet by a high school student working for the company and was not subjected to the usual verification procedures. 472 U.S. at 752. Hence, the fault requirement was not contested by the parties at the Supreme Court stage, id. at 784 (Brennan, J., dissenting), and it may still be intact. See New England Tractor- Trailer Training of Conn., Inc. v. Globe Newspaper Co., 480 N.E.2d 1005, 1009 n.4 (Mass. 1985); see also Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 Val. U. L. Rev. 241, 267-68 (1987); Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* Philadelphia Newspapers, Inc. v. Hepps, *and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 Ind. L. Rev. 767, 774-75 (1987). Compare Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) (when the speech is of exclusively private concern and the plaintiff is a private figure, the constitutional requirements do not necessarily force any change “in at least some” of the common law rules) with Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2707 (1990) (where a statement involves a private figure “on a matter of public concern,” a plaintiff must show some level of fault as required by *Gertz*).

13. A majority of the Justices in *Dun & Bradstreet* indicated that a media/nonmedia distinction had not been intended by *Gertz*. See 472 U.S. at 773 (White, J., concurring); id. at 781-84 (Brennan, Marshall, Blackmun, and Stevens, JJ., dissenting); see also Langvardt, supra note 12, at 247-48; Lewis, supra note 12, at 782 n.78; Rodney A. Smolla, *Dun & Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 Geo. L.J. 1519, 1563-64 (1987). Nevertheless, a media/nonmedia dichotomy had been developed in the wake of *Gertz* in many states, despite some debate as to whether any constitutional basis existed for such a dichotomy. See supra note 6. A public concern/private concern dichotomy, as the Court in *Gertz* recognized in appearing to reject this approach, creates practical difficulties by “forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of ‘general or public interest’ and which do not.” 418 U.S. at 346 (emphasis added) (citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971)). On the other hand, this dichotomy is more consistent with the original focus of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which first applied constitutional limitations to the law of defamation on the basis that “freedom of expression upon public questions is secured by the First Amendment.” Id. at 269.

In any case, the Court has retrenched somewhat from its suggestion that *Gertz* did not draw a distinction between media and nonmedia defendants, indicating that the application of the *Gertz* rules to nonmedia cases has not yet been decided. See Milkovich v. Lorain Journal Co., 110 S. Ct. at 2706 n.6; Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. at 779 n.4. This leaves states with a number of options in determining how far the *Gertz* rules will extend. It is reasonable to assume that states reluctant to extend *Gertz* beyond media cases will be equally reluctant to extend *Gertz* beyond matters of public concern after *Dun & Bradstreet*. SMOLLA, supra note 12, § 3.09[2]. Some of these states have tried to reconcile *Gertz* and *Dun & Bradstreet* by retaining the
the potential of *Gertz* as a catalyst for abandoning the relic of special damages in libel per quod cases is largely unfulfilled.

II. DEFAMATORY LANGUAGE AND SPECIAL DAMAGES AT COMMON LAW

The element of defamatory language in a common law defamation action\(^1\) encompasses several issues. Initially, the statement must have been capable of a defamatory meaning,\(^2\) which requires the trial judge to determine as a matter of law whether any reasonable construction\(^3\) of the words is defamatory.\(^4\) On this issue, the plaintiff may have to allege extrinsic

\(^1\) media/nonmedia distinction for imposing a fault requirement, while using a public concern/private concern analysis only on the issue of whether actual malice is required to recover presumed and punitive damages. See, e.g., infra notes 150, 236, and accompanying text. As a practical matter, *Dun & Bradstreet* will not increase the number of cases that apply the *Gertz* requirements. Cf. Douglas R. Matthews, Comment, *American Defamation Law: From Sullivan, Through Green moss, and Beyond*, 48 OHIO ST. L.J. 513, 523 (1987). (Based on an analysis of the cases in the Appendix, see infra notes 121-442 and accompanying text, most of the media cases that the courts have faced have arisen from statements on matters of public concern, based on the criteria of “content, form, and context” enunciated by the *Dun & Bradstreet* opinion. 472 U.S. at 761 (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)). In contrast, most of the nonmedia cases in states not extending *Gertz* to these cases involved matters that probably would not be considered “of public concern.” Hence, a substantial body of defamation law in many states will remain outside the scope of the *Gertz* damages requirements and, perhaps, its fault rules as well.

\(^2\) At common law, a defamation action could be brought against a defendant for defamatory language, understood as referring to the plaintiff, that was communicated to a third person. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 113, at 802 (5th ed. 1984).

\(^3\) A defamatory meaning is generally characterized as one that would tend to lower the plaintiff’s reputation in the eyes of the community where published or tend to deter third persons from associating with the plaintiff. *RESTATEMENT (SECOND) OF TORTS* § 559 (1977).

\(^4\) The majority approach is that unless the court can say that the language is not reasonably capable of any defamatory meaning, the case must be submitted to a jury. Thus, these jurisdictions hold that if language is susceptible to several meanings, one of which is innocent, it is for the jury to determine the sense in which it was used and understood. *RESTATEMENT (SECOND) OF TORTS* § 614 cmt. d (1977); *KEETON ET AL., supra* note 14, § 111, at 781; see *Washington Post Co. v. Chalonner*, 250 U.S. 290, 293 (1919).

\(^5\) The unique Illinois innocent construction rule, as modified by Chapski v. Copley Press, 442 N.E.2d 195 (III. 1982), holds that if any reasonable construction of the words is not defamatory, the statement is not actionable as a matter of law. Few would stretch the bounds of innocent construction as far as one nineteenth century case reported by G. SPENCER BOWER, A CODE OF THE LAW OF ACTIONABLE DEFAMATION 303-04 (2d ed. 1923). In that case, according to Bower, the defendant made the follow-
facts that are known to some recipients of the statement but that are not included in the statement itself. These extrinsic facts would make a statement that is not defamatory on its face possibly bear a defamatory meaning in the eyes of the court. The other factor involved in the element of defamatory language is essentially a question of fact: whether the statement in fact lowered the plaintiff's reputation. In order for the jury to resolve this question, the evidence must establish both that the statement was understood in its defamatory sense and that it was understood as referring to the plaintiff. With regard to all aspects of the defamatory language

18. In common law terminology, the allegation of extrinsic facts which make the statement defamatory is the inducement. The allegation as to the import of the allegedly defamatory words is known as the innuendo. RESTATEMENT (SECOND) OF TORTS § 563 cmt. f (1977); KEETON ET AL., supra note 14, § 111, at 782.

19. The typical example used to illustrate this situation is Morrison v. Ritchie & Co., where a newspaper published an erroneous announcement that the plaintiff's wife had just given birth to twins. It was known to those readers who were acquainted with the couple, that she had been married only one month. The defamatory innuendo was that the couple had been unchaste prior to marriage. KEETON ET AL., supra note 14, § 113, at 809 n.94 (citing Morrison v. Ritchie & Co., 39 Scot. L. Rep. 432 (1902)).

20. A plaintiff's reputation is damaged by a communication to a third person which "tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided." KEETON ET AL., supra note 14, § 111, at 773. This definition appears to have originated with Baron Parke in Parmiter v. Coupland, 6 M & W 105, 108, 151 Eng. Rep. 340, 342 (1840), and has been criticized as too narrow to encompass some types of defamatory statements, such as an imputation of insanity. KEETON ET AL., supra note 14, § 111, at 773. A broader definition is offered by the RESTATEMENT (SECOND) OF TORTS § 559 (1977), which states that a communication is defamatory "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

21. Here also, extrinsic facts may be necessary to resolve this inquiry. For example, a foreign word or colloquial term clearly directed at the plaintiff could have a dual meaning, only one of which is defamatory. Thus, the issue becomes whether some readers or listeners understood the term in its defamatory sense. See KEETON ET AL., supra note 14, § 111, at 780-83.

22. This inquiry may also require extrinsic evidence when a clearly defamatory statement does not reveal on its face to whom it is referring. This may occur when a defamatory reference to an unnamed or apparently fictional character is understood by
element, a defendant would be liable regardless of an absence of fault in failing to recognize the defamatory nature of the statement. In other words, strict liability would apply on this issue.\footnote{23}

The common law began distinguishing between slander actionable per se\footnote{24} and slander actionable per quod\footnote{25} very soon after the cause of action for slander was first permitted by the English common law courts.\footnote{26} Eventually,\footnote{27} four categories of slander per se came to be recognized by the courts:

\begin{footnotes}
23. Restatement (First) of Torts §§ 579, 580 (1938); Keeton et al., supra note 14, § 113, at 809. Only the publication element required fault to be shown. See id. § 113, at 803. However, even prior to Gertz, a few states had rejected strict liability to some extent. See infra notes 285 (Minnesota rule on colloquium), 331 (New Mexico fault requirement for libel per quod).

24. Both libels and slanders may be actionable per se, i.e., actionable without proof of special damage, even though the basis for a libel being actionable per se is historically different from the basis for a slander being actionable per se. See discussion infra text accompanying notes 34-44.

25. Although use of the terms "slander per se" and "slander per quod" undoubtedly contributed to the massive confusion in the case law when "per se" and "per quod" were employed in a different context in libel actions, see discussion infra text accompanying notes 38-44, the vast majority of cases discussing slander actionable per se and actionable per quod use the terms "slander per se" and "slander per quod," and these terms will be employed in this discussion.

26. The development of certain categories of slander that did not require the customary showing of injury in an action on the case was probably based on the greater likelihood of words within those categories causing "temporal" harm, rather than the "spiritual" harm that had been the basis of slander actions in the ecclesiastical courts. See Restatement (Second) of Torts § 568 cmt. b (1977); Keeton et al., supra note 14, § 112, at 788.

27. While the first three categories of slander per se were established in some form by the middle of the seventeenth century, the fourth category, imputation of unchastity to a woman, did not become part of the common law until early in this century. Laurence H. Eldredge, The Law of Defamation § 18, at 96-99 (1978); Keeton et al., supra note 14, § 112, at 793.
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(i) words imputing the commission of a criminal offense by the plaintiff punishable by death or imprisonment or involving "moral turpitude;"28 (ii) words imputing to the plaintiff conduct incompatible with the proper conduct of his business, trade, profession or office;29 (iii) words imputing to the plaintiff a loathsome disease, historically either leprosy or a presently-existing venereal disease;30 and (iv) words imputing unchastity to a woman.31 In all other slander actions, injury to reputation would not be presumed—the plaintiff would have to plead and prove special damage in order to prevail.32

In contrast to slander, libel was considered always to be actionable per se33 at common law, regardless of the nature of the statement.34 Thus, a plaintiff could recover general damages35 for injury to reputation without any actual proof that

29. Id. § 573.
30. Robert D. Sack, Libel, Slander and Related Problems 95 (1980) (citation omitted). Section 572 of the Restatement would permit other loathsome and communicable diseases in this category. See id. at 95 n.242 (citing Restatement (Second) of Torts § 572 cmt. c (1977)).
31. Restatement (First) of Torts § 574 (1938). The second Restatement expands this category to include any imputation of serious sexual misconduct to a man or a woman. Restatement (Second) of Torts § 574 (1977). While this modification has been criticized, see, e.g., Eldredge, supra note 27, § 21, at 123, it may be constitutionally required if the category is to be retained. Smolla, supra note 12, § 7.05[5].
32. "Special damage" is economic or pecuniary loss for which specific evidence is adduced. Eldredge, supra note 27, § 16, at 92. The special damage, or "special harm" as phrased by the Restatement (Second) of Torts § 575 (1977), must be a direct consequence of the defamation, Sack, supra note 30, at 345, such as the loss of customers, employment, or a particular contract, Eldredge, supra note 27, § 31, at 196. Thus, not all provable harm arising from the defamation can be classified as special damage, since it cannot be shown as a direct economic or pecuniary loss, and many cases permitting compensation solely for alienation of friends and mental distress under the rubric of "special damages" are not using the term accurately. Francis D. Murnaghan, From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1, 2 n.4 (1972) [hereinafter Murnaghan I]. Once special damages have been proved, however, mental distress and other types of "general damages," see infra note 35, are parasitic, i.e., they are permitted to be "tacked on" to the award of special damages. Restatement (Second) of Torts § 575 cmt. a (1977); Keeton et al., supra note 14, § 112, at 794.
33. Actionable per se meaning actionable without proof of special damages. See supra note 24.
34. Restatement (First) of Torts § 569 (1938). The basis for the distinction lay in the separate historical development of the two types of defamation, with libel originating from criminal defamation actions in the Star Chamber. See Restatement (Second) of Torts § 568 cmt. b (1977); Murnaghan I, supra note 32, at 11 n.41.
35. General damages refers to damages awarded to compensate the plaintiff for his
an injury occurred. 36

The fact that all libels were actionable per se, however, did not prevent courts from using the redundant term libel per se. 37 Therefore, if for no other reason than a natural tendency for symmetry, the term libel per quod was created. 38 Since libels were not categorized on the basis of the nature of the defamatory words as slanders were, 39 the term libel per quod had to have a different meaning than slander per quod. It came to be defined by most courts, often through dicta initially, 40 as libel that required the pleading 41 of extrinsic facts to make an otherwise innocent statement 42 assume a defama-

or her presumed injury to reputation. They are intended to be an approximate compensation for a real injury not capable of being proved in monetary terms, although the jury has broad discretion to award damages on whatever basis it chooses. The plaintiff may offer evidence of mental distress, alienation of associates, etc., in order to influence the jury's award but need not offer any evidence at all of injury to reputation. See Sack, supra note 30, at 346; Murnaghan I, supra note 32, at 12 n.44.


37. Often courts used the term to refer to a libel as a matter of law, as part of the process of determining whether the language was capable of a defamatory meaning. See supra notes 15-16.


39. See discussion supra text accompanying notes 24-32.

40. For accounts of the meandering and haphazard process by which courts of a particular state moved towards a libel per quod rule, see Richard C. Ausness, Libel Per Quod in Florida, 23 U. Fla. L. Rev. 51 (1970); Charles E. Carpenter, Libel Per Se in California and Some Other States, 17 S. Cal. L. Rev. 347 (1944) (primarily California); Henn, supra note 38 (New York); Murnaghan I, supra note 32 (Maryland); Alexander H. Barnes, Note, Libel-Special Damages, 33 N.C. L. Rev. 674 (1955) (North Carolina).

41. “Per quod,” meaning “whereby,” introduced the portion of the pleading alleging the basis for recovering special damages under the common law pleading rules for defamation actions. Black's Law Dictionary 1141 (6th ed. 1990). Therefore, it was not very difficult for courts to apply the per quod term to another pleading requirement, specifically that the pleading allege the extrinsic facts making the statement defamatory.

42. Libel may require the pleading of an innuendo, see supra note 18, where the statement is ambiguous on its face rather than wholly innocent on its face (i.e., the statement may be understood in two different ways, one of which is defamatory and one of which is innocent). A few jurisdictions treat this type of libel as an intermediate category between libel per se and libel per quod, see, e.g., Renwick v. News & Observer Publishing Co., 312 S.E.2d 405 (N.C. 1984), while other states impose a special damages requirement because the statement is not libel per se, see, e.g., Langworthy v. Pulitzer Publishing Co., 368 S.W.2d 385 (Mo. 1963); Moore v. P.W. Publishing Co., 209 N.E.2d 412 (Ohio 1965), cert. denied, 382 U.S. 978 (1966); Sellers v. Oklahoma Publishing Co., 687 P.2d 116 (Okla. 1984). States applying a special damages requirement for statements with both an innocent and a defamatory meaning will be even more inclined to do so for statements wholly innocent on their face where both innuendo and extrinsic
Almost inevitably, and also often through dicta, many courts extended the special damages requirement of slander per quod to cases of libel per quod. The proliferation of a special damages requirement for libel per quod cases was widely noted by commentators several decades ago, during which time the volume of defamation cases of all types grew

43. See supra notes 19, 22. The innuendo was not used only to explain the defamatory meaning of the statement in light of the extrinsic facts (the inducement). It was also used to indicate how the defamatory communication applied to the plaintiff when its application to the plaintiff had to be shown by pleading extrinsic facts (the colloquium) (see supra note 22). Restatement (Second) of Torts § 563 cmt. f (1977); BLACK'S LAW DICTIONARY 789 (6th ed. 1990); ELDREDGE, supra note 27, § 23, at 155. While most commentators agree that libel per quod refers only to libels requiring extrinsic facts to show its defamatory meaning and not to libels requiring extrinsic facts just to show that the statement was referring to the plaintiff, 1 ARTHUR B. HANSON, LIBEL AND RELATED TORTS ¶ 41, at 41-42 (1969); SACK, supra note 30, at 101, a number of cases, often through dicta, extend the libel per quod and special damages rule to libels requiring extrinsic facts just to show the statement's reference to the plaintiff. Reed Johnston, Jr., Note, Defamation—Libel Per Quod and Special Damage, 45 N.C. L. Rev. 241, 242 (1966); see, e.g., Lind v. O'Reilly, 636 P.2d 1319 (Colo. App. 1981); Inter-State Detective Bureau, Inc. v. Denver Post, Inc., 484 P.2d 131, 133 (Colo. App. 1971); Wainman v. Bowler, 576 P.2d 268, 270 (Mont. 1978); Arnold v. Sharpe, 251 S.E.2d 452, 455 (N.C. 1979) (dicta); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 419 n.6 (Tenn. 1978) (dicta); see also CAL. CIV. CODE § 45a (West 1982) (libel not defamatory on its face includes any libel requiring the pleading of "inducement, innuendo or other extrinsic fact").

44. While undoubtedly stemming at first from a confusion of terminology, Henn, supra note 38, at 22-23; Alfred H. Knight, III, Note, Libel Per Se and Special Damages, 13 Vand. L. Rev. 730, 734 (1960), its persistence may have been due to courts seeking further evidence in cases of inducement and innuendo that persons to whom the libel was published actually knew the extrinsic facts making the statement defamatory and construed it in a defamatory sense. Henn, supra note 38, at 48 nn.152-53. Or the cases may be reflective of a more general reluctance on the part of judges to permit unproven general damages, which were contrary to their common law philosophy. Murnaghan I, supra note 32, at 28. One of the primary justifications that commentators have identified is the reluctance to hold a defendant who might be unaware of the extrinsic facts to a strict liability standard. William Samore, New York Libel Per Quod: Enigma Still?, 31 Alb. L. Rev. 250, 254 (1967); Melinda J. Branscomb, Comment, Liability and Damages in Libel and Slander Law, 47 Tenn. L. Rev. 814, 822 (1980); see infra note 115; see also Restatement (Second) of Torts § 569 cmt. b. (1977); Keeton et al., supra note 14, § 112, at 796.

rapidly. The extent to which the rule was recognized, however, could not be determined readily from an examination of the often confused dicta from which the rule developed and became the subject of a famous law review battle between William Prosser and Laurence Eldredge. This debate served only to further muddy the waters.

In formulating a rule for the Restatement (Second) of Torts, the American Law Institute ultimately rejected the recommendation initially proposed by Prosser when he was the Restatement reporter in favor of the position advocated by Eldredge. Many treatises, however, accepted Prosser's position that the libel per quod rule was the growing trend, although virtually all rejected his contention that libel per quod falling within one of the four categories of slander per se is treated like libel per se. Thus, by the time the Supreme

46. 1 HANSON, supra note 43, at vii.
49. See 1 HANSON, supra note 43, ¶ 41, at 42 and n.20; SACK, supra note 30, at 96-98.
50. See 1 HANSON, supra note 43, ¶ 41, at 42; Murnaghan I, supra note 32, at 3 n.5, 25 n.95; Samore, supra note 44, at 251. While the slander per se exception may have been considered necessary to avoid violating the maxim that what is actionable as slander is, a fortiori, actionable as libel, it is an exception not articulated by the cases themselves and does not explain all of them. 1 HANSON, supra note 43, ¶ 41, at 42 n.22; Henn, supra note 38, at 49. The exception has also been criticized as virtually swallowing up the rule itself, Murnaghan I, supra note 32, at 25 n.95, since most libel cases are likely to fit into one of the four slander categories, in particular imputations of crime, unchastity, or improper business conduct. See Marc A. Franklin, Suing Media for Libel: A Litigation Study, 1981 AM. B. FOUND. RES. J. 795, 811-12 [hereinafter Franklin II]; Marc A. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 AM. B. FOUND. RES. J. 455, 481-82 [hereinafter Franklin I]. Nevertheless, perhaps because of the stature of the commentator proposing the exception, Murnaghan I, supra note 32, at 3 n.5, a number of cases subsequent to Prosser's enunciation of the exception have applied it as settled law. See Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 535 (10th Cir. 1987) (applying Colorado law, court cited dicta from Colorado Supreme Court in Bernstein v. Dun & Bradstreet, Inc., 368 P.2d 780, 783 (Colo. 1962), which observed that Prosser included Colorado in his list without authority and stated that "we do not disagree with it"); Brown v. Skaggs-Albertson's Properties, Inc., 563 F.2d 983 (10th Cir. 1977) (applying Oklahoma law, court stated proposition in uncited dicta, but Prosser cited elsewhere in opinion). But see Miller v. Lear Siegler, Inc., 525 F. Supp. 46, 57 (D. Kan. 1981) (Oklahoma law does not recognize slander per
Court in *Gertz* imposed new restrictions on the recovery of damages in defamation actions, a rule whose origin was uniformly criticized by commentators51 had become firmly established in the case law of about half of the states.52

III. THE CONSTITUTIONAL FAULT STANDARDS

The Supreme Court's transformation of the law of defamation began with *New York Times Co. v. Sullivan*,53 which established the requirement that a plaintiff who is a public official54 must prove that the false55 and defamatory statement

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51. Even those commentators who asserted that it was the majority rule or the emerging trend were critical of its origin. Eldredge, *supra* note 27, § 24, at 161.

52. By the time *Gertz* was decided, at least 24 jurisdictions had holdings or consistent dicta that libel not defamatory on its face requires the pleading of special damages: Alabama, Arizona, Arkansas, California (by statute), Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Missouri, Montana, New Mexico (requiring special damages or fault), North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, and Utah. One jurisdiction apparently recognized the rule in credit report cases (Georgia), while another recognized the rule (in dicta) only when the libel did not fall within one of the slander per se categories (Indiana). In 11 jurisdictions, the rule was unsettled—language in some cases could be interpreted as supporting the rule, but language to the contrary was also present: Hawaii, Maine, Maryland, Minnesota, Mississippi, Nebraska, New York, Nevada, Pennsylvania, South Carolina, and West Virginia. Three jurisdictions never had applied the rule—Alaska, Delaware, and Vermont—and seven had specifically rejected it: Massachusetts, New Hampshire, New Jersey, Oregon, Washington, Wisconsin, and Wyoming. Michigan and Virginia did not apply the rule because libel was treated like slander in those states, and Louisiana required "malice" rather than special damages for statements not defamatory on their face. As the Prosser-Eldredge dispute indicates, see *supra* note 47, classifying the jurisdictions is a hazardous venture that permits conflicting conclusions. Today, 17 years after *Gertz*, the law in this area has been clarified only slightly. See generally Summary *infra* pp. 94-97.

53. 376 U.S. 254 (1964). *New York Times* involved a suit brought by an Alabama police officer who claimed that a paid political advertisement in the New York Times had defamed him. The Court reversed a $500,000 verdict for the plaintiff, holding that the defendant did not have the requisite "malice" in regard to its publication. *Id.* at 286. *New York Times* has been called "unquestionably the greatest victory won by the defendants in the modern history of the law of torts." Prosser, *supra* note 50, § 118, at 819.

was made with "actual malice," i.e., with "knowledge that it was false or with reckless disregard of whether it was false or not." 56 In St. Amant v. Thompson, 57 the Court elaborated on the "reckless disregard" term, equating it with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 58

Three years after New York Times, the Court extended its requirements to "public figures," the definition of which was to dominate much of the Court's consideration of defamation cases during the next decade. 59

Finally, after several years of uncertainty, 60 the Court took a major step toward fixing the outer bounds of the constitutional privilege in Gertz v. Robert Welch, Inc. 61 In Gertz, the Court rejected a wholesale extension of the "actual malice" standard and instead applied a lesser fault standard to actions brought by private individuals. 62 The Court held that "so long as they do not impose liability without fault, the

55. Although the defendant had to plead and prove truth if it was raised as a defense under common law, the practical effect of New York Times shifted the burden of proving this issue to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 613 cmt. j (1977). The plaintiff must first establish the falsity of the statement in order to show that the defendant knew of its falsity or had serious doubts as to its truth. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).


58. Id. at 731.


60. In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), the plurality took the position that the New York Times standard should apply to all communications involving matters of public or general concern, regardless of the status of the plaintiff. This view was later rejected by a majority of the Court in Gertz, a majority achieved only with Justice Blackman's willingness to abandon his position in Rosenbloom for the sake of establishing a "clearly-defined majority position." See Gertz, 418 U.S. at 354 (Blackmun, J., concurring).


62. The Court concluded that Gertz was not a public figure, whether "for all purposes and in all contexts" or "for a limited range of issues." Id. at 351-52.
States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 63

In settling on an intermediate standard between the knowledge or reckless disregard requirement of New York Times and the liability without fault norm of the common law, the Gertz opinion added a caveat regarding the scope of its holding:

At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent." [citing Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)] This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. 64

The meaning and implication of this caveat has generated a fair amount of discussion among commentators, 65 but very little commentary in state case law applying Gertz. 66

In an extensive dissent, Justice White interpreted the majority's caveat as implying that the New York Times standard would apply to the issue of truth or falsity in private person cases when a statement's defamatory potential was not appar-

63. Id. at 347.
64. Id. at 348 (citation omitted).
66. Because most statements in defamation law are defamatory on their face, KEE TON ET AL., supra note 14, § 113, at 802, as a practical matter courts will give little attention to the defendant's claim of lack of fault as to defamatory potential even when they do consider it. See, e.g., E.W. Scripps Co. v. Cholmondeley, 569 S.W.2d 700, 702 (Ky. App. 1978). Nevertheless, at least 16 states have included the language in their application of Gertz, which would allow a court to consider such a claim in an appropriate case. See generally Appendix infra notes 121-442 and accompanying text for state-by-state analysis.
ent on its face. This would require a showing of knowledge or reckless disregard of falsity, effectively abolishing the public person/private person distinction in all cases where defamatory potential was not apparent.\textsuperscript{67}

Justice White's interpretation of the caveat has been criticized for failing to consider the possibility of applying a fault standard to the element of defamatory language as well as to the element of truth or falsity.\textsuperscript{68} There are at least two arguments for applying the fault standard to both the truth/falsity issue and the element of defamatory language. The first argument is textual: The Court's caveat states that its formulation of the fault standard might not be appropriate in cases where the content of the factual misstatement does not warn a "reasonably prudent" (i.e., non-negligent) publisher of the statement's defamatory potential. The Court must have meant this reasonable prudence of the publisher to refer to the publisher's degree of care as to defamatory potential, rather than the degree of care as to truth or falsity. If that phrase had been referring to truth or falsity, the caveat would have been superfluous because a publisher who was "reasonably prudent" as to truth or falsity by definition would not be liable under the Court's existing formulation of the fault standard. The second and more substantive argument for applying the fault element to both issues is that strict liability on the defamatory language issue would entirely defeat the \textit{Gertz} protections in cases where the statement's defamatory potential was not apparent to a defendant, who may have been reasonably prudent in checking the veracity of the statement as he understood it.\textsuperscript{69}

These arguments must have been considered by the committee drafting the fault standards for the final version of the

\textsuperscript{67} 418 U.S. at 389 n.27 (White, J., dissenting).
\textsuperscript{68} See Sack, supra note 30, at 124; Anderson, supra note 65, at 463-64.
\textsuperscript{69} See Sack, supra note 30, at 124 (citing David A. Anderson, \textit{Libel and Press Self-Censorship}, 53 TEX. L. REV. 422, 462-65 (1975)). In the course of arguing for an "awareness" requirement for defamatory potential, Franklin and Bussel observe that because a court in this type of case would judge the truth or falsity of the statement in terms of how the recipient (who was familiar with the extrinsic facts making the statement defamatory) actually understood the statement, the speaker would have to admit that he never believed the truth of the statement as it was so understood. Fault only on truth or falsity would offer no protection because it would no longer be applied to that which the speaker thought he was saying. Franklin & Bussel, supra note 65, at 843; see also McNulty, supra note 12, at 95.
Restatement (Second) of Torts on the law of defamation.  

Believing that the Gertz case essentially was the final word on the applicability of the fault standard itself, the Restatement adopted the New York Times standard for public officials and public figures and adopted negligence as the minimum standard for private persons in light of Gertz. More significantly, in both situations the Restatement applies the fault standards to the defamatory character of the statement as well as to the truth or falsity of the statement. Thus, where the statement is defamatory either because of extrinsic facts unknown to the plaintiff, because of the particular content of the communication (e.g., words with more than one meaning), or because a reference to another person or a fictitious person is understood as referring to the plaintiff, the defendant must be at least negligent as to each particular issue raised. If the defendant is without the minimum level of fault as to any aspect of the defamatory language element, he is not liable.

The comments to these sections of the Restatement recognize that the application of a fault standard to the element of defamatory language has not been specifically addressed by the Court, since the cases heard by the Court involved statements in which the defamatory potential was apparent on

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70. Volume three of the Restatement, which includes defamation, was completed in 1977. See Restatement (Second) of Torts (1977).
72. Restatement (Second) of Torts § 580A (1977) provides:
One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness, or role in that capacity is subject to liability, if, but only if, he
(a) knows that the statement is false and that it defames the other person,
or
(b) acts in reckless disregard of these matters.
73. Restatement (Second) of Torts § 580B (1977) provides:
One who publishes a false and defamatory communication concerning a private 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 public capacity, 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
(c) acts negligently in failing to ascertain them.
their face. 75 The drafters contend, however, that either the logic of the Gertz holding or the application of ordinary negligence principles by state courts applying Gertz will result in their requiring proof of negligence as to the defamatory character of the statement.76

Others who have addressed this issue are unanimous in concluding that a defendant should no longer face strict liability on this issue, 77 at least where the defamatory potential of the statement is not apparent. 78 These commentators are not

75. Restatement (Second) of Torts § 580A cmt. d (1977). The drafters considered part of the Gertz caveat, see supra text accompanying note 64, but offered several possible interpretations as to its implication. See Restatement (Second) of Torts § 580B cmt. d (1977). The Court's articulation of a fault standard narrowly defined to focus only on the element of truth or falsity creates analytical problems when the Court tries to apply a fault rule in a different context. In Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988), the plaintiff, a public figure, sued the defendant magazine over an offensive ad parody of him. The Court rebuffed the plaintiff's attempt to circumvent the constitutional restrictions on defamation actions by raising a claim for intentional infliction of emotional distress, holding that the New York Times "actual malice" standard applies:

We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 56. However, defining knowledge or reckless disregard solely in the context of truth or falsity is incongruous when the statements in the parody were obviously and intentionally false. On the other hand, the jury found against the plaintiff on his libel claim by concluding that the parody could not "reasonably be understood as describing actual facts . . . or actual events," id. at 57, making it apparent that the defendant was not at fault with regard to the statement's defamatory potential. Hence, whether actual malice or some lesser fault standard is applied, see infra note 83, its application in a case such as this goes not to the issue of truth or falsity but rather to the issue of whether the statement is defamatory.

76. See Restatement (Second) of Torts § 580B cmt. d (1977).


78. One commentator was critical of the Restatement's imposition of negligence on this issue as part of the prima facie case even where the statement is defamatory on its face. He argued that addressing the question of negligence in these cases is not justified by the case law or by the logic of applying it in defamation by extrinsic fact cases. See Murnaghan II, supra note 77, at 34-35.
unanimous, however, as to whether a negligence standard provides sufficient protection for the defendant.\textsuperscript{79} It may be true that requiring a speaker to exercise due care in not conveying a defamatory meaning may be too demanding in some cases that involve a latent ambiguity.\textsuperscript{80} However, applying a \textit{New York Times} standard instead, at least in cases where the defamatory potential of a statement would have been readily revealed through discovery of extrinsic facts, may offer defendants too much protection in comparison with a negligence standard.

The \textit{New York Times} standard would require the plaintiff to show at a minimum that the defendant had a "high degree of awareness" of the defamatory nature of the statement or had "serious doubts" that the statement did not contain a defamatory meaning.\textsuperscript{81} Where the defamatory potential of the statement is not apparent on its face, a subjective ignorance of the extrinsic facts making the statement defamatory would be sufficient to shield the defendant from liability. This would discourage a publisher from investigating the extrinsic facts where the defamatory potential is not apparent. On the other hand, application of a negligence standard in the same situation would encourage a reasonably prudent publisher to make a reasonable investigation in order to avoid liability.\textsuperscript{82}

Other arguments could be made in favor of applying a negligence standard, as opposed to the \textit{New York Times} standard, to the defamatory language element even where the

\textsuperscript{79} A few of the commentators have contended that the Restatement's adoption of negligence is inadequate on this issue, arguing instead for a higher standard. See Frakt I, \textit{supra} note 77, at 506; Franklin & Bussel, \textit{supra} note 65, at 837 n.40. Others have argued for a more refined determination of fault than the common law standard for negligence. See Anderson, \textit{supra} note 65, at 460-61.

\textsuperscript{80} Franklin & Bussel, \textit{supra} note 65, at 843.

\textsuperscript{81} See \textit{supra} text accompanying notes 57-58.

\textsuperscript{82} Franklin & Bussel attempt to provide some measure of protection by adding a prong of liability to their "awareness" test in cases where the defamation is created by extrinsic facts: "[T]he court should ask whether the defendant was aware of, or purposefully blinded himself to, the extrinsic fact that transformed the innocent statement into a defamatory one." Franklin & Bussel, \textit{supra} note 65, at 846 (emphasis added). However, unless this permits the plaintiff to show the defendant's failure to investigate or inquire where it would have been reasonable to do so (in effect a negligence standard), the additional prong has no effect. A defendant who regularly avoided even considering whether extrinsic facts might make the statement defamatory would be immune from liability under this test.
plaintiffs are public figures. For most state courts considering a standard of fault, however, arguments by commentators in law review articles carry little weight when compared to the relative simplicity and symmetry of the Restatement's fault rules and its influence on tort law in general. Hence, of the thirty-six states adopting negligence as the standard of fault under Gertz, several have adopted or cited to section 580B of

83. The various justifications for requiring public figure plaintiffs to prove a higher degree of fault as to truth or falsity do not carry as much weight when applied to the defamatory language element. Criticism of public officials or media reports of public figures that result in litigation generally involve statements that are defamatory on their face, and the focus of the litigation is on the status of the plaintiff, the truth or falsity of the statement, or the privileges available to the defendant. These types of statements, involving matters of public interest and concern, are what the New York Times standard is designed to protect. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 755 (1985). Adding a fault requirement to the defamatory language element will add little to a defendant's protections. In contrast, those situations where a statement is not defamatory on its face rarely concern the types of issues that the Court had in mind when it formulated the New York Times standard.

Another rationale identified in Gertz for requiring public figure plaintiffs to show a higher degree of fault than private plaintiffs is the greater likelihood of public figures having access to channels of communication to rebut the false statement and to establish the truth. 418 U.S. at 344. This rationale has no relevance for differentiating between the two categories of plaintiffs with regard to the defamatory language element, since that aspect of the harm cannot be reduced through broader channels of communication. Instead, broadening awareness of the extrinsic facts and the defamatory meaning of a statement not patently defamatory may serve to increase the harm to the plaintiff's reputation by expanding its scope of publication.

Applying the New York Times standard also raises analytical problems in the area of presumed damages and qualified privileges. While Gertz has been consistently read as permitting presumed and punitive damages if New York Times fault is established, see infra note 103, no consideration has been given to whether a showing of New York Times fault on defamatory potential will also be required for presumed damages. Similarly, establishing New York Times fault as to truth or falsity may be necessary to overcome a qualified privilege in many states; a defendant in a defamation by extrinsic fact situation will contend that the plaintiff also must show knowledge or reckless disregard of defamatory potential to defeat the privilege. However, since the plaintiff would have to show some fault on this element as part of the prima facie case, an additional showing of fault should not be needed. See supra text accompanying notes 80-82.

84. See Murnaghan II, supra note 77, at 34 (complaining that the "love of logic and symmetry" of the drafters of the fault rules obscures the basis of the New York Times and Gertz decisions).


86. Thirty-four states have held that negligence is the appropriate standard of fault for cases to which Gertz is applicable: Alabama, Arizona, Arkansas, California, Con-
the Restatement.87

IV. EFFECT OF GERTZ ON THE SPECIAL DAMAGES RULE FOR LIBEL PER QUOD

In the course of adopting a fault standard under the mandate of Gertz, a state court, even one adopting the Restatement standard, could not be expected to engage in the type of analysis necessary to recognize the effect of this fault standard on its libel per quod rule.88 However, Gertz also imposed an “actual injury” requirement to counterbalance its adoption of a lower fault standard than that required by New York Times, specifically prohibiting states from awarding presumed damages in cases applying the lower fault standard.89 This sweeping restriction of the common law rule of presumed damages, which probably had a more immediate effect on the overall

[footnotes]

87. Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Four states have indicated in dicta that negligence is the appropriate standard: New Jersey (for matters not of public concern), Maine, Montana, and Rhode Island. Two states have indicated that the fault standard will be lower than the New York Times standard: Nebraska and South Carolina. One state has as yet applied only the actual injury requirement of Gertz: Nevada. One state (New York) has adopted a gross negligence standard. Three states have adopted the New York Times standard: Colorado, Indiana, and New Jersey (for matters of public concern). Another state also might adopt this standard: Alaska. Five states have not given any indication of what fault standard they will adopt for cases to which Gertz applies: Idaho, Missouri, North Dakota, South Dakota, and Wyoming. See Appendix infra notes 121-442 and accompanying text.

88. Aside from the fact that most libels in these cases were defamatory on their face, see supra note 66, courts probably would not consider the two issues at the same time. In states with a libel per quod requirement, the cases are usually dismissed at the pleading stage before the court even considers a standard of fault because the plaintiff has not pleaded special damages. See, e.g., Glover v. NBC, Inc., 594 F.2d 715 (8th Cir. 1979); Winters v. Morgan, 576 P.2d 1152 (Okla. 1978). A few courts have recognized the connection between the two issues: “The threshold determination to be made by a trial judge on the question whether there is substantial danger to reputation apparent from the content of a publication resembles the determination traditionally made by the court on the question whether a statement is libelous per se.” Gazette, Inc. v. Harris, 325 S.E.2d 713, 729 (Va.), cert. denied, 472 U.S. 1032, and cert. denied, 473 U.S. 905 (1985).

89. 418 U.S. at 348-49.
structure of the common law of defamation than did the adoption of a fault standard, also influenced a number of courts to move away from their restrictive special damages rules, but not necessarily for the right reason.

In the process of "scuttling" the damage rules for libel "in wholesale fashion," the Supreme Court in Gertz attempted to provide the states with some guidance as to the appropriate type of damage that would qualify as "actual injury":

[A]ctual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

It is clear from the definition that "actual injury" encompasses a wider range of damages than does the definition of "special damage" applicable to libel per quod. This was illustrated in Time, Inc. v. Firestone, where the Court affirmed the plaintiff's recovery solely for mental anguish and suffering. Hence, for cases to which Gertz applies, general

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91. See infra text accompanying notes 94-102.
93. Id. at 350.
94. Supra notes 3, 15.
95. Sack, supra note 30, at 110-11; Murnaghan II, supra note 77, at 30-31; see also Restatement (Second) of Torts § 621 cmt. a (1977).
96. 424 U.S. 448 (1976). In that case, the Court held that the plaintiff, a wealthy socialite in a divorce proceeding, was not a public figure under Gertz despite the sensational publicity given to her trial. Hence, her defamation action against a news magazine for incorrectly reporting the grounds for the divorce was judged under the Gertz rules. Id. at 454-55.
97. The plaintiff's claim for injury to reputation was withdrawn prior to trial, Eldredge, supra note 27, § 95, at 538, perhaps to avoid having her reputation subject to attack by opposing counsel. See, e.g., Gobin v. Globe Publishing Co., 649 P.2d 1239 (Kan. 1982). Traditionally, injury to reputation was a prerequisite to recovery for any other type of injury. Smolla, supra note 12, § 9.06[4][b].
98. 424 U.S. at 460-61. The application of a broad "actual injury" requirement
damages may no longer be presumed but must be proved.99

Gertz, however, had no direct effect on the special damages rule in libel per quod actions; its rejection of presumed damages in no way compels state courts to abandon their special damages rules.100 Rather than the prior presumed damages for libel per se/special damages for libel per quod dichotomy, the expected post-Gertz status would be an actual damages for libel per se/special damages for libel per quod dichotomy.101 Nevertheless, several state courts, understandably eager to simplify the damages rules, used the Gertz damages requirement to cast doubt on the continued validity of a special damages rule.102 However, this approach does not re-

has been criticized. Id. at 475 n.3 (Brennan, J., dissenting); Anderson supra note 65, at 472; Frakt II, supra note 90, at 561.


100. Sack, supra note 30, at 110-11; Smolla, supra note 12, § 7.03[1]; Frakt II, supra note 90, at 569; Branscomb, supra note 44, at 833. Several commentators critical of the special damages requirement contend that it should be eliminated in light of the Gertz rejection of presumed damages simply because of its harshness and illogic. Elderidge, supra note 27, § 34, at 204; Eaton, supra note 65, at 1434; see also Murnaghan II, supra note 77, at 30-31 (praising Maryland court for apparently replacing two unsatisfactory damage concepts, presumed general damages and special damages, with the superior concept of actual damages).

101. Gertz was clearly a libel per se case. 418 U.S. at 327; see supra note 61.

102. Tennessee and Maryland were two of the first states in which the state's highest court at least considered the applicability of Gertz to the libel per quod rule. In Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978), the court stated that "the Per se/per quod distinction no longer has any practical meaning" because the plaintiff must plead and prove actual injury. Id. at 419. While this suggests a confusion of actual injury with special damages, Sack, supra note 30, at 110, the fact that the court later stated that special damages are required in libel per quod cases, Nichols, 569 S.W.2d at 420 n.8, caused another commentator to observe that the court was implying that it did not intend to alter the libel per quod rule, see Branscomb, supra note 44, at 834 (citing Nichols, 569 S.W.2d at 420 n.8). At the least, however, the lack of clarity in its decision caused the Tennessee Court of Appeals to erroneously reject a special damages requirement in all slander actions. See infra note 105.

In Maryland, the court of appeals did not specifically rule on the applicability of Gertz to the libel per quod rule until requested to do so by the United States District Court in Maryland in Hillman v. Metromedia, Inc., 452 F. Supp. 727 (D.C. Md. 1978). But see Murnaghan II, supra note 77, at 31, where the author erroneously concluded that two earlier cases, Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976) (discussed infra note 264); General Motors Corp. v. Piskor, 352 A.2d 810 (Md. 1976), eliminated the requirement of special damages in all Maryland defamation actions. In fact, despite a certified question from the federal district court specifically asking whether "special" damages were still required in libel per quod actions, the Maryland Court of Appeals did not provide a direct yes or no answer. Instead, the court stated that "[s]ince nominal or presumed damages no longer exist, in all libel actions Maryland pleading princi-
solves the libel per quod problem. A state court that was using the *Gertz* rejection of the presumed damages rule as an excuse for abandoning the relic of special damages in libel per quod cases would have no grounds for doing so in cases to which the *Gertz* ban on presumed damages does not apply—cases where the *New York Times* standard of knowledge or reckless disregard of falsity was shown\(^{103}\) and cases where the defamation did not involve a matter of public concern—leaving the door open for the libel per quod rule to continue to complicate state defamation law.\(^{104}\)

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\(^{103}\) See infra note 104.

\(^{104}\) Florida also may have followed the lead of Maryland and perhaps Tennessee in *From v. Tallahassee Democrat*, Inc., 400 So. 2d 52 (Fla. App. 1981). Although dicta, the court cited to *Memphis Publishing* and *Metromedia* to support its assertion that "all libels governed by *Gertz* are, in effect, libel per quod." *Id.* at 57; see infra note 198.

103. The widely-recognized implication of the Court's statement in *Gertz* that presumed damages may not be recovered “at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth,” 418 U.S. at 349, is that *Gertz* permits presumed damages to be recovered when the *Times* standard is shown. *El-dredge, supra* note 27, § 95, at 540; *Smolla, supra* note 12, § 9.05[2][a]; *Eaton, supra* note 65, at 1386; *Frakt II, supra* note 90, at 563; see, e.g., *Mid-America Food Servs., Inc. v. ARA Servs., Inc.*, 578 F.2d 691 (8th Cir. 1978) (dicta); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Cahill v. Hawaiian Paradise Park Corp.*, 543 P.2d 1356 (Haw. 1975); *Elliott v. Roach*, 409 N.E.2d 661 (Ind. App. 1980) (dicta); *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 334 N.E.2d 494 (Ohio App. 1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976). Compare *Restatement (Second) of Torts* § 621 (1977) (caveat takes no position on whether presumed damages are recoverable upon a showing of knowledge or reckless disregard of truth or falsity).

104. By not extending the ban on presumed damages to *New York Times* cases, Maryland courts have in effect resurrected the libel per se/libel per quod distinction in these cases. In *Hearst Corp. v. Hughes*, 466 A.2d 486, 493 (Md. 1983), the court of appeals observed in dicta that a presumption of harm still arises from words that are libelous per se and that the presumption may be utilized when constitutional malice is shown. In reliance on this statement, the appellate court concluded that Maryland retains the distinction between libel per se and libel per quod if the *New York Times* standard of fault is shown: libel per se permits presumed damages while libel per quod requires proof of actual damages. *Gooch v. Maryland Mechanical Sys., Inc.*, 567 A.2d 954, 962 (Md. App.), *cert. denied*, 573 A.2d 807 (Md. 1990).

If Maryland courts had used the *Gertz* fault requirement instead of the presumed
More problematically, in some states that have applied Gertz to slander actions, the Gertz majority’s rejection of presumed damages has led courts to conclude that the special damage requirement is no longer necessary for slander per quod (i.e., slander not within one of the four per se categories). This conclusion overlooks the very different historical bases for libel per quod and slander per quod, as well as the different reasons for the perpetuation of the two rules.

Similarly, many courts that retain the special damages requirement for both libel per quod and slander per quod may not recognize that the basis for retaining the requirement in slander per quod cases does not justify its retention in libel per quod cases. In slander cases, courts may have reason to preserve the status quo because imposing a broadly-defined actual injury requirement will not restrict the flow of litigation as effectively as retention of the special damages ban to eliminate the special damages rule, they would have been less likely to reach this conclusion. As long as some fault is required on the defamatory potential element when either the New York Times or the Gertz standard is utilized, see supra text accompanying notes 72-74, there is no need to apply different damages rules for libel per se and libel per quod. Presumed damages could be allowed for all libel cases if New York Times malice is shown, and actual damages required in all libel cases if negligence only is shown.

105. See, e.g., Beneficial Management Corp. of Am. v. Evans, 421 So. 2d 92 (Ala. 1982); Handley v. May, 588 S.W.2d 772, 776 (Tenn. App. 1979).

106. See supra text accompanying notes 24-44.

107. See supra note 44 (reasons for perpetuation of libel per quod rule). While slander per se developed out of the process by which the common law courts obtained jurisdiction over slanders from the ecclesiastical courts, supra note 25, other reasons were developed for its perpetuation, such as the assertion that slander falling within one of the four categories is likely to cause harm that cannot be identified in terms of specific economic loss. The less common slander not within the four categories, if defamatory at all, likely would be the cause of special harm, which the plaintiff should be required to prove. See, e.g., Schomer v. Smidt, 170 Cal. Rptr. 662 (App. 1980); Rowe v. Metz, 579 P.2d 83, 84 (Colo. 1978); Spence v. Funk, 396 A.2d 967, 970 (Del. 1978). Or the rule’s perpetuation may have been an attempt to restrict the flow of slander suits generally. See Sack, supra note 30, at 96 n.245 (citation omitted); cf. Murnaghan I, supra note 32, at 11 n.41 (discussing the development of new rationales to support slander per se after the original reason for the rule had disappeared).

108. The per se/per quod distinction in slander is based on the nature of the charge made, rather than whether extrinsic facts are necessary to make the statement defamatory. Sack, supra note 30, at 94; see also RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977), which concludes that the application of a fault standard to the defamatory language element eliminates the need for the libel per quod rule. The slander per se/per quod distinction, though, is retained. Id. § 570.
requirement.\textsuperscript{109}

Libel per quod cases should be treated differently, however. The imposition of the actual injury requirement by \textit{Gertz} does not justify eliminating the special damages requirement for libel per quod. Instead, \textit{Gertz}'s imposition of a fault standard to the defamatory potential element provides the justification.\textsuperscript{110} But, because the fault standard provides no basis for eliminating the slander per quod rule, courts grouping libels and slanders together are overlooking the effect of the fault standard on libel per quod situations.\textsuperscript{111}

In libel per quod cases, \textit{Gertz} should be interpreted as requiring the plaintiff to show that the defendant knew or should have known of the extrinsic facts that make the statement defamatory or, if libel per quod extends to colloquium issues,\textsuperscript{112} that make a defamatory reference to another person or a fictitious person understood as referring to the plaintiff.\textsuperscript{113} While the original basis for the development of the libel per quod rule simply may have been confusion,\textsuperscript{114} one of the primary recent justifications for continuation of the rule has been the reluctance to apply strict liability against a defendant unaware of the extrinsic facts making the statement defamatory without at least retaining the requirement that the plaintiff prove special damages.\textsuperscript{115} But it is undisputed that the special

\textsuperscript{109} As indicated by \textit{Time, Inc. v. Firestone}, 424 U.S. 448 (1976), the actual injury requirement does not hinder plaintiffs claiming damages solely for less tangible injuries such as emotional distress. See supra text accompanying notes 94-98.

\textsuperscript{110} See infra text accompanying notes 115-18. A benefit of using the fault standard rather than the actual injury requirement as the ground for eliminating the libel per quod rule is the sweep of its application. Because a fault standard also applies in \textit{New York Times} cases, see supra text accompanying notes 72-74, and at least arguably applies in cases involving matters of private concern, see supra note 12, the libel per quod rule could be replaced in all of these cases with a requirement of fault as to defamatory potential.

\textsuperscript{111} Those courts recognizing simply a “defamatory” per se/“defamatory” per quod distinction generally ignore their prior case law in blurring the distinction between libel per se and slander per se. See SACK, supra note 30, at 100.

\textsuperscript{112} See supra notes 22, 43.

\textsuperscript{113} \textbf{RESTATEMENT (SECOND) OF TORTS} § 580B cmt. d (1977); SACK, supra note 30, at 124.

\textsuperscript{114} See supra text accompanying notes 37-44.

\textsuperscript{115} See supra note 44; see also Eaton, supra note 65, at 1428. The recognition that courts may have been imposing a special damages requirement in an implicit attempt to protect innocent defendants from being held strictly liable prompted the American Law Institute, almost a decade before \textit{Gertz}, to give serious consideration to making a fault
damages rule, which applies to all libel per quod cases regardless of the defendant’s knowledge of the extrinsic facts, is awkward and ill-suited for that purpose.\textsuperscript{116} Requiring proof of fault for the defamatory language element resolves the problem with much greater precision than retention of a special damages requirement, because it considers not only whether the defendant knew of the extrinsic facts, but also, if he did not know, whether he was negligent in not learning of them.\textsuperscript{117} By applying a fault standard, a plaintiff no longer would have to plead and prove special damages simply because the defamatory nature of the statement is shown by extrinsic facts. Instead, a plaintiff would have to show that the defendant knew or should have known of the extrinsic facts that made the statement defamatory.\textsuperscript{118}

V. \textsc{Survey of Jurisdictions Recognizing Libel Per Quod Rule in Cases After Gertz}

“Few areas of the law are as analytically difficult as that of libel and slander, where courts attempt to mesh modern, First Amendment principles with common law precedents.”\textsuperscript{119} The truth of this statement is demonstrated fifty times over in the state-by-state survey found in the Appendix, which analyzes each state’s fault standard in private figure li-

\begin{footnotesize}
\footnotesize
\begin{enumerate}
\item\textsuperscript{116} See Eldredge, supra note 27, \S\ 26, at 178-82.
\item\textsuperscript{117} See supra text accompanying note 82.
\item\textsuperscript{118} Restatement (Second) of Torts \S\ 569 cmt. b (1977).
\item\textsuperscript{119} Ott v. Argus-Press Co., 586 F.2d 1108, 1111 (6th Cir. 1978), cert. denied, 440 U.S. 960 (1979).
\end{enumerate}
\end{footnotesize}
bel actions as well as its common law damages rule for libel per quod. Each state summary also addresses two significant variables for evaluating the impact of the fault standard on the libel per quod rule in each state: (i) whether the fault standard will apply to all private figure plaintiff actions or only those involving matters of public concern; and (ii) whether the courts in that state have indicated that the fault standard also applies to the defamatory language element. Of course, many states have not resolved all of these issues, and some degree of conjecture and oversimplification is inevitable in trying to summarize what each state would do in a particular case. Nevertheless, the chart on the following page illustrates each state's position on the fault standard and the libel per quod rule. As it indicates, the best approach for ensuring a fair resolution of a libel per quod case, which would reject a special damages rule and impose a negligence requirement for the defamatory language element in all private figure libel actions, has been adopted by only a handful of states.

VI. CONCLUSION

Jackie Sauerhoff sued the Hearst Corporation and its paper, the Baltimore News American, in the United States District Court in Maryland in 1974. The court, correctly holding that Maryland required proof of special damages for libel per quod, granted summary judgment for the newspaper solely because Sauerhoff's deposition indicated that he was better off financially after his wife left him.120

Today, a Maryland court would take a much more rational approach by requiring a showing of fault on the newspaper's part rather than special damages. In far too many jurisdictions, though, Sauerhoff's case would come out no differently today. Even courts that are willing to discard outdated common law rules for a legitimate reason fail to recognize the implication of the Gertz fault standard for libel per quod cases. Additionally, Dun & Bradstreet's limitation of at least some aspects of Gertz to matters of public concern will tend to counteract the influence of the Restatement approach,

<table>
<thead>
<tr>
<th>COMMON LAW DAMAGES RULE FOR LIBEL</th>
<th>CONSTITUTIONAL FAULT STANDARD IN PRIVATE FIGURE LIBEL ACTIONS</th>
<th>NEGLIGENCE REQUIRED(\dagger) FOR ALL PRIVATE FIGURE LIBEL ACTIONS</th>
<th>ONLY FOR ACTIONS INVOLVING MATTERS OF PUBLIC CONCERN(\dagger)</th>
<th>HIGHER FAULT STANDARD REQUIRED</th>
<th>NO STANDARD ADOPTED YET</th>
</tr>
</thead>
<tbody>
<tr>
<td>LIBEL PER QUOD RULE REJECTED (Special Damages Never Required for Libel)</td>
<td>Maryland, Massachusetts, Mississippi, New Jersey, New Mexico, Pennsylvania, Tennessee, Vermont, Washington, West Virginia</td>
<td>Delaware, Georgia, Hawaii, Minnesota, Montana, New Hampshire, Oregon, South Carolina, Wisconsin</td>
<td></td>
<td></td>
<td>Wyoming</td>
</tr>
<tr>
<td>LIBEL PER QUOD RULE FOLLOWED (Special Damages Required for Libel Not Apparent on Its Face)</td>
<td>Illinois, Oklahoma, Rhode Island</td>
<td>Alabama, Arizona, Arkansas, California, Connecticut, Iowa, Kentucky, North Carolina, Ohio, Texas, Utah</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>VARIATION OF LIBEL PER QUOD RULE (Special Damages Required for Libel Not in Slander Per Se Categories)</td>
<td>Michigan, Virginia</td>
<td>Indiana(\dagger)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>VARIATION OF LIBEL PER QUOD RULE (&quot;Malice&quot; Required)</td>
<td></td>
<td>Louisiana</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>STATUS OF RULE UNCERTAIN</td>
<td></td>
<td>Florida, Kansas, Maine</td>
<td>Alaska, New York</td>
<td>Missouri, Nevada</td>
<td></td>
</tr>
</tbody>
</table>

\(\dagger\) States in italic type have indicated that a fault standard also applies to the defamatory language element.
\(\dagger\) Also includes states that have limited Gertz fault rules to media defendants.
\(\dagger\) Higher fault standard applies for private figure defamation involving matter of public concern.
\(\dagger\) Libel per quod rule followed in credit report cases.
\(\dagger\) No fault standard applies for matters not of public concern.
\(\dagger\) Libel must also be by extrinsic fact for special damages requirement to apply.

How To Read This Chart: Each state is listed once in the chart. The horizontal row that a particular state falls within indicates whether it requires special damages for libel per quod. The vertical column that the state is within identifies the fault standard for the state that the state has adopted in private figure libel actions.
which applies a fault standard in all defamation cases. In sum, as analytically obsolete as the libel per quod rule now is, it still appears that widespread acceptance of a sensible approach to these cases is years away.
Alabama

In Beneficial Management Corp. of America v. Evans, the Alabama Supreme Court evaluated the effect of Gertz on its defamation law. Noting that an earlier nonmedia case had reversed a judgment for the plaintiff on the ground that proof of actual injury was not shown, the court in Beneficial concluded that Gertz should apply in all defamation cases. Hence, "compensation in defamation cases which are actionable per se" is limited to "recovery for actual injuries only." A subsequent nonmedia slander case adopted the Restatement version of negligence as the appropriate standard of fault under Gertz. In light of Dun & Bradstreet, however, the Alabama Supreme Court limited the reach of the Gertz damages rules to cases involving matters of public concern and questioned, but did not alter, the application of the Gertz fault requirement to all defamation cases.

Because the statements in these cases were actionable without pleading special damages, the courts did not consider the effect of the constitutional cases on the state's special damages rules. Although few cases have specifically defined libel per quod, the case law consistently requires special damages

121. 421 So. 2d 92 (Ala. 1982). Beneficial involved a statement that was slander per se—a false charge that the plaintiff had accepted kickbacks. The trial court had instructed the jury that damages were presumed in such a case.

122. Bryan v. Brown, 339 So. 2d 577 (Ala. 1976), cert. denied, 431 U.S. 954 (1977). The defamatory statements in Bryan were contained in a "petition for removal" filed with the court in a narcotics case. In the petition, the defendant alleged that the plaintiffs, two assistant district attorneys, had asked the defendant to plant narcotics in the residence of a codefendant in the narcotics trial.

123. 421 So. 2d at 96.

124. 421 So. 2d at 96.

125. Mead Corp. v. Hicks, 448 So. 2d 308 (Ala. 1983). The statements in Mead were defamatory on their face. Therefore, the court did not discuss the defamatory language prong of the Restatement fault standard.

126. Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085 (Ala. 1988). The court disapproved language in Beneficial and Bryan that limited presumed damages where matters of public concern were not involved. Id. at 1091 n.3. Nelson, like Beneficial, involved slander per se.

127. See Myers v. Mobile Press-Register, Inc., 97 So. 2d 819, 821 (Ala. 1957) (words held not libelous on their face); McIntire v. Cudahy Packing Co., 60 So. 848, 849 (Ala. 1913) (holding that where plaintiff relies upon an innuendo to make the publication libelous, it is not libelous per se), overruled on other grounds, Cooper v. Alabama Farm Bureau Mut. Casualty Ins. Co., 385 So. 2d 630, 632 (Ala. 1980). The fact that the
if the statement is libel per quod.\textsuperscript{127}

\textbf{Alaska}

Although the Alaska Supreme Court has not squarely considered the standard of fault in cases to which \textit{Gertz} is applicable,\textsuperscript{128} it applied an actual malice standard in a pre-\textit{Gertz} case without regard to the plaintiff's status where the suit involved a statement on a matter of public interest.\textsuperscript{129} Given \textit{Dun \& Bradstreet's} reestablishment of a content-based standard, the court might very well retain the actual malice standard.

Where a matter of public concern was not involved, a constitutional fault standard was not applied and presumed damages were permitted in a case involving statements defamatory per se.\textsuperscript{130} The court in that case went on to assert that

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\textsuperscript{127} \textit{See} Myers, 97 So. 2d at 821; McIntire, 60 So. at 849; Tidmore v. Mills, 32 So. 2d 769, 774 (Ala. App.) (could not be libel per quod because no special damages alleged, but held libel per se), \textit{cert. denied}, 32 So. 2d 782 (Ala. 1947).

\textsuperscript{128} \textit{See} Schneider v. Pay'N Save Corp., 723 P.2d 619, 625 (Alaska 1986).


\textsuperscript{130} \textit{See} Alaska Statebank v. Fairco, 674 P.2d 288 (Alaska 1983). This case, similar to \textit{Dun \& Bradstreet}, arose from a credit dispute between private parties. The court affirmed an award of damages to the plaintiff, holding that proof of damages is not required if words are deemed actionable per se. \textit{Id.} at 295. \textit{Schneider}, a more recent case, suggests that negligence will be required in cases involving private individuals and issues of private concern. 723 P.2d at 625 (citing \textit{RESTATEMENT (SECOND) OF TORTS}...
“evidence of specific harm suffered must be adduced if the statement is not defamatory on its face.” However, no Alaska case has specifically imposed this requirement in a holding. Nonetheless, since a fault standard probably is not applicable in all cases, the court might be inclined to follow its dictum should it ever be faced with a claim of presumed damages in a libel per quod situation.

Arizona

Arizona is one of several states that has apparently retained its libel per quod rule despite adoption of the Restatement fault rules, creating a double hurdle for the plaintiff to overcome in at least some libel per quod cases. In Peagler v. Phoenix Newspapers, Inc., the court specifically adopted section 580B of the Restatement. Later cases have adhered to the Restatement’s application of the fault standard to the defamatory potential element and its extension of Gertz to

§ 580B cmt. g (1977)). But Schneider, which did not cite Alaska Statebank, was discussing fault in the context of whether the defendant had abused his qualified privilege rather than as part of the plaintiff’s prima facie case. Id. at 624-25.

131. Alaska Statebank, 674 P.2d at 295.

132. In support of its dictum, the court in Alaska Statebank cited to a libel case, which held that words that are not libelous per se (i.e., words that are capable of two interpretations, one defamatory and the other not) must be submitted to the jury to determine their meaning. Id. at 295 n.15 (citing Fairbanks Publishing Co. v. Pitka, 376 P.2d 190, 194 (Alaska 1962) (footnotes omitted)). To support the damages aspect, the court cited slander cases holding that statements injurious to a plaintiff’s business reputation are actionable without proof of special damages. Id. at 295 n.16 (citations omitted). While the court used the term “defamation,” the conduct of the defendant (marching into the plaintiff’s store with a police officer and ordering it closed) would be characterized as libel by most courts. Keeton et al., supra note 14, § 112, at 786. More significantly, the court’s use of the terms “defamatory per se” and “defamatory per quod” and its interchangeable use of the terms “libelous per se” and “actionable per se” are the critical first steps in the development of a libel per quod rule through case law. See supra text accompanying notes 38-44.

133. 560 P.2d 1216 (Ariz. 1977). Peagler involved newspaper articles investigating consumer complaints about a car dealer’s business practices. The court reversed the trial court’s dismissal of the action and remanded it for trial, holding that a negligence standard applies in libel actions brought by private persons for statements on matters of “public interest and concern.” Id. at 1222.

nonmedia defendants. However, since *Dun & Bradstreet*, Arizona cases have indicated that *Gertz* probably will not be applied for a matter of private concern.

In reviewing its state defamation law, the court in *Peagler* gave considerable attention to its well-established libel per quod rule, holding that extrinsic evidence to establish colloquium did not make the statement libel per quod; only if extrinsic evidence were required to establish its defamatory character would it be libel per quod. Thus, the trial court's dismissal of the action for failure to plead special damages was held to be erroneous.

Arkansas

In *Dodrill v. Arkansas Democrat Co.*, the Arkansas Supreme Court adopted a negligence standard in an action by a private individual against a media defendant. The court stated that the standard would be used to determine whether the publisher exercised ordinary care in recognizing the defamatory potential of the statement. In a later appeal aris-

135. See Antwerp Diamond Exch. v. Better Business Bureau, 637 P.2d 733 (Ariz. 1981). The court applied a negligence standard on the basis of *Peagler*’s adoption of the Restatement standard. *Id.* at 738. However, the statements in this case, which arose from the defendant’s statements questioning the legitimacy of the plaintiff’s business, were similar to the statements in *Peagler* (i.e., statements on matters of public concern).


137. See *Ilitzky v. Goodman*, 112 P.2d 860 (Ariz. 1941) (held that letter was libel per quod based on recipients’ knowledge of extrinsic facts, and special damages were sufficiently alleged); *Berg v. Hohenstein*, 479 P.2d 730 (Ariz. App. 1971) (held that advertisement was libel per quod, but dismissal for failure to plead special damages was affirmed).

138. 560 P.2d at 1222-23.

139. The court indicated that there was sufficient evidence of damages to satisfy the *Gertz* “actual injury” requirement. *Id.* at 1223.

140. 265 Ark. 628, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076 (1980). *Dodrill* involved an erroneous report that a lawyer who had been suspended for breach of ethics had failed the bar exam that he had taken for reinstatement.

141. *Id.* at 637, 590 S.W.2d at 844.
ing out of the same litigation, the court ruled that recovery of presumed damages for statements libelous on their face was no longer permitted by *Gertz*.\(^\text{142}\)

Although the *Gertz* damages rule was applied without discussion (but over the dissent of three justices) in a libel case between private parties,\(^\text{143}\) the Arkansas Supreme Court stated in a *post-Dun & Bradstreet* case that the First Amendment "quagmire" does not apply in a case involving neither a media defendant nor a matter of public concern; hence, presumed damages can be recovered for libel per se and slander per se.\(^\text{144}\) Where the *Gertz* rules do not apply, defendants in libel per quod cases can still raise the barrier of special damages, which must be established for statements not defamatory on their face.\(^\text{145}\)

### California

For several years, California law was unsettled as to the fault standard that would apply in private plaintiff defamation actions. Some cases suggested in dicta that negligence would apply.\(^\text{146}\) Other cases, broadly interpreting the state's statutory privilege for matters of public interest,\(^\text{147}\) adopted the

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144. Ransopher v. Chapman, 302 Ark. 480, 791 S.W.2d 686 (1990) (holding that plaintiff in nonmedia slander per se case not involving matter of public concern need not offer evidence of actual loss).
145. See Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 179, 345 S.W.2d 34, 40 (1961) (holding that libel was not actionable per se because it was not defamatory on its face, but special damages were sufficiently established); Dunaway v. Troutt, 232 Ark. 615, 622, 339 S.W.2d 613, 617 (1960) (citation omitted), overruled on other grounds, Life & Casualty Ins. Co. v. Padgett, 241 Ark. 353, 407 S.W.2d 728 (1966); see also Steve Garner, Note, Little Rock Newspapers, Inc. v. Dodrill: *Proving Damage to Reputation in a Libel Action*, 38 Ark. L. Rev. 899, 905 (1985); Lisa R. Pruitt, Comment, *The Law of Defamation: An Arkansas Primer*, 42 Ark. L. Rev. 915, 922-25 (1989) (noting that some libel cases lapse into slander per se terminology).
147. See Cal. Civ. Code § 47(c) (West Supp. 1991) (amending § 47(3)). The privilege was broadly defined and extended to false statements of fact. Williams v. Daily Review, Inc., 46 Cal. Rptr. 135, 143 (App. 1965); see also Jeff Arrington, Comment,
statutory definition of malice, which was essentially common law malice, as the standard of fault that private plaintiffs were required to establish. Finally, in 1989, the California Supreme Court narrowly interpreted the statutory privilege as not applying to matters of public interest and adopted negligence as the standard of fault in actions by private figures against media defendants. In cases that do not involve the media, California probably will retain strict liability, as had nonmedia cases prior to *Dun & Bradstreet*.

On the other hand, California requires special damages to be established in libel per quod cases by statute. Thus, even


148. See CAL. CIV. CODE § 48a(4)(d) (West 1982).
150. Brown v. Kelly Broadcasting Co., 771 P.2d 406, 422 (Cal. 1989) (disapproving of Rollenhagen, 172 Cal. Rptr. 49). In Brown, the court declined to decide whether a fault standard would apply in cases against nonmedia defendants. *Id.* at 424 n.25. But the court clearly rejected the public concern/private concern dichotomy of *Dun & Bradstreet*, noting that it only governs the recovery of presumed and punitive damages and does not affect the standard of fault required to recover proven compensatory damages. *Id.* at 433 n.37. The public concern issue, however, is still critical in determining the scope of damages that can be awarded. See Carney v. Santa Cruz Women Against Rape, 271 Cal. Rptr. 30 (App. 1990), holding that because a matter of public concern was involved, *Dun & Bradstreet* requires the plaintiff to show _New York Times_ malice in order to recover punitive damages.

151. See, e.g., Slaughter v. Friedman, 649 P.2d 886 (Cal. 1982); Schomer v. Smidt, 170 Cal. Rptr. 662 (App. 1980), disapproved of by Miller v. Nestande, 237 Cal. Rptr. 359 (App. 1987). In Schomer, the court permitted presumed and punitive damages for slander in one of the statutory per se categories, see CAL. CIV. CODE § 46(4) (West 1982), and held that the _Gertz_ actual injury requirement is only applicable to media defendants. 170 Cal. Rptr. at 665. In Slaughter, the California Supreme Court applied California's libel per quod statute, see CAL. CIV. CODE § 45a (West 1982), without mentioning _Gertz_. 649 P.2d at 888-89. However, in reversing a summary judgment for the defendant, the court suggested both that the libel was defamatory on its face and that, even if it were not, some evidence of economic loss was established. *Id.* at 889.

152. Section 45a of the California Civil Code provides:

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

CAL. CIV. CODE § 45a (West 1982). Section 48a(4)(b) provides:

"Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges and proves he has expended as a result of the alleged libel, and no other.
in the absence of a fault requirement in nonmedia cases, defendants not at fault in making a statement innocent on its face would have some degree of protection.¹⁵³

Colorado

In Walker v. Colorado Springs Sun, Inc.,¹⁵⁴ the Colorado Supreme Court adopted a variation of the actual malice standard¹⁵⁵ for actions brought by private plaintiffs against media defendants for statements on matters of public or general concern.¹⁵⁶ Colorado was one of the first states to face this issue after the Supreme Court's Gertz decision, and thus, the court


In a recent case interpreting the statute, Barnes-Hind, Inc. v. Superior Court (Allergan Pharmaceuticals, Inc.), 226 Cal. Rptr. 354 (App. 1986), the plaintiff alleged that the defendant's circulars and advertisements to "eye care professionals" professed that the contact lens cleaner manufactured by the plaintiff did not properly clean lenses manufactured by the defendant, who also manufactured a lens cleaner. To avoid the more restrictive requirements of a trade libel action, the plaintiff claimed that the defendant's statements directly implied that the plaintiff had misrepresented the product's safety and efficacy to the Food and Drug Administration, which as recipients of the statements knew, must approve the product for marketing. The court ruled that since "the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge . . . the libel cannot be libel per se but will be libel per quod," and it sustained the defendant's demurrer to the libel per se claim. Id. at 360.

¹⁵³ Justice Traynor explained that "[t]he purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader." MacLeod v. Tribune Publishing Co., 343 P.2d 36, 43 (Cal. 1959).


¹⁵⁵ The court defined actual malice as knowledge of falsity or reckless disregard of truth or falsity, just as New York Times did, id. at 457, but indicated that the second part of the standard is met by showing a "[wanton] . . . indifference to consequences," id. at 457 n.2, rather than a "subjective awareness of falsity," the level of fault that later cases had required for a showing of reckless disregard under New York Times. See supra note 58 and accompanying text. The Colorado standard thus may have been closer to negligence than to the New York Times actual malice standard. Sack, supra note 30, at 256. The divergence in the definition of actual malice was eliminated seven years later in the Diversified Management case. See infra note 160.

¹⁵⁶ Walker, 538 P.2d at 457. The statements in Walker involved publicized allegations that owners of an antique store had bought furniture knowing it had been stolen from an elderly woman in a nursing home. The trial verdict for the plaintiffs against the newspaper, its publisher, editor, and a reporter was affirmed in part and reversed in part on appeal.
had almost no guidance from other states’ supreme courts.\textsuperscript{157} The court in \textit{Walker} reasoned that a negligence standard would not provide enough “breathing space”\textsuperscript{158} for free speech and would have a “chilling effect” on the activity of the media.\textsuperscript{159} The court retained this view upon reconsideration of the issue seven years later in \textit{Diversified Management, Inc. v. Denver Post, Inc.},\textsuperscript{160} although the court partially overruled \textit{Walker} by adopting the constitutional definition of “reckless disregard,” i.e., subjective awareness of falsity.\textsuperscript{161}

Rejecting an attempt to extend \textit{Gertz} to all cases, the Colorado Supreme Court reversed the appellate court’s use of \textit{Gertz} to bar presumed damages for slander by a nonmedia defendant in \textit{Rowe v. Metz}.	extsuperscript{162} While the opinion was based on the continuing validity of the rationale for presuming damages in slander actions,\textsuperscript{163} the sweep of the language\textsuperscript{164} and a cita-

\textsuperscript{157} The Indiana appellate court’s decision in \textit{Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.}, 321 N.E.2d 580 (Ind. App. 1974), \textit{cert. denied}, 424 U.S. 913 (1976), was apparently the only prior state court consideration of \textit{Gertz} available to the Colorado Supreme Court when \textit{Walker} was decided. \textit{See} 538 P.2d at 457.

\textsuperscript{158} 538 P.2d at 458.

\textsuperscript{159} \textit{Id.} at 463 (quoting \textit{NAACP v. Button}, 371 U.S. 415, 433 (1963)).

\textsuperscript{160} 653 P.2d 1103 (Colo. 1982) (en banc). \textit{Diversified} involved statements in the \textit{Denver Post} alleging financial irregularities in the activities of \textit{Diversified} and its president. \textit{Id.} at 1104. The jury found for the defendants after being instructed that the plaintiffs were private individuals suing on a matter of general or public concern and that reckless disregard had to be established by clear and convincing evidence. \textit{Id.}

\textsuperscript{161} The court in \textit{Diversified} had to reinterpret \textit{Walker} as a state constitutional decision because the burden of proof for the actual malice standard, clear and convincing evidence, conflicted with a statute establishing a preponderance of the evidence standard in all civil actions. \textit{See} \textit{Colo. Rev. Stat.} \textsection{13-25-127}(1) (1973). Because \textit{Gertz} did not require actual malice or a clear and convincing evidence standard, see 418 U.S. at 366 (Brennan, J., dissenting), the \textit{Diversified} court had to find a state constitutional basis for retaining the actual malice rule and superseding the state statute. 653 P.2d at 1109; \textit{see} Melissa A. Cohen, \textit{Libel: State Court Approaches in Developing a Post-Gertz Standard of Liability}, 1984 \textit{Ann. Surv. Am. L.} 169.

\textsuperscript{162} 579 P.2d 83 (Colo. 1978), \textit{rev’d} 564 P.2d 425 (Colo. App. 1977). In this case, the jury returned a verdict for the plaintiff on slander per se principles. After a reversal by the appellate court, the award of $1,000 presumed damages and $2,500 punitive damages was reinstated by the Colorado Supreme Court. The court did not consider whether the \textit{Gertz} fault requirement would also be inapplicable.

\textsuperscript{163} The court stated, “[t]he policy considerations underlying the presumption of damages in slander per se cases are still valid today.” \textit{Id.} at 84; \textit{see supra} notes 106-09 and accompanying text.

\textsuperscript{164} “[W]e think the balance should be struck in favor of the private plaintiff where his reputation has been injured by a nonmedia defendant in a purely private context.” 579 P.2d at 85.
tion to an Oregon libel case\textsuperscript{165} suggests that the court meant to classify all private plaintiff defamation cases based on whether the defendant was media or nonmedia.\textsuperscript{166}

In \textit{Walker}, the court declined to rule on the effect its adoption of a fault standard would have on the distinction between libel per se and libel per quod in Colorado.\textsuperscript{167} This became a relevant question since Colorado law prior to \textit{Walker} had required plaintiffs to plead and prove special damages in libel per quod cases.\textsuperscript{168} However, in \textit{Lind v. O'Reilly},\textsuperscript{169} the court squarely held that libel per quod (i.e., libel not on its face\textsuperscript{170}) requires the plaintiff to plead and prove special damages and that the plaintiff's allegation of actual damages as defined by \textit{Gertz} was insufficient to meet the special damages requirement.\textsuperscript{171}

\textsuperscript{165} Harley-Davidson Motorsports v. Markley, 568 P.2d 1359 (Or. 1977).

\textsuperscript{166} Ironically, if the court had had the fault requirement of \textit{Diversified} rather than \textit{Walker} in place, it could have permitted presumed damages without limiting the scope of \textit{Gertz}, since the actual malice showing required by \textit{Diversified} would have permitted an award of presumed and punitive damages under \textit{Gertz}. See supra note 103.

\textsuperscript{167} 538 P.2d at 460.

\textsuperscript{168} Bernstein v. Dun & Bradstreet, Inc., 368 P.2d 780 (Colo. 1962). As discussed supra note 50, the court in \textit{Bernstein} considered without deciding whether the slander per se exception to the libel per quod rule articulated by Prosser was the law in Colorado. \textit{Id.} at 783. This led federal courts applying Colorado law to adhere to that exception in later cases. See supra note 50 (discussion of Sunward Corp. v. Dun & Bradstreet, Inc.).

\textsuperscript{169} 636 P.2d 1319 (Colo. App. 1981). \textit{Lind} involved a television news report that showed a film of an unidentified home that belonged to the plaintiff. The news report asserted that "homes like these" were being built by drug dealers in the area. \textit{Id.} at 1320. The court of appeals said that since the broadcast was not libel per se, it must be libel per quod and, thus, it is actionable only if special damages are pleaded and proved. \textit{Id.} The court then affirmed a summary judgment for the defendant because special damages were not pleaded. \textit{Id.} at 1321. The court did not apply the slander per se exceptions to the libel per quod rule even though the broadcast would have been an imputation of criminal activity (drug-dealing) through the pleading of the extrinsic facts. See supra note 168.

\textsuperscript{170} The court stated that the broadcast would be libelous per se only if no extrinsic evidence was necessary to show \textit{either} its defamatory nature \textit{or} that it is of and concerning the plaintiff. \textit{Id.} at 1320 (citations omitted). Most courts do not treat the colloquium element, i.e., that the defamation was "of and concerning the plaintiff," as within the libel per quod requirement. See supra note 43.

\textsuperscript{171} This court was one of the few to recognize the distinction between the actual damages required by \textit{Gertz} (actual injury) and the special damages required by the libel per quod rule. See supra note 100. \textit{Lind} suggests that, at least prior to \textit{Diversified}, a plaintiff would have had to show the \textit{Walker} "malice" as well as actual damages under \textit{Gertz}, since only \textit{New York Times} malice would permit presumed and punitive damages.
Colorado is one of the few states that utilized an issue-oriented classification in applying the Gertz principles, anticipating the Court’s focus on “matters of public concern” in Dun & Bradstreet.\footnote{172} Colorado also has strong precedent limiting the Gertz principles to media defendants,\footnote{173} retaining a significant area of defamation law governed solely by state law.\footnote{174} In Lind, the court unfortunately chose to revitalize the awkward libel per quod special damages rule to hasten judgment for the defendant, rather than use the media protections offered by Gertz, including the application of a fault standard to other aspects of the defamation action.

Connecticut

The Connecticut Supreme Court has not specifically established what standard of fault it will adopt under Gertz,\footnote{175} although it will almost certainly follow the lead of its appellate courts by adopting a negligence standard.\footnote{176} However, whether the fault requirement will be applied only for matters of public concern is not resolved. Appellate court cases previously have declined to apply the Gertz presumed damages bar in purely private defamation actions.\footnote{177} These cases demon-

\footnote{172} See supra note 12.\footnote{173} See supra note 164.\footnote{174} Given the preexisting focus on “public concern” under the Colorado standard, Dun & Bradstreet affected the law in that state very little. Hence, actual malice is required for public figures and for matters of public concern, and a no fault standard applies for matters not of public concern. See e.g., Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 528 (10th Cir. 1987) (fault standard not applied in credit report case because not matter of public concern); Seible v. Denver Post Corp., 782 P.2d 805 (Colo. App. 1989), cert. denied (Colo. Nov. 27, 1989); Pittman v. Larson Distrib. Co., 724 P.2d 1379, 1387 (Colo. App. 1986); see also People v. Ryan, 806 P.2d 935, 940 (Colo. 1991) (criminal libel statute upheld in cases not involving matter of public concern), cert. denied, 112 S. Ct. 177 (1991).\footnote{175} In Goodrich v. Waterbury Republican-Am., Inc., 448 A.2d 1317 (Conn. 1982), the court applied the Gertz decision in its determination of whether allegedly defamatory statements were fact or opinion. The court noted that even though it assumed that the plaintiff was a private figure, it need not define the fault requirement of Gertz because the statement was opinion, entitled to protection under the New York Times standard as “fair comment.” Id. at 1324.\footnote{176} See Miles v. Perry, 529 A.2d 199 (Conn. App. 1987) (stating that private individuals need only prove negligence); see also Corbett v. Register Publishing Co., 356 A.2d 472 (Conn. Super. 1975) (applying lesser standard of fault to claims of private plaintiffs).\footnote{177} See Battista v. United Illuminating Co., 523 A.2d 1356, 1361 n.5 (Conn. App.)
strate that a defendant not at fault will be subject to state defamation law, which requires the pleading and proof of special damages in libel per quod cases to prevail.\textsuperscript{179}

**Delaware**

Delaware adopted a negligence standard for cases to which \textit{Gertz} applies in \textit{Gannett Co. v. Re.}\textsuperscript{180} The court in that case did not indicate whether negligence would be applied to defamation elements other than truth or falsity. However, Delaware fairly recently has held that all libels are actionable (court refused to apply \textit{Gertz} because case did not involve public figures or media defendants), \textit{cert. denied}, 525 A.2d 1352 (Conn. 1987); Monroe v. Crandall, 486 A.2d 657, 660 (Conn. App. 1985) (upholding award of general damages based on presumed injury); see also \textit{Goodrich}, 448 A.2d at 1325 (a statement of "pure" opinion, or a statement based upon disclosed facts, is afforded almost "complete constitutional protection" under the "fair comment" privilege, but the privilege applies to a statement of "mixed opinion" only when the statement is made by a media defendant on a matter of public concern and without a knowing or reckless distortion of its factual basis); Brown v. K.N.D. Corp., 509 A.2d 533, 537 (Conn. App. 1986) (citing \textit{Dun & Bradstreet}, 472 U.S. 749) (stating in dicta that common law governs where private person sues on matter of private concern), \textit{cert. granted}, 513 A.2d 696 (Conn. 1986), rev'd, 529 A.2d 1292 (Conn. 1987). \textit{But see Miles}, 529 A.2d at 206-07 (court approved application of negligence standard even though it found no matter of public concern for purpose of fair comment privilege). In addition, Connecticut's broad retraction statute applies to all libels and permits only "actual damage" "specially alleged and proved" (i.e., special damages) in the absence of "malice in fact" or a request for retraction (or where a retraction was made). \textit{Conn. Gen. Stat.} § 52-237 (1958).

\textsuperscript{178} Connecticut case law sometimes uses the term "actual damages" instead of special damages, see \\textit{Douglas B. Wright & John R. Fitzgerald, Connecticut Law of Torts} § 146, at 321 (2d ed. 1968), but the terms are equivalent. The former term derives from the Connecticut retraction statute, § 52-237; see \textit{Corbett}, 356 A.2d at 474, and is not the same as the "actual injury" requirement of \textit{Gertz}, \textit{id.} at 477.

\textsuperscript{179} \textit{Battista}, 523 A.2d at 1359 (citing \textit{Robert D. Sack, Libel, Slander & Related Problems} 96-97 (1980)). In this case, the court held that a letter alleging that the plaintiff had tampered with his electric meter was libel per se because it was defamatory on its face. Therefore, the trial court's instruction limiting the jury to nominal damages was erroneous. The court identified two categories commonly found to be libel per se: "(1) libels charging crimes and (2) libels which injure a man in his profession and calling." \textit{Id.} at 1360 (quoting \textit{Proto v. Bridgeport Herald Corp.}, 72 A.2d 820, 825 (Conn. 1950)). In Connecticut, however, libel per se is not limited to the four categories of slander per se. \textit{Corbett}, 356 A.2d at 478; see also \textit{Moriarty v. Lippe}, 294 A.2d 326 (Conn. 1972) (distinguishing libel per se from slander per se).

\textsuperscript{180} \textit{496 A.2d 553} (Del. 1985), \textit{aff'd} \textit{480 A.2d 662} (Del. Super. 1984). In \textit{Gannett}, an inventor, indicted for fraud and theft, allegedly was defamed by a newspaper article erroneously describing a demonstration two years earlier of another one of his inventions. The supreme court upheld the conclusion of the trial court that negligence was the proper standard for plaintiffs who are not public figures. \textit{Id.}
without proof of special damage. Hence, a defendant in a libel per quod case would rely on the Gertz fault standard protections.

Florida

Ten years after Gertz, the Florida Supreme Court approved a negligence standard in Miami Herald Publishing Co. v. Ane. Appellate court cases had predicted for a number of years that negligence would be the standard eventually adopted in Florida.

Prior to Dun & Bradstreet, the Florida Supreme Court had indicated in dicta that the constitutional privileges were not limited to media defendants. Dun & Bradstreet re-

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181. In Spence v. Funk, 396 A.2d 967 (Del. 1978), the defendant magazine published a statement attributed to the plaintiff, the Dover chief of police, implying widespread unchastity among the city's female population. The trial court's dismissal of the action on grounds that the writing was not libelous per se and no special damages were alleged was reversed by the supreme court. The opinion initially suggests that special damages are not needed because the statement, although libel per quod, falls into one of the slander per se categories. Id. at 971 (citing WILLIAM L. FROSISSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971)). However, the court manages to avoid resting its decision on that shaky foundation. It goes on to conclude that "Delaware law does not distinguish between libel per se and libel per quod. Under our law, any libel . . . is actionable without special damages, whether the defamatory nature is apparent on the face of the statement or only by reference to extrinsic facts." Id.; see also Edwards v. Lutheran Social Servs. of Dover, Inc., 1987 WL 10271 (Del. Super. 1987) [not in A.2d].

182. 458 So. 2d 239 (Fla. 1984). In Ane, a private plaintiff brought a defamation action against a newspaper for inaccurate statements concerning his identification as the owner of a beer truck carrying three tons of marijuana. At trial, the plaintiff was awarded compensatory damages but not punitive damages. The appellate court affirmed, holding that a negligence standard should apply in cases involving private plaintiffs and media defendants. 423 So. 2d 376 (Fla. App. 1982), aff'd, 458 So. 2d 239 (Fla. 1984).

183. See cases cited in From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 56 (Fla. App. 1981), review denied, 412 So. 2d 465 (Fla. 1982). In From, the media defendant was held to be not liable regardless of whether the actual malice or simple negligence fault standard was applied. Id. at 55.

184. Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984) (slander case decided on basis of common law privilege rules). This dicta has not significantly impacted the cases, however. Perry v. Cosgrove, 464 So. 2d 664 (Fla. App. 1985), held that the defendants were not "media defendants" because the libel action by the plaintiff, a former editor fired by the paper, was based on a letter sent by the defendants to a concerned reader rather than a published article in the defendant's newspaper. Id. at 665. The appellate court reversed the grant of the defendants' motion to dismiss because the statements in the letter were reasonably susceptible of a defamatory meaning, and hence, they should have been evaluated by the trier of fact. Id. at 666.
quired that *Ane* be reinterpreted as applying a negligence standard for private figures suing for defamation on public issues,\(^ {185}\) leaving it doubtful that the *Gertz* standards will be applied to matters not of public concern.\(^ {186}\)

The extent of the libel per quod rule in Florida has been the subject of a considerable amount of discussion in the law reviews,\(^ {187}\) but the discussion has not settled the matter. At least until recently, it was clear that certain statements requiring extrinsic facts to show their defamatory character also required special damages to be pleaded, but the cases were not in agreement as to the scope of this rule. A few slander cases in Florida went beyond the four traditional categories by holding statements slander per se (i.e., no special damages needed) when they naturally and proximately caused injury to a person’s personal, social, or business relations.\(^ {188}\) However, this expansive category of slander per se was originally taken from a definition of libel in a libel case.\(^ {189}\) Furthermore, some libel cases have utilized some of the slander per se categories in the course of defining the libel at issue as libel per se.\(^ {190}\)

Hence, there has been a tendency to confuse the rules for

\(^ {185}\) See Della-Donna v. Gore Newspapers Co., 489 So. 2d 72 (Fla. App. 1986), review denied, 494 So. 2d 1150 (Fla. 1986), cert. denied, 479 U.S. 1088 (1987). The court stated in dicta that, in light of *Dun & Bradstreet*, *Ane* should be read as applying a negligence standard where a private figure plaintiff is suing and the matter involved is a public issue. *Id.* at 75.

\(^ {186}\) See Rety v. Green, 546 So. 2d 410, 425 (Fla. App.) (court stated in dicta that proof of actual malice was not necessary to recover punitive damages because no issue of public concern was raised by defamation), review denied, 553 So. 2d 1165 (Fla.), and review denied, 553 So. 2d 1166 (Fla. 1989); see also Rabren v. Straigis, 498 So. 2d 1362 (Fla. App. 1986) (reversing punitive damage award in nonmedia case where statements found to be on matter of public concern).


\(^ {189}\) See Ausness, supra note 40, at 60. This "category" essentially defines what a defamatory statement is. See supra notes 15, 20.

\(^ {190}\) See, e.g., Firestone v. Time, Inc., 305 So. 2d 172 (Fla. 1974), rev’d on other grounds, 424 U.S. 448 (1976); Richard v. Gray, 62 So. 2d 597 (Fla. 1953).
libel and slander\textsuperscript{191} or to combine them into one rule for defamation per se.\textsuperscript{192} For example, some cases have defined the types of defamatory statements that are actionable per se (without pleading special damages) the same for both libel and slander. However, they should be considered separately because slander per se does permit reference to extrinsic facts to establish that it falls within one of the slander per se categories,\textsuperscript{193} whereas cases defining libel per se consistently require that the defamation appear on the face of the statement.\textsuperscript{194}

A recent private plaintiff-media defendant case, \textit{Mid-Florida Television Corp. v. Boyles},\textsuperscript{195} made it clear that at least the presumed damages aspect of the libel per se rule has been abrogated by \textit{Gertz} for cases against media defendants and that the only vestige of distinction was whether innuendo had to be pleaded.\textsuperscript{196} The court’s language\textsuperscript{197} strongly implies that no damages distinctions remain between libel per se and libel per quod in actions against media defendants.\textsuperscript{198} Therefore, in

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\item\textsuperscript{191} See, e.g., Firestone v. Time, Inc., 414 F.2d 790 (5th Cir. 1969). The court incorrectly stated that a libel per se allegation permits the establishment of innuendo through extrinsic facts when the imputation of a criminal offense is alleged. \textit{Id.} at 791 (citing \textit{Campbell}, 66 So. 2d at 497 (slander case)).
\item\textsuperscript{192} See, e.g., Rahdert & Snyder, supra note 187, classifying libel and slander alike in listing cases of “defamation per se,” \textit{id.} at 4-7, and stating that defamation not actionable on its face requires special damages to be pleaded and proved, \textit{id.} at 9. \textit{See also} M. David Shapiro, Note, 13 \textit{Fla. St. U. L. Rev.} 159, 161 n.12 (1985).
\item\textsuperscript{193} Campbell v. Jacksonville Kennel Club, Inc., 66 So. 2d 495 (Fla. 1953), overruling \textit{Commander v. Pedersen}, 156 So. 337 (Fla. 1934). Ausness concludes that slander in the fifth, expansive category, not mentioned by \textit{Campbell}, must be defamatory on its face to be slander per se. Ausness, \textit{supra} note 40, at 61.
\item\textsuperscript{195} 467 So. 2d 282 (Fla. 1985), \textit{approving} 431 So. 2d 627 (Fla. App. 1983). \textit{Boyles} involved a broadcast report of charges of misconduct and criminal violations by an employee in a mental hospital. The appellate court reversed the trial court’s holding that the statements were libel per quod and held that they were libel per se.
\item\textsuperscript{196} \textit{Id.} at 283. The court indicated that the per se/per quod distinction remains useful for identifying whether the statements being sued on are facially defamatory. \textit{Id.}
\item\textsuperscript{197} A special concurrence argued that the per se/per quod distinction, and the utility of those terms, was totally extinguished in Florida. \textit{Id.} at 283-84 (Ehrlich, J., concurring specially).
\item\textsuperscript{198} The statements in \textit{Boyles} were libel per se, \textit{see supra} note 195, and hence, spe-
\end{enumerate}
\end{footnotesize}
cases where Gertz applies, libel per quod does not require special damages to be alleged and proven but probably will require a defendant to show negligence as to the defamatory nature of the publication.\footnote{199} For private plaintiff actions not involving matters of public concern, however, libel per quod may still require pleading and proof of special damages.

Georgia

Ten years after Gertz, the Georgia Supreme Court held, in *Triangle Publications, Inc. v. Chumley*,\footnote{200} that a negligence standard should apply to a publisher charged with defaming a private figure.\footnote{201} The court gave no indication that it would extend the negligence standard beyond the Gertz requirement.\footnote{202} Subsequent to Gertz, nonmedia cases not involving matters of public concern have not applied the Gertz principal damages would not have needed to be considered. However, the appellate court appeared to be confusing actual damages and special damages by stating that Gertz abolished the "presumption of damage" distinction between per se and per quod actions. 431 So. 2d at 633. Although the appellate court questioned the court's statement in *From* that the per se/per quod distinction was totally extinguished, it made no mention of the *From* court's confusion of actual and special damages. *Id.* (questioning From v. Tallahassee Democrat, Inc., 400 So. 2d 52, 57 (Fla. App. 1981), review denied, 412 So. 2d 465 (Fla. 1982)). Hence, as with Tennessee and Maryland, Florida may have properly eliminated the requirement of special damages in cases to which Gertz applies, but for an erroneous reason. See *supra* note 102.

199. In adopting a negligence standard, the appellate court in *Ane* cited to § 580B of the Restatement, which applies fault to falsity and defamatory potential. Miami Herald Publishing Co. v. *Ane*, 423 So. 2d 376, 386 (Fla. App. 1982), *aff'd*, 458 So. 2d 239 (Fla. 1984) (citing *RESTATEMENT (SECOND) OF TORTS* § 580B (1977)). The supreme court in *Boyles* enunciated the negligence standard as whether the defendant "knew or should have known that the statements were false and defamatory." 467 So. 2d at 283 (quoting appellate court, 431 So. 2d at 634) (emphasis added).

200. 317 S.E.2d 534 (Ga. 1984). In this case, the alleged defamation was the unauthorized use of a teenage girl's picture in print ads promoting a television news report on teenage pregnancy.

201. The court in *Chumley* took note of other states' responses to Gertz and the Restatement in settling on a negligence standard. *Id.* at 536 (citing *RESTATEMENT (SECOND) OF TORTS* § 580B (1977)). Another factor which the court did not mention, but certainly recognized, was the negligence statutory standard that already applied to broadcasters for defamatory statements uttered by one other than an operator or employee of the broadcaster. GA. CODE ANN. § 51-5-10 (Michie 1981). The television defendant in *Chumley* did not appeal the court's application of a negligence standard to it, probably because of the statute.

202. The court used the term "publisher" in its decision in the context of the media, just as the Court in *Gertz*. *Chumley*, 317 S.E.2d at 536-37.
After Dun & Bradstreet, Georgia most likely will continue to apply only its state law to cases not involving matters of public concern.

Similar to many states, the law on the issue of libel per quod, also called libel by innuendo, is unsettled. Some recent cases have permitted libel per quod actions without any indication that special damages were either pleaded or proved, and dicta from other cases suggest that special damages are not necessary. However, other cases hold

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203. See, e.g., Retail Credit Co. v. Russell, 218 S.E.2d 54 (Ga. 1975). Like Dun & Bradstreet, Retail Credit involved a false credit report. The court referred to Hood v. Dun & Bradstreet, a pre-Gertz case applying the Rosenbloom standard, for the proposition that "matters of general and public interest" do not include credit reports. Id. at 57 (quoting Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 29 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974)). While noting Gertz, the court stated that First Amendment restrictions did not apply in this case. Id.; see also Melton v. Bow, 247 S.E.2d 100 (Ga.), cert. denied, 439 U.S. 985 (1978) (court did not discuss a fault standard in a case between private parties).

204. In Wright v. Southern Bell Tel. & Tel. Co., 313 S.E.2d 150 (Ga. App. 1984), a recording stating that the plaintiff's phone was "temporarily disconnected" was held to be a sufficient allegation of defamation, based on innuendo (implication of nonpayment of bill), so that summary judgment for the defendant was reversed. There was no indication that the plaintiff pleaded special damages.

205. In Macon Tel. Publishing Co. v. Elliott, 302 S.E.2d 692 (Ga. App. 1983), the court characterized a newspaper report of a juror's possibly premature arrival at a conclusion in a case as libel per quod requiring innuendo, which was pleaded. The court nevertheless affirmed a judgment and damage award for the plaintiff, although there was no evidence in the report of the case that special damages were pleaded or proved. Id.


207. In Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973), cert. denied, 415 U.S. 985 (1974), the court of appeals reversed the trial court dismissal of the libel action on the basis that the plaintiff specifically pleaded special damages to meet the requirements of a libel by innuendo action. Id. at 33-34. The Hood case involved ambiguous statements in a credit report, and the court cited Mell v. Edge, 22 S.E.2d 738 (Ga. App. 1942), which also was a credit report case. See also Signal Oil & Gas Co. v. Conway, 191 S.E.2d 624 (Ga. App.), rev'd, 194 S.E.2d 909 (Ga. 1972). In Signal, a letter to the plaintiff's employer by a creditor was ruled not libel per se, and libel per quod was not adequately alleged because the innuendo was not sufficient to make the letter libelous and because no special damages were pleaded. Id. at 628. The judgment was reversed on the ground that the plaintiff adequately alleged libel per se. Conway v. Signal Oil & Gas Co., 194 S.E.2d 909 (Ga.) (no discussion of libel per quod requirements), rev'd, 191 S.E.2d 624 (Ga. App. 1972); see also Smith v. First Nat'l Bank of Atlanta, 837 F.2d 1575 (11th Cir.) (erroneous report of delinquency in credit card account held not libel per se), cert. denied, 488 U.S. 821 (1988).
and suggest\textsuperscript{208} that special damages still are required in cases of libel by innuendo.

The best analysis, consistent with the holdings and much of the dicta, is that special damages are never required in libel actions against the media, since the newspaper libel statute defines the requirements of the action,\textsuperscript{209} but special damages might be required in libel per quod actions against creditors.\textsuperscript{210} This would be consistent with a constitutional overlay of \textit{Gertz} and \textit{Dun & Bradstreet} that requires fault\textsuperscript{211} in libel per quod actions on matters of public concern, which generally involve the media, but not on matters of private concern, such as credit reports, where defendants would instead have to rely on the special damages requirement. The validity of such a framework, however, remains to be determined by the Georgia courts.

\textbf{Hawaii}

Hawaii reaffirmed\textsuperscript{212} a negligence standard for private

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\begin{itemize}
\item \textsuperscript{209} See \textit{GA. CODE ANN.}, § 51-5-2 (Michie 1981). The statute restates the general definition of defamation and specifies that publication is essential to recovery. Actions under the newspaper libel statute are actionable without pleading or proving special damages. Southland Publishing Co. v. Sewell, 143 S.E.2d 428 (Ga. App. 1965).
\item \textsuperscript{210} See cases cited supra note 207. Applying the newspaper libel statute, \textit{Floyd} stated the general rule to be that libel never requires allegations of special damages, but the court observed that \textit{Mell} and other credit report cases might carve out a limited exception. 117 S.E.2d at 909 (citing \textit{Mell}, 22 S.E.2d 738); see also Jamison v. First Ga. Bank, 387 S.E.2d 375 (Ga. App. 1989), \textit{cert. denied}, (Nov. 22, 1989). In \textit{Jamison}, the court held that stamping the plaintiff's checks as dishonored for insufficient funds was not libel per se and affirmed dismissal of the libel claim because no special damages were alleged. \textit{Id.} (citing \textit{Mell}, 22 S.E.2d 738). The court distinguished the newspaper libel actions as not controlling for common law libel per quod. \textit{Id.} at 379. \textit{Compare} Wright v. Southern Bell Tel. & Tel. Co., 313 S.E.2d 150 (Ga. App. 1984).
\item \textsuperscript{211} In \textit{Chumley}, the defendant's contention that the ad did not "make substantial danger to reputation apparent," as required by \textit{Gertz}, was summarily dismissed as "without merit" (since the ad was clearly defamatory on its face). Triangle Publications, Inc. v. Chumley, 317 S.E.2d 534, 538 (Ga. 1984).
\item \textsuperscript{212} In \textit{Aku} v. Lewis, 477 P.2d 162 (Haw. 1970), decided prior to \textit{Rosenbloom} as well as \textit{Gertz}, the court adopted a negligence standard in an action by a private individual against a broadcaster.
\end{itemize}
}
plaintiffs in *Cahill v. Hawaiian Paradise Park Corp.*\(^{213}\) It is unclear whether Hawaii courts would extend the *Gertz* rules to all private plaintiff actions. In purely private matters not involving the media, the constitutional rules have not been mentioned.\(^{214}\)

Numerous cases in Hawaii have stated in dicta that special damages must be pleaded for defamation that is not libel per se.\(^{215}\) However, the implications of this dicta are subject to debate. Hawaii courts also state that words may be libelous per se even if they are ambiguous. The jury determines whether the words were understood in their innocuous sense or in their defamatory sense.\(^{216}\) While courts sometimes state that the libel per se determination is made from the words "standing alone"\(^{217}\) or "on their face,"\(^{218}\) other cases suggest that words within the slander per se categories are libel per se regardless of extrinsic facts.\(^{219}\) Thus, a defendant unaware of the extrinsic facts in a libel per quod case should seek to have the *Gertz* fault standard extended to his case.

\(^{213}\) 543 P.2d 1356 (Haw. 1975). The court cited with approval to a draft of § 580B of the Restatement, which applied a negligence test to the issues of both truth or falsity and defamatory potential. *Id.* at 1365 n.4 (citing *RESTATEMENT (SECOND) OF TORTS* § 580B (Tentative Draft No. 21, 1975)).


\(^{217}\) *Tagawa*, 427 P.2d at 82.

\(^{218}\) *Baldwin*, 30 Haw. at 617.

\(^{219}\) See *Russell*, 497 P.2d at 43 n.2; *Kahanamoku v. Advertiser Publishing Co.*, 25 Haw. 701, 709 (1920). The libel per se cases are discussed in Susan K. Park, Comment, *Defamation: A Study in Hawaii Law*, 1 U. HAW. L. REV. 84, 99 (1979), where the author concludes that special damages are not required even if the statement is not defamatory on its face. Although the author bases this conclusion on cases involving ambiguous statements rather than cases with statements that were innocent on their face, it is a reasonable prediction of how the latter type of case would be decided.
Idaho

Idaho courts have not yet established the required degree of fault and the extent of its application in private plaintiff defamation cases. A recent supreme court case considering Gertz and Dun & Bradstreet concluded only that the actual malice standard does not apply if a private plaintiff suing on a matter of public concern is seeking to recover damages for actual injury rather than presumed damages. In the absence of an established fault standard, a defendant in a libel per quod case would rely on Idaho's requirement that special damages be alleged for words that are not libel per se.

Illinois

Illinois adopted a negligence standard in a 1975 case, Troman v. Wood. The court held that the negligence standard would apply "regardless of whether . . . the publication in question related to a matter of public or general interest."

220. Wiemer v. Rankin, 790 P.2d 347 (Idaho 1990). The court reversed the trial court's grant of summary judgment to the defendant but did not specify what fault standard should be applied for the plaintiff to recover actual damages.

221. In order to maintain a libel action without a plea of special damages, a plaintiff must establish that the words complained of are libelous per se. Weeks v. M-P Publications, Inc., 516 P.2d 193, 195 (Idaho 1973) (dismissal affirmed because words not libel per se and no special damages alleged). To be libelous per se, the words must be of such a nature that the court can presume as a matter of law that they are defamatory, without considering "innuendo, colloquium, and explanatory circumstances." Gough v. Tribune-Journal Co., 249 P.2d 192, 195 (Idaho 1952) (citations omitted) (dismissal affirmed where no special damages alleged and words on their face did not tend to harm reputation of plaintiffs).

222. 340 N.E.2d 292 (Ill. 1975). In this case, a private individual sued a media defendant for an article about a gang headquarters in a particular neighborhood, accompanied by a captioned photo of the plaintiff's home.

223. Id. at 299. The court rejected the defendant's suggestion to apply the New York Times standard, concluding that limiting a private individual's right to recover damages to publications that do not relate to matters of public interest unduly subordinates the rights of the individual as a matter of Illinois law. Id. at 297. A later case, Colson v. Stieg, 433 N.E.2d 246 (Ill. 1982), suggests that Illinois may instead require actual malice where the defamed person had an opportunity to contact the recipients of the defamatory statements in order to rebut the statements. Id. at 249. That decision should probably be read as requiring New York Times malice only in order to overcome a qualified privilege. See Linda A. Malone & Rodney A. Smolla, The Future of Defamation in Illinois after Colsen v. Stieg and Chapski v. Copley Press, Inc., 32 DePaul L. Rev. 219, 245-46 (1983). The decision has not been extended beyond its particular facts. See, e.g., American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n, 435 N.E.2d 1297, 1301-02 (Ill. App. 1982).
However, in light of *Dun & Bradstreet's* interpretation of *Gertz* as applying only to matters of public concern, it appears that the *Gertz* actual damages requirement will not apply in private concern cases.224

However, even if presumed damages are permitted in non-*Gertz* cases, they would be permitted under Illinois law only for slander or libel that falls within one of the traditional slander per se categories225 on its face226 and that is not rea-

224. In Mittelman v. Witous, 552 N.E.2d 973 (Ill. 1989), a slander action between two attorneys not involving a matter of public concern, the court noted *Dun & Bradstreet's* limitation of *Gertz* to matters of public concern and observed that private publications about private figures are "untouched by constitutional concerns." *Id.* at 981. Nevertheless, it held that the plaintiff had to prove actual malice to recover presumed damages for slander per se. The court was not rejecting the rule of *Dun & Bradstreet*, however. In this case, a qualified privilege applied (matter of common interest). Formerly, negligence was required to overcome a qualified privilege, but since negligence was now required as part of the prima facie case, there would be no "privilege" in the qualified privilege unless actual malice became the standard to overcome the privilege. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 600 cmts. a, b (1977)). The implication is that presumed damages would have been available without a showing of actual malice if the qualified privilege were not applicable. Also, numerous nonmedia cases have stated, usually without discussion of *Gertz*, that damages are presumed where the statement is defamatory per se. See, e.g., Ely v. National Super Mkts., Inc., 500 N.E.2d 120 (Ill. App. 1986) (upholding award of presumed damages in a case of slander per se); American Pet Motels, Inc., 435 N.E.2d at 630; Welch v. Chicago Tribune Co., 340 N.E.2d 539 (Ill. App. 1975) (newspaper sued as employer); cf. Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 334 N.E.2d 160, 164 (Ill. 1975) (noting that a credit reporting agency does not enjoy the constitutional protections given mass-media publications).

225. American Pet Motels, 435 N.E.2d at 629. As defined by the Illinois courts, the categories of statements are (1) those imputing the commission of a criminal offense, (2) those imputing infection with a communicable disease that would tend to exclude one from society, (3) those imputing inability or lack of integrity in the discharge of one's duties, (4) those prejudicing one in his profession or trade, and (5) (by statute) those falsely accusing one of fornication, adultery, or false swearing. Fried v. Jacobson, 457 N.E.2d 392, 394 (Ill. 1983); see ILL. REV. STAT. ch. 126, paras. 1, 2 (1977).

226. Language stating that the statements must be "obviously and naturally harmful" may be incorporating the Illinois innocent construction rule, see infra note 227, rather than the requirement that the statement be defamatory on its face, see, e.g., Owen v. Carr, 497 N.E.2d 1145, 1147 (Ill. 1986). However, most characterizations of the per se rule also have stated that the words must be "in and of themselves" so obviously harmful that proof of special damages is unnecessary. See, e.g., Fried, 457 N.E.2d at 394; Heerey v. Berke, 544 N.E.2d 1037 (Ill. App. 1989); see also Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 267-68 (7th Cir. 1983) (actionability without special damages depends on both the character and the completeness of the statement); Dombrowski v. Shore Galleries, Inc., 376 N.E.2d 45, 48 (Ill. App. 1978) ("words themselves, without the aid of extrinsic facts to explain them," must be so obviously hurtful that damage to reputation may be presumed) (quoting Zeinfeld v. Hayes Freight Lines, Inc., 243 N.E.2d 217, 220 (Ill. 1968)).
sonably susceptible to an innocent interpretation. Thus, defamatory statements not apparent on their face (regardless of category), as well as certain facially defamatory statements, still require special damages to be established, even though the fault requirement on the defamatory potential issue provides more appropriate protection in the former situation.

Indiana

Indiana is one of the few states that retained the Rosenbloom rule even after Gertz, applying the New York Times actual malice standard in actions brought by private plaintiffs for statements on matters of public interest. Some courts

227. Chapski v. Copley Press, 442 N.E.2d 195, 198 (Ill. 1982); see discussion of innocent construction rule supra note 17. The interaction of the libel per quod rule and the innocent construction rule has been the source of some confusion in Illinois. Because libel "per quod" in Illinois may in some cases be libelous on its face, see infra note 228, some courts have applied the innocent construction rule in a libel per quod context, see, e.g., American Int'l Hosp. v. Chicago Tribune Co., 483 N.E.2d 965, 970 (Ill. App. 1985) (holding statement nonactionable under libel per quod rule and under court's version of innocent construction rule); Newell v. Field Enters., Inc., 415 N.E.2d 434, 442 (Ill. App. 1980). Other courts, however, have concluded that the issue was unsettled. See, e.g., American Pet Motels, Inc., 435 N.E.2d at 1300-01 (correctly observing that if libel is capable of innocent construction, it is nonactionable, regardless of whether special damages are pleaded and proved). In Mittelman, the court held that the innocent construction rule does not apply to per quod actions, since the whole point of per quod defamation is to establish the defamatory character of statements that are innocent on their face. 552 N.E.2d at 979. The court did not discuss the rule's application to statements that are defamatory on their face but not defamatory per se.

228. Because of the limitation of libel per se to the slander categories, supra note 225, certain libel may be defamatory on its face but still require special damages. This libel has been characterized by at least one court as libel per quod. See, e.g., Newell, 415 N.E.2d 434. In Newell, an article describing a wrongful death complaint implied on its face that the plaintiff elected to save a parrot rather than a house guest from a fire. Although not libelous per se because not within the per se categories, the article was libelous per quod, requiring special damages to be alleged. Id. Although other cases have defined libel per quod as a publication not libelous on its face that is rendered defamatory by alleging extrinsic facts and proving special damages, see, e.g., Harris Trust & Sav. Bank v. Phillips, 506 N.E.2d 1370, 1373 (Ill. App.), appeal denied, 515 N.E.2d 108 (Ill. 1987); American Int'l Hosp., 483 N.E.2d 965, 970, nothing in these cases suggests that libel per quod in Illinois is limited to libel by extrinsic fact cases.

229. Although Troman did not specifically apply a fault standard to this issue, the court's adoption of the Gertz rule included its caveat that the publication must make substantial danger to reputation apparent. Troman v. Wood, 340 N.E.2d 292, 299 (Ill. 1975). In Newell, the court concluded that the libel was sufficiently defamatory on its face that a newspaper editor would be put on notice of the danger in publishing such an article. 415 N.E.2d at 449.

have considered the defendant’s fault in nonmedia cases not involving a matter of public concern. It is uncertain, though, whether the fault requirement explicitly will be extended to these cases in light of *Dun & Bradstreet*. However, since the required *New York Times* actual malice fault standard permits presumed damages in any case, Indiana’s rule permitting presumed damages for libel per se would not be affected. In addition, since the weight of authority suggests that Indiana is one of the few states that adopted Prosser’s application of the slander per se categories in libel per quod cases, relatively few cases will require any evidence of damages, regardless of whether the fault standard is applied.

**Iowa**

Iowa adopted a negligence standard of liability for private plaintiff defamation actions in *Jones v. Palmer Communications, Inc.*, which involved a media defendant being sued...
on a matter of public concern. The court specifically retained a media/nonmedia dichotomy in determining whether a fault standard was required, while utilizing Dun & Bradstreet's public concern/private concern dichotomy for determining whether proof of actual malice was required for recovery of presumed and punitive damages.\textsuperscript{236} Hence, for each of these issues, Iowa law alone will govern in some defamation cases.

In Vinson v. Linn-Mar Community School District, the court considered the status of the libel per se/libel per quod distinction in Iowa, recognizing that courts have used the term "defamation per se" to refer both to statements that the court can presume as a matter of law to be defamatory and to statements that are defamatory without the need for reference to inducement and innuendo.\textsuperscript{237} While a recent court of appeals case overlooked this dual meaning,\textsuperscript{238} other holdings\textsuperscript{239}  

\textsuperscript{236} Id. at 898 (citing Restatement (Second) of Torts § 580B (1977)).
\textsuperscript{237} Id. at 897, 900. This framework preserves intact Vinson v. Linn-Mar Community Sch. Dist., 360 N.W.2d 108 (Iowa 1984), in which the Iowa Supreme Court declined to extend Gertz to private individuals suing nonmedia defendants. In Vinson, an employer was sued by a former employee for statements made to prospective employers that the employee was fired for recording the incorrect time on time cards. The plaintiff's defamation judgment was affirmed by the supreme court. The court in Vinson distinguished Anderson v. Low Rent Hous. Comm'n, 304 N.W.2d 239 (Iowa), cert. denied, 454 U.S. 1086 (1981), which had applied the New York Times standard in a nonmedia libel action, because Anderson involved a public figure and Vinson did not. 360 N.W.2d at 118.

\textsuperscript{238} 360 N.W.2d at 116. For the latter definition of the term, the court cited Shaw Cleaners & Dyers v. Des Moines Dress Club, 245 N.W. 231 (Iowa 1932).

\textsuperscript{239} See Kelly v. Iowa State Educ. Ass'n, 372 N.W.2d 288 (Iowa App. 1985). Kelly involved an education administrator allegedly libeled by statements in a teachers' union newsletter. The plaintiff alleged actual damages, but the trial court determined that the plaintiff was a public figure who would have to show actual malice to recover. The jury award of compensatory and punitive damages was reinstated on appeal. In the course of applying libel per se according to the first definition in Vinson, the court rejected the defendant's claim that libel per se does not apply because "no derogatory meaning is present in the statements themselves; such meaning only arises by inference," \textit{id.} at 295, partly on the basis of a faulty analysis of an earlier case that supposedly required extrinsic facts for statements held to be libel per se. \textit{See infra} note 240. In fact, the court in Kelly was lumping together libels for which a defamatory meaning can be inferred from the statement itself, even though not explicitly defamatory, and statements which appear innocent on their face, but are clearly defamatory when extrinsic facts are shown. The statements in Kelly not only were unambiguously libelous but also libelous without any reference to extrinsic facts.

\textsuperscript{239} See Ragland v. Household Fin. Corp., 119 N.W.2d 788 (Iowa 1963). This case involved a letter to the superintendent that the plaintiff teacher owed an overdue debt.
and dicta strongly indicate that libel per quod (i.e., libel by extrinsic fact) still requires allegations of special damages in Iowa.

Kansas

A year after Gertz was decided, Kansas adopted a negligence standard for defamation apparent on its face in a private plaintiff action against a media defendant. In a later case, the supreme court held that damages no longer could be presumed in cases of libel per se, but the court has not yet specifically extended Gertz to nonmedia defendants. Because the statements in the case applying the negligence standard were libel per se, the court did not indicate whether a fault standard would apply to the defamatory potential element.

The court held that the statements in the letter were not libel per se. Id. at 790. Since the statements were libel per quod (i.e., "by reference to the inducement and innuendo") and the plaintiff did not plead special damages, dismissal of the action was affirmed. Id. at 792; see also Shaw Cleaners, 245 N.W. 231.

240. See Brown v. First Nat'l Bank of Mason City, 193 N.W.2d 547 (Iowa 1972) (no need to look for innuendo because words held clearly libelous on face); see also Vojak v. Jensen, 161 N.W.2d 100 (Iowa 1968) (letters by architect about roofer held libel per se, or "actionable in and of themselves," because the clear implication of the statements themselves was that the roofer was not reliable in his work).

241. See Gobin v. Globe Publishing Co., 531 P.2d 76 (Kan. 1975) (Gobin I). In a subsequent decision arising from the same litigation, the court permitted evidence of the plaintiff's bad reputation to be admitted to show that the statements did not injure the plaintiff's reputation. Gobin v. Globe Publishing Co., 620 P.2d 1163, 1166 (Kan. 1980) (Gobin II).


243. See Turner v. Halliburton Co., 722 P.2d 1106, 1115 (Kan. 1986) (not necessary to consider whether the Gobin III damages rule applies to nonmedia defendants). Prior to the Gobin cases, the state had a broad fair comment privilege that protected even false statements of fact if they involved matters of public concern. See Cohen, supra note 161, at 158-59 (discussing Coleman v. MacLennan, 98 P. 281 (Kan. 1908)). More recently, however, the Kansas Supreme Court has questioned the continued validity of the privilege in light of the focus on the status of the defendant in Gertz rather than the content of the statement, as in Rosenbloom. See Hanrahan v. Horn, 657 P.2d 561, 566 (Kan. 1983). In light of Dun & Bradstreet's reinterpretation of Gertz, Kansas courts might limit the application of Gertz to matters that were formerly covered by the privilege. Compare Polson v. Davis, 895 F.2d 705, 708 (10th Cir. 1990) (applying Gobin's ban on presumed damages to nonmedia case involving matter of private concern).

244. Gobin III, 649 P.2d at 1242; Gobin I, 531 P.2d at 84. The litigation in these cases arose out of an erroneous newspaper report that the plaintiff had pleaded guilty to a charge of cruelty to animals.

245. However, the court in Gobin I cited the Gertz caveat, indicating that different
On the other hand, the court observed in dicta that Kansas had recognized the libel per se/libel per quod distinction but that presumed damages no longer were permissible. However, this observation did not resolve whether the special damages requirement for libel per quod would continue to apply to these cases.

Kentucky

In *E.W. Scripps Co. v. Cholmondelay,* the Kentucky appellate court adopted a negligence standard in an action by a private individual against a media defendant. In *Scripps*, the court applied a negligence standard to the defamatory language element, correctly observing that because the statement was libel per se, or defamatory on its face, "appellant's argument that the reasonably prudent editor and publisher were not warned of the article's defamatory potential is without substance." A negligence standard applicable to both the truth or falsity and the defamatory character of the communication was approved by the supreme court in *McCall v. Cou-

considerations would apply if the defamation was not apparent on its face. 531 P.2d at 83-84.

246. The cases cited in *Gobin III*, 649 P.2d at 1242, indicate some confusion between the definitions of per se and per quod in libel and those in slander. See, e.g., *Koerner v. Lawler*, 304 P.2d 926 (Kan. 1956) (libel per quod case but libel and slander per quod defined the same); *Bennett v. Seimiller*, 267 P.2d 926 (Kan. 1954) (slander case using elements of libel per se and slander per se in its definitions). However, other cases state the rule correctly in holding that libel not apparent on its face requires pleading and proof of special damages. See, e.g., *Karrigan v. Valentine*, 339 P.2d 52 (Kan. 1959), a classic libel per quod case where an imputation of immorality was created from an erroneous birth announcement. See also supra note 19. The court held that the allegation of special damages was sufficient to state a cause of action for libel per quod. 339 P.2d at 56. See also *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1016 (D. Kan. 1986); *Chauffeurs Local Union No. 795 v. Kansans for the Right to Work*, 368 P.2d 308 (Kan. 1962).

247. 569 S.W.2d 700 (Ky. App. 1978).

248. The court noted that the libel per se term has been used to refer both to libel defamatory on its face and to libel within one of the four slander per se categories. The court opted for the former definition in holding that an account of a fight stating that one boy was "beaten into insensibility" by an older boy, who some readers would know to be the plaintiff, was libel per se. Id. at 702.

249. Id. The court also concluded that there was sufficient evidence to uphold the award of compensatory damages, id. at 703, although it did not specifically indicate that *Gertz* rejected presumed damages. *See Frakt II, supra* note 90, at 566 (criticizing award as more like presumed damages than the "actual injury" of *Gertz*).
rier-Journal & Louisville Times Co. 250

Adoption of a negligence standard did not alter any of Kentucky's common law libel rules that otherwise would be applicable. 251 Thus, Kentucky's requirement that special damages be established for libel not defamatory on its face 252 evidently still is applicable not only to cases to which Gertz has not been applied 253 but also to cases in which the defendant also must be at fault on the defamatory potential issue.

Louisiana

The Louisiana Supreme Court has not specifically articulated the fault standard applicable to cases to which Gertz applies, but appellate court cases have required a showing of negligence. 254 While one of these cases involved an action between private parties on a matter not of public concern, 255 other cases in similar contexts did not apply Gertz. 256 There-


251. 623 S.W.2d at 886.

252. See Towles v. Travelers Ins. Co., 137 S.W.2d 1110 (Ky. 1940); Sweeney & Co. v. Brown, 60 S.W.2d 381 (Ky. 1933); see also O'Brien v. Williamson Daily News, 735 F. Supp. 218, 224 (E.D. Ky. 1990) (facts alleged by plaintiff were sufficient to reach the jury on the issue of libel per se so special damages not required), aff'd, 931 F.2d 893 (6th Cir. 1991); Cullen v. South E. Coal Co., 685 S.W.2d 187, 190 (Ky. App. 1983) (court stated that libel per quod requires "evidence of pecuniary loss" but held that memorandum was not libel per quod because it was not defamatory at all).

253. See Cullen, 684 S.W.2d 187 (constitutional cases not considered in libel action between private parties); Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 274 (Ky. App. 1981) (court in nonmedia slander case makes no mention of Gertz and applies fault only to the publication element).


255. In Wattigny, the plaintiff attorney was allegedly defamed by the defendant attorney's pleadings alleging a conspiracy. In Louisiana, an attorney's pleadings are only entitled to a qualified privilege. Freeman v. Cooper, 414 So. 2d 355, 359 (La. 1982). While recognizing that Wattigny did not involve a matter of public interest or a media defendant, the court held that the defendant was entitled to the constitutional protections of Gertz. 408 So. 2d at 1130-31.

256. Freeman also involved an attorney suing another attorney for defamatory statements in pleadings, e.g., that the plaintiff attorney was lying and considered himself "above and beyond the law." 414 So. 2d at 357 (citing defendant's memorandum). The appellate court held that recovery of damages for injured feelings may be inferred from
fore, the extent of its applicability in Louisiana remains uncertain.

It does not appear, however, that a broad "fault" requirement should be gleaned from Gertz in order to protect defendants in libel by extrinsic fact situations, because Louisiana law requires "malice" to be proved rather than implied in these cases. While Louisiana courts have been inconsistent in defining malice in terms of either New York Times "actual malice" or common law malice (in the sense of improper motive), either definition would impose a difficult hurdle for the plaintiff to overcome where the defendant

the libelous statements. Freeman v. Cooper, 390 So. 2d 1355, 1360 (La. App. 1980), aff'd, 414 So. 2d 355 (La. 1982). Only one member of the supreme court believed that the appellate court was in error for not imposing the Gertz actual damages requirement. See 414 So. 2d at 360 (Dennis, J., dissenting); see also Brannan v. Wyeth Lab., Inc., 526 So. 2d 1101 (La. 1988) (no application or discussion of constitutional rules in nonmedia case not involving matter of public concern); Elmer v. Coplin, 485 So. 2d 171 (La. App.), writ denied, 489 So. 2d 246 (La. 1986). Elmer involved a bar applicant's suit against an attorney for writing a negative letter to the National Conference of Bar Examiners. The court recited the standard elements required for a defamation action and hinted that the Wattigny opinion deviated from the weight of authority in not applying the standard elements. Id. at 176.

257. Nominally, "fault," along with "causation" and "damage," are the basic elements of defamation in Louisiana civil law because it is a quasi-offense governed by L.A. CIV. CODE ANN. art. 2315 (West Supp. 1991). However, as a guide to determining fault, causation, and damage in defamation actions, courts have specifically defined a defamation action to require (1) defamatory words, (2) publication, (3) falsity, (4) malice, actual or implied, and (5) resulting injury. Elmer, 485 So. 2d at 175 (and cases cited therein). Only the Wattigny case has suggested that the "fault" requirement has any significance in relation to the Gertz fault requirement. 408 So. 2d at 1133.

258. Louisiana law makes no distinction between libel and slander in this context, characterizing all statements that are defamatory without considering extrinsic facts and surrounding circumstances as "defamatory per se." See Elmer, 485 So. 2d at 176; Shylock, Inc. v. Covenant Broadcasting Corp., 352 So. 2d 379, 382 (La. App. 1977), writ denied, 354 So. 2d 206 (La. 1978); see also John T. Cox, Jr., Comment, Defamation: A Compendium, 28 L.A. L. REV. 82, 89 (1967).

259. Shylock, 352 So. 2d at 382; see also Trahan v. Ritterman, 368 So. 2d 181 (La. App. 1979). Compare Munson v. Gaylord Broadcasting Co., 491 So. 2d 780, 781 (La. App.), writ denied, 496 So. 2d 335 (La. 1986), which states that malice, or a deliberate intent to injure, is not an element of a cause of action for defamation. Id. (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)). However, the court's later statements indicate that it is referring to statements defamatory per se, in which malice is presumed. Id. at 782. Louisiana rejects any requirement of special damages where the statements are not defamatory per se. Makofsky v. Cunningham, 576 F.2d 1223, 1236 n.23 (5th Cir. 1978); Wattigny, 408 So. 2d at 1133; see also Cox, supra note 258, at 96.

260. Cox, supra note 258, at 91-92; see, e.g., Shylock, 352 So. 2d at 381-82.
was unaware of the extrinsic facts making the statement defamatory.

**Maine**

The Maine Supreme Court has assumed, but has not specifically held, that a negligence standard is appropriate when a private plaintiff sues a media defendant about "a matter of public importance." Where the matter does not involve a media defendant and is not of public concern, the state common law decisions will apply. While some of these decisions have stated that libel that is defamatory on its face, without resort to extrinsic facts, does not require an allegation of special damages, no cases have made a specific holding as to what must be pleaded and proved for libel by extrinsic fact.

**Maryland**

Maryland became one of the first states to confront the

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261. Hudson v. Guy Gannett Broadcasting Co., 521 A.2d 714, 716 (Me. 1987). In that case, the court agreed with the trial court's assumption that negligence was the proper basis for liability. Id. at 716 n.4. However, the court reversed the trial court's grant of summary judgment for the defendant under this standard because it applied a "convincing clarity" standard rather than a "preponderance of the evidence" standard. Id. at 715-16.

262. Ramirez v. Rogers, 540 A.2d 475, 477 (Me. 1988) (citing Dun & Bradstreet, 472 U.S. 749). In one slander action between private parties on a matter not of public concern, the trial court applied the constitutional standards in determining whether the plaintiff was a public figure and whether the statement was fact or opinion. The supreme court affirmed a judgment for the plaintiff without discussing whether the jury's finding of actual malice was required in this type of case. True v. Ladner, 513 A.2d 257 (Me. 1986). However, in another slander case involving similar circumstances, the court, in discussing the standard of fault, cited to Dun & Bradstreet for support in holding that the case "involves neither a public figure nor an issue of public interest," and hence *New York Times* doesn't control. Saunders v. VanPelt, 497 A.2d 1121, 1124 n.2 (Me. 1985).

263. See Cohen v. Bowdoin, 288 A.2d 106, 110 n.5 (Me. 1972) (holding that since statement was defamatory on its face and required no resort to extrinsic circumstances, the failure to allege special damages was not fatal to complaint sounding in libel rather than slander); Powers v. Durgin-Snow Publishing Co., 144 A.2d 294 (Me. 1958) (held statement libel per se so no allegation of special damages necessary). Compare Springer v. Seamen, 658 F. Supp. 1502, 1508 (D. Me. 1987) (citing Cohen for statement that libel does not require special damages); Briola v. J.P. Bass Publishing Co., 25 A.2d 489, 490-91 (Me. 1942) (stating that it is not necessary in a case of libel that the statement impute a crime or that special damage be alleged; also stating, however, that if words are libelous on their face, even though they do not impute a crime, innuendo may be regarded as surplusage).
effect of Gertz in Jacron Sales Co. v. Sindorf, an extremely influential precedent for other states that subsequently considered their defamation law in light of Gertz. The Maryland Court of Appeals correctly concluded that Gertz had rejected the “public concern” test and predicted that Gertz would be extended by the Supreme Court to nonmedia as well as media cases. Apart from that prediction, the court held as a matter of state law that Gertz would apply to both media and nonmedia cases and to slander as well as libel. In other words, Gertz applies to all defamation actions to which the higher New York Times standard does not apply. Furthermore, the court specifically adopted the Restatement standard of fault for these cases, which applies the fault standard to whether a statement is false and to whether it defames the other.

Although a fault standard was in place for the protection of all libel per quod defendants, the special damages issue was still uncertain. As previously discussed, Maryland did

264. 350 A.2d 688 (Md. 1976). In this case, Sindorf brought a slander action against his former employer for a statement made by an executive of a subsidiary to his current employer that Sindorf had stolen merchandise from his former employer.

265. More than forty state court cases from other jurisdictions have cited to Jacron, 350 A.2d 688.

266. The reinterpretation of Gertz by Dun & Bradstreet, which resurrected the public concern/private concern distinction, likely will have no effect on Maryland law. Maryland courts will continue to apply the Gertz standards to all defamation cases as a matter of state law, which was the basis for extending Gertz in Jacron. See infra text accompanying note 268.

268. 350 A.2d at 695.

269. Id. at 697-98 (adopting RESTATEMENT (SECOND) OF TORTS § 580B (Tentative Draft No. 21, 1975)). The court also anticipated Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), by placing the burden of proving falsity upon the plaintiff rather than retaining truth as an affirmative defense. 350 A.2d at 698.

270. The federal courts were struggling with the special damages rule about the time that Jacron was being decided. In the case recounted in the introduction to this article, Sauerhoff v. Hearst Corp., 388 F. Supp. 117 (D. Md. 1974), rev’d, 538 F.2d 588 (4th Cir. 1976), the district court correctly concluded that special damages were required in libel per quod cases in Maryland, id. at 120, and that no slander exceptions to the libel per quod rule were recognized, id. at 121. The district court also noted that a triable issue of fact was presented as to whether the subject matter of the article would have warned a reasonably prudent editor of its defamatory potential. Id. at 126 (citing Gertz). It nevertheless granted the defendant’s summary judgment motion because Sauerhoff’s deposition indicated that he had suffered no pecuniary damages from his wife’s departure. Id. at 123. The court of appeals, in a two-to-one decision, reversed the district court after misinterpreting its holding. See 538 F.2d at 592 (Haynsworth, J.,
eventually eliminate the special damages rule, but the task was by no means simple and straightforward, and occasional lapses into the common law terminology still occur. Nevertheless, by putting into place the constitutional framework in all cases and eliminating almost all of the common-law rules, the Maryland courts have simplified their libel per quod law.

Massachusetts

Massachusetts adopted a negligence standard for private plaintiff defamation actions in *Stone v. Essex County Newspapers, Inc.* The language of the court in that case did not limit its holding to media cases or matters of public concern. A case decided after *Dun & Bradstreet* indicates that dissenting). The court of appeals then created an unworkable rule for measuring damages, stating that damages could not be based on anything not in the statement itself and unknown to the newspaper. *Id.* at 590, in order to accommodate the fact that a reasonably prudent editor might not have known of the statement's defamatory potential (i.e., that the plaintiff was married). The court overlooked the fact that *Jacron*, decided six months earlier, had adopted the Restatement rule requiring fault on the issue of defamatory potential, a much more practical approach than trying to segregate damages into per se and per quod elements.

271. See supra note 102.

272. In *Winebolt v. Westinghouse Elec. Corp.*, 476 A.2d 217 (Md. App.), cert. denied, 483 A.2d 38 (Md. 1984), the court observed that *Jacron* and *Metromedia* had negated the damages distinctions between per se and per quod defamation, requiring a showing of actual injury for both. *Id.* at 220 (citing *Metromedia*, Inc. v. Hillman, 400 A.2d 1117 (Md. 1979); *Jacron*, 350 A.2d 688). However, the court defined actual injury in post-*Jacron* per se actions the same as special damages for pre-*Jacron* per quod actions and used the terms as synonyms. *Id.* at 220.

273. In cases involving actual malice rather than negligence, the per se/per quod distinction survives: libel per se allows recovery of presumed damages while libel per quod requires evidence of actual damages. See supra note 104. It is interesting to note that the erosion of the common law distinction between libel and slander has been accelerated in Maryland by the extension of *Gertz* to slander in *Jacron*. As a result, courts are confusing libel per se and slander per se in situations where the difference is critical. Hence, a case involving a television broadcast was characterized as defamation actionable per se, using the slander per se definition. See *Hearst Corp. v. Hughes*, 466 A.2d 486 (Md. 1983). Also, in *Winebolt*, the court held a statement to be libel per se in part on the basis of slander cases permitting extrinsic circumstances to be considered. 476 A.2d at 220.

274. 330 N.E.2d 161, 168 (Mass. 1975). In this case, a newspaper story about a drug trial incorrectly reported that the plaintiff was the owner of the "harmful drug" seized. *Id.* at 164-65. The court reversed on the basis of erroneous jury instructions and remanded for trial on the issues of whether the plaintiff was a public official and whether the defendant's conduct met the requisite fault standard. *Id.* at 175.

275. The court observed that *Gertz* broadened First Amendment protection, "since
at least the fault requirement will be applied to all defamation cases.276

The fault requirement also has been applied to the defamatory character of the statement.277 Because Massachusetts has clearly held that libel by extrinsic fact is actionable without the necessity of pleading special damages,278 application of the fault requirement to defamatory potential is essential in these cases to protect a defendant unaware of the extrinsic facts making the statement defamatory.

Michigan

In an exhaustive discussion of state privilege law and fed-
eral constitutional law on defamation, the Michigan Supreme Court adopted a negligence standard for cases to which Gertz applies in *Rouch v. Enquirer & News of Battle Creek*. Although the court in *Rouch* did not make the issue crystal clear, the Gertz rules probably apply to all private plaintiff defamation actions in Michigan.

*Rouch* also did not specify to what elements of defamation the fault standard should apply. However, Michigan cases treat libel like slander with regard to the special damages requirement; they apparently do not require proof of

279. 398 N.W.2d 245 (Mich. 1986). In this case, a private person sued a newspaper for reporting that he had been arrested as a suspect in a rape (which was true) and that the county prosecutor had charged him with the offense (which was not true). The court of appeals reversed the trial court's grant of summary judgment to the defendant and held that "there is no federal constitutional privilege to report on matters of public interest." *Rouch v. Enquirer & News of Battle Creek*, 357 N.W.2d 794, 798 (Mich. App. 1984) (the decision was issued prior to the Supreme Court's decision in *Dun & Bradstreet*), aff'd and remanded, 398 N.W.2d 245 (Mich. 1986). The appellate court further held that the qualified privilege of state law to report on matters that promote the public interest, which could only be overcome by a showing of "actual malice," see Peisner v. Detroit Free Press, Inc., 266 N.W.2d 693 (Mich. App. 1978), did not extend to reporting "matters merely interesting to the public," 357 N.W.2d at 801, such as the arrest of a rapist, *id.* at 804. The supreme court agreed with the appellate court that the plaintiff in this case needed only to prove negligence but disagreed with the lower court's analysis of the state law privilege, concluding that the privilege has been overthrown by federal constitutional law. 398 N.W.2d at 258.

280. It is difficult to reconcile the court's statement that Gertz applies to "a private person in the context of a matter of public interest," 398 N.W.2d at 264, with the statement that "[s]peech content is considered only as regards the burden of proof of falsity." *id.*

281. One of the *Rouch* court's justifications for rejecting the content-based state law privilege for reporting on matters of public interest was that *Gertz* had rejected the content-based standards of Rosenbloom. *Id.* at 258. The court managed to avoid mentioning *Dun & Bradstreet*, which resurrected consideration of content in *Gertz* cases, while citing *Philadelphia Newspapers v. Hepps* for the premise that the content of the speech determines whether the plaintiff has the burden of proving falsity. *Id.* at 256 (citing Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1563 [475 U.S. 767] (1986)). The court concluded, based on the parties' briefs on the state law privilege, that a matter of public concern was involved. *Id.* at 266. Given the court's language in rejecting the state law privilege, it probably intended the fault requirement of Gertz to apply regardless of the content of the speech. This also is supported by the court's approval of the prima facie case enunciated by the RESTATEMENT (SECOND) OF TORTS § 558 (1977), which applies the fault and actual damages requirements of Gertz to all private plaintiff defamation actions. 398 N.W.2d at 252 (citing Postill v. Booth Newspapers, Inc., 325 N.W.2d 511 (Mich. App. 1982) (leave denied, 417 Mich. 1050 (1983))).

282. See, e.g., Bowerman v. Detroit Free Press, 272 N.W. 876 (Mich. 1937) (while citing to a slander statute, court held that article indicating the plaintiff may have been guilty of unchastity was libel per se, so that no special damages were required); Croton
special damages in libel by extrinsic fact cases. Hence, the fault requirement applied to the defamatory language element would provide an innocent defendant with the appropriate protection in libel per quod cases.

Minnesota

Minnesota settled on a post-\textit{Gertz} standard for media defendants relatively late in comparison to other states, holding, in \textit{Jadwin v. Minneapolis Star \\& Tribune Co.}, that a private individual may recover actual damages for a defamatory publication only by showing that the publisher reasonably should have known that the statement was false. However, the court in \textit{Jadwin} did not extend the rule beyond

\begin{footnotesize}
\begin{enumerate}
\item v. Gillis, 304 N.W.2d 820 (Mich. App. 1981) (account in newspaper of reasons for police officer's discharge was injurious to his profession and therefore, was actionable per se, and thus, special damages need not be alleged); Tumbarella v. Kroger Co., 271 N.W.2d 284 (Mich. App. 1978) (letter circulated to former co-workers stating that the plaintiff had been discharged for stealing was actionable per se as an accusation of crime, even in the absence of special harm).
\item In Ardash v. Karp, 170 N.W.2d 854 (Mich. App. 1969), cards distributed by the landlord stating that the premises had been rented to "competent doctors, not osteopaths" were not libelous per se as to claimants (osteopaths and former tenants of the defendant). Thus, extrinsic evidence was required to establish the personal reference and the inference of incompetence. However, even though claimants alleged only general damage to their reputation and profession, the case was remanded to allow them to establish that third persons connected them to the statements. \textit{Id.} at 856.
\item The case setting the standard cited to twenty-two other states that had already considered the issue. \textit{See infra} note 285.
\item 367 N.W.2d 476 (Minn. 1985). \textit{Jadwin} involved a suit by an investment fund and its director against a newspaper for a critical article questioning the fund's claims and the director's credentials. The plaintiffs appealed the district court's grant of summary judgment to the newspaper. \textit{Id.}
\item Minnesota had prior experience with negligence in defamation law through its retraction statute, MINN. STAT. § 548.06 (1976), and its broadcasters statute, MINN. STAT. § 544.043 (1976). \textit{See Note, Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander}, 3 WM. MITCHELL L. REV. 81 (1977). Although the language of the supreme court did not suggest that a fault standard would apply to the defamatory language aspect, on remand, the court of appeals interpreted \textit{Gertz} as requiring a showing of fault for both falsity and defamatory potential. \textit{Jadwin} v. Minneapolis Star \\& Tribune Co., 390 N.W.2d 437, 440 (Minn. App. 1986) (citing Marc A. Franklin \\& Daniel J. Bussell, \textit{The Plaintiff's Burden in Defamation: Awareness and Falsity}, 25 WM. \\& MARY L. REV. 825 (1984)); \textit{see also} Note, supra, at 108-10 (observing that for colloquium, Minnesota requires that the defendant intended to refer to the plaintiff and predicting that the Minnesota Supreme Court would deny recovery, or impose a higher standard of fault on the falsity issue, where the defendant was not negligent in failing to realize the defamatory potential of the statement).
\end{enumerate}
\end{footnotesize}
media defendants and cited to an earlier case that had specifically refused to apply either New York Times or Gertz in a nonmedia context.\(^{287}\) Nor will Dun & Bradstreet's reinterpretation of Gertz prompt an extension of the Gertz rule beyond "public concern" cases. Minnesota has consistently permitted presumed and punitive damages for defamation per se\(^{288}\) in cases to which Gertz does not apply.\(^{289}\) Courts now simply will focus on the public concern issue\(^{290}\) rather than the media/nonmedia distinction in holding Gertz inapplicable.\(^{291}\)

Despite some early cases suggesting a libel per quod rule,\(^{292}\) Minnesota's most recent cases clearly hold that all li-

\(^{287}\) Stuemperg v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980). In Stuemperg, a private figure sued his former employer for providing a poor recommendation over the telephone. The supreme court affirmed an award for the plaintiff, holding that there was sufficient evidence that the false and defamatory statements were made with common law malice sufficient to overcome the qualified privilege and that the New York Times actual malice standard should not be substituted for common law malice. The court also did not consider as relevant the fact that Gertz involved libel while this case involved slander but did consider it relevant that most courts facing the issue of applying Gertz in nonmedia cases had refused to apply it. Id. at 257. Although the court confused special damages and actual damages (of which there was some evidence), it stated that "general damages are presumed" because the statement was defamatory per se. Id. at 259 (citations omitted); see infra note 288.

\(^{288}\) In the Stuemperg case, which used the term "defamation" throughout the opinion, "defamatory per se" was used by the court simply to mean defamatory as a matter of law, so that damages will be presumed and punitive damages can be recovered. To that extent, its citation to libel cases on the punitive damages rule was justifiable. See infra note 293.

\(^{289}\) See Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1 (Minn. 1984) (stating that libel per se, defined as statements that are defamatory as a matter of law, are actionable without proof of special damages). Jadwin, consistent with Gertz, stated that plaintiffs must prove actual malice on the part of the defendant to recover punitive damages, 367 N.W.2d at 492, but again was only referring to cases to which Gertz applies, given the context and the lack of reference to the nonmedia cases allowing punitive damages.

\(^{290}\) The court in Jadwin retained a vestige of the issue-oriented approach by holding that corporate plaintiffs must prove actual malice against media defendants where the defamation concerns a matter of "legitimate public interest." 367 N.W.2d at 487.

\(^{291}\) The Minnesota Court of Appeals did this with regard to the New York Times rule in Culliton v. Mize, 403 N.W.2d 853 (Minn. App. 1987) (clarifying language in Stuemperg).

\(^{292}\) See, e.g., Echtenacht v. King, 259 N.W. 684 (Minn. 1935), where the court held that since the statements were not libelous per se (on their face), extrinsic circumstances had to be pleaded to show that they were in fact defamatory. Id. at 686. The defendant's demurrer was sustained because the allegations of special damages were inadequate. Id. at 687. But see Note, supra note 286, at 86 and cases cited at 84 n.27.
bels are actionable without proof of special damages. Thus, an innocent libel per quod defendant has some protection only in cases to which the Gertz fault standard applies. In cases not involving public figures or matters of public concern, a defendant faces strict liability on the issue of awareness of defamatory potential.

Mississippi

The Mississippi Supreme Court has indicated that negligence will apply in a libel action brought by a private plaintiff. It also appears that the Gertz fault requirement will be extended to all private plaintiff defamation cases.

In Brewer v. Memphis Publishing Co., the Fifth Circuit Court of Appeals extensively examined Mississippi law, and the majority concluded that special damages were not required for libel per quod. As the concurrence indicated,
the Mississippi cases considered by the court permit a different conclusion to be reached.299 However, dicta from recent Mississippi Supreme Court opinions suggest approval of the majority's conclusion.300 Hence, in Mississippi, all libels are actionable without pleading special damages.301

Missouri

Missouri courts have not specifically established what standard of fault will be applied under Gertz.302 Nor is it entirely clear whether the fault aspect of Gertz will extend to all private plaintiff defamation cases.303

298. Id. at 1260 n.1 (Godbold, J., specially concurring). Judge Godbold was critical of the majority for making pronouncements on Mississippi law that was unsettled. Id. at 1260.

299. Compare Conroy v. Breland, 189 So. 814 (Miss. 1939) (cited by majority in Brewer, 626 F.2d at 1244-45) with Manasco v. Walley, 63 So. 2d 91 (Miss. 1953) (cited by concurrence in Brewer, 626 F.2d at 1260 n.1, and distinguished by the majority, 626 F.2d at 1244). The dicta in Conroy, which cites to the Restatement, is more on point.

300. See Fulton v. Mississippi Publishers Corp., 498 So. 2d 1215, 1217 (Miss. 1986) (citing Brewer, 626 F.2d at 145-46, for statement that "Mississippi does not recognize a distinction between libel per se and libel per quod"); Newson v. Henry, 443 So. 2d 817 (Miss. 1983). Newson essentially restated the definition of libel in identifying what defamatory language is actionable per se. Id. at 824 (citing to Brewer, 626 F.2d at 1238, as additional support). As these and other cases demonstrate, courts that conclude that a particular libel is "actionable per se" are not necessarily implying that other libels are not actionable per se. See supra note 37. Compare Ferguson v. Watkins, 448 So. 2d 271, 274 n.2 (Miss. 1984) (dicta suggesting recognition of libel per quod rule).

301. Whether the fault requirement of Gertz extends to the defamatory potential of the language has not been considered by Mississippi, although the defendants in Brewer did raise the issue in their appeal. See Brewer, 626 F.2d at 1241 n.3.

302. Missouri had extended the New York Times standard to private plaintiffs suing over statements involving matters of public interest under the mandate of Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). See Woolbright v. Sun Communications, Inc., 480 S.W.2d 864 (Mo. 1972). However, in light of Gertz, the drafters of the Missouri Approved Instructions concluded that whether the higher standard will continue to apply is an open question, MAI 23.06(2) committee's cmt. (1980), and thus require simply that the defendant "was at fault," leaving it to the jury to determine exactly what standard of fault shall be applied. See MAI 23.06(1) and committee's cmt. (1980).

303. The Missouri Supreme Court considered the application of the Gertz rule protecting opinions in Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985) (en banc). The court concluded that this aspect of Gertz should be applied regardless of the status of the declarant, although one of its justifications for doing so was that the opinion language of Gertz does not refer to media defendants. Id. at 783-84. The fault rule, by contrast, does refer to publishers and broadcasters. See supra text accompanying notes.
Missouri has a considerable amount of case authority applying the rule that statements not defamatory on their face require an allegation of special damages.\(^{304}\) However, the Missouri Supreme Court has hinted that this rule might be reconsidered if it is confronted with an appropriate case implementing the constitutional rules.\(^{305}\)

Montana

In *Madison v. Yunker*,\(^{306}\) the Montana Supreme Court

63-64. In addition, the court’s emphasis on the subject matter of the statement rather than the status of the declarant, 690 S.W.2d at 784, 786, suggests that, in light of *Dun & Bradstreet*, it might decline to apply the constitutional principles where matters of public concern are not involved. Nevertheless, the jury instructions imposing a “fault” requirement without regard to whether the issue is of private concern or public concern remain intact. In *McDowell v. Credit Bureaus of Southeast Mo., Inc.*, 747 S.W.2d 630, 633 (Mo.) (en banc), *cert. denied*, 488 U.S. 852 (1988), the court recognized that *Dun & Bradstreet*, on similar facts, permitted recovery of presumed and punitive damages absent a showing of actual malice. But, the court held that the existence of a qualified privilege for credit reporting agencies in Missouri required the plaintiff to show actual malice as per MAI 23.06(2). *Id.* The court did not indicate what standard would apply in the absence of a qualified privilege.

304. Some recent appellate cases have added aspects of the slander per se categories to their libel per se rules, see, e.g., *Muchinsky v. Kornegay*, 741 S.W.2d 43 (Mo. App. 1987); *Swafford v. Miller*, 711 S.W.2d 211 (Mo. App. 1986); *Mitchell v. St. Louis Business Journal*, 689 S.W.2d 389 (Mo. App. 1985) (not imputation of crime so not libel per se), and have even imposed the libel per se rule that the statement be defamatory on its face to slander cases, see, e.g., *Joseph v. Elam*, 709 S.W.2d 517 (Mo. App. 1986) (stated in dicta that words imputed crime on their face). *See generally Smith v. UAW-CIO Fed. Credit Union*, 728 S.W.2d 679, 682-83 (Mo. App. 1987) (noting differences between libel per se and slander per se but analyzing libel per se under slander per se rules). However, stronger authority applies the standard libel per quod definition in imposing the special damages requirement. *See, e.g.*, Missouri Church of Scientology *v. Adams*, 543 S.W.2d 776 (Mo. 1976) (en banc) (dismissal affirmed because words not libel per se and libel per quod action not established); *Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969) (court concluded, after reviewing dozens of commentaries and cases from throughout the country, that it should not overrule its present requirement of special damages for libel per quod, or libel not defamatory on its face); *see also Carter v. Willert Home Prods., Inc.*, 714 S.W.2d 506, 509 n.1, 510 (Mo. 1986) (en banc) (distinguishing libel and slander damages rules); *Herberholt v. DePaul Community Health Ctr.*, 625 S.W.2d 617 (Mo. 1981) (en banc) (words not libel per se and special damages not established); *Buller v. Pulitzer Publishing Co.*, 684 S.W.2d 473, 479 (Mo. App. 1984) (upheld dismissal as to one plaintiff because statements not libel on their face and special damages not alleged).

305. *See Henry*, 690 S.W.2d 775. While recognizing that the libel per quod rule is firmly established in Missouri, the court noted that “the weight of scholarly commentary” calls for its abolition. *Id.* at 779 n.7.

306. 589 P.2d 126 (Mont. 1978). In *Madison*, the editor of the University of Montana student newspaper was sued by the director of the University printing shop for
adopted a negligence standard\textsuperscript{307} for private plaintiff defamation cases to which \textit{Gertz} applies, although the court did not resolve to which elements the fault standard would apply.\textsuperscript{308} In \textit{Gallagher v. Johnson},\textsuperscript{309} the \textit{New York Times} standard was applied where a public official sued a nonmedia defendant on a matter of public concern.\textsuperscript{310} The \textit{Gallagher} case also held that special damages were no longer needed in libel per quod actions, citing \textit{Madison} as support.\textsuperscript{311} \textit{Madison}, however, was not a libel per quod case.\textsuperscript{312} More importantly, the court in \textit{Gallagher} either ignored or overlooked a case that it had decided two years earlier that specifically held that special damages are required in libel per quod cases.\textsuperscript{313} The \textit{Gallagher}

publishing statements asserting that the director was “incompetent” and a “congenital liar.” \textit{Id.} at 127. The case was reversed and remanded on grounds that the state retraction statute violated the state constitution, \textit{id.} at 131 (citing MONT. CODE ANN. § 64-207.1 (1947) (repealed 1979)) but, for guidance on remand, the court enunciated new damages rules in the wake of \textit{Gertz}, \textit{id.} at 133.

\textsuperscript{307} Although the court uses the term “fault” rather than negligence, \textit{id.} at 133, it clearly distinguished the fault standard from the higher knowledge or reckless disregard standard applicable to public figures. \textit{Id.} at 132-33.

\textsuperscript{308} The court stated that a private person can only recover damages by establishing (1) falsity, (2) “fault in the publication,” and (3) actual injury for which actual damages are recoverable; and punitive damages are recoverable if (4) actual malice is shown. \textit{Id.} at 133. Since fault regarding the element of publication of a libel was already established at common law, see \textit{supra} note 23, the fault required here almost certainly referred to fault on the issue of truth or falsity, given the court’s reliance on \textit{Gertz} and analogizing to the \textit{New York Times} standard. There is no indication that the court considered whether fault applies to the defamatory language element.

\textsuperscript{309} 611 P.2d 613 (Mont. 1980).

\textsuperscript{310} The court’s focus on the status of the statement rather than the status of the defendant anticipated the Supreme Court’s decision in \textit{Dun & Bradstreet}. \textit{Id.} In Kurther v. Great Falls Tribune Co., 804 P.2d 393, 395 (Mont. 1991), the court, in the course of restating its fault rules, recognized the distinction drawn by the Supreme Court between private figures involved in matters of public concern and private figures involved in matters of private concern.

\textsuperscript{311} 611 P.2d at 619 (stating that the issue “has been well cared for in [the \textit{Madison}] opinion”).

\textsuperscript{312} As indicated \textit{supra} note 306, \textit{Madison} involved libel per se. The \textit{Madison} court held only that \textit{Gertz} barred presumed damages in this case, requiring a showing of actual damages. 589 P.2d at 133. The court in \textit{Gallagher} may have been misled by the lower court’s holding that the statements were libel per quod, which was based erroneously on the definition of slander per se rather than libel per se. See 611 P.2d at 616.

\textsuperscript{313} See Wainman v. Bowler, 576 P.2d 268 (Mont. 1978), where a newspaper was sued by a police chief for alleging mismanagement of the police department and implying that the chief was a “bully boy.” The supreme court could have disposed of the case by applying \textit{Gertz} (as it subsequently did in \textit{Madison}), but, instead, it applied libel per quod law without mentioning \textit{Gertz}. The lower court’s judgment on the pleadings was
court either may have simply confused special damages and actual damages or may have assumed without stating that *Madison* restated the prima facie case and the damages recoverable for all libel cases.

**Nebraska**

The Nebraska Supreme Court has not yet applied the *Gertz* fault requirement to a defamation case before it, although a majority of the justices have indicated that a lesser degree of fault than *New York Times* malice would be appropriate.\(^{314}\) The *Gertz* ban on presumed damages is not likely to affect Nebraska law, which would rarely permit them in the absence of actual malice.\(^{315}\) Although primarily in dicta, the supreme court has indicated that statements defamatory on the basis of extrinsic facts, whether libel or slander, require an allegation of special damages in order to be actionable.\(^{316}\)

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affirmed on the basis that, since no special damages were alleged in the complaint, it must be treated as alleging libel per se rather than libel per quod, and the statements were insufficient to establish libel per se—in part because the police chief was not specifically named in the publication. *Id.* at 270; *see also* Steffes v. Crawford, 386 P.2d 842 (Mont. 1963).

314. *See* Silence v. Journal Star Printing Co., 266 N.W.2d 533 (Neb. 1978) (Spencer, J., concurring) observing that trial judge should apply *Gertz* rules rather than *New York Times* standard on defamation counts set for trial because plaintiffs are not public figures). However, because Nebraska's well-established qualified privileges can only be overcome by *New York Times* malice, Kloch v. Ratcliffe, 375 N.W.2d 916, 921 (Neb. 1985) (citing Bartels v. Retail Credit Co., 175 N.W.2d 292 (Neb. 1970)), plaintiffs will often have to prove more than negligence to recover. *See, e.g.*, Deaver v. Hinel, 391 N.W.2d 128 (Neb. 1986) (privilege of fair comment on government activity).

315. In addition to the extensive common law privileges, *see supra* note 314, which ordinarily preclude a presumption of damages, *Bartels*, 175 N.W.2d 292, Nebraska has a broad retraction statute limiting a libel plaintiff to special damages if a retraction request is not made or a retraction is not published. *Neb. Rev. Stat.* § 25-840.01 (1988). The court has applied this statute in a nonmedia libel action, further reducing the possibility that the court will ever permit a presumption of harm. *See* Whitcomb v. Nebraska State Educ. Ass'n, 165 N.W.2d 99, 103-04 (1969) (McCoun, J., dissenting); *see also* *Neb. Rev. Stat.* § 86-803 (1988) (limiting the liability of radio and television broadcasters to "actual damages"). One such rare case where presumed damages were permitted was McCune v. Neitzel, 457 N.W.2d 803 (Neb. 1990), a slander per se case involving private parties. The court applied the common law rules without any discussion of the constitutional cases.

316. *See* Hennis v. O'Connor, 388 N.W.2d 470 (Neb. 1986) (applying libel rules to slander per se case); *see also* Tennyson v. Werthman, 92 N.W.2d 559 (Neb. 1958) (held libel per se); Barry v. Kirkland, 32 N.W.2d 757 (Neb. 1948) (no cause of action where words were not slanderous or libelous per se and no special damages alleged).
Nevada

Nevada courts have not yet adopted a standard of fault in private plaintiff defamation actions and did not mention any constitutional standards in two nonmedia slander cases. In dicta, Nevada courts have suggested that special damages would be required for statements that are not libelous on their face, but there are no holdings on libel per quod in the case law.

New Hampshire

New Hampshire adopted a negligence standard for private plaintiffs in *McCusker v. Valley News* and apparently requires negligence on the defamatory potential issue. It is uncertain whether these rules would be extended to statements not involving matters of public concern.

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317. *See* Branda v. Sanford, 637 P.2d 1223 (Nev. 1981); Ornatek v. Nevada State Bank, 558 P.2d 1145 (Nev. 1977). In Nevada Indep. Broadcasting Corp. v. Allen, 664 P.2d 337, 347 (Nev. 1983), the court reduced the plaintiff’s damage award, even though the plaintiff was a public figure and *New York Times* actual malice was shown, because there was not sufficient evidence of “actual injury” as required by *Gertz*.

318. *See* Las Vegas Sun v. Franklin, 329 P.2d 867, 870 (Nev. 1958) (headline held libelous on face so special damages not necessary). In *Ornatek*, the court in a slander case erroneously stated the libel per se/libel per quod distinction, 558 P.2d at 1147 (citing *Las Vegas Sun*, 329 P.2d at 867), but did not discuss damages. Compare *Nevada Indep. Broadcasting Corp.*, 664 P.2d at 341 (traditional slander per se definition stated) and *Branda*, 637 P.2d at 1225 (even though not slanderous on its face, words fell within one of the slander per se categories, so special damages not needed). Nevada also limits recovery to special damages under the rules of its retraction statute. See *Nev. Rev. Stat.* § 41.336 (1989).

319. 428 A.2d 493 (N.H.), *cert. denied*, 454 U.S. 1017 (1981). The court, which was evaluating the status of the plaintiff on the defendant’s appeal from a denial of its summary judgment motion, did not elaborate on this aspect of its decision to remand the case, simply stating that “if the plaintiff was neither a public official nor a public figure, . . . he may recover compensatory damages upon a showing that the defendant was negligent in publishing a defamatory falsehood.” *Id.* at 494 (citing *Gertz*, 418 U.S. at 343-48, 349-50).

320. In Duchesnaye v. Munro Enters., Inc., 480 A.2d 123 (N.H. 1984), a plaintiff brought a libel action against a newspaper for an editorial suggesting that the plaintiff had made obscene phone calls. The court rejected the defendant’s argument that it did not intend “the statements to be understood in a false and defamatory sense,” *id.* at 125, holding in effect that the adoption of a negligence standard by *McCusker*, 428 A.2d 493, overruled any prior cases that may have required an intent to defame (substituting negligence on that issue), 480 A.2d at 126-27.

321. Chamberlin v. 101 Realty, Inc., 626 F. Supp. 865 (D.N.H. 1985), involved an action for wrongful discharge and for allegedly defamatory statements made by the defendant as to the reason for the plaintiff’s discharge. *Id.* at 869. The court indicated
Hampshire's lack of a special damages requirement for libel per quod cases, however, would justify extension of the fault requirement for defamatory potential to all cases.

New Jersey

In a case decided subsequent to Dun & Bradstreet, the New Jersey Supreme Court held that private plaintiffs must show actual malice in defamation actions involving matters of public concern. Even when this degree of fault is shown, the plaintiff also must show some actual injury to reputation;

without discussion that the plaintiff must prove actual damages under Gertz, despite the fact that a media defendant was not involved and the statements did not involve a matter of public concern. Id. at 872. No state court decisions have specifically considered the issue.

322. In Chagnon v. Union Leader Corp., 174 A.2d 825 (N.H. 1961), cert. denied, 369 U.S. 830 (1962), the court cited Richardson v. Thorpe, 63 A. 580 (N.H. 1906) for its definition of libel and for the proposition that libel does not require proof of special damages. 174 A.2d at 830. Chagnon involved newspaper articles suggesting that the plaintiff had cheated the city in landscaping work that he had done. The opinion is somewhat inconsistent; it states that innuendo was needed to make the statement defamatory, id. at 831, but that the statement was libel "per se" because it injured the plaintiff in his trade or business, id. at 835, which is just one part of the overall definition for libel in New Hampshire, id. at 830. In addition, while stating that special damages or specific monetary loss is not needed, the court reviewed and accepted extensive evidence of specific monetary loss. Id. at 836. Nevertheless, the "per se" language should be regarded as surplusage, see supra note 37, and no case has suggested that certain libels would require special damages. See also Chamberlin v. 101 Realty, Inc., 626 F. Supp. 865 (D.N.H. 1985), also holding that special damages are not required for libel.

323. Sisler v. Gannett Co., 516 A.2d 1083 (N.J. 1986). In this case, a former bank president sued a newspaper for defamatory statements in an article about improper bank loans. The court rejected the application of a negligence standard by the lower courts, holding that New Jersey's broad free speech rights require a higher burden of proof, at least for matters of public concern. Id. at 1093. In a companion case handed down that same term, Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220 (N.J. 1986), the court also applied the actual malice standard but characterized its opinion as extending a broad "fair comment" privilege, protecting statements of fact as well as opinion, to all matters of public interest and requiring actual malice to overcome the privilege. Id. at 232-33. Sisler distinguished the Dairy Stores opinion as applying only to product disparagement cases, 516 A.2d at 1092, but in effect the court in Sisler recognized that imposing actual malice as the fault standard for the prima facie case was preferable to imposing a lower standard initially and then, after the defendant raises the broad privilege defense, requiring the higher standard to overcome it. But see Bainhauer v. Manoukian, 520 A.2d 1154 (N.J. Super. App. Div. 1987), discussed infra note 325, where the appellate court seems to take the approach of Dairy Stores rather than Sisler.
presumed damages are not permissible. In cases of purely private concern, private plaintiffs most likely will have to establish negligence and, perhaps, actual injury. Given this standard of fault, and the fact that some type of fault on the issue of defamatory potential is probably necessary, New Jersey’s rejection of special damages in libel per quod cases.

324. "[A] plaintiff should offer some concrete proof that his reputation has been injured. . . . Awards based on a plaintiff’s testimony alone or on ‘inferred’ damages are unacceptable." Sister, 516 A.2d at 1096. This standard may be even narrower than the actual injury rule of Gertz, since it suggests that the plaintiff’s own mental anguish and humiliation might not be sufficient. In Sister, the court held that the plaintiff had established special damages of a monetary nature as a result of the defamation. Id.

325. In Bainhauer, which involved litigation over a surgeon’s oral and written statements concerning the conduct of an anesthesiologist, the court cited § 580B of the Restatement in its discussion of fault standards but left open the question of whether the plaintiff had to plead negligence because a qualified privilege was involved. 520 A.2d at 1168 (citing RESTATEMENT (SECOND) OF TORTS § 580B (1977)). The court observed that where the New York Times standard applies as the initial fault requirement, consideration of common law privileges that can be overcome by the standard is a redundancy. Id. Adopting the approach of Dairy Stores rather than Sister, the court held that the New York Times standard should be presented as the standard necessary to overcome a qualified privilege rather than as the initial fault standard, which the court suggested would be negligence where public debate and comment on public issues is not involved. Id. at 1172 n.13. Requiring at least negligence is consistent with the conclusion in Sister that free speech rights under New Jersey common law require a higher balance than the Supreme Court has mandated. 516 A.2d at 1093; see also Rogozinski v. Airstream By Angell, 377 A.2d 807, 813 (N.J. Super. Law Div. 1977) (in action involving matter of private concern, the court assumed that Gertz applies to private defendants as well as media defendants) (citing Barbetta Agency, Inc. v. Evening News Publishing Co., 343 A.2d 105 (N.J. Super. App. Div. 1975)), aff’d as modified, 397 A.2d 334 (N.J. Super. App. Div. 1979).

326. See Rogozinski, 377 A.2d at 814 (stating that Gertz apparently denies the court the right to presume damages). However, other authority does permit presumed damages, at least for slander per se. See Hall v. Heavey, 481 A.2d 294 (N.J. Super. App. Div. 1984) (trial court’s dismissal for failure to allege special damages was reversed because injury is presumed since allegation of shoplifting was slander per se). In Bainhauer, the court held that the trial judge’s strict liability instructions were erroneous even with regard to the defendant’s oral statements, 520 A.2d at 1168, suggesting that the absence of consideration of a fault standard in Hall would be incorrect in light of Sister. On the other hand, Bainhauer cites Hall in dicta as good law for the proposition that damages are presumed for slander per se. Id. at 1171 n.12.

327. See Sister, 516 A.2d at 1091 n.1 (indicating that the statements here, as in Gertz, unquestionably make substantial danger to reputation apparent); see also Bainhauer, 520 A.2d at 1167 (citing RESTATEMENT (SECOND) OF TORTS § 580B (1977)); Rogozinski, 377 A.2d at 813 (citing RESTATEMENT (SECOND) OF TORTS § 580B (1977)).

is appropriate.

New Mexico

New Mexico courts have given more consideration to the libel per quod rule than most state courts. In *Marchiondo v. Brown*, the state supreme court adopted a negligence standard for private plaintiff defamation actions and held that "actual malice" must be shown before punitive damages can be recovered. In a later case, this standard specifically was applied to nonmedia defendants.

For several years prior to *Gertz*, New Mexico had imposed a requirement in libel per quod actions that fault on the defendant's part regarding defamatory potential be proven as an alternative to proving special damages. The opinion establishing this standard, based on a careful consideration of the cases and commentary on the issue, was one of the very few that recognized a fault requirement as a more appropriate alternative to the special damages requirement in libel per quod actions.

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329. 649 P.2d 462 (N.M. 1982) (*Marchiondo II*). In *Marchiondo II*, a private plaintiff was linked to organized crime figures in the headlines, photo, and article of a newspaper. After the defendant's various motions to dismiss and for summary judgment were granted, the plaintiffs appealed. On appeal, the New Mexico Supreme Court affirmed in part, reversed in part, and remanded. *Id.*

330. *Id.* at 470-71.

331. See Poorbaugh v. Mullen, 653 P.2d 511 (N.M. App.), cert. denied, 653 P.2d 876 (N.M. 1982). In Poorbaugh, a broker sued a real estate purchaser for statements in a letter accusing the broker of fraud and misappropriation of funds. The court of appeals reversed the judgment for the plaintiff, finding error in the trial court's damages instructions. *Id.*

332. See Reed v. Melnick, 471 P.2d 178 (N.M. 1970), overruled by *Marchiondo v. Brown*, 649 P.2d 462 (N.M. 1982). *Reed* involved a letter sent to an insurance company asking that an agent not be sent a refund premium, since the agent was threatening bankruptcy and people could not get their money from him. The agent brought a defamation action, which was dismissed by the trial court. The dismissal was reversed by the court of appeals, holding that the defamation was libel per se because it defamed the plaintiff's business. On appeal, the supreme court first declared that the special damages requirement would not be necessary where the publisher "knew or should have known of the extrinsic facts which were necessary to make the statement defamatory." *Id.* at 180. However, where the defendant was not at fault in being unaware of the extrinsic facts, the special damages requirement would be retained to protect innocent publishers. *Id.* at 180-01. The supreme court nevertheless affirmed the judgment of the court of appeals, even though not the reasoning, because the letter was defamatory on its face. *Id.* at 182.

333. See supra note 115.
The impact of Gertz on this rule was considered briefly in Marchiondo v. New Mexico State Tribune Co.,334 where the appellate court remarked in passing that "Gertz's dual requirement of fault and actual damage has an impact on the New Mexico alternative fault or special damage requirement enunciated in Reed v. Melnick."335 The court recognized that the New Mexico special damages requirement is narrower than the Gertz actual damages requirement336 but apparently did not recognize that the Gertz fault requirement to which it was referring was not the same as the fault requirement enunciated in Reed v. Melnick.337 Nor did the supreme court in Marchiondo II give more than passing mention to the effect of Gertz on the libel per quod rule. Instead, the court simply directed that the Uniform Jury Instructions permit recovery of actual damages in libel per quod actions rather than just special damages.338


335. Id. at 329.

336. Id. at 328.

337. This seems evident by the court's failure to distinguish the fault requirement regarding truth or falsity which was directly enunciated by Gertz and the fault requirement on the defamatory potential issue which was established only by implication in Gertz and by the discussion of New Mexico's former Uniform Jury Instruction on libel, which imposed a negligence standard with regard to truth or falsity and required a showing of special, rather than actual, damages. See N.M.U.J.I. 10.4, N.M. STAT. ANN. (1980). The court characterized this instruction as "a strict hybrid of Reed and Gertz." 648 P.2d at 329. If the court had made the distinction, it would have recognized that Gertz did not have any effect on the rule in Reed, since Gertz did not preclude an additional fault requirement and narrower damages in libel per quod cases.

338. The court stated, "We further note particularly that N.M.U.J.I. Civ. No. 4., subparagraph 3 (Libel Per Quod) . . . does not include general or actual damages, but mentions only recovery of special damages. This is no longer the law, and recovery for actual or general damages is to be included in the instruction." Marchiondo II, 649 P.2d at 471. As one commentator has observed, not only was the court's interchangeable use of actual damages and general damages imprecise, its language also permits an interpretation that it was just clarifying the general rule that actual damages can be recovered once the prerequisite of special damages is established, see supra note 32, although the better interpretation is that the court was abolishing the special damages requirement for libel per quod. See Philip R. Higdon, Defamation in New Mexico, 14 N.M. L. REV. 321, 329 n.53 (1984). That is also the conclusion reached by the revisors of the New Mexico Civil Uniform Jury Instructions. See N.M.U.J.I.-Civil, N.M. STAT. ANN. § 13-1010 (Michie 1991).
Although neither Gertz nor Marchiondo required rejection of the alternative fault aspect of the Reed v. Melnick case, 339 this may be the ultimate result of the revised Uniform Jury Instructions, which eliminated the special damages requirement for libel per quod 340 but also ignored the Reed requirement of fault on awareness of extrinsic facts making the statement defamatory. 341 Thus, if these instructions apply, a plaintiff will have to show fault on the truth or falsity issue in all cases 342 but will never have to show fault regarding the extrinsic facts making the statement defamatory, even though the defendant might not be aware of them and even though special damages would not be required in those cases.

339. See supra note 337 regarding the effect of Gertz. Marchiondo II overruled the part of Reed distinguishing between fact and opinion. See 649 P.2d at 472.

340. See N.M.U.J.I.-Civil, N.M. STAT. ANN. § 13-1001 committee's cmt. (Michie 1991), which states that all distinctions between per se and per quod variations of libel and slander have been abolished. Although different considerations apply to eliminating these distinctions for slander than for libel, see supra notes 106-09 and accompanying text, New Mexico had begun to merge the two actions to a certain extent prior to this. As the Reed court stated, the "pseudo-maxim" that a statement, if actionable as slander, is a fortiori actionable as libel, 471 P.2d at 182 (prompting Prosser to enunciate the slander per se exceptions to the libel per quod rule, see supra note 50), caused a modification to the slander rule in New Mexico, so that slander per se had to be not only within the four per se categories but also defamatory on its face. 471 P.2d at 182; see also Dillard v. Shattuck, 11 P.2d 543, 545 (N.M. 1932). Hence, if a statement on its face fell within one of the four categories, it was defamatory per se (i.e., no need to prove special damages), regardless of whether it was libel or slander. See Marchiondo I, 648 P.2d at 327. The statement in Marchiondo I is subject to misinterpretation. See Higdon, supra note 338, at 327.

341. See N.M.U.J.I.-Civil, N.M. STAT. ANN. § 13-1009 committee's cmt. (Michie 1991), which notes that the RESTATEMENT (SECOND) OF TORTS § 580B (1977) imposes this rule because the logic of Gertz seems to require it, but that, "absent direction from the New Mexico Supreme Court to impose a negligence requirement" on this issue, the instruction will follow the common law rule. But see Saenz v. Playboy Enters., Inc., 653 F. Supp. 552, 557 (N.D. Ill. 1987) (applying Reed's libel per quod rule of fault or special damages), aff'd, 841 F.2d 1309 (7th Cir. 1988).

342. Although acknowledging that Dun & Bradstreet defined Gertz as applying only to "matters of public concern," the instructions retain a fault requirement for all cases. See N.M.U.J.I.-Civil, N.M. STAT. ANN. § 13-1002; see also Newberry v. Allied Stores, Inc., 773 P.2d 1231, 1236 (N.M. 1989), involving a matter of private concern between private parties, which recognizes that strict liability no longer applies to defamation in New Mexico. In contrast, the instructions modify the common law rule of truth as a defense only in cases involving public figures or matters of public concern, as mandated by Philadelphia Newspaper v. Hepps, 475 U.S. 767, 776 (1986), but retain the common law rule for private plaintiff/nonpublic concern cases.
New York

In Chapadeau v. Utica Observer-Dispatch, Inc., the New York Court of Appeals adopted a fault requirement in private plaintiff defamation actions that could best be characterized as "gross irresponsibility," a standard somewhere between actual malice and negligence. The standard applies to statements about matters "arguably within the sphere of legitimate public concern." With regard to private-figure defamation matters not within the sphere of legitimate public concern, New York courts have not yet articulated the applicable standard.

In a thoughtful analysis of libel per quod in New York, one commentator reached what is probably the most accurate conclusion possible: "New York [libel per quod] law . . . is in disarray." That conclusion is particularly apt when all of the conflicting language in the various Appellate Division cases is considered. Based on what little the Court of Ap-


344. The court held that the plaintiff must establish that "the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Id. at 571.

345. In contrast to the "reckless disregard" aspect of the actual malice test, the New York standard can be proved objectively, without resort to the defendant's subjective mental state. Karaduman v. Newsday, Inc., 416 N.E.2d 557, 563 (N.Y. 1980).

346. Chapadeau, 341 N.E.2d at 571. This standard might be broader than the Dun & Bradstreet standard, since the matter will be "arguably" one of public concern whenever there is a reasonable difference of opinion on that issue. See Sack, supra note 30, at 259; see also Gaeta v. New York News, Inc., 465 N.E.2d 802 (N.Y. 1984) (decision of commercial media to cover issue is strong evidence that issue is one of public concern).

347. Sack, supra note 30, at 259; see also Steinhilber v. Alphonse, 501 N.E.2d 550, 552 n.1 (N.Y. 1986) (indicating that whether the constitutional protections extend to speech about a private person by nonmedia defendants concerning matters not of public concern has not been decided).

348. Sack, supra note 30, at 104 (citation omitted); see also Smolla, supra note 12, § 7.07[4] n.61; Samore, supra note 44, at 253.

349. See cases cited in Sack, supra note 30, at 106-07; see also Christopher Lisa Matthew Policano, Inc. v. North Am. Precis Syndicate, Inc., 514 N.Y.S.2d 239 (App. Div. 1987) (complaint dismissed because statements were not libel per se and special damages were not pleaded); New Testament Missionary Fellowship v. E.P. Dutton & Co., 491 N.Y.S.2d 626 (App. Div. 1985) (in modifying the summary judgment granted to the defendant because of the failure to plead special damages, the court stated that most of the statements involved were libelous on their face without the need of innuendo); Laboratory of Chromatography, Inc. v. Eastern Lab., Ltd., 490 N.Y.S.2d 832 (App. Div. 1985) (court held that special damages need not be pleaded when words were libel per se, both because words within letter, taken in their natural meaning,
peals has provided to illuminate this area, the best guess is that New York does not require special damages for libel per quod, unless perhaps the extrinsic facts involved are not widely known in the community. \textsuperscript{350}

**North Carolina**

North Carolina has adopted a negligence standard for private plaintiff/media defendant actions\textsuperscript{351} but has not considered whether the fault standard would be applied to all private plaintiff defamation actions.\textsuperscript{352} North Carolina classifies libel into three categories: (1) statements defamatory on their face (libel per se); (2) statements susceptible of two interpretations, one defamatory and the other not (these statements are neither libel per se nor libel per quod, and require an allegation of the defamatory interpretation but no allegation of special damages); and (3) statements only defamatory when considered with innuendo, colloquium, and extrinsic circum-

\begin{footnotesize}

\textsuperscript{350} This statement of the rule is derived from an analysis of Hinsdale v. Orange County Publications, Inc., 217 N.E.2d 650 (N.Y. 1966). This case is subject to different interpretations. See also Matherson v. Marchello, 473 N.Y.S.2d 998, 1002 n.3 (App. Div. 1984). Compare Sack, supra note 30, at 108 and Samore, supra note 44, at 252-53 with Prosser, supra note 50, § 111, at 762-63. For slander cases, the Court of Appeals held that slander per se must not only be within the four categories but also defamatory on its face. If reference to extrinsic facts is necessary to make the statement defamatory, special damages must be established. Aronson v. Wiersma, 483 N.E.2d 1138, 1140 (N.Y. 1985).

\textsuperscript{351} Walters v. Sanford Herald, Inc., 228 S.E.2d 766 (N.C. App. 1976). Walters arose from a newspaper article suggesting that the plaintiff was a public nuisance. The court did not specify to which elements the fault standard would apply.


\end{footnotesize}
stances (libel per quod).\textsuperscript{353} North Carolina applies a special damages requirement not only in libel per quod cases\textsuperscript{354} but also for slander that is not defamatory on its face.\textsuperscript{355}

\textbf{North Dakota}

No North Dakota cases have applied a constitutional fault standard in the wake of \textit{Gertz}. On the other hand, North Dakota cases have consistently recognized the requirement of special damages for libel per quod.\textsuperscript{356}

\textbf{Ohio}

Ohio has adopted a negligence standard in actions by private individuals against media defendants\textsuperscript{357} and requires consideration of negligence on the issue of defamatory potential.\textsuperscript{358} Nevertheless, because the cases adopting this standard

\textsuperscript{353} Renwick v. News & Observer Publishing Co., 312 S.E.2d 405, 408 (N.C.), \textit{cert. denied}, 469 U.S. 858 (1984); Arnold v. Sharpe, 251 S.E.2d 452, 455 (N.C. 1979). In both of these cases, the court analyzed only whether the statements were libel per se, because the statements were not alleged to be ambiguous and susceptible to two meanings in order to be considered under the second category and because special damages were not pleaded in order to be considered as libel per quod.

\textsuperscript{354} Renwick, 312 S.E.2d at 408 (dicta); Arnold, 251 S.E.2d at 455 (dicta); Flake v. Greensboro News Co., 195 S.E. 55, 59 (N.C. 1938). In Flake, the court held that because the alleged defamatory statement could not be analyzed as to whether it was libel per quod (because the plaintiff did not allege special damages) and could not be analyzed under the intermediate category (because the plaintiff did not allege that the statement had two meanings), it could be analyzed only as libel per se. Because it was not defamatory on its face, the court held that it could not be libel per se and dismissed the action. \textit{Id.}

\textsuperscript{355} See Johnson v. Bollinger, 356 S.E.2d 378, 384 (N.C. App. 1987) (citing Flake, 195 S.E. at 59, for the definition of statements actionable per quod); Morris v. Bruney, 338 S.E.2d 561, 566 (N.C. App. 1986) (tracing slander rule's origin in confusion of terminology in libel law and recognizing criticism of rule but concluding that it is "the current rule in this State").

\textsuperscript{356} See Ellsworth v. Martindale-Hubbell Law Directory, Inc., 268 N.W. 400 (N.D. 1936) (symbols used to classify attorneys in directory not libelous on face so special damages required); cf. Emo v. Milbank Mut. Ins. Co., 183 N.W.2d 508 (N.D. 1971) (held libel per se without aid of innuendo so special damages not required). Other requirements for both libel and slander are statutory. See N.D. \textsc{Cent. Code} §§ 14-02-02, -03 (1991).


\textsuperscript{358} "[W]here a prima facie showing of defamation is made... the jury must deter-
involved libel per se, they did not consider the impact of the fault rule on Ohio's special damages requirement for libel per quod. Until Gertz is extended to all private plaintiff libel actions, there will be little incentive to abandon the special damages requirement.

Oklahoma

Oklahoma adopted a negligence standard for libel and slander actions brought against media defendants in *Martin v. Griffin Television, Inc.* The court did not indicate whether a fault standard should extend to all private plaintiff defamation actions, but subsequent cases, on balance, tend to support such an extension.

The Oklahoma fault standard does not specifically include a requirement of fault regarding defamatory poten-

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359. *Embers* involved a news broadcast of the seizure of gambling paraphernalia at a restaurant, *id.* at 1165, while *Maloney* involved an article about an unauthorized demolition of a building that quoted the owner of the wrecking company as saying: "I guess we got carried away." 334 N.E.2d at 496. *Maloney* considered the effect of Gertz only on the libel per se rule, in particular its prohibition of presumed damages, and left intact the libel per quod rule. *Id.* at 497-98.

360. Libel per quod encompasses words that are innocent on their face and require extrinsic facts as well as words that are susceptible to a defamatory interpretation. Special damages must be pleaded for both types. *See* Moore v. P.W. Publishing Co., 209 N.E.2d 412 (Ohio 1965), cert. denied, 382 U.S. 978 (1966); Becker v. Toulmin, 138 N.E.2d 391 (Ohio 1956); Sheppard v. Stevenson, 203 N.E.2d 507 (Ohio App. 1964).

361. *Cf.* Rainey v. Shaffer, 456 N.E.2d 1328 (Ohio App. 1983), which was a slander action brought by a private individual against a former employer. Without considering the constitutional cases, the court rejected the plaintiff's assertion of presumed damages by holding that the defendant's statements were not slander per se. *Id.* at 1332-33.

362. 549 P.2d 85, 92 (Okl. 1976). The court also held that presumed and punitive damages were only permissible upon a showing of the *New York Times* standard. *Id.* at 93.

tial. On the other hand, extensive case law in the state requires special damages to be alleged if the words are not libelous on their face. As several of these cases demonstrate, courts have failed to determine the applicability of the state's fault standard because the requirement that special damages be pleaded for libel per quod permits dismissal of the case by summary judgment when such damages are not alleged.

Oregon

The Oregon Supreme Court adopted a negligence standard in private plaintiff-media defendant cases in 1985. The court in that case specifically rejected any state law basis for treating speech on "matters of public concern" differently than other speech or for providing media defendants with

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364. See Anson, where the court listed the fault standards required for liability of a person who publishes a defamatory statement concerning a private person or a purely private matter involving a public person as intent, recklessness, and negligence as to falsity. 702 P.2d at 396. Although also citing § 580B of the Restatement, the court merely observed that those standards were "similar" to the Oklahoma standard adopted by Martin, 549 P.2d 85. Anson, 702 P.2d at 396 n.3 (citing RESTATEMENT (SECOND) OF TORTS § 580B (1977)).

365. Some of these cases, particularly the more recent ones, seem to be flirting with merging the question of whether a statement is libelous per se with whether the statement is libelous at all. See, e.g., Robert K. Bell Enters., 695 P.2d at 517 (allegation of debt held not libel per se and also stated to be "not libelous"). Thus, the holdings that the words are not libel per se and that the special damages required for libel per quod were not alleged is not strong authority by itself. See also Sellers, 687 P.2d 116 (mingling rules for determining libel with rules for determining libel per se). Other case authority, however, confirms that libel per se is libel defamatory on its face without the aid of extrinsic facts. See Haynes v. Alverno Heights Hosp., 515 P.2d 568, 569 (Okla. 1973) (distinguishing cases in other states that treat all libel as actionable without proof of special damages); Edwards v. Crane, 292 P.2d 1034 (Okla. 1956); Oklahoma Publishing Co. v. Gray, 280 P. 419, 421 (Okla. 1929) (determining whether a statement is libelous per se is a separate step from determining that it is libelous); see also Miller, 525 F. Supp. at 57.

366. See Sellers, 687 P.2d 116; see also Winters v. Morgan, 576 P.2d 1152 (Okla. 1978) (trial court's grant of summary judgment because no special damages were alleged was reversed after court held that the editorial was libelous on its face).

367. See supra note 88.

368. Bank of Or. v. Independent News, Inc., 693 P.2d 35 (Or.), cert. denied, 474 U.S. 826 (1985). In this case, a bank and its president brought a libel action against a newspaper and its reporters for an article alleging that the bank wrongfully diverted funds from a customer's account. The court adopted a negligence standard based solely on the federal constitutional requirement of Gertz, concluding that state constitutional provisions impose no minimum standard of liability. Id. at 41.
greater protection than nonmedia defendants. Hence, in light of *Dun & Bradstreet*, Oregon courts will apply the *Gertz* requirements to all private figure defamation on issues of public concern as a matter of federal constitutional law, but may not apply them to other cases.

On the other hand, Oregon does not require the pleading of special damages for any type of libel. Thus, for classic libel per quod statements that do not involve matters of public concern, a defendant unaware of the extrinsic facts making the statement defamatory may be liable for presumed damages.

Pennsylvania

The Pennsylvania Supreme Court considered the impact of *Gertz* in *Hepps v. Philadelphia Newspapers, Inc.* The court observed that Pennsylvania law has applied a fault requirement of at least negligence on the issue of falsity in defamation cases at least since 1939. The court went on to hold

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369. *Id.* at 39-40.

370. The court observed that the *Dun & Bradstreet* case, then being argued before the Supreme Court, might invalidate prior Oregon decisions holding that the *Gertz* requirements do not apply in nonmedia cases. *Id.* at 41 n.6 (citing Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Or. 1977)).

371. The court enunciated a fault standard only in terms of whether the statements were true, *id.* at 43, although the appellate court quoted the Restatement guidelines for determining due care as to a statement's accuracy "and as to its defamatory character," Bank of Or. v. Independent News, Inc., 670 P.2d 616, 629 (Or. App. 1983), aff'd, 693 P.2d 35 (Or.), *cert. denied*, 474 U.S. 826 (1985).

372. *Hinkle* v. Alexander, 417 P.2d 586 (Or. 1966). Although the court characterized the libel per quod rule as encompassing the slander per se exceptions enunciated by Prosser, *id.* at 588, it discussed at length the competing authorities and arguments for the damage rule for libels and concluded that the Restatement rule holding that all libels are actionable without proof of special damages is the most workable approach, *id.* at 589.

373. The court in *Hinkle* noted that a media defendant could avoid responsibility for other than special damages by complying with Oregon's retraction statutes. *Id.* at 589; see OR. REV. STAT. §§ 30.160, .165 (1953).

374. 485 A.2d 374 (Pa. 1984), rev'd, 475 U.S. 767 (1986). In *Hepps*, the principal stockholder of a franchised food store corporation sued the media defendant for alleging that the plaintiff had links with organized crime.

375. The court noted that, by statute in Pennsylvania since 1901, civil actions for libel have required the plaintiff to show that "the publication has been maliciously or negligently made." *Id.* at 384 n.12 (citing 42 PA. CONS. STAT. § 8344 (1982)). Although the statute does not specify whether the negligence requirement applies to all elements of the prima facie libel case, the court, in *Summit Hotel Co. v. National*
that Gertz required that the plaintiff, a private figure, establish at least negligence on the part of the defendant, but it also held that the defendant has the burden of proving the truth of the statement (i.e., defamatory statements are presumed false). The Supreme Court reversed the state court on the latter issue.

Although Hepps was a media case, the statutory fault requirement has no limitations based on the content of the statement or the status of the defendant. Other cases at the appellate level have applied both the fault requirement and the actual injury requirement of Gertz to nonmedia cases not involving matters of public concern.

Pennsylvania courts have not yet specifically applied the fault requirement to the defamatory language element of the defamation action. In Agriss v. Roadway Express, Inc., though, one of the court's principal justifications for rejecting the special damages rule was the fact that Gertz now requires actual fault to be shown on the part of the defendant.

Broadcasting Co., 8 A.2d 302 (Pa. 1939), applied a fault requirement to the defendant's duty “to ascertain the truth of the published matter.” 485 A.2d at 384 (citing Summit Hotel, 8 A.2d at 307).

376. 485 A.2d at 384.

377. Id. at 387. The court noted that placing the burden of proving truth on the defendant had been the well-settled rule in the state for years. Id. at 377 (citations omitted). The court further noted that this same rule had been codified. Id. (citing 42 Pa. Cons. Stat. § 8343(b)(1) (1982)).


380. Chicarella v. Passant, 494 A.2d 1109 (Pa. Super. 1985), involved a report by an investigation agency to an insurance company that allegedly defamed the plaintiff, who had been involved in an auto accident. The court held that a private figure plaintiff must prove at least negligence. Id. at 1112 (citing Hepps, 485 A.2d at 384; RESTATEMENT (SECOND) OF TORTS § 613 (1977)). The court concluded that no evidence of negligence was established by the plaintiff. Id. In Agriss v. Roadway Express, Inc., 483 A.2d 456 (Pa. Super. 1984), an employee sued his employer for circulating a warning letter charging the employee with “opening company mail.” Id. at 460. The appellate court ruled that the trial court erred in granting the employer's motion for nonsuit for failure to prove "actual harm" as required by Gertz and held that sufficient evidence of actual harm was established to satisfy the Gertz requirements. Id. at 467.

381. In Hepps, the court noted in passing that the Gertz caveat regarding statements not warning of their defamatory potential was not applicable here, since the defamatory character of the statements was apparent. 485 A.2d at 383 n.11.


383. Given these newly-articulated constitutional requirements of actual harm to the plaintiff and actual fault on the part of the defendant, there is no sense and no reason in jurisprudence to impose a further artificial restriction, in the
the course of rejecting the special damages requirement, Agriss provides one of the most detailed historical surveys in a judicial opinion of a particular state’s libel per quod rule.\textsuperscript{384} It also provides convincing reasons for holding that special damages should no longer be required in libel actions.\textsuperscript{385}

Rhode Island

In DeCarvalho v. daSilva,\textsuperscript{386} the Rhode Island Supreme Court indicated in dicta that a negligence standard would apply in private plaintiff defamation actions\textsuperscript{387} and extended the application of the New York Times standard to a nonmedia defendant in language broad enough to suggest that Gertz also would be applicable to nonmedia cases.\textsuperscript{388} At the same time,

\footnotesize{form of the need to prove “special damages,” on the defamed plaintiff who seeks recovery for a “libel per quod.”}

\textit{Id.} at 473. The broad language of the statutory fault requirement, see supra note 375, permits its application to the defamatory language element as well as to the truth or falsity element. See also Zerpol Corp. v. DMP Corp., 561 F. Supp. 404, 410 n.3 (E.D. Pa. 1983) (indicating that the plaintiff would have to establish that the defendant, “‘either intentionally or by want of due care and diligence’ . . . failed to perceive the natural and reasonable inference created by [the statements] that plaintiff was the person to whom the publications referred”) (quoting Clark v. North Am. Co., 53 A. 237 (Pa. 1902)).

\textsuperscript{384} The court devoted several pages of analysis to the libel per quod issue, commenting that “[t]rying to say where Pennsylvania stands on libel per quod is much like chasing shadows.” Agriss, 483 A.2d at 471 n.8. The court observed that the assertion that a statement was not “libelous per se” in a number of opinions probably meant that it was not “libelous,” i.e., capable of a defamatory meaning on its face, rather than that it was libelous only by way of extrinsic fact. Id. at 472. The court concluded that a rule spawned out of confusion and of very doubtful validity has no place in the state’s modern defamation law. Id. at 466.

\textsuperscript{385} The Agriss holding was applied in Marcene v. Penthouse Int’l Magazine for Men, 754 F.2d 1072 (3d Cir.), cert. denied, 474 U.S. 864 (1985), where the court rejected an appeal of the trial judge’s ruling that statements were libel per se, since that “classification has no bearing on whether special damages had to be proven.” Id. at 1080 n.2.

\textsuperscript{386} 414 A.2d 806 (R.I. 1980). DeCarvalho involved statements made by a doctor charging an attorney, the Honorary Portuguese Consul for Rhode Island, with violating Portuguese emigration laws. Id. at 808-09.

\textsuperscript{387} Id. at 812-13. The court concluded that the plaintiff was a pervasive public figure within the state’s Portuguese-American community and affirmed the trial court’s application of the New York Times standard. Id. at 813.

\textsuperscript{388} Id. The court observed that limiting the cases to media defendants raises “many types of equal protection problems.” Id. Later cases support this conclusion. See, e.g., Healey v. New England Newspapers, Inc., 555 A.2d 321 (R.I.), cert. denied, 110 S. Ct. 63 (1989). In Healey, the court listed fault amounting to at least negligence as part of the prima facie case. Id. at 324 (quoting Lyons v. Rhode Island Pub. Employ-
Rhode Island has a fairly recent case requiring special damages for libel per quod. If the court were specifically to apply Gertz to all private plaintiff defamation actions, fault on the defamatory language element would eliminate the need for the special damages requirement.

South Carolina

South Carolina implicitly adopted a negligence standard in a defamation action brought by a private person against a newspaper. There is no indication, though, that the Gertz requirements have been extended to all defamation cases.

At first glance, South Carolina's rule regarding libel per quod appears confusing: "[I]f a publication is not actionable on its face, special damage or extrinsic facts may be pled to render it actionable." The practical effect of this rule, however, is to treat all libels as actionable without proof of special damage, since extrinsic facts must always be pleaded for libel per quod to make the statement defamatory. If the extrinsic

389. Barrett v. Barrett, 271 A.2d 825 (R.I. 1970). The supreme court affirmed a summary judgment for the defendant on the grounds that its obituary notice, erroneously listing the plaintiff's deceased husband as a bachelor and failing to list the plaintiff as a survivor, was libel per quod, because it implied an adulterous relationship only to those who knew that the plaintiff and the deceased lived together as wife and husband and because the plaintiff failed to allege special damages. Id.

390. Jones v. Sun Publishing Co., 292 S.E.2d 23 (S.C.), cert. denied, 459 U.S. 944 (1982). In this case, the defendant newspaper erroneously reported that the plaintiff had pleaded guilty to a charge of copyright infringement when in fact the charges were dropped. The supreme court reinstated the jury verdict for the plaintiff, holding that there was sufficient evidence for the jury to find that the defendant had "some measure of legal fault" in publishing the erroneous article, a less stringent standard than that imposed on public officials and public figures. Id. at 24; see also Deloach v. Beaufort Gazette, 316 S.E.2d 139 (S.C.), cert. denied, 469 U.S. 981 (1984) (holding that the preponderance of evidence standard is appropriate under Gertz for proving actual damages).


392. Capps, 246 S.E.2d at 611. In Capps, the court held that the defendant's characterization of the plaintiff as a "paranoid sonofabitch" was not libelous on its face, id. at 609, and that the expense of medical treatment for the plaintiff's wife was not special damage, id. at 610. However, the court concluded that, on the basis of the extrinsic circumstances alleged, the statement injured the plaintiff in his profession as a spokesperson for the National Federation of the Blind. Id. at 612.
facts are not sufficient, the statement is not defamatory.\textsuperscript{393} Hence, the rule does not have the effect of a typical special damages requirement.

South Dakota

South Dakota has not yet adopted a standard of fault in private plaintiff defamation actions.\textsuperscript{394} In \textit{Glover v. NBC, Inc.},\textsuperscript{395} the court did not reach the issue of determining the appropriate fault standard because of a well-established special damages requirement for libel per quod.\textsuperscript{396} Thus, summary judgment for the defendant was affirmed because the statements were not libelous per se and special damages were not pleaded.\textsuperscript{397}

Tennessee

Tennessee adopted negligence as the appropriate standard in private plaintiff defamation actions in \textit{Memphis Publishing Co. v. Nichols}.\textsuperscript{398} The court indicated that the fault standard would apply both to the element of truth or falsity and the element of defamatory language.\textsuperscript{399} In a later case, the court specifically adopted the \textit{Restatement} fault standards,\textsuperscript{400} and appellate courts have applied the standards in

\begin{itemize}
  \item \textsuperscript{393} See \textit{supra} notes 18-19 and accompanying text.
  \item \textsuperscript{394} In Droitzmans, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 835-36 (8th Cir. 1974), a private plaintiff-media defendant case, the court of appeals reversed because presumed damages were awarded without a showing of actual malice and remanded to allow the plaintiff to establish liability under \textit{Gertz}. In Wollman v. Graff, 287 N.W.2d 104 (S.D. 1980), the plaintiff, suing a nonmedia defendant, was a candidate for public office, and the \textit{New York Times} standard was applied.
  \item \textsuperscript{395} 594 F.2d 715 (8th Cir. 1979).
  \item \textsuperscript{396} See Brodsky v. Journal Publishing Co., 42 N.W.2d 855 (S.D. 1950); see also pendrich v. Lauck, 307 N.W.2d 607 (S.D. 1981) (held libel per se). Libel per quod in South Dakota includes libel requiring extrinsic facts to establish that it was of and concerning the plaintiff as well as libel requiring extrinsic facts to make the statement defamatory. See \textit{Glover}, 594 F.2d at 716-17; \textit{Brodsky}, 42 N.W.2d at 856-57.
  \item \textsuperscript{397} 594 F.2d at 717.
  \item \textsuperscript{398} 569 S.W.2d 412 (Tenn. 1978). In this case, a married couple sued a newspaper over an article implying that a shooting was precipitated by an adulterous relationship between the female plaintiff and a third party. \textit{Id.} at 414. The supreme court dismissed in part and remanded in part for trial. \textit{Id.} at 421.
  \item \textsuperscript{399} \textit{Id.} at 418.
  \item \textsuperscript{400} Press, Inc. v. Verran, 569 S.W.2d 435, 442 (Tenn. 1978) (adopting \textit{Restatement (Second) of Torts} \S\S 580A, 580B (1977)).
\end{itemize}
nonmedia cases.\textsuperscript{401}

As previously discussed,\textsuperscript{402} \textit{Nichols} did not entirely settle the issue of whether Tennessee's requirement of special damages for libel per quod cases\textsuperscript{403} has been eliminated. \textit{Nichols} involved libel defamatory on its face and held only that the plaintiff must plead and prove "actual injury" rather than rely on a presumption of damages in libel per se cases.\textsuperscript{404} The court appeared to be confusing "actual injury" and "special damages."\textsuperscript{405} However, even if the court used the wrong aspect of \textit{Gertz} to reject the libel per quod rule, the court's adoption of the \textit{Restatement} fault standard justifies the rule's elimination.

\section*{Texas}

In \textit{Foster v. Laredo Newspapers, Inc.},\textsuperscript{406} the Texas Supreme Court adopted a negligence standard of fault for libel actions brought by private persons against media defendants. In dicta, the court specifically agreed with the Restatement interpretation of the \textit{Gertz} caveat, which imposes a negligence standard on the issue of the defamatory nature of the statement.\textsuperscript{407} Nevertheless, Texas apparently still requires a plaintiff to plead and prove special damages in libel per quod cases.\textsuperscript{408} It is doubtful that Texas courts ever will be

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\textsuperscript{401} See, e.g., Emerson v. Garner, 732 S.W.2d 613 (Tenn. App. 1987) (applied actual injury requirement to nonmedia slander case); Handley v. May, 588 S.W.2d 772 (Tenn. App. 1979) (also applied actual injury requirement to nonmedia slander case).

\textsuperscript{402} See supra note 102.

\textsuperscript{403} See, e.g., Brown v. Newman, 454 S.W.2d 120, 122 (Tenn. 1970) (summary judgment affirmed because statement was not libel per se and no special damages were pleaded); see also Branscomb, supra note 44, at 833.

\textsuperscript{404} 569 S.W.2d at 419.

\textsuperscript{405} See supra note accompanying notes 102, 105-07.

\textsuperscript{406} 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977).

\textsuperscript{407} Id. at 820 n.15 (citing \textit{RESTATEMENT (SECOND) OF TORTS} § 580B cmt. c (Tentative Draft No. 21, 1975)). In \textit{Foster}, the court concluded that this issue would have to be established at trial, since the summary judgment evidence did not establish whether the statements themselves were sufficient to warn a reasonably prudent editor of their defamatory potential. \textit{Id.}; see also Outlet Co. v. International Sec. Group, Inc., 693 S.W.2d 621, 626-27 (Tex. App. 1985) (noting that defendant did not challenge jury's finding that broadcaster should have been warned of statement's defamatory potential and holding that statement was libel per se).

\textsuperscript{408} See Fields v. Worsham, 476 S.W.2d 421 (Tex. Civ. App. 1972, writ ref. n.r.e.). In this case, the court held that the words were not so "obviously hurtful" as to be libelous per se and reversed an award of damages because no evidence of special dam-
prompted by the fault standards to abandon this rule, in part because the fault standards probably will not be extended beyond cases involving matters of public concern.409

Utah

In Seegmiller v. KSL, Inc.,410 the Utah Supreme Court adopted a negligence standard in a defamation action brought against a media defendant. In Cox v. Hatch,411 the court, in dictum, limited the fault requirement of Gertz and Seegmiller to “public concern” cases. The court in Seegmiller did not consider the application of the negligence standard to the defamatory potential element, probably because the defamatory

ages were established. Id. at 426-27. The court also used the term “actual damages,” id. at 427, but was referring specifically to “financial injury,” id. at 426. See also City of Brownsville v. Pená, 716 S.W.2d 677, 682 (Tex. App. 1986) (held libel per se); Bellefonte Underwriters Ins. Co. v. Brown, 663 S.W.2d 562, 583 (Tex. App. 1983) (citing Fields in holding that because statement was libel per se, plaintiff did not have to prove actual damages), aff’d in relevant part, 704 S.W.2d 742 (Tex. 1986).

409. The first case considering the scope of Gertz adopted a broad interpretation. In Ryder Truck Rentals, Inc. v. Latham, 593 S.W.2d 334, (Tex. Civ. App. 1979, writ ref. n.r.e.), the court extended the Gertz damages rules to nonmedia cases. Id. at 338 (citing Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976); Foster, 541 S.W.2d 809; RESTATEMENT (SECOND) OF TORTS § 580B (1977)). Although the court did not consider the scope of the fault standards enunciated in Foster, its reliance on those sources would suggest a broad fault standard as well. However, in Hajek v. Bill Mowbray Motors, Inc., 645 S.W.2d 827 (Tex. App. 1982), rev’d on other grounds, 647 S.W.2d 253 (Tex. 1983), the court declined to apply the Gertz dichotomy between fact and opinion to the facts of the present case (statements painted on side of the defendant’s van claimed that the plaintiff car dealer had sold the defendant a “lemon”). The court anticipated Dun & Bradstreet by characterizing Gertz and the other constitutional cases as limited to statements made in connection with “public concerns.” Id. at 833. In Leyendecker & Assoc., Inc. v. Wechter, 683 S.W.2d 369 (Tex. 1984), the Texas Supreme Court, with no mention of Foster, Ryder, or any United States Supreme Court decisions, affirmed in part an award of damages because part of the defendant’s statement was libelous per se, permitting injury to reputation to be presumed “without proof of other injury.” Id. at 374. The court also used the definition of common law malice in affirming an award of exemplary damages. Id. at 375. This case, which did not involve a matter of public concern, is a good indication that Texas will limit its application of Gertz and Foster to matters of public concern.


411. 761 P.2d 556, 559 (Utah 1988). Although the Gertz damage rule was not considered by the court, that rule probably also will be limited to “public concern” cases. Compare Allred v. Cook, 590 P.2d 318 (Utah 1979). In Allred, a slander action by private parties, the court cited a media case for the rule that “general and punitive damages are not recoverable without a showing of actual malice.” Id. at 322-23 (citing Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 334 N.E.2d 494 (1974), cert. denied, 423 U.S. 883 (1975)).
potential of the statement—that the plaintiff was neglecting his starving horses—was apparent on its face. The dictum in Cox suggests that Utah's prior case law, holding that special damages are required for libel not defamatory on its face, is still valid.

Vermont

In an extensive analysis of the state law of defamation, the Vermont Supreme Court held, in Lent v. Huntoon, that the fault and actual injury requirements of Gertz applied to all defamation actions in Vermont. The court further indicated that negligence would be the appropriate standard in actions brought by private persons. In that same decision,

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412. While the court observed that the statements were thus actionable without proof of special damages, Gertz would not permit presumed damages and thus, actual injury was required. 626 P.2d at 977 n.7.

413. See Western States Title Ins. Co. v. Warnock, 415 P.2d 316, 317-18 (Utah 1966) (holding that defendant's charge of "slander of title" against plaintiff was not libelous on its face to anyone but attorneys with special knowledge of that term and affirming summary judgment because plaintiff failed to plead special damages required for libel per quod); see also Tracy H. Fowler, Note, Modernizing Defamation Law in Utah, 1980 Utah L. Rev. 535, 537, 552-54.

414. 470 A.2d 1162 (Vt. 1983). Lent involved a libel and slander action brought by the defendant's former employee, who was in competition with the defendant, alleging that the defendant had falsely implied to potential customers that the plaintiff had been fired for dishonesty and theft. Id. at 1167. The court affirmed the plaintiff's award of compensatory and punitive damages. Id. at 1172.

415. Just six months earlier, the court had held that Gertz was "totally inapplicable" to defamation actions against nonmedia defendants and that presumed damages were permissible in these cases. Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414 (Vt. 1983), aff'd on other grounds, 472 U.S. 749 (1985). The court's observation in Lent that its opinion in Greenmoss "has no force" anymore, 470 A.2d at 1170, has not been changed by the Supreme Court's acceptance in Dun & Bradstreet of presumed damages where matters of public concern are not involved. See Solomon v. Atlantis Dev., Inc., 516 A.2d 132 (Vt. 1986). In this case, the court, in disposing of a claim for slander per se that did not involve a matter of public concern, cited Lent for the rule that "a claimant must show actual harm in order to recover general or compensatory damages." Id. at 138 (quoting Lent, 470 A.2d at 1168-69).

416. The court listed the elements of a private plaintiff defamation action as:

(1) a false and defamatory statement concerning another; (2) some negligence, or greater fault, in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) some actual harm so as to warrant compensatory damages.

470 A.2d at 1168 (footnote omitted). The court did not indicate to which elements the fault standard applied, although its citation to the Restatement in support of the fault requirement, id. at 1168 n.1 (citing RESTATEMENT (SECOND) OF TORTS § 580B (1977)),

HeinOnline -- 45 Ark. L. Rev. 88 1992-1993
the court waded through the murky waters of the libel per quod rule and concluded that Vermont does not recognize such a rule; all libel, whether defamatory on its face or by way of extrinsic evidence, is actionable without pleading special damages.\footnote{417}

Virginia

Virginia offers an illustration of the effect of \textit{Dun \& Bradstreet} on carefully considered rules applying \textit{Gertz} to state law. A few months prior to \textit{Dun \& Bradstreet}, the Virginia Supreme Court concluded that \textit{Gertz} required private plaintiffs to establish negligence regardless of whether the defendant was a media or nonmedia defendant and regardless of whether the publication involved a matter of public concern.\footnote{418} In contrast, a few months after \textit{Dun \& Bradstreet}, the court, recognizing that \textit{Gertz} had been "substantially modified," concluded that the \textit{Gertz} rule prohibiting presumed compensatory damages would not apply to speech involving matters of private concern.\footnote{419}

The partial application of \textit{Gertz} is particularly significant when defamation by extrinsic fact is considered. Because Virginia treats all defamation like slander, permitting presumed damages for any defamation within the four traditional slan-
der per se categories, an innocent publisher of defamation not apparent on its face does not even have the protection of special damages. Perhaps because of this, the court, in the broad application of the Gertz fault requirement, was particularly concerned with the Gertz caveat requiring that the substance of the defamatory statement make "substantial danger to reputation apparent." As a result, the court effectively required that the defendant be negligent on the issue of the defamatory potential of the material before liability would be imposed. Hence, even where a defendant's statement would otherwise subject him to presumed damages because it fell within one of the four per se categories and did not involve a matter of public concern, if it was a traditional libel per quod statement that did not give warning as to its defamatory potential, an innocent defendant would not be liable.

Washington

Washington adopted a negligence standard in Taskett v. King Broadcasting Co. The initial statement of the rule in that case limited its application to cases involving matters of public concern.

However, in the course of restating the standard as part

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421. Even if the defamatory statement was not within one of the four slander per se categories, a plaintiff could recover upon proof of actual injury (including emotional distress), rather than only "special damages" of a pecuniary nature. Sateren v. Montgomery Ward & Co., 362 S.E.2d 324 (Va. 1987); Fleming, 275 S.E.2d at 639.
422. Gazette, Inc., 325 S.E.2d at 724 (quoting Gertz, 418 U.S. at 348). The court in Gazette held that, where the statement does not make substantial danger to reputation apparent, New York Times actual malice must be established to recover compensatory damages under the standard damages rules. 325 S.E.2d at 725.
423. Several of the appeals in Gazette required consideration of this issue. In one case in particular, a summary of a police blotter listed the names of the complaining witnesses in a sexual assault case without identifying their status. Evidence that readers understood them to be the defendants was considered by the court in holding that the cryptic nature of the summary should have warned a reasonably prudent editor of its defamatory potential. Id. at 733.
425. Id. at 85. The limitation of Taskett to matters of public concern was criticized as being contrary to the approach of Gertz, which rejected the subject-matter analysis of Rosenbloom. See Allen D. Israel, Note, Libel—New Standard of Liability for Media Defendants, 52 WASH. L. REV. 975, 985 (1977) (interpreting the holding in Taskett to be limited to media defendants). Ironically, by the time Dun & Bradstreet revived the
of the prima facie case for defamation in Washington, subsequent opinions omitted both the public concern and media defendant limitations,\textsuperscript{426} and these limitations have remained absent in cases decided after \textit{Dun & Bradstreet}.	extsuperscript{427} Hence, Washington courts apply the \textit{Gertz} requirements in all defamation cases not involving public figures.

None of the Washington cases have considered the application of the fault requirement to the defamatory language element. Arguably, however, a fault requirement is justified to protect an innocent publisher of language not apparently defamatory, since the requirement of special damages for defa-

\begin{footnotesize}

\textsuperscript{427} See \textit{Dunlap v. Wayne}, 716 P.2d 842 (Wash. 1986). In this case, involving a business dispute between private parties, the supreme court utilized \textit{Dun & Bradstreet}'s differentiation between matters of public concern and matters of private concern to reject the requirement in its prior cases that the plaintiff must establish a prima facie case with "convincing clarity" to defeat a defense motion for summary judgment. \textit{Id.} at 846. Nevertheless, it still applied the prima facie case standard previously enunciated. \textit{Id.} at 850 (citing Mark v. Seattle Times, 635 P.2d 1081); see also Vern Sims Ford, Inc. v. Hagel, 713 P.2d 736 (Wash. App.), \textit{review denied}, 105 Wash. 2d 1016 (1986). \textit{Vern Sims Ford} was brought by a car dealership, its manager, and a salesman, who were characterized as "thieves" in a disgruntled customer's flyers sent to other businesses. The court specifically held that the \textit{Gertz} requirements of negligence and actual damages applied, \textit{id.} at 739, even though a nonmedia defendant was involved and even though the matter did not involve a matter of public concern, \textit{id.} at 741. Here also, while the court relied on \textit{Dun & Bradstreet} to conclude that a matter of public concern was not involved, the court was not altering the scope of the application of \textit{Gertz} in Washington case law. Instead, because the plaintiffs had not alleged any actual damages, the court was relying on \textit{Dun & Bradstreet} to conclude that presumed damages were permissible for purposes of federal constitutional law in certain cases. For purposes of state law, \textit{Taskett}, 546 P.2d at 86, had specifically stated that presumed damages were permissible upon a showing of actual malice, which was established in this case. For purposes of federal law, instead of relying on the \textit{implication} of \textit{Gertz} that presumed damages were permissible where actual malice was shown, the court relied on the \textit{holding} of \textit{Dun & Bradstreet} that presumed damages were allowed (even where malice was not shown) as long as the statement did not involve a matter of public concern. 713 P.2d at 740-41. Thus, the court permitted the presumed damages award on a different basis under federal law than under state law. See also \textit{Story v. Shelter Bay Co.}, 760 P.2d 368, 375 (Wash. App. 1988) (declining to modify state defamation law under \textit{Dun & Bradstreet} in absence of "adequate briefing")
\end{footnotesize}
mation\textsuperscript{428} by extrinsic fact has been rejected in Washington.\textsuperscript{429}

West Virginia

West Virginia adopted a negligence standard in private plaintiff defamation actions in \textit{Crump v. Beckley Newspapers, Inc.}\textsuperscript{430} The language of the opinion suggests that negligence will apply regardless of the status of the defendant or content of the statement,\textsuperscript{431} but the opinion does not specify to which elements a negligence standard will apply.\textsuperscript{432} Nor does the opinion give any indication that special damages are ever re-

\\textsuperscript{428} Despite the frequent use of the term “libel per se,” see infra note 429, Washington courts do not make a distinction between libel and slander, even with regard to whether a defamation is actionable without proof of special damages. See Grein v. La Poma, 340 P.2d 766 (Wash. 1959) (holding that oral charge that plaintiffs were “communists” was slander per se without proof of special damage independent of whether the statement was imputing a crime).

\textsuperscript{429} Pitts v. Spokane Chronicle Co., 388 P.2d 976 (Wash. 1964). In Pitts, a classic libel per quod case, the defendant newspaper had erroneously reported that a divorce had just been granted to the plaintiff’s husband and his first wife, when in fact the judicial proceeding was merely a modification of a custody decree and the plaintiff had been married to the husband for the past six months. Although the plaintiff did not allege special damages, the court held that the statements were “libelous per se” in light of the extrinsic facts alleged. \textit{Id.} at 978; see also Amsbury v. Cowles Publishing Co., 458 P.2d 882, 884 (Wash. 1969); Purvis v. Bremer’s, Inc., 344 P.2d 705 (Wash. 1959) (“per se” in this context means actionable without proof of special damages, rather than libelous on its face). However, the phrase then becomes meaningless (and misleading) under Washington law, because essentially all defamatory statements are actionable without proof of special damages under the Washington definition of “libel per se” (which essentially restates the definition of defamatory language):

\begin{quote}
A defamatory publication is libelous per se (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office.
\end{quote}


\textsuperscript{430} 320 S.E.2d 70 (W. Va. 1983); see also Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1981).

\textsuperscript{431} The court listed the elements of a defamation action in West Virginia as “(1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury.” 320 S.E.2d at 77 (citing \textit{Havalunch, Inc.}, 294 S.E.2d at 73-74; \textit{Restatement (Second) of Torts} § 558 (1977)). These elements were repeated by the court in a nonmedia case involving a matter of private concern. See Bryan v. Massachusetts Mut. Life Ins. Co., 364 S.E.2d 786, 793 (W. Va. 1987) (citing \textit{Crump}, 320 S.E.2d 70).

\textsuperscript{432} The court simply stated that the defendant’s conduct should be “measured against what a reasonably prudent person would have done under the same or similar circumstances.” 320 S.E.2d at 88 (citations omitted) (footnote omitted).
required in libel actions, although there is dicta in other cases suggesting that possibility.

Wisconsin

The Wisconsin Supreme Court adopted a negligence standard for defamation actions brought by private individuals against media defendants in 1982. However, because the court based its decision in part on Wisconsin's constitutional guarantee of freedom of the press, it declined to extend the negligence requirement to actions against nonmedia defendants. Nor has Wisconsin specifically extended the fault requirement to the issue of defamatory potential, although recent case law suggests that it would do so.

433. The plaintiff had alleged that the unauthorized publication of her photo in conjunction with an article on the harassment of women coal miners subjected her to embarrassment and humiliation. Id. at 75. The court reversed the trial court's grant of summary judgment, noting that defamation may be accomplished through inference and innuendo, id. at 77 (citations omitted), and that the trial court should consider whether the article implied, through picturing plaintiff, that she had been harassed, id. at 81.

434. See Mauck v. City of Martinsburg, 280 S.E.2d 216 (W. Va. 1981). In discussing the state's "insulting words" statute, see W. VA. CODE § 55-7-2 (1981), the court observed that it was adopted in order to extend the concept of defamation per se (without proof of special damages) beyond its common law boundaries. 280 S.E.2d at 219. However, the court cited the Restatement rules on slander per se for its definition of "defamation per se." Id. at 219 n.3 (citing RESTATEMENT (SECOND) OF TORTS §§ 571-74 (1977)). Other cases indicate that libel is treated differently. In Colcord v. Gazette Publishing Co., 145 S.E. 751 (W. Va. 1928), the court observed that libel need not impute an indictable offense to be actionable and held that because the publication was libelous on its face, the plaintiff was entitled to recover without proof of special damages. Id. at 753. This case has been cited for the proposition that libel in general is actionable without proof of special damages. Id. at 753. See W. Martin Harrell, Note, Havilunch v. Mazza—The Scrambling of Constitutional and Common Law Defamation Analysis in West Virginia, 84 W. VA. L. REV. 849, 865 and n.106 (1982).

435. Denny v. Mertz, 318 N.W.2d 141 (Wis.), cert. denied, 459 U.S. 883 (1982). In this case, a dissident stockholder sued the chief executive officer of the company and the publishers of a business magazine, which erroneously reported that the stockholder had been fired as general counsel of the company.

436. Id. at 153. No Wisconsin case has considered the impact of Dun & Bradstreet on this media-nonmedia distinction.

437. In Maynard v. Port Publications, Inc., 297 N.W.2d 500 (Wis. 1980), the supreme court affirmed a summary judgment for the defendant, a contract printer that printed allegedly defamatory material without reviewing it, on the basis that a defendant without knowledge or reason to know of the libelous nature of the material it is printing is not at fault. Id. at 505-06 (quoting Gertz, 418 U.S. at 347-48). The court's broad statement of the fault requirement would permit its application to libel per quod cases.
Wisconsin specifically rejected the special damages requirement in libel per quod cases.\textsuperscript{438} Hence, a publisher of libel per quod would rely on a broad interpretation of \textit{Maynard} to avoid the prospect of being liable for presumed damages even in the absence of fault.

\section*{Wyoming}

Wyoming has not yet specifically adopted a standard for cases to which \textit{Gertz} applies, although the supreme court's reference in a public figure case to the statutory due care requirement for broadcasters suggests that it would be inclined to adopt negligence as the appropriate standard.\textsuperscript{439} No recent cases have changed the rule in Wyoming that all libels are actionable without alleging special damages.\textsuperscript{440}

\section*{Summary of State-by-State Analysis}

As previously noted,\textsuperscript{441} more than forty states have given some indication of the fault standard that will be applied in the wake of \textit{Gertz}. However, only thirteen had indicated prior to \textit{Dun & Bradstreet} that \textit{Gertz} would be applied to all private plaintiff libel actions (i.e., nonmedia cases as well as media cases). Of these thirteen, those applying a \textit{Gertz} fault standard were: Alabama, Arizona, Illinois (dicta), Maryland, Pennsylvania, Vermont, Virginia, and Washington. Those applying the \textit{Gertz} actual injury requirement were: New Hampshire (federal case), New Jersey, New Mexico, Tennessee, and

\textsuperscript{438} Martin v. Outboard Marine Corp., 113 N.W.2d 135 (Wis. 1962).
\textsuperscript{439} See Adams v. Frontier Broadcasting Co., 555 P.2d 556, 559 n.2 (Wyo. 1976). \textit{Adams} held that failure to use a tape delay system on a radio talk show was not "reckless disregard" of truth or falsity. \textit{Id.} at 564. The court noted that a statute, providing that a broadcaster shall not be liable for damages unless it has failed to exercise due care to prevent the utterance of a defamatory statement, does not apply where the \textit{New York Times} standard is applied. \textit{Id.} at 559 n.2 (citing WYO. STAT. § 1-872 (1957), amended by WYO. STAT. § 1-29-101 (1977)).
\textsuperscript{440} See Samuelson v. Tribune Publishing Co., 296 P. 220, 228 (Wyo. 1931) (the defendant's argument, that in the absence of an allegation of special damages, language used must be defamatory on its face without explanation or interpretation of any kind, was rejected by the court as not an accurate statement of Wyoming law). In contrast, Wyoming does require special damages for slander that is not in one of the per se categories, Jelly v. Dabney, 581 P.2d 622 (Wyo. 1978), and for defamation of property, Brennan v. Laramie Newspapers, Inc., 493 P.2d 1044 (Wyo. 1972).
\textsuperscript{441} See supra note 86.
Utah (as well as six states that also applied a fault requirement—Alabama, Arizona, Maryland, Pennsylvania, Vermont, and Washington). In eight other states, a broad application of Gertz was suggested but not resolved: Arkansas (cases inconsistent), Florida (cases inconsistent), Louisiana (cases inconsistent), Massachusetts (broad language in adopting fault standard), Oklahoma (cases inconsistent), Rhode Island (broad language in adopting fault standard), Texas (cases inconsistent), and West Virginia (Restatement cited). In nine states, some aspect of Gertz had been specifically not applied in nonmedia cases: California (actual injury rule, but case overruled after Dun & Bradstreet), Colorado (actual injury rule), Connecticut (Gertz rejected), Georgia (fault standard), Iowa (Gertz rejected), Kansas (actual injury rule indicated in dicta), Minnesota (fault standard and actual injury rule), Oregon (fault standard), and Wisconsin (fault standard). In nine other states (in addition to the states listed above where the cases were inconsistent), courts retained their pre-Gertz rules in nonmedia cases without discussion: Alaska (no fault standard or actual injury rule applied), Connecticut (no actual injury requirement except by statute), Hawaii (no fault standard or actual injury rule), Illinois (no actual injury requirement), Kentucky (no fault standard), Mississippi (no fault standard), Nevada (no fault standard), Ohio (no actual injury requirement), and South Carolina (no fault standard).

Although only a few states have clearly settled the extent to which Gertz will be applied in light of Dun & Bradstreet, some conclusions and predictions can be made: Gertz will be limited to matters of public concern in Alabama (at least with regard to damages rule), Arizona (at least with regard to damages rule), Arkansas (at least with regard to damages rule), Colorado, Connecticut, Florida, Illinois (probably with regard to damages rule only), Maine, Utah (at least with regard to fault standard), and Virginia (with regard to damages rule only). California and Iowa also have adopted a public concern limitation on the damages rule, while the fault requirement may be limited to media defendants. The Gertz damages rule, and perhaps its fault requirement as well,\textsuperscript{442} probably

\textsuperscript{442} See supra note 12.
will be similarly limited in Indiana and perhaps Alaska (based on their use of the Rosenbloom standard), Kansas (based on its fair comment privilege), Nebraska (based on its award of presumed damages in a private concern case), New York (based on its gross negligence standard), Oregon (based on its minimal adoption of the constitutional requirements), and Minnesota, Missouri, Montana, and Texas (based on language prior to Dun & Bradstreet characterizing Gertz as a public concern case). On the other hand, Gertz probably will be extended to matters of private concern in Massachusetts (fault requirement on basis of state law), Michigan, Mississippi (at least the fault requirement), New Jersey (negligence if matter of private concern/actual malice if matter of public concern), New Mexico, Pennsylvania (pre-Gertz fault statute), Rhode Island (at least the fault requirement), Vermont, Virginia (the fault aspect only), and Washington. Based on the language of pre-Dun & Bradstreet opinions, the same result probably will hold true for Illinois (the fault aspect only), Maryland, and West Virginia.

Eighteen states have given some indication that fault will be required for the defamatory language element. Arizona, Florida, Kentucky, Massachusetts, New Hampshire, Ohio, Tennessee, Texas, and Virginia specifically have included it in their adoption of a fault requirement; Georgia, Minnesota, New Jersey, Pennsylvania, and Wisconsin (in a different context) have taken note of the Gertz caveat (usually in the context of indicating that it does not apply in the case because defamatory potential was apparent); Alabama, Hawaii, Maryland, and Vermont (as well as some of the previously listed states) have cited with approval the Restatement fault standard.

Finally, while only three courts (New Mexico, Pennsylvania, and Virginia) have even partially recognized that the adoption of a fault requirement has some relation to the libel per quod rule, the requirement of special damages for libel per quod is nevertheless on the wane. Pennsylvania and probably New Mexico rejected the rule in part for that reason, Maryland rejected the rule because of the Gertz actual injury requirement, and Delaware, Minnesota, Mississippi, South Carolina (in effect), and Vermont rejected the rule for reasons
unrelated to the *Gertz* requirements. In addition to those states that had formerly rejected it (Massachusetts, New Hampshire, New Jersey, Oregon, Washington, Wisconsin, and Wyoming) and those states that have special rules (Louisiana, Michigan, and Virginia), a total of eighteen states clearly do not apply it. In addition, the rule is probably not applicable in five states: Georgia (except in credit report cases), Montana and Tennessee (based on language applying *Gertz* actual injury rule), and Hawaii and West Virginia (based on the weight of recent cases). In Florida, it is only recognized, if at all, in cases to which *Gertz* does not apply, and few cases in Indiana would recognize the rule because of its adoption of the slander per se exception. The future applicability of the rule is uncertain in Alaska, Kansas, Maine, Missouri, Nevada, and New York. The rule appears to remain in force in nineteen jurisdictions: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Iowa, Kentucky, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, and Utah.