

# Chapter 1

## DEFAMATION (Libel and Slander)

Joseph E. Martineau  
Lewis, Rice & Fingersh, L.C.  
St. Louis, Missouri

### I. (§1.1) PREFACE

The tort of defamation developed under English common law to provide redress for statements which damaged a person's reputation. Because the tort restricts First Amendment rights of free speech and free press, the United States Supreme Court has imposed constitutional restrictions on it.<sup>1</sup> As a result, defamation law in the United States differs from that in other countries, including Great Britain and Canada.

### II. (§1.2) THE ELEMENTS OF DEFAMATION

In order to successfully recover damages for libel or slander, the person complaining of defamation (the "plaintiff") must prove each of the following things: (1) the publication; (2) of a defamatory statement; (3) which identifies the plaintiff; (4) which is objectively capable of being proven materially false; (5) which is published with the requisite degree of fault ("actual malice" in the case of a public official or public figure plaintiff; negligence in the case of a private figure plaintiff); and (6) damages proximately resulting therefrom.<sup>2</sup> The essential requirements of each of these elements of proof are discussed below.

#### A. (§1.3) Publication

For purposes of defamation law, publication means "the communication of the defamatory matter to some third person or persons" other than the person defamed.<sup>3</sup> The defamatory matter need not be communicated to a large group of persons. It is enough that it is communicated to a single individual other than the one defamed.<sup>4</sup> Ordinarily, there is no liability where a statement is made only to the person defamed. However, an exception to this rule exists where "the utterer of the defamatory matter intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person."<sup>5</sup>

If the publication is oral and extemporaneous, the tort action is called "slander."<sup>6</sup> If the publication is recorded in printing, writing or by signs or pictures, the tort action is called "libel."<sup>7</sup> A radio or television broadcast is frequently referred to as a libel although it could conceivably be characterized as either.<sup>8</sup> An internet-based publication would be considered libel. Whether a defamation is considered slander or libel, however, would seem to be immaterial, for although historically, the courts treated libel and slander differently, that is no longer the case in Missouri.

#### 1. (§1.4) Republication and the Single Publication Rule

One who repeats the defamatory statements of another is liable for that republication even if he attributes the statement to the original publisher.<sup>9</sup> The republisher, however, may have privileges that are unavailable to the original publisher.<sup>10</sup> Under the single publication rule, the publication of an article in a newspaper or magazine gives rise to only one legal claim, not a separate claim for each copy circulated.<sup>11</sup> If a new edition is published, however, it is considered a new publication giving rise to a new claim.<sup>12</sup>

#### 2. (§1.5) Intracorporate Communication

While the law in other states is not necessarily in accord, Missouri holds that "communications between officers of the same corporation in the due and regular course of the corporate business or between different offices or between officers of the same corporation are not publications to third persons."<sup>13</sup> Because solving personnel problems is part of the proper course of the corporate business, employee statements concerning sexual harassment, made to management, fall within this rule.<sup>14</sup> Communications by supervisors to non-supervisory employees with no particular interest in the information may constitute a publication.<sup>15</sup>

## **B. (§1.6) Defamatory Statement**

By definition, a defamation action requires publication of a defamatory statement. To be defamatory, words must reflect negatively upon a person's integrity, character, good name and standing in the community and must tend to expose him to public hatred, contempt or disgrace.<sup>16</sup> Defamation necessarily involves the idea of "disgrace," and the disgrace must be evident to a substantial and respectable minority of the population as a whole.<sup>17</sup>

Because defamation law is designed to compensate for harm to reputation, and not merely for hurt feelings, words are not defamatory solely because they expose one to ridicule or because they hurt personal feelings.<sup>18</sup> Mere words of abuse, indicating dislike or a low opinion, without suggesting specific factual charges, are not defamatory.<sup>19</sup>

Determining whether a publication is defamatory is a two step process. First, the judge considers the full context of the publication and decides whether the language complained about is reasonably capable of a defamatory meaning.<sup>20</sup> While the plaintiff may plead extrinsic facts and his own interpretation of the publication (referred to as "innuendo"), the judge is not bound by these allegations.<sup>21</sup> The courts have also said that in determining whether a publication is defamatory, it must be "unequivocally so" and the words "should be construed in their most innocent sense."<sup>22</sup> Second, if the judge concludes that words are capable of a defamatory meaning, then it becomes a question for the jury whether such a meaning was intended by the publisher and understood by the audience.<sup>23</sup>

The mores of the community at the time of the publication are important in deciding whether words are defamatory. For example, a court once found a publication that a school allowed dancing which was harmful to the moral interests of the community was defamatory.<sup>24</sup> Such a holding would be unlikely today.

### **1. (§1.7) Per Se vs. Per Quod**

In *Nazeri v. Missouri Valley College*, the Missouri Supreme Court abandoned the longstanding classifications of defamation per se and per quod, holding that "libel and slander plaintiffs need not concern themselves with whether the defamation was per se or per quod, nor with whether special damages exist, but must prove actual damages in all cases."<sup>25</sup> While pre-*Nazeri* cases may be suspect insofar as the per se/per quod distinction, they may still be helpful in determining the type of language is sufficiently harmful to reputation as to be defamatory.

### **2. (§1.8) Examples of Defamatory Publications**

Though a listing of statements which have been found to be defamatory would be difficult, most cases of defamation involve statements disgracing a person by imputing to him criminal conduct, professional dishonesty or incompetence or serious sexual misconduct.

#### **a. (§1.9) Imputation of Crime**

Words which impute the commission of a crime or acts which constitute an indictable offense are defamatory.<sup>26</sup> Likewise, stating that a person has been incarcerated at a penitentiary is defamatory because it imputes that the person was a convicted felon.<sup>27</sup> Indirect accusations that "obviously and naturally" allege commission of a crime are also defamatory.<sup>28</sup> If the acts charged omit essential elements of the crime, then the statement may not be defamatory. For example, an accusation that a plaintiff "possessed counterfeit money" was held not defamatory because not knowingly doing so is not a crime.<sup>29</sup> Similarly, strong words falling short of charging a crime are not defamatory. Thus, "taking" is not "stealing," and "killing" is not "murdering."<sup>30</sup>

#### **b. (§1.10) Imputation of Misconduct or Incompetence in Employment**

Words are also defamatory if they impute fraud, misconduct or incompetence in one's business or occupation.<sup>31</sup> Some cases hold, however, that the words must directly tend to injure the plaintiff in his trade or profession by imputing a want of knowledge, skill, capacity or fitness to perform, and must not consist merely of a disparagement of a general character trait equally discreditable to all persons unless the particular quality disparaged is of such a character that it is uniquely valuable in the plaintiff's business or profession.<sup>32</sup>

#### **c. (§1.11) Imputation of Sexual Misconduct**

By statute, it is defamatory to publish falsely and maliciously that any person has been guilty of fornication or adultery.<sup>33</sup> Not many recent cases deal with accusations of sexual indiscretion, perhaps because of the change in sexual mores. However, in *Nazeri v. Missouri Valley College*, the Missouri Supreme Court held defamatory a statement that the plaintiff "lives with S\_\_ A\_\_, who is a well-known homosexual."<sup>34</sup>

### **C. (§1.12) Of and Concerning**

A plaintiff must show that defamatory statements were about him. Even if the plaintiff is readily identifiable, the defamatory portion of the article must be about him.<sup>35</sup> Whether a publication is of and concerning the plaintiff is not determined by what the writer intended but by the manner in which the article would be understood by a reasonable reader.<sup>36</sup>

When a defamation concerns a large group of people, issues may arise as to whether the communication is “of and concerning” particular members of the group. Generally, the courts have held that if the group is so large that there is little likelihood that a reader would understand the publication to refer to any particular person, it is not libelous of any member of the group. For instance, a statement that all lawyers are “crooks” does not give any lawyer a claim.<sup>37</sup> While “it is not possible to set definite limits as to the size of the group or class, the cases in which recovery has been allowed usually have involved numbers of 25 or fewer.”<sup>38</sup> When a defamatory statement concerns some members of a larger group, none of whom are identified, no members of the group may sue.<sup>39</sup>

### **D. (§1.13) Falsity**

In *Hepps v. Philadelphia Newspapers, Inc.*,<sup>40</sup> the Supreme Court ruled that libel plaintiffs suing media defendants have the burden of proving the material falsity of defamatory statements. If the fact finder cannot resolve conclusively whether the speech is true or false, the plaintiff’s suit will fail.<sup>41</sup> While a different rule for non-media defendants would seem illogical,<sup>42</sup> there is some authority for the proposition that plaintiffs suing non-media defendants need not prove falsity, and that the burden of proving truth resides with the defendant.<sup>43</sup>

The falsity of the publication must be material in the sense that it creates an opprobrium of the plaintiff greater than that which would have followed from the literal truth. “It is not necessary that the precise facts stated in the allegedly defamatory article should be found literally true. Slight inaccuracies of expression are immaterial if the defamatory charge is true in substance.”<sup>44</sup> This is often referred to as the “substantial truth” defense, though really not a defense at all because of the requirement that the plaintiff prove material falsity.

The rule adopted in *Hepps* contrasts with the common law which held that truth was an affirmative defense and in the common law jargon referred to as “the justification” for the publication.<sup>45</sup> Based on this common law rule, Missouri Rule of Civil Procedure 55.08 requires that “truth in defamation” “shall” be pleaded as an affirmative defense.

Closely akin to the requirement that plaintiff prove falsity is the rule that a plaintiff may not recover for defamatory statements consisting of nothing more than opinions in their most fundamental sense, i.e. subjective viewpoints and beliefs which contain no provably false factual components.<sup>46</sup> “The logic underlying the opinion privilege is that an opinion can never be objectively proved true or false.”<sup>47</sup> The opinion issue is discussed elsewhere.<sup>48</sup>

### **E. (§1.14) Fault**

Proving falsity is not sufficient to sustain a viable claim for defamation. A libel plaintiff must also prove some degree of fault by the defendant. The degree of fault depends upon the type of plaintiff, but in no event can it be less than negligence.

At common law, fault was generally irrelevant unless the publication was privileged.<sup>49</sup> In 1964, however, the Supreme Court held in *New York Times Co. v. Sullivan*,<sup>50</sup> that for a “public official” to recover damages in a libel case, he had to prove “actual malice” with “clear and convincing evidence.” Three years later, in *Curtis Publishing Co. v. Butts*,<sup>51</sup> the Supreme Court held that the same rule applied with respect to “public figures.” Ten years after *New York Times Co. v. Sullivan*, in *Gertz v. Robert Welch, Inc.*,<sup>52</sup> the Supreme Court held that a private figure plaintiff may not recover any damages for libel unless he proves that the defendant was “at fault” in publishing a false defamatory statement.<sup>53</sup> This fault must rise to at least a level of negligence.<sup>54</sup>

#### **1. (§1.15) Determining the Plaintiff’s Status**

The degree of fault which must be proven by a defamation plaintiff varies depending on the plaintiff’s status as a public official, public figure or private person. The determination of the plaintiff’s status is a legal one made by the court.<sup>55</sup>

##### **a. (§1.16) Public Official**

In *Rosenblatt v. Baer*,<sup>56</sup> the Supreme Court defined a public official “at the very least, to be those among the hierarchy of government employees who have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”<sup>57</sup>

Certain categories of persons are obviously public officials (e.g., elected officials, officials appointed to high office, judges and military officials).<sup>58</sup> Even lower level public employees who exercise discretion in a position which affects members of the public have been included within the definition (e.g., police officers,<sup>59</sup> public school teachers and superintendents,<sup>60</sup>

municipal clerks,<sup>61</sup> and municipal attorneys<sup>62</sup>). However, public employees who exercise no discretion are probably not public officials.<sup>63</sup>

The simple fact that a person is no longer in public office normally does not eliminate his public official status unless he “is so removed from a former position . . . that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the New York Times rule.”<sup>64</sup>

### **b. (§1.17) Public Figure**

In *Gertz v. Robert Welch, Inc.*,<sup>65</sup> the Supreme Court set forth two alternative types of public figures. First, “in some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts” referred to as a “Pervasive or All Purpose Public Figure”. Second, “more commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues” referred to as a “Vortex or Limited Public Figure”. “In either case, such persons assume special prominence in the resolution of public questions.”<sup>66</sup>

There are few Missouri cases that have addressed the question of classification of libel plaintiffs, but it appears that Missouri adheres to the Gertz standard and has held that one who voluntarily becomes involved in a matter of public controversy in a significant way is considered a “public figure.”<sup>67</sup>

The following types of persons have been held to be pervasive public figures: television personalities,<sup>68</sup> professional sports figures,<sup>69</sup> infamous criminals,<sup>70</sup> and a Playboy playmate.<sup>71</sup>

The following have been held to be limited purpose public figures: lobbying group,<sup>72</sup> priest actively involved in Northern Ireland controversy,<sup>73</sup> scientist and Nobel Prize winner who injected himself into public controversy over nuclear weapons,<sup>74</sup> and a convicted criminal regarding a much later story giving account of the crime.<sup>75</sup>

## **2. (§1.18) Applicable Standard of Fault**

### **a. (§1.19) Public Officials/Figures**

As previously discussed, the applicable standard of fault is determined by the plaintiff’s status. A public official or public figure plaintiff must prove “actual malice” by “clear and convincing” evidence.<sup>76</sup>

### **b. (§1.20) Private Figures**

Under *Gertz v. Robert Welch, Inc.*,<sup>77</sup> a non-public official or non-public figure must at least show that the defamatory statements were negligently published by the defendant.<sup>78</sup> States, however, are free to set a more exacting standard, and at least three states have done so, requiring proof of “actual malice” where a defamatory falsehood about a private figure involves a matter of public interest.<sup>79</sup> In Missouri, a private figure plaintiff must prove negligence to recover damages for defamation.<sup>80</sup>

## **3. (§1.21) Actual Malice**

### **a. (§1.22) Definition and Description**

The use of the term “actual malice” in *New York Times* was perhaps unfortunate because of various meanings given to that term in libel law and tort law generally. The term has “resulted in much unnecessary confusion with the traditional common law concept of malice as ill will.”<sup>81</sup> In its constitutional sense, “actual malice” does not mean malice at all. It refers to the knowledge possessed by the publisher rather than any predilection to harm the plaintiff. In other words, “actual malice” refers to the intellectual state of mind of the defendant, not to his emotional or motivational state.

In *St. Amant v. Thompson*,<sup>82</sup> the Supreme Court indicated that constitutional “actual malice” was subjective in nature, because in order for the plaintiff to show that a publisher acted with “actual malice,” he had to prove that the publisher possessed either actual knowledge of falsity or that the publisher subjectively entertained serious doubts as to the truth of what he was publishing.<sup>83</sup> In another decision, *Garrison v. Louisiana*,<sup>84</sup> “actual malice” was described as a “high degree of awareness of . . . probable falsity . . . .”

This subjective definition of “actual malice” has been recognized in Missouri. In *Williams v. Pulitzer Broadcasting Co.*,<sup>85</sup> the Missouri appellate court held that proof of “actual malice” requires proof that the publisher “seriously and consciously doubted the truth of the information at the time it was published,” and that subsequent knowledge or actions were irrelevant.<sup>86</sup>

“Recklessness in publishing a false statement, including recklessly failing to investigate the truth of what is published,

does not constitute actual malice.”<sup>87</sup> Likewise, actual malice “is not measured by whether a reasonably prudent man would have published or would have investigated before publishing.”<sup>88</sup> A mistake, even one that if reflected upon would have been recognized as false, is not consonant with actual malice.<sup>89</sup> For instance in *Glover*, a rewrite man at a newspaper received the correct information from a reporter, but mistakenly interchanged two names in the story, thereby erroneously reporting that the public official plaintiff, who had publicly and personally expressed moral indignation to abortion, had received an abortion. (Abortions were illegal at the time and so the charge was defamatory, whereas such a charge probably would not be today.) The Missouri Supreme Court reversed a jury verdict for the plaintiff, holding that while the rewrite man knew that the statement published was false, he did not consciously intend to publish the false statement; he had merely been negligent in interposing the names, and thus “actual malice” was not present.

“Actual malice” cannot be predicated on information known by persons within a corporate defendant who had no responsible role in the preparation of the publication. For instance, in *New York Times Co. v. Sullivan*,<sup>90</sup> the Supreme Court held that “the mere presence of stories which showed the falsity of the subject publication in the files does not, of course, establish that the Times knew the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times’ organization having responsibility for the publication. . . .” Similarly, in *Speer v. Ottaway Newspapers*,<sup>91</sup> a district court held that a newspaper could not be found to have published with “actual malice” where a public official plaintiff, a police officer, could not show that those responsible for an editorial knew or had serious doubts about the falsity of certain information provided to them by a reporter, who knew of the statement’s falsity but acted merely as a source for information for the editorial and did not actually participate in writing it.

Even intentional fabrication may not be consonant with actual malice unless the fabrication materially alters the truth such that the falsehood creates an opprobrium of the plaintiff greater than that which would follow from reports which were literally true. In *Masson v. New Yorker Magazine, Inc.*,<sup>92</sup> the United States Supreme Court considered whether “actual malice” would be present where a reporter allegedly fabricated quotations. The Court rejected an argument that fabricated quotations would demonstrate actual malice in all cases, stating:

Even if a journalist has tape recorded the spoken statement of a public figure, the full and exact statement will be reported in only rare circumstances. The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker’s perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy.<sup>93</sup>

The Court adopted a test which would require that the quotation be defamatory and that the change in the quotation be a “material change” in the statement’s meaning. The Court defined “material change” as one which “would have a different effect on the mind of the reader from that which the . . . truth would have produced.”<sup>94</sup>

Though falsity, alone, can never be equated with actual malice, some recent decisions demonstrate that in cases in which the defendant makes a false and defamatory accusation based on purported first hand knowledge, then by coupling the defendant’s first hand opportunity to know the truth with evidence of the falsity of what the defendant said, the plaintiff may be able to present a submissible case of actual malice.<sup>95</sup> However, even then, the crucial determination is whether the defendant consciously understood the falsity at the time of publication. Thus, if the false statement results from a forgetfulness of the original facts, a misunderstanding of the situation or a mistake in reporting, actual malice is not present.<sup>96</sup>

Likewise, where the first hand knowledge or observation which prompts the false accusation concerns an ambiguous occurrence, then actual malice may not be shown by an argument that the way in which the defendant reported on that ambiguous occurrence is incorrect.<sup>97</sup> In fact, the case law suggests that the greater the degree of ambiguity and subjectivity which surrounds an alleged defamatory statement made by the defendant, the more difficult it becomes for a plaintiff to sustain its burden to prove that the defendant acted with actual malice. For instance, in *Bose Corp. v. Consumer’s Union of United States*,<sup>98</sup> the Supreme Court held that the testimony of a reviewer for Consumer Reports magazine regarding his belief in criticizing a stereo speaker system must be given credence even though false. The court specifically distinguished such a situation from the situation in which the purported mistake by the defendant does not involve subjective elements of criticism but concerns “events which speak for themselves.”

Actual malice is perhaps most difficult to prove where the defamation is premised upon a republication of information obtained from another source because in those cases the plaintiff would have to prove that the defendant did not believe what the source was telling him and published it anyway.<sup>99</sup> In *Williams*, the court held that the following facts were insufficient to support a finding of actual malice: (1) the source had been in error on two prior occasions; (2) the source was political and therefore allegedly unreliable; (3) although easily verifiable, there was no further investigation of the source; (4) the story was not “hot news” and there was no immediate need for broadcast without further investigation; and (5) the defendant’s revenue was related to the number of people who watched defendant’s television broadcast.<sup>100</sup>

## **b. (§1.23) Burden of Proving “Actual Malice”**

The quantum of proof required to establish actual malice is “clear and convincing” evidence.<sup>101</sup> There is no jury instruction which defines “clear and convincing,” and there are no Missouri cases which have analyzed the term in the context of a libel case. In other contexts, it has been defined as a quantum of proof between “preponderance of the evidence” and “beyond a reasonable doubt.”<sup>102</sup>

## **c. (§1.24) Appellate Review of Actual Malice Determination**

A significant feature of the plaintiff’s burden to prove “actual malice” is that the normal rules under which the judiciary defers to jury factual findings do not apply. Because constitutional facts, such as the “actual malice” determination are “too great to entrust them finally to the judgment of the trier of fact,” “judges as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’”<sup>103</sup>

In this respect First Amendment cases are unlike other jury-tried cases, where the jury’s verdict is sustained if, disregarding all contrary evidence and inferences therefrom, the verdict is supported by evidence in the record viewed most favorably to the verdict. citations omitted. In First Amendment cases, the reviewing court must make an independent review of the evidence to determine for itself whether actual malice was present.<sup>104</sup>

## **4. (§1.25) Media vs. Non-Media Defendants**

Although *Gertz* was a media case and contained language possibly implying application only to media defendants, Missouri cases have applied its constitutional fault principles to statements made by non-media defendants, as well as to those made by media defendants.<sup>105</sup> THE RESTATEMENT (SECOND) OF TORTS, § 580B, comment e (1977), in addressing this issue, states:

It would seem strange to hold that the press, composed of professionals and causing much greater damage because of wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard for his lack of fault.

## **E. (§1.26) Damages**

### **1. (§1.27) Actual**

Actual damages available to libel plaintiffs include general damages for impairment of reputation, loss of standing in the community, economic harm, personal humiliation, mental anguish and suffering.<sup>106</sup> *Gertz v. Robert Welch, Inc.*<sup>107</sup> reconciled the interests of the states in awarding damages for reputational loss with the First Amendment interest of securing vigorous and robust debate on public issues and cautioned against excessive verdicts in defamation cases, stating: “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.”<sup>108</sup> The proscription of *Gertz* does not preclude damage awards for emotional distress and anxiety. It merely requires that such awards be reasonable and carefully supervised by the courts so as not to inhibit the exercise of First Amendment rights.<sup>109</sup> The Missouri Supreme Court has held that a defamation plaintiff must prove impairment to reputation in order to recover any damages for defamation and that emotional distress alone will not suffice.<sup>110</sup>

### **2. (§1.28) Presumed**

At common law, where a publication was actionable per se, damages could be presumed and no specific proof of damage was required.<sup>111</sup> In *Gertz, supra*, the Supreme Court specifically rejected such a rule absent a showing of “actual malice.” However, the Supreme Court’s holding in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>112</sup> may allow awards of presumed damages without proving actual malice in instances where a publication is not a “matter of public concern.”

### **3. (§1.29) Punitive**

Under *Gertz v. Robert Welch, Inc.*,<sup>113</sup> “actual malice” must be proven before punitive damages may be awarded regardless of the plaintiff’s status.<sup>114</sup> The *Dun & Bradstreet* holding,<sup>115</sup> however, permits a state to allow punitive damages without proof of “actual malice” if the publication does not concern a matter of legitimate public interest. Because the purpose of punitive damages is to punish, they have been found particularly suspect in defamation actions. While there is no Missouri case prohibiting such damages, other states have done so.<sup>116</sup> In a dissenting opinion in *McDowell v. Credit Bureau of Southeast Missouri*,<sup>117</sup> former Missouri Supreme Court Justice Donnelly indicated his view that Article I, Section 8 of the Missouri Constitution expressly limits damage in defamation actions to actual damages.

## **F. (§1.30) Prior Restraint**

Constitutional provisions protecting free speech and the right to trial by jury prevent injunctive relief against the publication of defamatory statements prior to a jury verdict on the issue of falsity of the statements.<sup>118</sup>

## **III. (§1.31) DEFENSES--PRIVILEGES**

### **A. (§1.32) Consent**

Consent is a complete defense to an action for defamation.<sup>119</sup> Consent may be limited or qualified.<sup>120</sup> Honest inquiry by a person who has been defamed regarding the source of substance of the defamation does not constitute consent to its repetition.<sup>121</sup> However, a person who requests or submits to an investigation knowing that the results thereof will be published consents to the publication of defamatory matters that may result.<sup>122</sup>

### **B. (§1.33) Truth**

At common law truth was a defense to be proven by the defendant. As discussed at §1.13, now falsity must be proven by the plaintiff, at least in those cases where the defendant is a member of the media.

### **C. (§1.34) Retraction**

Some states have retraction statutes which limit the plaintiff's remedy or damages for defamation unless he or she first requests a retraction. Missouri has no retraction statute and there appears to be no case which discusses the effect of a retraction. Presumably, however, a retraction would be admissible evidence to mitigate the damages suffered by the plaintiff.<sup>123</sup>

### **D. (§1.35) "Libel Proof" Plaintiff Defense**

The purpose of defamation law is to provide redress for an injury to reputation. There comes a time when an individual's reputation is so tarnished as a result of his anti social or criminal behavior, however, that it cannot be further injured by false statements.<sup>124</sup> Accordingly, some courts have held that such a person is unable to recover damages for a libelous publication because he is "libel proof" as a matter of law.<sup>125</sup> Missouri seems to be in accord.<sup>126</sup>

### **E. (§1.36) Privileged Communications**

Certain statements, although otherwise defamatory and actionable, may be privileged. Privileges may be absolute or qualified. A qualified privilege may be overcome by the plaintiff if he proves actual malice.

The existence of a privilege is a question of law for the court.<sup>127</sup> However, if the court determines that a qualified privilege exists, then it is a question of fact whether the plaintiff has demonstrated "actual malice" so as to overcome the privilege.<sup>128</sup>

#### **1. (§1.37) Absolute Privilege**

The rule of "absolute privilege" is founded on the principle that on certain occasions it is indispensable to the public interest that persons should speak freely and fearlessly.<sup>129</sup> Statements made by participants in judicial, quasi-judicial (e.g., administrative hearings) and legislative proceedings are absolutely privileged.<sup>130</sup> Statements set forth in documents forming a part of such proceedings, e.g. court pleadings, also are absolutely privileged.<sup>131</sup> Statements made by public officials in the discharge of their duties are absolutely privileged.<sup>132</sup> Statements between husband and wife are absolutely privileged.<sup>133</sup> Publications required by law are absolutely privileged.<sup>134</sup> In *Pipefitters Health & Welfare Trust v. Waldo R., Inc.*,<sup>135</sup> the court held that one who files a notice of lis pendens is absolutely privileged and immune from liability for slander of title as long as the notice has a reasonable relation to the action filed.

#### **2. (§1.38) Qualified Privilege**

The common law recognized several situations in which the interests of either the participants or society dictated that bona fide communications should not be hampered by fear of lawsuits. For this reason, Missouri has long recognized a qualified privilege for publications which are made in good faith about a subject matter in which the person making the communication has an interest or duty and which are made to a person having a corresponding interest or duty.<sup>136</sup>

The common law doctrine of qualified privilege has been applied in a variety of contexts, including the following: (1) employment references;<sup>137</sup> (2) employment verification checks;<sup>138</sup> (3) former employer's defamatory statements made while contesting the plaintiff/ex-employee's application for unemployment compensation;<sup>139</sup> (4) reports by citizens of suspected criminal activities to authorities;<sup>140</sup> (5) insurance cancellation notices;<sup>141</sup> (6) reports of grand jury proceedings;<sup>142</sup>

(7) service letters;<sup>143</sup> (8) client grievance to St. Louis Bar Association;<sup>144</sup> (9) “defamatory extrajudicial communications made by attorneys to persons other than the alleged defamed party or its agents, in the preparation or investigation of pending or anticipated civil judicial proceedings...;”<sup>145</sup> (10) hospital’s response to unsolicited inquiry regarding reason for its revocation of plaintiff’s staff privileges in connection with plaintiff’s application for staff privileges at another hospital;<sup>146</sup> (11) statements bearing on the well being of family members;<sup>147</sup> and (12) reports of credit reporting agencies furnished in good faith to one having legitimate interest in the information.<sup>148</sup>

A qualified privilege is lost if the publication is actuated by “actual malice.”<sup>149</sup> Early Missouri decisions held that the qualified privilege was overcome upon a showing of legal malice, i.e., an intentional act, wrongfully done with improper motives and without just excuse.<sup>150</sup> These rulings should be disregarded. The standard now is whether the publication was made with actual malice.<sup>151</sup>

### **3. (§1.39) Statutory Privileges**

In Missouri, a statutory privilege exists for reports by an employer to the Division of Employment Security.<sup>152</sup> A physician may advise the legal guardian of a minor concerning the examination, treatment, hospitalization, medical and surgical care given or needed by the minor and such disclosure is privileged from a defamation action or an action for invasion of privacy.<sup>153</sup> Similarly, reports of child abuse or neglect are privileged under § 210.185, RSMo 1986. The privilege is overcome if the defendant “intentionally” makes a false report.<sup>154</sup> Section 191.656.7, RSMo, provides a qualified privilege for “good faith” reports made by health care providers to the department of health “about a person reasonably believed to be infected with HIV.” Television and radio stations are statutorily privileged from defamation actions brought by any person for republication of any statement uttered over the facilities of such TV or radio station by or on behalf of any candidate for public office where such statement is not subject to censorship or control by reason of any federal statute or any ruling or order of the Federal Communications Commission.<sup>155</sup> Reports of suspected violations of the Sunshine Law are qualifiedly privileged.<sup>156</sup> Statements made during hospital peer review proceedings are qualifiedly privileged.<sup>157</sup>

### **F. (§1.40) Republication Privileges**

As discussed previously, generally a person who republishes a defamatory statement is liable for that republication, even if he attributes it to its source. However, to ameliorate the chilling effect on the reporting of newsworthy events occasioned by the republication rule, the law has created certain privileges which are available to truthful republications of defamatory statements.<sup>158</sup> Under such privileges, it matters not that the underlying statement might be false. Likewise, the republisher’s knowledge of this falsity is generally irrelevant.

#### **1. (§1.41) Fair Reports Privilege**

Missouri has adopted the privilege set forth in § 611 of the RESTATEMENT (SECOND) OF TORTS.<sup>159</sup> Section 611 provides: The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.

Early Missouri cases recognized a limited privilege for reports of official proceedings, but the privilege was qualified or conditional in the sense that it could be overcome by proof that the publication was made with malice.<sup>160</sup> Under the § 611 privilege, “actual malice” is irrelevant, “The privilege fails only when the report is not a fair and accurate account of the proceedings . . . .”<sup>161</sup>

A good example of the fair reports privilege as it exists today is found in *Shafer v. Lamar Publishing Co., Inc.*<sup>162</sup> There, the plaintiff, Shafer, brought a libel action over a newspaper article reporting on a public meeting of the City Council of Golden City. During that meeting certain accusations were made about the plaintiff, a member of the police department. The article reported: “The council heard one man accuse Shafer of ‘knocking up’ his 16-year-old daughter.” The court of appeals, in affirming a judgment for the newspaper, held that this statement, because it was a republication of a statement made during a public meeting, was privileged regardless of its falsity and regardless of whether the newspaper knew or had reason to know that it was false or not.

In *Williams v. Pulitzer Broadcasting Co.*,<sup>163</sup> the court held that whether the circumstances give rise to the privilege is a matter of law consigned to the trial court and not to the trier of fact.<sup>164</sup> The court in *Williams* refused to apply the privilege because the “‘sting’ of the libel . . . was attributed to the reporter and not the official governmental body.”<sup>165</sup>

In *Hoeflicker v. Higginsville Advance, Inc.*,<sup>166</sup> the court ruled that a defendant-newspaper was privileged to report on the filing of a wrongful death action even before any judicial action had been taken on the case. However, because the newspaper incorrectly reported that the individual named to be served on behalf of the corporate defendant was also a defendant, the court found the privilege to be inapplicable. *Hoeflicker* rejects the view of the RESTATEMENT (SECOND) OF TORTS § 611 (1977),

comment e and some early Missouri cases that there is no privilege for reporting the contents of preliminary pleadings, such as a petition, before any judicial action has been taken.

## **2. (§1.42) Neutral Reportage**

Some courts, beginning with *Edwards v. National Audubon Society, Inc.*,<sup>167</sup> have developed a privilege of neutral reportage which allows republication of newsworthy accusations even though such accusations may not have been made in some official record or proceeding such that they would be subject to the fair reports privilege. The privilege recognizes that a “vast amount of what is published by the media purports to be descriptive of what somebody said rather than what somebody did.”<sup>168</sup>

In *Edwards*, the court held that an absolute constitutional privilege existed under the following circumstances: (1) the republication of a newsworthy accusation or statement; (2) which is made by a prominent or responsible person; (3) which is about a public official or public figure; and (4) which is reported in a neutral and unbiased fashion. Under such circumstances “actual malice” is irrelevant.<sup>169</sup>

Subsequent to *Edwards*, some courts across the country have adopted the doctrine of neutral reportage.<sup>170</sup> Others have rejected it.<sup>171</sup> Missouri has no case suggesting whether neutral reportage is applicable in Missouri. In a concurring opinion in *Harte-Hanks Communications, Inc. v. Connaughton*,<sup>172</sup> Justice Blackmun expressed some willingness to consider the neutral reportage issue stating:

Petitioner has eschewed any reliance on the ‘neutral reportage’ defense. . . . This strategic decision appears to have been unwise in light of the facts of this case. . . . Were this court to adopt the neutral reportage theory, the facts of this case arguably might fit within it. That question, however, has not been squarely presented.

## **3. (§1.43) Constitutional Privilege — Wire Service Defense**

The ruling in *New York Times Co. v. Sullivan*, and progeny, that public officials/figures must prove “actual malice” and private figures must prove at least negligence has sometimes been referred to as a constitutional privilege. This is really a misnomer because the burden of proof resides with the plaintiff, not with the defendant. However, some court decisions applying the rule of *New York Times* and its progeny have developed a doctrine which might best be referred to as a defense. In *Walker v. Pulitzer Publishing Co.*,<sup>173</sup> the court held that a newspaper has a right to rely upon and to republish information obtained from “reputable and properly regarded as reliable news services” where the matters republished are of public significance. Some courts have referred to this as the “wire defense.”<sup>174</sup>

## **G. (§1.44) Privileges For Fair Comment and Opinion**

### **1. (§1.45) Fair Comment**

At common law, defamatory statements of opinion could be actionable unless the defendant could affirmatively prove that the defamatory opinion was privileged “fair comment.”<sup>175</sup> Under the “fair comment” privilege, persons could express opinions as public issues and could discuss the qualifications, character and ability of public persons.

Perhaps the best discussion of the fair comment privilege is found in *Warren v. Pulitzer Publishing Co.*:<sup>176</sup>

One also has the right (and this applies to a newspaper which is properly in the business not only of giving the public news but also of making them think about its significance) to comment upon true facts, when they are matters of public concern, by stating his inferences and conclusions about them. One may even be wrong in the inference he draws from true facts, which may be susceptible of more than one interpretation, and may even state such inferences critically and sarcastically and not be guilty of libelous defamation ... but to stay within the field of this privilege, he must not state his conclusions as facts, unless they are true.

### **2. (§1.46) Constitutional Privilege for Opinion**

For a time, and still to a more limited extent, the common law privilege of “fair comment” was elevated and expanded to a constitutional level. In *Gertz v. Robert Welch, Inc.*,<sup>177</sup> the Supreme Court seemingly made this common law privilege absolute (in other words, not overcome by a finding of falsity or malice) in stating:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend upon its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.<sup>178</sup>

Based upon this statement, the courts almost universally adopted a broad “opinion privilege” under which many defamatory statements comprised mainly of subjective opinion, but still having factual components, were found non-actionable as a matter of constitutional law.<sup>179</sup>

In *Henry v. Halliburton*,<sup>180</sup> the Missouri Supreme Court, in deciding whether statements were actionable fact or privileged opinion, relied upon the analysis set forth in the decision of the United States Circuit Court of Appeals for the District of Columbia in *Ollman v. Evans*.<sup>181</sup> Under this analysis, to determine whether words are fact or opinion, a court should examine the totality of the circumstances in which they were made and: (1) analyze the common usage or meaning of the alleged defamatory statement (e.g., is it capable of a precise factual connotation or is it a hyperbolic statement or rhetoric?); (2) consider the statement's objective verifiability (can it objectively and realistically be proven true or false?); (3) consider the literary context of the statement (e.g., editorial or lampoon vs. news); and (4) consider the broader social context in which the statement appears (e.g., political commentary). In *Henry v. Halliburton*, the court held that this determination is one of law for the court which can ordinarily be made only at the summary judgment phase.<sup>182</sup>

The viability of this "opinion privilege" as a separate doctrine was largely eliminated by the Supreme Court in *Milkovich v. Lorain Journal Co.*,<sup>183</sup> which held that statements in a newspaper sports column that a wrestling coach had "lied under oath" were not constitutionally protected from a defamation claim as statements of opinion. In its holding, the court eschewed the creation of a "wholesale defamation exemption for anything that might be labeled 'opinion'" by the "creation of an artificial dichotomy between 'opinion' and fact." Thus, *Milkovich* seemingly does away with the rule that by judicially interpreting a statement as "opinion" vs. "fact" a defamation action may be dismissed by the court.

However, the decision in *Milkovich* probably does nothing more than change the focus of the inquiry, by directing attention away from the notion that opinions are protected by a distinct privilege, and redirecting attention to the existing requirement that the plaintiff prove through objectively ascertainable criteria that what was said about him is verifiably false. Specifically, the decision reaffirms that if a defamatory statement is not a provably false factual assertion, or constitutes merely an "imaginative expression" or "rhetorical hyperbole" intended to convey a point of view, then it is not actionable.<sup>184</sup> For instance, the defendant's reference to an abortion provider as a "murderer" would not be actionable where the content of the statement made it clear that the speaker was not accusing the plaintiff of having actually committed the crime of murder, but was only expressing defendant's subjective view that such activities should be made criminal.<sup>185</sup>

The continued viability of pre-*Milkovich* "opinion" holdings is unclear. Post-*Milkovich* reported Missouri decisions do not conclusively resolve the issue, but the analysis in these cases is not inconsistent with the analysis employed in the pre-*Milkovich* cases.<sup>186</sup>

In *Nazeri v. Missouri Valley College*,<sup>187</sup> the Missouri Supreme Court rejected a defense of protected opinion in reliance upon *Milkovich* holding. At the same time, it seemed to reaffirm its previous recognition that such a privilege continued to exist under Missouri law by citing with approval its previous holding in *Henry v. Halliburton* and by establishing the following test:

The test to be applied to ostensible "opinion" is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact. (citations omitted). The issue of falsity relates to the defamatory facts implied by a statement - in other words, whether the underlying statement about the plaintiff is demonstrably false. . . . But neither "imaginative expression" nor "rhetorical hyperbole" is actionable as defamation.

*Pape v. Reither*<sup>188</sup> held that, in general, statements preceded by phrases such as "it is my position" or "it is my belief" or "I will attempt to prove" are protected as opinion. Those types of cautionary phrases put a gloss on any following statements so that the reader is alerted that they reflect the expression of an opinion. "Put plainly, it is impossible to interpret statements preceded by such cautionary language as positing a verifiable proposition, and verifiability is the crux of the fact/opinion distinction in defamation law."<sup>189</sup> *Pape* held further that "allegations of fraudulent or illegal conduct are conclusions about the consequences that should attach to certain conduct, and as such they too are opinions."<sup>190</sup> The court said about such prognostications:

The fact that it might eventually be established in court that the persons accused in these statements indeed engaged in fraudulent or illegal conduct does not make the statements verifiable; it simply means that the prediction issued in the statements proved accurate. . . . Thus, a statement must be verifiable at the time it is issued in order to be one of fact."<sup>191</sup>

Finally, according to *Pape*, statements which present an actual, historical account of occurrences are not predictive or conclusory and consequently are verifiable fact statements and not protected opinion.<sup>192</sup>

## **IV. (§1.47) PROCEDURAL ISSUES**

### **A. (§1.48) Statute of Limitations**

An action for libel or slander must be commenced within two years.<sup>193</sup> *White v. Fawcett Publications*<sup>194</sup> holds that the statute of limitations accrues at the time of publication rather than from the time the plaintiff becomes aware of the publication.<sup>195</sup> However, a very limited exception to this rule exists "when factors outside plaintiff's control prevent his knowing either that he has suffered a legal wrong or that he has been damaged because of the wrong."<sup>196</sup> An example of this very limited

rule can be found in *Thurston v. Ballinger*,<sup>197</sup> where the court held that the statute of limitations began to run only when the plaintiff learned about allegedly slanderous statements made to the Federal Bureau of Investigation as a consequence of his indictment on criminal charges. The court reasoned that until that time plaintiff neither knew about the defamation nor had any damages accrued. When the indictment became public knowledge, plaintiff's restaurant business declined and the "fact of damage" appeared.

Under the single publication rule, the publication of an article in a newspaper or other mass-published material gives rise to only one cause of action, not one cause of action for each copy of the publication.<sup>198</sup> A subsequent republication of a defamation is a distinct cause of action, and, as such, the statute of limitations on a republication begins to accrue from the date of republication, not from the date of original publication.<sup>199</sup>

In *Patch v. Playboy Enterprises, Inc.*,<sup>200</sup> the court held that for purposes of the Missouri Borrowing Statute,<sup>201</sup> the applicable statute of limitation lies in the state where the libelous publication was first edited, printed, and distributed.<sup>202</sup>

## **B. (§1.49) Haec Verba**

A plaintiff in his petition may not rely upon his interpretation of the publication, but must specifically set forth, in haec verba, the exact words alleged to be defamatory. Thus, merely alleging six innuendos stating the plaintiff's interpretation of the meaning of newspaper articles attached as exhibits was held not sufficient to state a cause of action for libel per se in *Missouri Church of Scientology v. Adams*.<sup>203</sup>

## **C. (§1.50) Publisher's Right to Jury Determination**

Article I, Section 8 of the Missouri Constitution provides: "In suits and prosecutions for libel, the jury, under the direction of the court, shall determine the law and the facts." Under this constitutional provision, a trial court cannot enter summary judgment or direct a verdict for a plaintiff in an action for defamation, although it may direct a verdict for the defendant in a proper case.<sup>204</sup>

## **D. (§1.51) Venue**

Actions against resident publishers are governed by § 508.010(6), RSMo, which provides in part: "In any action for defamation or for invasion of privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion was first published." Missouri case law has construed this provision strictly, permitting a plaintiff to sue a resident publisher only in the county of original publication.<sup>205</sup> Non-resident publishers apparently can be required to defend a libel action in any county in the state, including that of the plaintiff's residence.<sup>206</sup>

## **E. (§1.52) No Right of Survival**

Once a libel plaintiff dies, the cause of action dies with him. There is no survival of a defamation claim.<sup>207</sup>

## **F. (§1.53) Respondeat Superior Liability**

The issue of respondeat superior liability sometimes arises in defamation cases. In *Carter v. Willert Home Products, Inc.*,<sup>208</sup> the Missouri Supreme Court approved the use of MAI 3d 13.02 and discussed favorably RESTATEMENT (SECOND) OF TORTS §247 (1977) as the applicable legal standard. Section 247 provides:

If the master employs a servant to speak for him, he is subject to liability if the servant makes a mistake as to the truth of the words spoken or as to the justification for speaking them, or even if he speaks with an improper motive, provided that he acts at least in part to serve his employer's purposes. The master may be liable even though the servant knows the statement to be untrue, as where the manager of a store, for the purpose of obtaining an admission from a suspected thief, charges such person with other similar crimes, although having no belief in his own statements.

## **G. (§1.54) Jury Instructions**

The following Missouri Approved Instructions (MAI) are applicable to defamation cases:

MAI 3d 3.05--burden of proof where plaintiff is a public official/figure;

MAI 3d 3.06--burden of proof where plaintiff is not a public official/figure but seeks punitive damages;

MAI 3d 4.15--damages where plaintiff not a public official/figure (including a paragraph for the submission of punitive damages, where requested);

MAI 3d 4.16--damages where plaintiff is a public official/figure;

MAI 3d 23.06(i)--verdict director for libel where plaintiff is not a public official/figure;

MAI 3d 23.06(2)--verdict director for libel where plaintiff is a public official/figure;

MAI 3d 23.10(1)--verdict director for slander where plaintiff is not a public official/figure;

MAI 3d 23.10(2)--verdict director for slander where plaintiff is a public official/figure;  
MAI 3d 32.12--truth as an affirmative defense.

## Footnotes

- 1 See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).
- 2 *Overcast v. Billings Mutual Insurance Co.*, 11 S.W.3d 62, 70 (Mo. banc. 2000).
- 3 *Jones v. Pinkerton's Inc.*, 700 S.W.2d 456, 458 (Mo.App.W.D. 1985).
- 4 RESTATEMENT (SECOND) OF TORTS, §577, comment b (1977).
- 5 *Overcast v. Billings Mutual Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000) (letter from insurance company denying coverage on grounds of arson, where the person sending the letter acknowledged that the recipient would be required to divulge the contents of the letter to third parties).
- 6 *Chambers v. National Battery Company*, 34 F.Supp. 834 (W.D.Mo. 1940).
- 7 *Dobbin v. Chicago R.I. & P. Ry. Co.*, 138 S.W. 682 (Mo.App.W.D. 1911).
- 8 R. Sack, *Libel, Slander and Related Problems*, §II.3. (1980).
- 9 *Moritz v. Kansas City Star Co.*, 258 S.W.2d 583 (Mo. 1953) (“No one is justified in stating false facts about another merely because some one else has done so.”); *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 78 S.W.2d 404 (1935).
- 10 See §1.40-§1.43, *infra*.
- 11 *Houston v. Pulitzer Pub. Co.*, 249 Mo. 332, 155 S.W. 1068 (banc 1913); *Litzinger v. Pulitzer Pub. Co.*, 356 S.W.2d 81 (Mo. 1962); see also RESTATEMENT (SECOND) OF TORTS §577A(3) (1977).
- 12 *Cox Enters., Inc. v. Gilreath*, 142 Ga. App. 297, 235 S.E.2d 633 (1977).
- 13 *Hellesen v. Knaus Truck Lines, Inc.*, 370 S.W.2d 341, 344 (Mo. 1963)(document written and placed in company files was not “published” although presumably read by secretaries, file clerks and other corporate personnel); *Ellis v. Jewish Hospital of St. Louis*, 581 S.W.2d 850 (Mo.App.E.D. 1979) (evaluation reports contained in plaintiff’s personnel file held not published because not communicated to a third party); *Perez v. Boatmen’s Nat’l Bank of St. Louis*, 788 S.W.2d 296, 300 (Mo.App.E.D. 1990) (communications between two employees of different branches of a single national bank were not “published” for defamation purposes).
- 14 *Lovelace v. Long John Silver’s Inc.*, 841 S.W.2d 682, 685 (Mo. App. W.D. 1992).
- 15 *Snodgrass v. Headco Indus., Inc.*, 640 S.W.2d 147 (Mo. App. W.D. 1982) (statements by manager to receptionist concerning criminal activities of another employee held to be published).
- 16 *Coots v. Payton*, 280 S.W.2d 47, 53 (Mo. 1955).
- 17 Prosser & Keeton on Torts, §111, at 773 (5th ed. 1984).
- 18 *Langworthy v. Pulitzer Publishing Company*, 368 S.W.2d 385, 389 (Mo. 1963) (humorous news article poking fun at a lawyer’s complaint to police about a children’s prank); *Coots v. Payton*, 280 S.W.2d at 54-55.
- 19 Prosser & Keeton on Torts, §111 at 776 (5th ed. 1984). See also §1.44 §1.46, *infra*.
- 20 *Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969); *Coots v. Payton*, 280 S.W.2d 47 (Mo. 1955); *Diener v. Chronicle Publishing Co.*, 230 Mo. 613, 135 S.W. 6 (1911).
- 21 *Id.*
- 22 *Walker v. Kansas City Star Co.*, 406 S.W.2d 44, 51 (Mo. 1966); *Hagler v. Democrat-News, Inc.*, 699 S.W.2d 96 (Mo.App.E.D. 1985).
- 23 *Branch v. Publishers: George Knapp & Co.*, 121 S.W. 93 (Mo. 1909).
- 24 *St. James Military Academy v. Gaiser*, 125 Mo. 517, 28 S.W. 851 (1894).
- 25 860 S.W.2d 303, 313 (Mo. banc 1993).
- 26 *Walker v. Kansas City Star Co.*, 406 S.W.2d 44 (Mo. 1966) (libelous to publish that plaintiff led a charge against United States marshals during a riot); *St. Joseph Ry. Light, Heat & Power Co.*, 52 S.W.2d 852 (Mo. 1932) (statement that one had fraudulently obtained electricity).
- 27 *Michael v. Matheis*, 77 Mo.App. 556 (1898).
- 28 *Bauer v. Ribaldo*, 926 S.W.2d 38, 42 (Mo. App. E.D. 1996) (Political advertisement stating plaintiff “was part of the city court clerk gang, the same gang that the *Post-Dispatch* reported may have stolen over one million dollars” held defamatory); *Wahl v. Marschalk*, 913 S.W.2d 432, 434 (Mo. App.E.D. 1996) (statement that plaintiff “is man who had children in movies” in the context of a discussion of pornography is defamatory because the implication was that plaintiff used children in pornographic movies, a crime under Missouri law).
- 29 *Church v. Bridgeman*, 6 Mo. 108 (1839).
- 30 *Christal v. Craig*, 80 Mo. 367 (1883); *Diener v. Star Chronicle Publishing Co.*, 135 S.W. 6 (Mo. 1911).
- 31 *Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969).
- 32 *Klien v. Victor*, 903 F.Supp. 1327, 1335 (E.D. Mo. 1995) (statements that a child therapist active in fighting against satanic cults “made a very lucrative practice out of the satanic cult scare” and statements that the plaintiff had been terminated from employment held not defamatory); *Greening v. Klamen*, 652 S.W.2d 730, 735 (Mo.App.E.D. 1983) (accusations of “indecision” and “vacillation” in business dealings held not sufficient); *Jacobs v. Transcontinental & Western Air*, 216 S.W.2d 523, 525 (Mo. 1948).
- 33 Section 537.110, RSMo 1986.
- 34 860 S.W.2d 303 (Mo. banc 1993).
- 35 *Fairyland Amusement Co. v. Metro Media, Inc.*, 413 F.Supp. 1290 (W.D.Mo. 1976) (broadcast about rapes occurring around amusement park were not about the owner of the amusement park, and the owner could not sue for defamation.); *Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969) (a letter critical of the operations of a community center was not libelous of the plaintiff, the owner and manager of the community center); see also *Pennington v. Meredith Corp.*, 18 Med.L.Rptr. 2202, 2203-04 (W.D.Mo. 1991) (videotape broadcast of plaintiff’s house during a news report which stated that drug-related trouble in the area “has been traced to just two drug-dealing juveniles and about a dozen suspected drug houses in the area” was not libelous per se because the station did not identify the plaintiffs or their address and because the television audience would thus have needed extrinsic facts to draw any connection between plaintiffs and the alleged illegal activity).
- 36 *Byrne v. News Corp.*, 190 S.W. 933 (Mo.App.W.D. 1916).
- 37 See W. Prosser, *THE LAW OF TORTS*, §111 (4th Ed. 1971); see also *Nordlund v. Consolidated Electric Cooperative*, 289 S.W.2d 93 (Mo. 1956); *Riss v. Anderson*, 304 F.2d 188 (8th Cir. 1962).

38 RESTATEMENT (SECOND) OF TORTS §564A, comment b (1977).

39 *Kenworthy v. Journal Co.*, 93 S.W. 882 (Mo.App.W.D. 1906) (an article saying 3 of 7 witnesses in a trial would be charged with perjury did not libel the plaintiff although he was one of the seven named witnesses).

40 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

41 475 U.S. at 776, 106 S.Ct. at 1563. See also *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493 (Mo.App.E.D. 1980) (“public officials, public figures and private persons suing media defendants for defamation must establish that the defendant published a false statement of fact.”).

42 See, e.g., *In re IBP Confidential Bus. Documents Litigation*, 797 F.2d 632, 647 (8th Cir. 1986), wherein the Eighth Circuit, applying Iowa law, held:

to recognize the existence of a first amendment right and yet distinguish the level of protection accorded that right based on the type of entity involved would be incompatible with the fundamental first amendment principle that “the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.”

(quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)).

43 Missouri Approved Instruction (“MAI”) 23.06(2), Committee Comment.

44 *Kleinschmidt v. Johnson*, 183 S.W.2d 82, 86 (Mo. 1944); see also *Turnbull v. Herald Co.*, 459 S.W.2d 516 (Mo.App.E.D. 1970) (report that plaintiff was arrested with several thousand dollars worth of stolen jewelry in his possession “did not alter the complexion of the essential facts” and was substantially true even though the jewelry was worth only \$500).

45 *Kleinschmidt v. Bell*, 353 Mo. 516, 183 S.W.2d 87 (1944); *Brown v. Briggs*, 569 S.W.2d 760 (Mo.App.W.D. 1978).

46 See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L.Ed.2d 1 (1990).

47 *Anton v. St. Louis Suburban Newspapers, Inc.*, 498 S.W.2d 493, 498 (Mo.App.E.D. 1980).

48 See §1.44-§1.46, *infra*.

49 See, e.g., *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 78 S.W.2d 404 (1935).

50 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

51 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

52 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

53 418 U.S. at 347, 94 S.Ct. at 3010.

54 418 U.S. at 350, 94 S.Ct. at 3012.

55 *Warner v. Kansas City Star*, 726 S.W.2d 384, 385 (Mo.App.W.D. 1987).

56 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 297 (1966).

57 *Id.* at 85, 86 S.Ct. at 676; see also *Ramacciotti v. Zinn*, 550 S.W.2d 217, 225 (Mo.App.E.D. 1977).

58 See, e.g., *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo. 1977), *cert. denied*, 98 S.Ct. 505 (1978) (St. Louis alderwoman held a public official).

59 *Ramacciotti v. Zinn*, 550 S.W.2d 217, 225 (Mo.App.E.D. 1977).

60 *Basarich v. Rodeghero*, 24 Ill.App.3d 889, 321 N.E.2d 739 (1974).

61 *Cooper v. Rockford Newspapers, Inc.*, 50 Ill.App.3d 247, 365 N.E.2d 744 (1977).

62 *Ewald v. Roelofs*, 120 Ill.App.2d 30, 265 N.E.2d 89 (1970).

63 *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8, 99 S.Ct. 2675, 2680 n.8, 61 L.Ed.2d 411 (1979).

64 *Rosenblatt v. Baer*, 383 U.S. at 87 n.14, 86 S.Ct. at 676 n.14.

65 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

66 418 U.S. at 351, 94 S.Ct. at 3013.

67 See *Sigafus v. St. Louis Post-Dispatch, LLC*, 109 S.W.3d 174 (Mo.App.E.D. 2003) (recording artists who sought and received national attention through national distribution of musical recordings and who participated in gatherings of a religious group which professed racial separation held public figures); *McQuoid v. Springfield Newspapers, Inc.*, 502 F.Supp. 1050, 1056 (W.D.Mo. 1980) (Plaintiff who promoted the controversial building of the “world’s largest swine producing complex” and who gave speeches and interviews promoting the project held a public figure); *Warner v. Kansas City Star*, 726 S.W.2d 384 (Mo.App.W.D. 1987) (outdoor editor of a daily newspaper who was well known to a wide audience and who invited attention to his views was held to be a public figure).

68 *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

69 *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3rd Cir. 1979).

70 *Ray v. Time, Inc.*, 452 F.Supp. 618 (W.D.Tenn. 1976), *aff’d*, 582 F.2d 1280 (1978).

71 *Corcoran v. Indianapolis Newspapers, Inc.*, 175 Ind.App. 548, 372 N.E.2d 1211 (1978).

72 *Liberty Lobby v. Anderson*, 562 F.Supp. 201, 208 (D.D.C. 1983).

73 *McManus v. Doubleday & Company*, 513 F.Supp. 1383 (S.D.N.Y. 1981).

74 *Pauling v. Globe Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966).

75 *Underwood v. First National Bank*, 8 Med.L.Rptr. 1278 (Minn. 1982).

76 *Glover v. Herald Co.*, 549 S.W.2d 858, 862 (Mo. 1977); *Williams v. Pulitzer Broadcasting Co.*, 706 S.W.2d 508 (Mo.App.E.D. 1986).

77 418 U.S., 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

78 RESTATEMENT (SECOND) OF TORTS §558 (1977).

79 See, e.g., *Sisler v. Gannett Co.*, 516 A.2d 1083, 1095 (N.J. 1986); *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975); *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind.App. 671, 321 N.E.2d 580 (1974).

80 *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. 2000).

81 Bloom, Proof of Fault in Media Defamation Litigation, 38 VAND.L.REV. 247, 249 n.5 (1985).

82 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968).

83 See also *Bose v. Consumer’s Union of United States, Inc.*, 466 U.S. 485, 511 n.30, 104 S.Ct. 1949, 1965 n.30, 80 L.Ed.2d 502 (1984).

84 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964).

85 706 S.W.2d at 512.

86 *Id.*

87 *Williams v. Pulitzer Broadcasting Co.*, 706 S.W.2d at 512; see also *Shafer v. Lamar Publishing Co.*, 621 S.W.2d 709, 714 (Mo.App.W.D. 1981).

88 *St. Amant v. Thompson*, 390 U.S. at 73, 88 S.Ct. at 1325.

89 *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo. 1977); *Estes v. Lawton-Byrne-Bruner Insurance Agency*, 437 S.W.2d 685 (Mo.App.E.D. 1969).

90 376 U.S. at 287, 84 S.Ct. at 730.

91 13 Med.L.Rptr. 1731 (W.D.Mo. 1986).

92 111 S.Ct. 2419 (1991).

93 111 S.Ct. at 2432.

94 *Id.* at 2433.

95 See, e.g., *Thurston v. Ballinger*, 884 S.W.2d 22, 27 (Mo.App.W.D. 1994) (“If Ballinger’s statements based upon purported first had knowledge were false, there is clearly a genuine issue of fact whether they were made with malice”); *Bauer v. Ribaud*, 926 S.W.2d 38, 42 (Mo.App.E.D. 1996) (“Given the statement linking Bauer to a crime with no apparent basis in fact, the facts and inferences from the evidence here could support a jury finding of actual malice.”).

96 See, e.g., *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo. banc 1977) (mistake by interposing two names in newspaper article); *Warner v. Kansas City Star Co.*, 727 S.W.2d 388, 391 (Mo. App. W.D. 1987) (even though plaintiff and defendant’s versions of what occurred during the conversation amongst them differed, defendant’s version was just as plausible as plaintiff’s and, consequently, plaintiff failed to prove by clear and convincing evidence that defendant’s publication that plaintiff had misrepresented himself during conversation was the result of actual malice. At worst, the evidence pointed to a misunderstanding which was insufficient to establish actual malice. Accordingly, the appellate court affirmed a judgment N.O.V. for the defendant.).

97 See, e.g., *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 512-13 (1984).

98 466 U.S. at 512-13.

99 See, e.g., *Williams v. Pulitzer Publishing Co.*, 706 S.W.2d 508 (Mo. App. E.D. 1986); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

100 706 S.W.2d at 512-13.

101 *Williams v. Pulitzer Broadcasting Co.*, 706 S.W.2d 508 (Mo.App.E.D. 1986); MAI 3d 3.05.

102 *Grissum v. Reesman*, 505 S.W.2d 81, 85-86 (Mo. 1974) (“the court should be clearly convinced of the affirmative of the proposition to be proved, but this does not mean that there may not be contrary evidence.”); *In re Interest J.A.J.*, 652 S.W.2d 745, 748 (Mo.App.E.D. 1983) (clear and convincing evidence “instantly tilts the scales when weighed against evidence in opposition”).

103 *Bose Corp. v. Consumers’ Union of the United States, Inc.*, 466 U.S. 485, 502 n.17 and 511, 104 S.Ct. 1960 n.17 and 1965, 80 L.Ed.2d 502 (1984) (emphasis added).

104 *Warner v. Kansas City Star*, 726 S.W.2d 384, 387 (Mo.App.W.D. 1987) (J.N.O.V. for defendant newspaper sustained); see also *Williams v. Pulitzer Broadcasting Co.*, 706 S.W.2d 508 (Mo.App.E.D. 1986)(court reversed a \$1,002,500 punitive damage judgment in a private figure’s libel action, but allowed a \$100,000 compensatory damage judgment to stand).

105 See, e.g., *Ramacciotti v. Zinn*, 550 S.W.2d 217, 224 (Mo.App.E.D. 1977); *Snodgrass v. Headco Industries*, 640 S.W.2d 147 (Mo.App.W.D. 1982); *Rowden v. Amick*, 446 S.W.2d 849 (Mo.App.W.D. 1969); *McQuoid v. Springfield Newspapers, Inc.*, 502 F.Supp. 1050, 1054 n.3 (W.D. Mo. 1980).

106 See, e.g., *Brown v. Publishers: George Knapp & Co.*, 213 Mo. 655, 112 S.W. 474 (1908).

107 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

108 418 U.S. at 349-50, 94 S.Ct. at 3011-12 (emphasis added).

109 RESTATEMENT (SECOND) OF TORTS §620, comment c (1977).

110 *Kenney v. Walmart Stores, Inc.*, 100 S.W.3d 809, 814 (Mo. 2003).

111 W. Prosser, THE LAW OF TORTS, 754 (4th ed. 1974).

112 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

113 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

114 See also *Williams v. Pulitzer Broadcasting Company*, 706 S.W.2d 508 (Mo.App.E.D. 1986).

115 See §1.28, *supra*.

116 See, e.g., *Wheeler v. Green*, 593 P.2d 777 (Ore. 1979).

117 747 S.W.2d 630, 635 (Mo. banc 1988).

118 *Downey v. United Weather Proofing Inc.*, 253 S.W.2d 976 (Mo. 1953). See also *Wolf v. Harris*, 184 S.W. 1139 (1916); *Marx & Haas Jeans Clothing Company v. Watson*, 67 S.W. 391 (Mo. 1902) (stating that an injunction may lie against the same or similar labels being republished, but only after judgment).

119 *Williams v. School District of Springfield R-12*, 447 S.W.2d 256, 269 (Mo. 1969); *Willman v. Dooner*, 770 S.W.2d 275, 280 (Mo.App.W.D. 1989).

120 RESTATEMENT (SECOND) OF TORTS § 583, Illus. 1 (1977).

121 RESTATEMENT (SECOND) OF TORTS § 584 (1977).

122 *Willman v. Dooner*, 770 S.W.2d 275, 280-82 (Mo.App.W.D. 1989); *Pulliam v. Bond*, 406 S.W.2d 635, 641 (Mo. 1966) (by accepting membership within union, plaintiff consented to having written charges filed and processed pursuant to the union’s constitution and bylaws); *Kelewae v. Jim Meagher Chevrolet, Inc.*, 952 F.2d 1052, 1055 (8th Cir. 1992) (defamatory statements which are “solicited” by the plaintiff or agents of the plaintiff cannot form the basis of a defamation suit); RESTATEMENT (SECOND) OF TORTS § 583, comment d, Illus. 2 and 3 (1977).

123 Mo.R.Civ.Pro. 55.20; W. Prosser, THE LAW OF TORTS, p. 846 (5th ed. 1984).

124 See, e.g., *Guccione v. Hustler Magazine Inc.*, 800 F.2d 298, 303 (2d Cir. 1986); *Ray v. Time, Inc.*, 452 F.Supp. 618 (W.D.Tenn.), aff’d without opinion, 582 F.2d 1280.

125 *Id.* see generally The Libel-Proof Plaintiff Doctrine, 98 Harv.L.Rev. 1909 (1985).

126 *Ray v. United States Dep’t of Justice*, 508 F.Supp. 724 (E.D. Mo. 1981), aff’d, 658 F.2d 608 (8th Cir. 1981) (federal district court applying Missouri law adopted the “libel proof” defense to the convicted assassin of Martin Luther King, Jr.).

127 *Cash v. Empire Gas Corp.*, 547 S.W.2d 830 (Mo.App.E.D. 1976); *Estes v. Lawton-Byrne-Bruner Ins. Agency*, 437 S.W.2d 685 (Mo.App.E.D. 1969).

128 *Snodgrass v. Headco Industries, Inc.*, 640 S.W.2d 147 (Mo.App.W.D. 1982); *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo.App.E.D. 1977); *Skain v. Weldon*, 422 S.W.2d 271 (Mo. 1967).

129 *Laun v. Union Electric Co.*, 166 S.W.2d 1065 (Mo. 1942).

130 *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966); *Wright v. Truman Road Enterprises, Inc.*, 443 S.W.2d 13 (Mo.App.W.D. 1969); *Ruderer v. Meyer*, 413 F.2d 175 (8th Cir.), cert. denied, 396 U.S. 936 (1969).

131 *Laun v. Union Electric Company*, 166 S.W.2d 1065 (Mo. 1942); *Jones v. Brownlee*, 161 Mo. 258, 264, 61 S.W. 795 (1901) (defamatory statement made in a pleading in a civil suit in a court having jurisdiction of the cause, if relevant and pertinent to the issues, is absolutely privileged from a defamation action).

132 *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959); *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966).

133 *Williams v. School District of Springfield R-12*, 447 S.W.2d 256, 269 (Mo. 1969).

134 RESTATEMENT (SECOND) OF TORTS §592A (1977).

135 760 S.W.2d 196, 200 (Mo.App. E.D. 1988).

136 See, e.g., *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 121 S.W.2d 100 (1909); *Estes v. Lawton-Byrne-Bruner Insurance Agency Co.*, 437 S.W.2d 685 (Mo.App.E.D. 1969).

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

138 *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506, 511 (Mo. banc 1986).

139 *Remington v. Wal Mart Stores, Inc.*, 817 S.W.2d 571 (Mo.App. S.D. 1991).

140 *Perdue v. Montgomery Ward & Company*, 341 Mo. 252, 107 S.W.2d 12 (1937); *Thurston v. Ballinger*, 884 S.W.2d 22, 27 (Mo.App.W.D. 1994).

141 *Estes v. Lawton-Byrne-Bruner Insurance Agency Co.*, 437 S.W.2d 685 (Mo.App.E.D. 1969).

142 *Merriam v. Star Chronicle Publishing Company*, 335 Mo. 9371, 74 S.W.2d 592 (1934).

143 *Williams v. Kansas City Transit, Inc.*, 339 S.W.2d 792 (Mo. 1960).

144 *Lee v. W. E. Fuetterer Battery & Supplies, Co.*, 23 S.W.2d 45, 60 (Mo. 1929).

145 *Roberson v. Beeman*, 790 S.W.2d 948, 950 (Mo.App. W.D. 1990).

146 *Willman v. Dooner*, 770 S.W.2d 275 (Mo.App.W.D. 1989).

147 RESTATEMENT (SECOND) OF TORTS §597 (1977).

148 *McDowell v. Credit Bureaus of Southeastern Missouri*, 747 S.W.2d 630 (Mo. banc 1988); *Moore v. Credit Information Corp. of America*, 673 F.2d 208 (8th Cir. 1982).

149 See §1.22, *supra*. See *McDowell v. Credit Bureaus of Southeastern Missouri*, 747 S.W.2d 630, 633 (Mo. banc 1988); *Carter v. Willert Home Products, Inc.*, 714 S.W.2d at 511; *Snodgrass v. Headco Industries, Inc.*, 640 S.W.2d 147 (Mo.App.W.D. 1982); MAI 3d 23.06(1) and 23.10(1), “Notes on Use.” See also *Brown v. P.N. Hirsch & Co. Stores, Inc.*, 661 S.W.2d 587 (Mo.App.E.D. 1983).

150 See, e.g., *Butler v. Freyman*, 260 S.W. 523 (Mo.App.W.D. 1924).

151 See *McDowell v. Credit Bureaus of Southeastern Missouri*, 747 S.W.2d 630, 633 (Mo. banc 1988). See §1.21, *supra* for a description of actual malice.

152 Section 288.250, RSMo 1986; *Tucker v. Delmar Cleaners, Inc.*, 637 S.W.2d 222 (Mo.App.E.D. 1982).

153 Section 431.062, RSMo.

154 *Id.* See also *Hester v. Barnett*, 723 S.W.2d 544, 557-58 (Mo.App.W.D. 1987).

155 Section 537.105, RSMo.

156 Section 610.028, RSMo.

157 Section 537.035, RSMo.

158 See generally *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3rd Cir. 1981).

159 See *Lami v. Pulitzer Publishing Co.*, 723 S.W.2d 458 (Mo.App.E.D. 1986); *Williams v. Pulitzer Publishing Co.*, 706 S.W.2d 508 (Mo.App.E.D. 1986); *Shafer v. Lamar Publishing Co., Inc.*, 621 S.W.2d 709 (Mo.App.W.D. 1981).

160 See, e.g., *Biermann v. Pulitzer Publishing Co.*, 627 S.W.2d 87 (Mo.App.E.D. 1981); *Turnbull v. Herald Co.*, 459 S.W.2d 516 (Mo.App.E.D. 1970).

161 *Williams v. Pulitzer Broadcasting Co.*, 706 S.W.2d at 511 (emphasis added).

162 621 S.W.2d 709 (Mo.App.W.D. 1981).

163 706 S.W.2d 508 (Mo.App.E.D. 1986).

164 *Id.* at 511.

165 *Id.* at 511.

166 818 S.W.2d 650 (Mo.App. W.D. 1991).

167 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1978).

168 *Time, Inc. v. Pape*, 401 U.S. 279, 285, 91 S.Ct. 633, 637, 28 L.Ed.2d 45 (1971).

169 556 F.2d at 120.

170 See, e.g., *Krauss v. Champaign News-Gazette*, 59 Ill.App.3d 745, 375 N.E.2d 1362 (1978).

171 *Hogan v. Herald Co.*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002 (1982).

172 491 U.S. 657, 694-95, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

173 271 F.Supp. 364 (E.D.Mo. 1967), *aff’d*, 394 F.2d 800 (8th Cir. 1968).

174 See, e.g., *Brown v. Courier Herald Publishing Co.*, 700 F.Supp. 534 (S.D.Ga. 1988).

175 *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 78 S.W.2d 404 (1935).

176 336 Mo. 184, 78 S.W.2d 404, 413 (1935).

177 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

178 418 U.S. at 339-40, 94 S.Ct. at 3007.

179 See, e.g., *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493, 499 (Mo.App.E.D. 1980) (editorial which characterized the plaintiff, a lawyer, as being the “henchman” of a union official and engaged in “sleazy dealings”); *Henry v. Halliburton*, 690 S.W.2d 775, 788 (Mo. 1985) (references to insurance agents as “frauds” and “twisters”).

180 690 S.W.2d 775 (Mo. 1985).

181 750 F.2d 970 (D.C.Cir. 1984), *cert. denied*, 105 S.Ct. 2662 (1985).

182 *Id.* at 789. See also *Willman v. Dooner*, 770 S.W.2d 275 (Mo.App.W.D. 1989).

183 497 U.S. 1 (1990).

184 *Id.* at 16-20.

185 See, e.g., *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (accusation that developer was “blackmailing” city counsel by insisting that his sale of one parcel of land to the city be conditioned on favorable rezoning of another parcel held nothing more than a “vigorous epithet” used by those who considered the developer’s negotiating position extremely unreasonable).

186 See, e.g., *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 314 (Mo. banc 1993) (discussed below); *Pape v. Reither*, 918 S.W.2d 376, 380-81 (Mo.App.E.D. 1996) (discussed below); *Ribaudo v. Bauer*, 982 S.W.2d 701, 704-06 (Mo.App.E.D. 1998) (applying the *Henry v. Halliburton* test); *Diez v. Pearson*, 834 S.W.2d 250 (Mo.App. E.D. 1992) (holding that statements published in letters to the editor of newspaper were protected opinion without even mentioning *Milkovich*).

187 860 S.W.2d at 314.

188 918 S.W.2d 376, 380-81 (Mo.App.E.D. 1996).

189 *Id.* at 380.

190 *Id.* at 381.

191 *Id.*

192 *Id.* at 382.

193 Section 516.140, RSMo 1986.

194 324 F.Supp. 403 (W.D.Mo. 1971).

195 See also *Finnegan v. Squires Publishers, Inc.*, 765 S.W.2d 703, 705-06 (Mo.App.W.D. 1989); *Hasenyager v. Board of Police Commissioners*, 606 S.W.2d 468 (Mo.App.W.D. 1980).

196 *Finnegan v. Squires Publishers, Inc.*, 765 S.W.2d at 706; see also *Jones v. Pinkerton’s, Inc.*, 700 S.W.2d 456, 460 (Mo.App.E.D. 1985).

197 884 S.W.2d 22, 27 (Mo.App.W.D. 1994).

198 *Houston v. Pulitzer Publishing Company*, 249 Mo. 332, 155 S.W. 1068 (1913); *Litzynger v. Pulitzer Publishing Co.*, 356 S.W.2d 81 (Mo. 1962); see also RESTATEMENT (SECOND) OF TORTS § 577A(3) (1977).

199 See, e.g., *Cox Enterprises, Inc. v. Gilreath*, 142 Ga.App. 297, 235 S.E.2d 633 (1977).

200 652 F.2d 754 (8th Cir. 1981).

201 Section 516.190, RSMo 1986.

202 See also *Finnegan v. Squire Publisher’s, Inc.*, 765 S.W.2d at 704-05.

203 543 S.W.2d 776, 777 (Mo. 1976).

204 *McDowell v. Credit Bureaus of Southeast Missouri, Inc.*, 747 S.W.2d 630, 633 (Mo. banc 1988); *Patterson v. Evans*, 162 S.W. 179 (Mo. 1914); *Coots v. Payton*, 280 S.W.2d 47 (Mo. 1955).

205 See, e.g., *Litzynger v. Pulitzer Publishing Co.*, 356 S.W.2d 81 (Mo. 1962).

206 *Patch v. Playboy Enterprises, Inc.*, 652 F.2d 754 (8th Cir. 1981) (construing Mo.Rev.Stat. §508.010(4)).

207 *Diener v. Star-Chronicle Publishing Co.*, 230 Mo. 613, 132 S.W. 1143, 1147 (1910); *Bello v. Random House, Inc.*, 422 S.W.2d 339 (Mo. 1968).

208 714 S.W.2d 506 (Mo. 1986).