Libel

Defamation is a false communication made with fault that damages a person's reputation. Libel and slander are the two types of defamation. Traditionally the term libel referred only to written communication while slander referred to spoken messages. Historically, libel was treated as the more serious of the two offenses, largely because the written word was capable of reaching a larger audience and was more lasting than the spoken word. In most states, including North Carolina, broadcast defamation is now treated as libel because it can have both the reach and permanency of printed defamation.[1] Also, if statements are spoken with the intention that they be printed and they are, in fact, printed, a person who feels he has been defamed by the statements can sue for both libel and slander. Thus, a source who defames someone in an interview with a reporter could be sued for both.[2]

Libel law is concerned with the effect a particular communication has on the defamed individual's relationships with others. It is insufficient for a libel plaintiff to claim hurt feelings or embarrassment.[3] A defamatory message must affect the way other people view the plaintiff; the message must expose the plaintiff to hatred, contempt or ridicule, lower him in the esteem of others or cause him to be shunned or avoided.

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[1] Woody v. Catawba Valley Broad. Co., 272 N.C. 459, 158 S.E.2d 578 (1968).

[2] *See, e.g.*, Aycock v. Padgett, 131 N.C. App. 164, 166, 516 S.E.2d 907, 909 (1999); Phillips v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 117 N.C. App. 274, 278, 450 S.E.2d 753, 756 (1994), *cert. denied*, 340 N.C. 115, 456 S.E.2d 318 (1995); Clark v. Brown, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *cert. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990).

[3] Flake v. Greensboro News Co., 212 N.C. 780, 788, 195 S.E. 55 (1938).

Who can sue for libel?

- Any living person.[4] Unlike property rights, which survive death and can be passed on to heirs, personal rights, including the right to reputation, die with the individual.[5]

- A corporation. A corporation can sue for libel to vindicate its corporate reputation or the reputation of its product.

- An unincorporated association, organization or society, including a labor union, charitable foundation or fraternal organization. Suits by such groups are uncommon. However, it is possible for a religious or charitable organization, for example, to sue if a news story damages its ability to raise money or attract members.

Agencies and units of government — cities, counties, states, the U.S. government — may **not** sue for libel. Because in a democratic society citizens have the right to criticize and comment upon their government, courts consistently have held that governments cannot be defamed. However, individual government officials and employees can — and do — sue for libel when they feel their individual reputations are harmed by news stories.

What must a libel plaintiff prove?

A plaintiff usually must prove six elements to win a libel suit:

- Publication
- Identification
- Defamatory content
- Falsity
- Injury
- Fault

In the following sections, each of those elements will be discussed in detail.

Publication

Libel involves at least three people: the defamer, the defamed and a third person who heard or saw the defamatory message. Obviously, publication is not difficult to prove when a story has been published in a newspaper or on a website, or broadcast on radio, television or cable. Reporters must recognize, however, that they can defame someone in the course of gathering news as well as by publishing news. For example, suppose a reporter has heard rumors about a local high school principal embezzling school funds. In an interview with the school superintendent, the reporter says, "I've got some reliable sources who tell me Principal X is being investigated for using school funds to purchase computer equipment for his own home. Can you confirm that for me?" Such a newsgathering technique could result in a slander lawsuit against the reporter, even if the rumor about Principal X is never printed or broadcast.[6] The Alton (Ill.) Telegraph was successfully sued for libel as a result of a memo two of its reporters sent to the U.S. Justice Department suggesting that a local developer had ties to the Mafia. No story was published in the newspaper, but transmitting the memo to government officials was sufficient to meet

[4] N.C. GEN. STAT. §28A-18-1 (2011); Gilliken v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961).

[5] *See* RESTATEMENT (SECOND) OF TORTS § 560 (1977).

[6] *See, e.g.*, Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975).

the publication requirement of libel law.[7] Similarly, in a 2009 North Carolina case, a federal district court held the publication element was met when a company officer submitted a draft of a proposed defamatory advertisement to an employee of a magazine even though the magazine refused to publish the ad.[8]

The republication rule. Republication of a libel meets the publication requirement. That means both the reporter who accurately quotes the libelous statements of another person and the publication that prints the libelous quotes can be sued along with the source of the statement.[9] Likewise, a newspaper that prints a letter to the editor containing defamatory statements can be sued. It is also possible that a broadcast station can be held legally liable for defamatory statements made over the air by guests on programs or members of the public during a call-in show.[10] Broadcasters, however, are immune from libel suits for statements made by political candidates to whom they are required to provide airtime under the federal Communications Act.[11] Because the Communications Act prohibits broadcasters from censoring candidates' comments,[12] the U.S. Supreme Court in 1959 ruled broadcasters could not be legally liable for such comments. Of course, many libel suits against the repeaters of libelous statements fail on other grounds, especially the plaintiff's inability to prove the requisite level of fault on the part of the repeater. Nonetheless, it is critical journalists realize that "I was just quoting someone else" isn't an adequate defense in a libel suit.

In 2008, however, a federal district court in North Carolina held that when "a media outlet … includes defamatory accusations in a news report for the specific purpose of debunking them," the media outlet would not be liable.[13] NBC's Dateline showed some clips from the movie "Bold as a Lion," in which the brother of a homicide victim was accused of incest and the murder of his sister. In addition, the maker of the film in an interview accused both of the victim's brothers and her father of incest and involvement in the murder. In dismissing the libel claim against NBC, the court noted that the "two-hour television report . . . was favorable to the Plaintiffs generally" and characterized the movie maker's "accusations as 'bunk,' 'way out there,' and 'insinuation . . . [without] actual evidence.'"[14]

Congress created a major exception to the republication rule in 1996 when it passed a law declaring that Internet service providers (ISPs) and users of interactive computer services could not be held liable for defamatory material posted by someone else. Section 230 of the Telecommunications Act of 1996 says, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[15] The provision was part of the Communications Decency Act, an effort by Congress to encourage ISPs to screen material to eliminate sexually explicit messages from the Internet. While the U.S. Supreme Court struck down the indecency ban as a violation of the First Amendment, the provision granting ISPs and users immunity for republishing libelous statements was allowed to stand.[16]

Thus far, most courts have interpreted Section 230 very broadly to provide absolute immunity to ISPs and Internet users for third-party postings.[17] The seminal case, *Zeran v. AOL*, resulted from anonymous

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[7] *See* T.B. LITTLEWOOD, COALS OF FIRE (1988).

[8] Diagnostic Devices, Inc. v. Pharma Supply, Inc., No. 3:08-cv-149-RJC-DSC, 2009 WL 2998004 (W.D.N.C. Sept. 15, 2009).

[9] *See* Taylor v. Kinston Free Press Co., 237 N.C. 551, 75 S.E.2d 528 (1953); Lewis v. Carr, 178 N.C. 578, 101 S.E. 97 (1919).

[10] *See* N.C. GEN. STAT. §99-5 (2011) (providing that a broadcaster can be held liable for airing defamatory comments by non-employees of the station if the broadcaster is "guilty of negligence in permitting any such defamatory statement"). *See also* Snowden v. Pearl River Broad. Corp., 251 So.2d 405 (La. App. 1971).

[11] Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525 (1959).

[12] 47 U.S.C. §315 (2006).

[13] Morgan v. Moug, No. 3:07CV374-C, 2008 WL 1733623 *6 (W.D.N.C. Apr. 10, 2008).

[14] *Id.* at *7.

[15] 47 U.S.C.§230 (c) (1) (2006).

[16] Reno v. ACLU, 521 U.S. 844 (1997).

[17] *See, e.g*., Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Green v. Am. Online, 318 F.3d 465 (3d Cir. 2003); Ben Ezra, Weinstein & Co. v. Am.

postings on an AOL bulletin board linking Kenneth Zeran to the sale of tee shirts, bumper stickers and other items carrying "offensive and tasteless slogans" related to the 1995 Oklahoma City federal building bombing.[18] The sham ads said to call "Ken" at Zeran's home phone number. Zeran received hundreds of angry and abusive phone calls, some including death threats. Despite the fact Zeran contacted AOL and obtained a promise the initial posting would be taken down, additional postings with Zeran's phone number continued to appear on the site.[19] Zeran sued AOL, but the U.S. Court of Appeals for the Fourth Circuit (which includes North Carolina) took an expansive view of the immunity provided by Section 230, holding that even Zeran's notification of AOL that the postings were false and defamatory did not remove the protection provided by the statute.[20]

Identification

Identification is seldom at issue in lawsuits against the media. However, there are a few pitfalls with which journalists ought to be familiar. For example, identification can occur even if names are not used. People can be identified through pictures, sketches, pennames, nicknames, initials and even descriptions.

A classic case in this area occurred when a New York gossip columnist wrote: "Palm Beach is buzzing with the story that one of the resort's richest men caught his blonde wife in a compromising spot the other day with a former FBI agent." Rich men and blonde women may abound in Palm Beach, but apparently former FBI agents do not. Frederick Hope convinced the court that his friends and co-workers were able to identify him as the subject of that item because he was a former FBI agent who had recently joined the county attorney's staff, an event that received considerable publicity. In addition, he was able to prove that he was the only former FBI agent who "traveled in the resort's high society circles."[21] More recently, a U.S. District Court ruled that a rape victim was identified in a TV news story that did not use her name but did say she was a student at Bryn Mawr, a Pennsylvania college with an enrollment of about 1,500; lived in a dorm; drove a Nissan; and had attended a party at the University of Pennsylvania shortly before the crime. The young woman sued for libel after the station reported comments of a police officer that cast doubt on the truth of the victim's story. Noting that Bryn Mawr is a small school, the court said, "In this type of environment, it would not be surprising if some people could identify plaintiff from the information supplied in the broadcast."[22]

Incorrect identification — carelessness in reporting names, using incorrect middle initials or addresses, or placing the wrong photo with a story — can result in successful libel suits. For example, in 1940 a reporter for the Greensboro Record, acting on a tip from an FBI agent, examined old city directories and found listings for a Harry Roth, the name of a man who had been arrested on white slavery charges in New York. Without any further checking, the reporter wrote a story saying the Harry Roth arrested in New York was a former Greensboro resident who "was for a time connected with the Palace Theatre in Greensboro." The former North Carolinian, however, was living at the time in Suffolk, Va., and had nothing to do with the white slave trade. The N.C. Supreme Court upheld a jury award of $5,000 to Roth.[23]

Incorrect use of pictures can also result in libel suits. In the 1930s, singer Nancy Flake sued the Greensboro Daily News when her photo was inadvertently used in a bread ad and she was identified as

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Online, Inc., 206 F.3d 980 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006).

[18] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[19] *Id*. at 329.

[20] *Id*. at 333.

[21] Hope v. Hearst Consol. Publ'ns, Inc., 294 F.2d 681 (2d Cir. 1961), *cert. denied*, 368 U.S. 956 (1962).

[22] Weinstein v. Bullick, 827 F. Supp. 1193, 1199 (E.D. Pa. 1993).

[23] Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940).

"Mlle. Sally Payne, exotic red-haired Venus" appearing with the Folies de Paree. The use of her photo was sufficient to meet the identification requirement, but Ms. Flake lost her libel suit because the court did not feel the content of the ad was defamatory. [24] (She did win on her appropriation claim, however. See the next chapter, Invasion of Privacy and Infliction of Emotional Distress.)

Group libel. Occasionally the media are sued by individuals who claim they suffered reputational harm because a group to which they belong was attacked, even though they were not named or specifically identified. Most such suits are unsuccessful because the plaintiffs are unable to convince the courts the libels were "of and concerning" them. For example, after The Boston Globe ran an editorial saying the Manchester (N.H.) Union Leader was "probably the worst newspaper in America" and was a paper run "by paranoids for paranoids," three of the paper's eight editors and 24 of the other 325 employees sued for libel. The judge dismissed the suit because of lack of identification.[25]

With small and well-defined groups, though, the results can be different. In a 2002 case resulting from a televised campaign ad, the N.C. Court of Appeals held that a reference to "Dan Boyce's law firm" defamed not only state attorney general candidate R. Daniel Boyce and his firm, Boyce & Isley, but also each of the individual attorneys who were part of the firm. "The fact that the advertisement did not specifically name each present plaintiff does not bar their suit. . . . By claiming that 'Dan Boyce's law firm' had committed unethical business practices, defendants maligned each attorney in the firm, of which there are only four," the court concluded.[26]

The wording of the charge also can make a difference. To refer to "a member" of a group is less dangerous than saying "most members" or just the nebulous "members." This point was underscored in 1996 when the N.C. Court of Appeals dismissed the defamation claims of nine individuals who owned or were employed at businesses located in the Colonial House business complex in Raeford. The nine had sued Hoke County and two county EMS officials because the officials allegedly had said "someone" at a restaurant in the Colonial House had AIDS. The statement subsequently appeared in the Fayetteville Observer-Times and Raeford News Journal and on WTVD 11 news. "Since the alleged statements referred only to 'someone' in a group of nine, they clearly do not refer to some, most or all of the group," the court noted, dismissing the defamation claims because plaintiffs failed "to show that the alleged defamatory statements were 'of and concerning' them."[27]

In reaching its decision, the Court of Appeals distinguished the facts of the 1996 case from one decided nearly 80 years earlier by the N.C. Supreme Court, which had resulted from a letter saying, "I note what you say about the jury standing eleven to one; this was due entirely to whiskey and the appeal made to their prejudice." One of the unnamed 11 jurors accused of being swayed by whiskey and prejudice sued the letter writer and won $1,500. According to the state Supreme Court, "It was as harmful to libel and slander the plaintiff collectively as one of the eleven jurors as it would have been to have libeled him individually."[28] In explaining why the Supreme Court precedent was inapplicable to the 1996 case, the Court of Appeals noted that in the earlier case "eleven of the jurors were accused of misconduct; so all of them had potential causes of action. In contrast, here the statements concern only one person in a group of nine."[29]

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[24] Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938).

[25] Loeb v. Globe Newspaper Co., 489 F. Supp. 481 (D. Mass. 1980). *But see* Fawcett Publ'ns, Inc. v. Morris, 377 P.2d 42 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964) (upholding a $75,000 award to fullback Dennit Morris as the result of an article that said members of the 60-man Oklahoma University football team used an amphetamine nasal spray before games to make them more aggressive).

[26] Boyce & Isley, PLLC v. Cooper (*Boyce I*), 153 N.C.App. 25, 33, 568 S.E.2d 893, 900 (2002), *appeal dismissed and review denied*, 357 N.C. 163, 580 S.E.2d 361, *cert. denied*, 540 U.S. 965 (2003). *See also* Boyce & Isley, PLLC v. Cooper (*Boyce II*), 710 S.E.2d 309, 319-20 (N.C. Ct. App. 2011), *cert. denied,* No. 11-979, 2012 WL 425178 (U.S. May 14, 2012).

[27] Chapman v. Byrd, 124 N.C. App. 13, 17-18, 475 S.E.2d 734, 737-38 (1996).

[28] Carter v. King, 174 N.C. 549, 552-53, 94 S.E. 4 (1917).

[29] 124 N.C. App. at 16, 475 S.E.2d at 737.

Defamatory content

As discussed above, defamatory content consists of words that damage an individual's reputation. The N.C. Supreme Court has recognized three categories of libelous content: 1) libel per se, consisting of "obviously defamatory" publications; 2) "publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not"; and 3) libel per quod, "publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances."[30]

The last two categories recognized by the N.C. Supreme Court might seem rather frightening at first glance because they imply a journalist could be held liable for words she never suspected of being harmful or for a meaning she never intended to impart. Fortunately, the state's high court has imposed restrictions on the last two types of libel, making it difficult for plaintiffs to succeed in such cases. There are no reported North Carolina cases in which a claim based on either libel per quod or libel resulting from a publication susceptible of two meanings succeeded.

In a case involving words that are susceptible of two meanings, the plaintiff must prove the "defamatory meaning was intended and was so understood by those to whom the publication was made."[31] In a 1985 case, a boutique claimed a cartoon in an advertising supplement had two meanings, one of which defamed the business. The cartoon pictured a cat saying, "Look what I got at Cathy's Boutique . . . a designer flea collar!" The Court of Appeals saw only one meaning in the ad, one that was humorous and not defamatory.[32]

In cases of libel *per quod*, the plaintiff must prove the innuendo, that is, must prove the special circumstances that make a seemingly innocent statement defamatory. It is up to the judge to determine if the statement is capable of having a defamatory meaning. If so, then the jury determines whether the audience understood the defamatory implication or connotation. "The circumstances of the publication are pertinent, as well as the hearers' knowledge of the facts which would influence their understanding of the words used."[33] In addition, in cases of libel per quod, plaintiffs must prove special damages, that is, actual monetary loss as a result of the libel.[34]

The first category, libel per se, accounts for the vast majority of libel actions. It consists of statements that are harmful on their face. The reader or listener needs no additional information to understand the charge, nor is the meaning of the statement unclear or subject to interpretation.[35] "The general rule is that publications are to be taken in the sense which is most obvious and natural according to the ideas that they are calculated to convey to those who see them. . . . The question always is how would ordinary men naturally understand the publication. . . . The fact that super-sensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make it libelous."[36]

The N.C. Supreme Court has identified four specific types of libel per se: 1) accusing a person of having committed "an infamous crime"; 2) charging that a person has "an infectious disease"; 3) impeaching a person in his or her trade or profession; and 4) a catchall category consisting of communication that "tends to subject one to ridicule, contempt, or disgrace."[37] According to the state Supreme Court, "[I]t is not essential that the words should involve an imputation of crime, or otherwise impute the violation of

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[30] Flake v. Greensboro News Co., 212 N.C. at 785.

[31] Renwick v. News & Observer Publ'g Co., 310 N.C. 312, 317, 312 S.E.2d 405, *cert. denied*, 469 U.S. 858 (1984).

[32] Cathy's Boutique, Inc. v. Winston Salem Joint Venture, 72 N.C. App. 641, 325 S.E.2d 283 (1985).

[33] Tyson v. L'Eggs Prods., Inc., 84 N.C. App. 1, 13, 351 S.E.2d 834 (1987).

[34] *See* Jolly v. Academy Collection Serv., Inc., 400 F. Supp. 2d 851, 863-64 (M.D.N.C. 2005); Flake v. Greensboro News Co., 212 N.C. at 785.

[35] Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 28, 588 S.E.2d 20, 27 (2003).

[36] *Flake*, 212 N.C. at 786.

[37] *Id*. at 787.

some law, or moral turpitude, or immoral conduct." Libel encompasses any message that tends "to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule or cause him to be shunned and avoided."[38]

The first type of defamatory statement listed by the court — accusing a person of having committed an infamous crime — is one of the most common bases for libel suits. It includes reporting a person was charged with, arrested for or convicted of a serious criminal act.[39] However, in 1999, the Court of Appeals said that not every felony constitutes an "infamous crime" sufficient to meet the libel per se definition. An unsuccessful candidate for the Black Mountain Board of Aldermen sued a citizen who publicly accused the candidate of not living in the town when he filed to run for office. Because it is a Class I felony "to swear falsely with respect to any matter pertaining to any primary or election,"[40] the plaintiff contended the accusation constituted libel per se. Noting that throwing rocks at railroad cars, offering prizes of more than $50 for beach bingo games and taking polluted shellfish at night are also Class I felonies, the appellate court disagreed. "[I]t cannot be seriously contended that this particular felony carries with it the infamy accorded to those such as murder and treason," the court said in determining that at most the accusation could be libel per quod.[41] The plaintiff could not win on a per quod claim either, though, since the court held that loss of an election does not constitute special damages.[42]

Because North Carolina, as well as other states, deemed sodomy a felony,[43] individuals falsely labeled homosexuals sometimes claimed that allegation constituted libel per se because it accused them of a crime. In a 1994 slander case, the N.C. Court of Appeals said that calling someone "gay and bisexual" did not constitute accusing a person of "'a crime or offense involving moral turpitude,'" one of the three types of slander per se.[44] Referring to the decisions of other courts in other states, the state appeals court said, "[T]he label of 'gay' or 'bisexual' does not carry with it an automatic reference to any particular sexual activity; indeed, . . . it does not necessarily connote sexual activity at all, but rather inclination or preference."[45] While this was a slander, not a libel, case, it is reasonable to assume that the Court of Appeals would have reached a similar decision in a libel per se case based on the "infamous crime" category.

The second category listed by the court — charging a person with having an infectious disease — reflects societal views of an earlier era when smallpox, diphtheria, tuberculosis and other communicable diseases were leading causes of death. Today an accusation of this sort seldom is the basis for a libel action, but journalists need to be very careful about identifying an individual as having AIDS or some other sexually transmitted disease. In a 1912 N.C. Supreme Court slander case involving the "infectious disease" category, the court ruled it was slander per se to say someone had "a loathsome venereal disease."[46]

Statements tending to harm a person's occupational or professional reputation are another common basis

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[38] *Id.* at 786.

[39] *See*, *e.g.*, Woody v. Catawba Valley Broad. Co., 272 N.C. 459, 158 S.E.2d 578 (1968); Greer v. Skyway Broad. Co., 256 N.C. 382, 124 S.E.2d 98 (1962); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962); Ramsey v. Cheek, 109 N.C. 270, 13 S.E. 775 (1891); Taylor v. Greensboro News Co., 57 N.C. App. 426, 291 S.E.2d 852 (1982); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976).

[40] N.C. GEN. STAT. §163-275 (4) (2005).

[41] Aycock v. Padgett, 131 N.C. App. 164, 167, 516 S.E.2d 907, 909-10 (1999).

[42] *Id.* at 168.

[43] N.C. GEN. STAT. § 14-177 (2011). *But see* State v. Whiteley 172 N.C. App. 772, 616 S.E.2d 576 (2005) (limiting applicability of the statute in light of Lawrence v. Texas, 539 U.S. 558 (2003)).

[44] Donovan v. Hunter, 114 N.C. App. 524, 528, 442 S.E.2d 572, 575 (1994) (quoting Williams v. Freight Lines, 10 N.C. App. 384, 388, 179 S.E.2d 319, 322 (1971)). The other two types of slander per se are impeaching a person in his or her trade or profession and imputing to a person a loathsome disease. *Id*.

[45] 114 N.C. App. at 531, 442 S.E.2d at 577.

[46] Hamilton v. Nance, 159 N.C. 56, 74 S.E. 627 (1912).

for libel suits. Allegations of incompetence, unethical behavior, lack of integrity or occupational crime are all actionable. In the 2002 campaign ad case mentioned above in the section on identification, the N.C. Court of Appeals found the following content "directly maligned plaintiffs in their profession by accusing them of unscrupulous and avaricious billing practices"[47]:

I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.
....
Dan Boyce-his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.
The Judge said it shocks the conscience.
Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.
Dan Boyce, wrong for Attorney General.[48]

In 1970 a court ruled it was libelous for Sports Illustrated to report that Neil Johnston, an assistant basketball coach at Wake Forest University and former NBA player, "was at one time during his career as a professional player destroyed psychologically, practically run out of organized basketball, and playing so ludicrously that the players on the bench were laughing." According to the court, "It seems that this would tend to subject him to ridicule, contempt and/or disgrace; and, since the plaintiff is presently an assistant basketball coach at Wake Forest University, this might also tend to impeach him in his trade or profession."[49] In 2005, a dispute over a billboard resulted in the N.C. Court of Appeals upholding a jury's decision that calling one of the plaintiffs a "lease jumper," "bitch" and "billboard whore" and accusing her of "unprofessional, unethical and despicable" actions constituted libel.[50]

Even though it is difficult for a public official to win a libel suit because of the constitutional fault requirement (discussed below), accusing a government employee of corruption, dereliction of duty, incompetence or illegal conduct in the performance of his or her job can result in a libel suit. In an unusual case resulting from a "heavily edited" video of Greensboro police officers arresting a rapper at the Four Seasons Mall in 2005, the court ruled that portraying the officers as racists who illegally arrested rapper Jayceon Taylor "caused plaintiffs significant harm in their personal lives and in their careers as police officers, [and] that this harm will continue throughout the remainder of plaintiffs' careers."[51] The video was included as a bonus feature on Taylor's documentary's DVD "Stop Snitchin' Stop Lyin'," which the trial court found earned Taylor and his co-defendants in excess of $40 million. The trial court awarded each of the five police officers $1 million in compensatory damages and $2 million in punitive damages, but in 2012 the Court of Appeals remanded the case for reconsideration of the punitive damages amount.[52]

Other North Carolina cases have resulted from an editorial accusing a sheriff of having "openly lied to the public" when he denied having sex with a jail inmate's girlfriend;[53] letters to state officials and news media accusing county election officials of election fraud;[54] a report that an assistant district attorney

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[47] Boyce & Isley, PLLC v. Cooper (*Boyce I*), 153 N.C. App. 25, 32, 568 S.E.2d 893, 899 (2002). *But see* Hugh Stevens, Boyce & Isley, PLLC v. Cooper *and the Confusion of North Carolina Libel Law*, 82 N.C.L. Rev. 2017, 2026-28 (2004) (questioning the appeals court's designation of the statements as libel per se). In a subsequent review of the same case, a different panel of the Court of Appeals referenced the Stevens article, noting it too had concerns about whether the *Boyce I* panel "misapplied defamation law." Boyce & Isley, PLLC v. Cooper (*Boyce II*), 710 S.E.2d 309, 316 n.2 (N.C. Ct. App. 2011), *cert. denied,* No. 11-979, 2012 WL 425178 (U.S. May 14, 2012).

[48] 153 N.C. App. at 27, 568 S.E.2d at 897.

[49] Johnston v. Time, Inc., 321 F. Supp. 837, 849 (M.D.N.C. 1970), *aff'd in part, vacated in part*, 448 F.2d 378 (4th Cir. 1971).

[50] Beroth Oil Co. v. Whitehart, 173 N.C. App. 89, 100-01, 618 S.E.2d 739, 747 (2005), *cert. denied*, 633 S.E.2d 674 (2006). *See also* Bell v. Simmons, 247 N.C. 488, 495, 101 S.E.2d 383 (1958); Badame v. Lampke, 242 N.C. 755, 757, 89 S.E.2d 466 (1955); Lay v. Gazette Publ'g Co., 209 N.C. 134, 137, 183 S.E.2d 416 (1936).

[51] Nguyen v. Taylor, 723 S.E.2d 551, 555, 560 (N.C. Ct. App. 2012).

[52] *Id.* at 560-64.

[53] Proffitt v. Greensboro News & Record, Inc., 91 N.C. App. 218, 371 S.E.2d 292 (1988).

[54] Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962).

was fired for incompetence;[55] allegations that a deputy sheriff may have violated federal law and been involved in a conspiracy in connection with the fatal shooting of a burglary suspect;[56] and, in 1904, an article in The News & Observer charging the director of the state prison with illegally profiting from the state prison's purchase of over-priced horses and mules.[57]

The N.C. Supreme Court's fourth catchall category of libelous statements can include charging someone with immoral, bizarre or socially unacceptable behavior; saying a person is of bad character or lacks personal integrity; suggesting a person engages in deviant sexual conduct; or accusing a person of holding radical political beliefs or being associated with generally discreditable organizations, such as the Nazi Party or Ku Klux Klan. In 1969 the N.C. Court of Appeals ruled it was libelous for the Winston-Salem Journal to erroneously report that a woman's husband divorced her for adultery.[58] Three decades earlier, the N.C. Supreme Court held that an article in The State magazine asserting that a woman's home was unsanitary and her manner of living indecent because of the numerous dogs she kept could be considered defamatory.[59]

However, not every statement that upsets or embarrasses a person is defamatory. In the 1994 slander case discussed above, the Court of Appeals said, "[A]s North Carolina progresses through the mid 1990's, we are unable to rule the bare allegation that an individual is 'gay' or 'bisexual' constitutes today an accusation which, as a matter of law and absent any 'extrinsic, explanatory facts,' . . . per se holds that individual up to 'disgrace, ridicule or contempt.'"[60] Similarly, in one of the state's classic cases, decided in 1938, the N.C. Supreme Court said it was not defamatory to incorrectly identify a woman as a member of a vaudeville troupe. "To do so would in effect hold that such type of entertainment is disreputable and those connected therewith are persons of ill-repute. This would constitute an unwarranted reflection upon and condemnation of many young ladies who earn their living in this manner."[61] In a 1987 case, the Court of Appeals ruled a letter sent to the media attacking two women who had complained about working conditions at a chicken processing plant was neither libel per se nor libel per quod. The letter called the women's complaints "a bunch of hog wash" and added, "The two ladies . . . have always been out of work for numerous reasons. . . . We are not saying there is nothing wrong with these ladies, we definitely think there is."[62]

Businesses also can sue for libel. Recall that in the campaign ad case discussed above, the law firm itself was a plaintiff along with the individual attorneys.[63] Charging that a business engages in deceptive practices; has ties to organized crime; is financially unstable or insolvent; intentionally sells dangerous or shoddy products; mistreats its employees; violates labor, tax, health and safety or other laws; or is otherwise disreputable can all damage a corporate reputation. In 1990 Ellis Brokerage Co. won a libel suit against another company that had sent letters to Ellis customers accusing Ellis of sending out unauthorized price lists. The N.C. Supreme Court held that the disputed passage, in the context of the entire letter, "can only be read to mean that Ellis Brokerage Company, acting in its capacity as broker for Northern Star, did an unauthorized act." This, said the court, "impeaches Ellis Brokerage in its trade as a food broker."[64] An attack on a product, as opposed to the business producing the product, is known

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[55] Clark v. Brown, 99 N.C. App. 255, 393 S.E.2d 134, *cert. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990).

[56] Cline v. Brown, 24 N.C. App. 209, 210 S.E.2d 446 (1974), *cert. denied*, 286 N.C. 412, 211 S.E.2d 793 (1975).

[57] Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

[58] Littlejohn v. Piedmont Publ'g Co., 7 N.C. App. 1, 171 S.E.2d 227 (1969).

[59] Harrell v. Goerch, 209 N.C. 741, 184 S.E. 489 (1936).

[60] Donovan v. Hunter, 114 N.C. App. at 538, 442 S.E.2d at 580 (quoting Badame v. Lampke, 242 N.C. at 757, 89 S.E.2d at 467 (1955); West v. King's Dept. Store, Inc., 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988)).

[61] Flake v. Greensboro News Co., 212 N.C. at 789.

[62] Tyson v. L'Eggs Prods., Inc., 84 N.C. App. 1, 11-14, 351 S.E.2d 834 (1987). *See also* Robinson v. Nationwide Ins. Co., 273 N.C. 391, 159 S.E.2d 896 (1968).

[63] Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893 (2002).

[64] Ellis v. Northern Star Co., 326 N.C. 219, 224, 388 S.E.2d 127 (1990).

as product disparagement or trade libel. In a product disparagement suit, the plaintiff must prove all the usual elements of the offense, plus monetary loss resulting from the defamation.[65] Product disparagement suits against the media are rare; they usually result from battles between competitors and involve other issues, such as unfair competition and deceptive trade practices.[66]

Falsity

In 1986 the U.S. Supreme Court ruled that the First Amendment requires a libel plaintiff to prove the falsity of the defamatory statement if the statement involves a matter of public concern.[67] The case in which the Court established the falsity requirement, *Philadelphia Newspapers v. Hepps*, involved a charge that plaintiffs were linked to organized crime, but the Court did not define what constitutes "a matter of public concern," simply asserting that crime certainly qualified. In a subsequent case, the Supreme Court said that a confidential credit report did not constitute a matter of public concern.[68] Certainly most of what fills a daily newspaper or an evening news broadcast would qualify as matters of public concern, but the Court's failure to define the term raises many questions. For example, would gossip column items, especially about private individuals, qualify as "matters of public concern"? What about intimate details about prominent individuals? Or reviews of service providers on Internet sites such as Angie's List?

In one of the more thorough discussions of what constitutes a matter of public concern, the N.C. Court of Appeals in 2005 said that the determination requires examining "'the content, form, and context'" of the speech.[69] The court concluded that a radio broadcast blaming a construction company for the appearance of two sinkholes in the parking lot of a Hickory restaurant after a heavy rainfall addressed a matter of public concern. The court first cited widespread national and even international news coverage of the sinkholes. "The record reveals that, more than merely being newsworthy, the sinkholes were a matter of public study: two days after they developed, the sinkholes were discussed at the Western Piedmont Council of Government which was attended by a number of influential people, including members of North Carolina's Department of Transportation; North Carolina State University and University of North Carolina at Charlotte began teaching on the sinkhole subject; and that the Hickory Visitors Bureau received calls from as far away as Michigan asking how to find the sinkholes. Based on this record and in light of the clear safety ramifications the sinkholes posed to the community of Hickory, we find that determining the cause of the sinkholes was a matter of "'public concern.'"[70]

In most cases, whether the plaintiff must prove falsity or the defendant must prove truth is not a factor in the outcome of a libel suit. However, in those cases in which truth is hard to prove, the *Hepps* rule can be of real benefit to the press. For example, in the *Hepps* case, the Philadelphia Inquirer had relied on confidential sources for its story alleging that Hepps and his company were linked to organized crime. Proving the truth of the allegation would have required the Inquirer to reveal the identities of those sources. The Supreme Court acknowledged that sometimes plaintiffs would be unable to meet their burden of proof even though the defamatory statements were false. The Court felt, however, that to require defendants to bear the burden of proving truth would have a "chilling effect" on the discussion of matters of public concern.[71]

Even before the U.S. Supreme Court ruled that the First Amendment requires plaintiffs to prove falsity

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[65] *See* Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

[66] *See, e.g., id*.; Pinehurst, Inc. v. O'Leary Bros. Realty, Inc., 79 N.C. App. 51, 338 S.E.2d 918, *cert. denied*, 316 N.C. 378, 342 S.E.2d 896 (1986).

[67] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).

[68] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[69] Neill Grading & Const. Co., Inc. v. Lingafelt, 168 N.C. App. 36, 45, 606 S.E.2d 734, 740 (2005) (quoting Corum v. Univ. of North Carolina, 330 N.C. 761, 775, 413 S.E.2d 276, 285 *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied*, 506 U.S. 985 (1992)).

[70] 168 N.C. App. at 45-46.

[71] 475 U.S. at 776-77.

in most libel suits, the N.C. Court of Appeals had placed that burden of proof on those bringing libel actions. In a 1979 libel case brought by a private person plaintiff, the court said, "If the plaintiff's case is to succeed, he must show that the factual statements concerning him and his actions were false."[72] In 1983 the Court of Appeals again ruled a private plaintiff must prove falsity in his libel action against a newspaper. The court did not explicitly restrict the requirement to reports involving matters of public concern although both cases involved articles that would fall into that category.[73] After the U.S. Supreme Court decision in *Hepps*, North Carolina courts have continued to declare that "a plaintiff must allege and prove that a defendant made false, defamatory statements of or concerning the plaintiff."[74]

Injury

As discussed above, in some types of libel suits — those involving libel per quod and trade libel — plaintiffs must prove monetary loss in order to win. In most libel suits, however, injury need not be tangible. The more common types of harm libel plaintiffs allege include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[75] The U.S. Supreme Court has said a libel plaintiff must prove injury to win, unless he or she is able to prove actual malice, which is discussed below.

Generally, the injury requirement is not a key issue in libel suits. In most cases, it is not difficult for a plaintiff to convince a court that a news article accusing him of committing a crime, taking a bribe or engaging in unethical business practices hurt his reputation. However, it is important to remember that mere hurt feelings or embarrassment is not enough for a libel suit to succeed. As the N.C. Supreme Court said in 1938, "The law seeks to compensate for damage to the person, the reputation or the property of an individual. It cannot and does not undertake to compensate for mere hurt or embarrassment alone."[76] The type and degree of harm the plaintiff suffered are related to the damages ultimately awarded the successful libel plaintiff. Damages are discussed briefly below.

Fault

Fault is the most complicated of the elements a libel plaintiff must prove. Only an overview of the fault requirement can be provided here.

Until 1964, when the U.S. Supreme Court issued its landmark opinion in *New York Times v. Sullivan*,[77] libel law in most states was based on the concept of strict liability. Strict liability meant that if a newspaper or broadcast station disseminated a defamatory story, it was responsible for the damage done to the subject's reputation regardless of whether the journalists involved were careful and responsible in their reporting. Application of this strict liability standard can be seen in early North Carolina cases in which the courts held that when a statement was libelous per se, both malice and falsity were presumed.[78]

In *Sullivan*, the Supreme Court said the rule of strict liability offended the First Amendment, at least when the libel plaintiffs were public officials. The Court said a public official couldn't win a libel action unless he or she demonstrated "with convincing clarity" that the defamatory statement was published with knowledge it was false or with reckless disregard for the truth, a fault level the Court

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[72] Brown v. Boney, 41 N.C. App. 636, 648, 255 S.E.2d 784, *cert. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979).

[73] Cochran v. Piedmont Publ'g Co., 62 N.C. App. 548, 549, 302 S.E.2d 903, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983), *cert. denied*, 469 U.S. 816 (1984).

[74] *See, e.g.*, Boyce & Isley, PLLC v. Cooper, 710 S.E.2d 309, 317 (N.C. Ct. App. 2011); Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 356, 595 S.E.2d 778, 783 (2004); Tyson v. L'Eggs Products, Inc., 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987).

[75] Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

[76] Flake v. Greensboro News Co., 212 N.C. at 788.

[77] 376 U.S. 254 (1964).

[78] *See, e.g.*, Ramsey v. Cheek, 109 N.C. 270, 273, 13 S.E. 775 (1891).

termed "actual malice."[79] A few years later, the Court extended the actual malice requirement to public figures[80] and candidates for elected office.[81] In 1974 the Court said that private person plaintiffs also would have to prove at least some degree of fault to win their libel suits.[82] In North Carolina, the level of fault that must be proved by private person plaintiffs — those who are neither public officials nor public figures — is negligence. However, even private person plaintiffs must prove actual malice to collect punitive damages if they were defamed in a report that involved a matter of public interest.[83] Because of the fault requirement, it is especially difficult for a public official, candidate for elected office or public figure to win a libel suit.

Who is a public official?

All elected government officials are subject to the actual malice requirement, but not every non-elected government employee qualifies as a public official. The U.S. Supreme Court said the public official category includes "at the very least . . . 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."[84] Clearly the definition applies to high-level appointed officials, such as heads of governmental agencies and departments, public school superintendents, the president of the University of North Carolina and the various campus chancellors. Thus, the N.C. Court of Appeals had no trouble deciding that Knightdale's town manager and the deputy county manager/ finance officer of Moore County were public officials in their defamation suits.[85] It is also clear that the definition does not include relatively low-level employees with no policy-making responsibility, such as receptionists, maintenance workers and highway construction workers. In between these two extremes are thousands of government workers not so easily categorized.

In deciding whether an individual is a public official, courts ask if the person has the power to set public policy or make governmental decisions; has control over the expenditure of public funds; is directly responsible for public health, safety and welfare; exercises power or control over citizens; or has high public visibility. Thus most law enforcement officials are considered public officials because of their responsibility for public safety and the power they can exert over an individual's liberty and property. In 1974 the N.C. Court of Appeals, in holding that a deputy sheriff qualified as a public official, noted that state law specifically provides for the appointment of deputies. "The deputy is the representative of the sheriff in his official capacity. He is a public officer whose authority and duties are regulated and prescribed by law. . . . [T]hough the office of deputy sheriff may be a comparatively low ranking one in the hierarchy of government, nevertheless, if the deputy's office be abused, it has great potential for social harm and thus invites independent interest in the qualifications and performance of the person or persons who hold the position."[86] Relying on that decision, the N.C. Court of Appeals also ruled a uniformed taxicab inspector for the City of Charlotte[87] and an IRS agent[88] were public officials. In the latter case, the court said, "Insofar as the average taxpayer is concerned, the Internal Revenue Service agent is the federal government for tax assessment purposes. No constitutional difference exists between 'police work' entailed in the assessment and collection of taxes and that involved in the

[79] 376 U.S. at 279-80, 285-86.

[80] Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

[81] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

[82] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

[83] *Id*. at 349; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

[84] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[85] Griffin v. Holden, 180 N.C. App. 129, 636 S.E.2d 298 (2006); Varner v. Bryan, 113 N.C. App. 697, 440 S.E.2d 295 (1994).

[86] Cline v. Brown, 24 N.C. App. 209, 215, 210 S.E.2d 446 (1974), *cert. denied*, 286 N.C. 412, 211 S.E.2d 793 (1975).

[87] Dellinger v. Belk, 34 N.C. App. 488, 238 S.E.2d 788 (1977), *cert. denied*, 294 N.C. 182, 241 S.E.2d 517 (1978).

[88] Angel v. Ward, 43 N.C. App. 288, 258 S.E.2d 788 (1979).

enforcement of other governmental laws."[89]

In *New York Times v. Sullivan,* the Supreme Court said public officials must prove actual malice when the defamatory statements relate to their "official conduct." Courts have interpreted the "official conduct" requirement very liberally and have found that "anything which might touch on an official's fitness for office" is subject to the actual malice rule.[90] Accusations of "dishonesty, malfeasance, or improper motivation"[91] and criminal activity[92] have been found to relate to a person's fitness for office and thus meet the official conduct requirement.

Who is a public figure?

The Supreme Court has identified two types of public figures, both of whom must prove actual malice in libel suits. The **all-purpose public figure** is an individual with widespread fame or notoriety or special prominence in society, one who has "persuasive power and influence" or occupies a position of continuing news value.[93] One court has described the all-purpose public figure as "a well-known 'celebrity,' his name a 'household word.'"[94] Clint Eastwood, Johnny Carson, Carol Burnett, William F. Buckley Jr., Wayne Newton and Ralph Nader have been found to be all-purpose public figures. Occasionally courts have found corporations to be all-purpose public figures, but only when they meet the requirement of special prominence or persuasive power and influence.[95]

An individual can be deemed an all-purpose public figure on a local level, although this is rare. For example, the Kansas Supreme Court ruled that a prominent attorney was a local all-purpose public figure. The man had practiced law in the county for 32 years, including eight as county attorney, had served as special counsel to the county commissioners during a controversial construction project and, according to the court, "was a prominent participant in numerous social activities and served as an officer and representative for many professional, fraternal and social activities."[96]

The second category, known as **limited-purpose or vortex public figures**, is much more common in libel suits. The U.S. Supreme Court has defined limited-purpose public figures as people who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[97] Three critical elements in this definition must be present for an individual to be classified a limited-purpose public figure. First, the allegedly defamatory statements must relate to a public controversy. The D.C. Court of Appeals has defined a public controversy as a "real dispute" over an issue affecting a segment of the general public, the resolution of which will have "foreseeable and substantial ramifications for nonparticipants."[98]

Second, the libel plaintiff must have voluntarily injected himself or herself into the debate over the public controversy that was the subject of the defamatory report. Although the Supreme Court said it might be possible for a person to become an involuntary public figure,[99] the Court has never found anyone to fit that category. In a few cases, lower courts have found plaintiffs to be involuntary public figures, but this has been very rare, and journalists should not expect the involuntary public figure category to provide them with the protection of the constitutional actual malice rule.

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[89] 43 N.C. App. at 292-93.

[90] Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

[91] *Id.*

[92] *See* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[93] Gertz v. Robert Welch, Inc., 418 U.S. at 345, 351-52.

[94] Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1294 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).

[95] *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977).

[96] Steere v. Cupp, 602 P.2d 1267, 1273 (Kan. 1979).

[97] *Gertz* , 418 U.S. at 345.

[98] *Waldbaum*, 627 F.2d at 1296-97.

[99] *Gertz*, 418 U.S. at 345.

Third, the plaintiff must have entered into the public controversy in an effort to affect the outcome or influence public opinion. The plaintiff's involvement in the public controversy must precede the defamatory publication or broadcast. A news medium cannot defame an individual and then when that individual steps forth to defend himself — perhaps through a news conference or interviews with journalists — contend that the plaintiff has voluntarily sought to affect the resolution of the controversy.[100]

Determining whether an individual qualifies as a limited-purpose public figure is not easy, and courts frequently disagree. Just because a person has become the subject of news coverage or has a well-known name does not mean that person will be considered a public figure. Perhaps the best example of this is a 1976 case involving the ex-wife of Russell Firestone, heir to the Firestone tire fortune. Mary Alice Firestone sued Time after the magazine incorrectly reported that Russell was granted a divorce on the grounds of "extreme cruelty and adultery." Mrs. Firestone was a prominent member of Palm Beach society, whose divorce, according to the Florida Supreme Court, was a "veritable *cause celebre* in social circles across the country."[101] Nonetheless, the U.S. Supreme Court said Mrs. Firestone was not a public figure. First, her divorce case was not a public controversy but a private matter. Second, Mrs. Firestone's involvement was not deemed voluntary because she had no choice but to go to court to dissolve her marriage, and third, Mrs. Firestone's press conferences were held to "satisfy inquiring reporters" and "should have had no effect upon the merits of the legal dispute . . . or the outcome of (the divorce) trial."[102]

In contrast, Richard Jewell, the security guard who went from hero to suspect in the 1996 bombing at Centennial Olympic Park in Atlanta, was found to be a limited-purpose public figure because of his many interviews and public appearances immediately after the bombing. Jewell, who was ultimately cleared of suspicion in the bombing, sued the Atlanta Journal-Constitution for its coverage of him. In reaching its public figure decision, the Georgia Court of Appeals noted: "While we can envision situations in which news coverage alone would be insufficient to convert Jewell from private citizen to public figure, we agree with the trial court that Jewell's actions show that he voluntarily assumed a position of influence in the controversy. . . . The fact is that Jewell was prominent enough to require the assistance of a media handler to field press inquiries and coordinate his media appearances."[103]

A person does not become a limited-purpose public figure merely by being arrested for, charged with or even convicted of a crime. While crime and the functioning of the law enforcement and judicial systems may qualify as public controversies, criminal suspects typically do not voluntarily seek public attention. The Supreme Court has expressly rejected the "contention . . . that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction."[104]

Heads of businesses or corporations may or may not be limited-purpose public figures, depending on the subject of the defamatory report and the business leader's involvement in that subject. For example, in 1987 the D.C. Court of Appeals ruled that William Tavoulareas was a limited-purpose public figure for purposes of his libel suit against the Washington Post not because he was the president of Mobil Oil but because he had voluntarily injected himself into the debate over regulation and reform of the U.S. oil industry through his own controversial speeches and Mobil "advertorials" in numerous publications. Thus when Tavoulareas sued the Post because of a story alleging he set up his son Peter as a partner in a shipping company that did millions of dollars of business with Mobil, the court ruled he had to prove

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[100] *See* Hutchinson v. Proxmire, 443 U.S. 111, 134-36 (1979).

[101] Firestone v. Time, Inc., 271 So.2d 745, 751 (Fla. 1972).

[102] Time, Inc., v. Firestone, 424 U.S. 448, 454-55 n. 3 (1976).

[103] Atlanta Journal-Constitution v. Jewell, 251 Ga. App. 808, 818, 555 S.E.2d 175, 184 (2001), *cert. denied*, 537 U.S. 814 (2002).

[104] Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 168 (1979). *See also* McKinney v. Avery Journal, 99 N.C. App. 532, 393 S.E.2d 295, *cert. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990).

actual malice.[105] In contrast, the Minnesota Supreme Court ruled that entrepreneur Thomas Jadwin did not become a public figure simply by heavily advertising and promoting a double tax-exempt, no-load bond mutual fund he developed because soliciting media attention for such an offering was a normal business practice.[106]

Nor is a corporation or business, even one that advertises heavily, automatically a public figure. For example, in 1990 a federal appeals court ruled that neither Blue Cross/Blue Shield nor its competitor U.S. Healthcare, the largest HMO in the Philadelphia area, was a limited public figure. In approximately a six-month period, Blue Cross/Blue Shield had spent $2.175 million on direct mail, radio, television and print ads, while U.S. Healthcare had spent $1.255 million on its ad campaign in southeastern Pennsylvania. It was those comparative ad campaigns that resulted in the two "giants of the health care industry in the Delaware Valley" suing one another for libel and other things. Nonetheless, the court ruled the two companies were not public figures because they "have acted primarily to generate revenue by influencing customers, not to resolve 'the issues involved.'"[107] Similarly, the Oregon Supreme Court ruled that the Bank of Oregon was not a public figure in its lawsuit against the Willamette Week newspaper. "Merely opening one's doors to the public, offering stock for public sale, advertising, etc., even if considered a thrusting of one's self into matters of public interest, is not sufficient to establish a public figure."[108] On the other hand, courts have said that corporations that engage in unusual or unconventional advertising,[109] are heavily regulated by the government[110] and/or enjoy a high level of public prominence can be public figures.[111]

In only a few North Carolina cases have courts found libel plaintiffs to be public figures. In one case, a physician who performed in vitro fertilizations and a fertility clinic were considered limited-purpose public figures in a libel suit that resulted from a newspaper article about infertility treatments and the medical training needed to perform such procedures. The plaintiffs did not sue The Charlotte Observer, which published the story, but instead sued several infertility specialists who were quoted in the article regarding the plaintiff-physician's training and expertise as an infertility specialist.[112] A lawyer who was actively seeking appointment as the U.S. attorney for the Middle District of North Carolina was labeled a public figure without any discussion in a case resulting from letters written to President Ronald Reagan opposing the appointment.[113] In 1980 John J. Ryan, the former vice president and general manager for North Carolina for Southern Bell Telephone Co., was deemed a public figure when he sued the author and publisher of a book that accused him of extorting money from Southern Bell executives for political campaign contributions and filing "false vouchers."[114] And in a 1976 case, a man who led an effort to change certain Interstate Commerce Commission rules conceded he was a public figure for purposes of his libel suit against a truckers magazine that accused him of diverting legal defense fund donations to his own personal use.[115]

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[105] Tavoulareas v. Piro, 817 F.2d 762, 773 (D.C. Cir.), *cert denied,* 484 U.S. 870 (1987). *See also* Silvester v. ABC, 839 F.2d 1491 (11th Cir. 1988).

[106] Jadwin v. Minneapolis Star, 367 N.W.2d 476, 486 (Minn. 1985).

[107] U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 939 (3d Cir. 1990).

[108] Bank of Oregon v. Indep. News, 693 P.2d 35, 42, *reh. denied*, 696 P.2d 1095 (Ore.), *cert. denied*, 474 U.S. 826 (1985).

[109] *See, e.g.*, Steaks Unlimited v. Deaner, 623 F.2d 264 (3d Cir. 1980).

[110] *See, e.g.*, Harris Nursing Home, Inc. v. Narragansett Television, Inc., 24 Media L. Rep. (BNA) 1671 (R.I. 1995); Beech Aircraft v. National Aviation Underwriters, 11 Media L. Rep. (BNA) 1401 (D. Kan. 1984).

[111] *See, e.g.*, Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 1329 (5th Cir. 1993).

[112] Gaunt v. Pittaway, 135 N.C.App. 442, 520 S.E.2d 603 (N.C. App. 1999). Despite the plaintiffs' objections to being deemed public figures, the N.C. Court of Appeals did not discuss that issue because plaintiffs committed a procedural error.

[113] Smith v. McDonald, 713 F. Supp. 871 (M.D.N.C. 1988), *rev'd* 895 F.2d 147 (4th Cir. 1990), *cert. denied*, 498 U.S. 814 (1990). The reversal of the trial court's decision had nothing to do with Smith's status as a public figure but was because McDonald's letters to the president were absolutely privileged.

[114] Ryan v. Brooks, 634 F.2d 726, 728 n.2 (4th Cir. 1980).

[115] Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

Candidates for public office. The U.S. Supreme Court has made it clear that candidates for elective office are considered public figures. Although the Court did not clarify whether candidates are all-purpose or limited-purpose public figures, the Court said that statements about virtually all aspects of a candidate's life would be subject to the actual malice rule. In a case brought by an unsuccessful candidate for U.S. Senate against a columnist who called him a former "small-time bootlegger," the Court said that a political candidate "put[s] before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary. . . . Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks."[116]

Passage of time. An issue that occasionally arises in libel suits is whether a public figure retains that status over time, even if he or she has returned to relative anonymity.[117] Most courts that have considered the question have indicated that once a person becomes a public figure for a certain issue, he or she retains public status for discussions of that issue. For example, the Fourth Circuit U.S. Court of Appeals reached just such a conclusion in reviewing the Neil Johnston case, discussed above. The trial court had held that Johnston, who played in the NBA in the 1950s, had lost his public figure status by 1968, when Sports Illustrated ran the allegedly libelous article. The appellate court disagreed. "[M]ere passage of time will not necessarily insulate from the application of (the actual malice requirement) publications relating to the past public conduct of a then 'public figure'. No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."[118]

What is actual malice?

To win a libel suit, a public official or public figure must prove actual malice, *i.e.*, that the libelous material was published or broadcast with knowledge of its falsity or reckless disregard for the truth. Knowledge of falsity consists of purposely and knowingly publishing lies. This type of actual malice is seldom at issue in libel suits against the media.

In a well-publicized 1991 case, the U.S. Supreme Court held that altering quotes does not necessarily constitute knowing falsification. Psychoanalyst Jeffrey Masson sued The New Yorker magazine, author Janet Malcolm and book publisher Alfred A. Knopf, charging Malcolm attributed fabricated quotations to him, thereby injuring his reputation. Masson contended that altering a direct quote, except to correct grammar or syntax, constituted knowing falsification. The Court, however, rejected that stringent interpretation, taking note of the difficulties journalists encounter "in the task of attempting a reconstruction of the speaker's statement." The Court concluded "that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement." In other words, if changing the speaker's words gives a different meaning to his or her statements, knowingly altering direct quotations can constitute actual malice.[119]

In 2007, the N.C. Court of Appeals relied on the Masson case to rule in favor of the Durham Herald-Sun

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[116] Monitor Patriot Co. v. Roy, 401 U.S. 265, 274-75 (1971). *See also* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989); Boyce & Isley, PLLC v. Cooper, 710 S.E.2d 309, 318 (N.C. Ct. App. 2011).

[117] *See* Wolston v. Reader's Digest Ass'n., 443 U.S. 157, 166 n.7 (1979).

[118] Time, Inc. v. Johnston, 448 F.2d at 381. *See also* Street v. NBC, 645 F.2d 1227 (6th Cir.), *cert. granted*, 454 U.S. 815, *cert. dismissed*, 454 U.S. 1095 (1981).

[119] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 514-17 (1991).

in a libel suit brought by former Durham County Commissioner Joe Bowser.[120] The article, based on a letter written to the County Commission, stated, "In the letter, Assistant Health Director Gayle Harris says Bowser attempted to pressure her to help his friend Lois Murphy, a disgruntled county employee who has alleged mistreatment by County Manager Mike Ruffin."[121] Bowser contended the paper was guilty of actual malice because the phrase "attempted to pressure" was not actually in Harris's letter. Citing *Masson*, the N.C. Court of Appeals said the phrase "was a rational interpretation of the allegations contained in the letter." Furthermore, the court noted that the phrase was not within quotation marks. "Thus, there was no attempt on the part of defendant to indicate that Harris actually made this statement."[122]

Reckless disregard for the truth is more frequently at issue in libel suits than knowing falsification and more difficult to define. The U.S. Supreme Court has provided a number of definitions:

1) A high degree of awareness of probable falsity.[123]

2) Serious doubts as to the truth of the publication.[124]

3) Purposeful avoidance of the truth.[125]

It is important to note that carelessness or failure to follow standard journalistic procedures is not enough to constitute actual malice, nor is evidence of ill will, bad motives or intent to harm. As the N.C. Court of Appeals has said, "[P]ersonal hostility is not evidence of actual malice."[126] The U.S. Supreme Court emphasized that even evidence of "'extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers'" was insufficient to prove actual malice.[127] However, evidence regarding motive or care taken in the preparation of a story can be used to bolster other proof of actual malice, the Court said.[128]

In a recent case stemming from two blog posts, the N.C. Court of Appeals held that there was insufficient evidence of actual malice regarding the first post even though "[u]ndoubtedly, defendant could have conducted some research before making his false assertions" and "perhaps . . . should have known" that statements were untrue. At most, the court said, "defendant case may have acted negligently" in accusing a sitting judge of violating the Code of Judicial Conduct by endorsing another candidate running for office. [129] Edward Lee Rapp, the volunteer "media strategist" for Bettie Fennel, a candidate for the N.C. State Senate, posted two blog entries on Facebook and Carolina Talk Network. The first, posted April 9, 2010, was titled "Dirty Politics by the good ol boys" and accused Ola M. Lewis, senior resident judge of District 13B, of an ethics code violation for endorsing Fennell's opponent. That same day Lewis's attorney emailed Rapp to tell him that Lewis was herself a candidate for reelection and, therefore, was permitted by the Code of Judicial Conduct to endorse any other candidate for office.[130] On April 12, 2010, Rapp posted a second blog entry in which he said he "was wrong" to say Judge Lewis was guilty of violating the Code. However, he went on to say:

This can be done only by proper disciplinary proceedings and I have neither right nor authority

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[120] Bowser v. Durham Herald Co., 181 N.C. App. 339, 638 S.E.2d 614 (2007).

[121] 181 N.C. at 340.

[122] *Id*. at 342.

[123] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[124] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

[125] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 692 (1989).

[126] Griffin v. Holden, 180 N.C. App. 129, 137, 636 S.E.2d 298, 305 (2006). *See also* Varner v. Bryan, 113 N.C. App. 697, 704, 440 S.E.2d 295, 300 (1994).

[127] *Harte-Hanks Commc'ns*, 491 U.S. at 666 (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967)).

[128] *Id*. at 668.

[129] Lewis v. Rapp, No. COA11–1188, 2012 WL 1512110, at *4 (N.C. Ct. App May 1, 2012).

[130] *Id.* at *1.

to make that judgment and will let the proper authorities make that determination, if and when, it is brought before them. I have read, top to bottom, The North Carolina Code of Judicial Conduct and have voiced my opinion based on the pertinent articles provided in *appendix 1* at the end of this blog. I also solicited the opinion of a friend of mine who happens to be an attorney. We both agreed that there is probable cause for such action. Read the appendix and make up your own mind.[131]

Rapp included portions of the Code in this blog, but *not* the portion allowing a judicial candidate to endorse another candidate.[132] Saying that "[d]efendant could no longer claim ignorance on 12 April after he had been informed that plaintiff was, in fact, running for reelection," the Court of Appeals ruled that there was sufficient evidence "that he acted, at the very least, with reckless disregard, i.e., he entertained serious doubts as to the truth of his publication," to send the libel claim regarding the second blog post to trial.[133]

In determining whether actual malice is present, courts generally consider two types of evidence: intrinsic or direct state-of-mind evidence, aimed at determining what the journalist thought and believed at the time the story was being produced; and extrinsic, indirect or circumstantial evidence, which relates to the circumstances surrounding production and publication of the libelous material. Because actual malice ultimately depends on the journalist's state of mind, the U.S. Supreme Court has said libel plaintiffs may probe the minds of reporters and editors, questioning them about their thought processes as they worked on stories and about their conversations with editors, co-workers and sources.[134] In the case discussed above, the appeals court relied on the defendant's own testimony to conclude that the evidence was insufficient to prove that the blogger knew his first post was false or had serious doubts about its truth.[135] Reporters can be forced to testify about their evaluations of the reliability of sources or information and why they did or didn't use certain sources or information. Editors and co-workers can be called to give evidence about their conversations with the reporter who wrote the allegedly libelous story. Notes, drafts, tape recordings and outtakes can be used as evidence of what journalists thought and believed as they produced stories. Journalists must be careful about what they say and do in the course of researching and writing stories. Publicly expressing doubts about the veracity of a source or piece of information and then using that source or information in the story without further verification can be dangerous. Boasting that you're "going to get" someone can come back to haunt you at a libel trial. Information in notes, drafts, tapes or outtakes that tends to contradict the libelous accusations, but which you did not include in the story, can become evidence of knowing or reckless falsification.

Typically, direct state-of-mind evidence will be supplemented with indirect evidence. "Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence," the U.S. Supreme Court said.[136] The circumstantial factors most commonly used to prove actual malice are 1) the sources used or not used in the compilation of the story; 2) the nature of the story itself — feature or breaking news — especially whether the reporter was working under deadline pressure; and 3) the inherent probability or believability of the defamatory charges themselves.

Using reliable sources is one of the best defenses a journalist can raise to charges of actual malice. For example, in the *Ryan* case discussed above, the court noted that author John Brooks "relied on two secondary sources which he had used in the past and which have an excellent reputation. He had no reason to doubt the accuracy of their accounts. . . . The reliability of the third source . . . is more

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[131] *Id.*

[132] *Id.* at *2.

[133] Id. at *6.

[134] Herbert v. Lando, 441 U.S. 153 (1979).

[135] *Lewis*, 2012 WL 1512110, at *3-4.

[136] *Harte-Hanks Commc'ns*, 491 U.S. at 668.

questionable, but Brooks used nothing from it that was not also found in his other sources. . . . Clearly it would have been better journalistic practice to have verified the accuracy of these secondary sources. . . . But we cannot say that the failure to do so amounted to more than mere negligence."[137]

A 1989 U.S. Supreme Court case demonstrated that using an unreliable source while ignoring other obvious sources can be evidence of reckless disregard for the truth. An unsuccessful candidate for municipal judge, Daniel Connaughton, sued the Hamilton (Ohio) Journal-News over a front-page story accusing him of using "dirty tricks" in his campaign. The story was based on the accusations of a woman with a criminal record and a history of mental instability, who accused Connaughton of offering her and her sister jobs and a Florida vacation "in appreciation" for their help in discrediting the incumbent judge. Not only was the source questionable, but the paper also failed to verify the charges with the sister or even listen to tapes of conversations between Connaughton and the sisters, which Connaughton had provided the newspaper staff. Describing as "utterly bewildering" the paper's failure to interview the sister, an obvious source to confirm or deny the allegations, the Court ruled the paper's staff made a "deliberate decision not to acquire knowledge" that might have revealed the falsity of the charges and, therefore, was guilty of purposely avoiding the truth.[138]

In determining what constitutes reckless behavior, courts have also recognized the nature of the news business and the deadlines under which journalists often work. For example, in a pair of cases decided together in 1967, the Supreme Court recognized that an Associated Press story about the integration of Ole Miss "was news which required immediate dissemination." In contrast, the Court said, a Saturday Evening Post story alleging that a college athletic director and a coach had conspired to fix a football game about a month prior to the publication "was in no sense 'hot news.'" The magazine had time to check the allegations of its questionable source.[139]

In those cases, the Court also considered the inherent believability of the defamatory allegations. The AP story had accused retired Maj. Gen. Edwin Walker of taking command of a violent crowd and leading a charge against federal marshals at the University of Mississippi. According to the Court, the AP reporter's dispatches, "with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy." The Court then quoted Walker's public statements, in which he opposed integration and urged defiance of court orders. In contrast, the Court noted The Saturday Evening Post staff failed to evaluate the believability of its game-fixing allegations by screening game films, determining whether game plans had been adjusted or consulting football experts.[140]

What is negligence and who must prove it?

If a libel plaintiff is not a public official, a candidate for public office or a public figure, he or she is considered a private person for purposes of a libel suit. The U.S. Supreme Court has left it up to the states to determine what level of fault private person plaintiffs must prove, so long as they do not allow liability without proof of fault. In North Carolina private person plaintiffs must prove negligence, at least when the subject of the defamatory report is a matter of public concern.[141]

Generally, negligence means a failure to exercise ordinary or reasonable care. In deciding whether negligence occurred, some courts rely on professional standards, seeking to determine if defendants followed accepted journalistic practices in their investigation and verification of the information and

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[137] Ryan v. Brooks, 634 F.2d at 732-33.

[138] *Harte-Hanks Commc'ns*, 491 U.S. at 682, 692.

[139] Curtis Publ'g Co. v. Butts, 388 U.S. at 157-58.

[140] *Id*. at 157-59.

[141] Neill Grading & Const. Co., Inc. v. Lingafelt, 168 N.C. App. 36, 47, 606 S.E.2d 734, 741 (2005). *See also* McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295, *cert. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990); Walters v. Sanford Herald, 31 N.C. App. 233, 228 S.E.2d 766 (1976).

sometimes allowing expert testimony on industry standards and procedures. Other courts use a "reasonable person" standard, which requires the jury to decide how a reasonably prudent person would have acted under similar circumstances but does not focus on professional norms. The North Carolina appellate courts, while holding in several cases that negligence is the applicable fault standard for private individuals, have not defined negligence, nor have they clearly indicated whether negligence is to be determined on the basis of professional norms or by applying a reasonable person standard. In 1982, however, a federal district court in North Carolina used a professional standards approach, holding that "normal publishing procedures" do not require reporters to investigate whether someone else might have the same name as a person arrested and charged with a crime.[142]

Generally, in determining whether journalists are guilty of negligence, courts consider the same factors they use in actual malice analysis: the sources used or not used, the existence of deadline pressure and the inherent probability of the information itself. A study of libel cases decided between 1974 and 1984 showed negligence is likely to be found when "there is a discrepancy between what a reporter says he was told by a source and what the source said he told the reporter," when a journalist makes little or no effort to contact the subject of the defamatory charges, when a story is based on only one source or when information is not verified through official or reliable sources.[143] In other words, juries appear to place a great deal of emphasis on the use of proper sources, on accuracy in quoting or paraphrasing sources and on giving the person being attacked a chance to rebut the accusations. For example, in one of the few reported North Carolina cases in which negligence was discussed, the Court of Appeals said it was not negligent for a journalist to rely on the sheriff for "information regarding plaintiff's being listed on Interpol or as to the status of warrants sworn out against plaintiff. In fact, consulting a law enforcement agency may have been the only avenue for obtaining this information."[144] In an earlier case, the Court of Appeals said failure to run a retraction is not proof of negligence. "[T]he fault required . . . relates to some act or omission of the publisher at the time of publication. An allegation or showing of a failure to retract has no probative value or effect upon what a publisher did or failed to do at the time of publication."[145]

The wire service defense. Normally it is not negligent for a news medium to use wire service stories without checking their accuracy. Courts have recognized that the major news services have reputations for reliability and that it would be impossible for newspapers and broadcasters to verify all of the wire service stories they run. However, it is possible that news media could be found guilty of negligence, or even actual malice, if they published wire service stories containing obvious errors or that were "so inherently improbable or inconsistent that the defendants had, or should have had, some reason to doubt their accuracy."[146] In 1990 the N.C. Court of Appeals accepted the wire service defense in a libel suit against the Avery Journal and its editor. Joyce McKinney sued over an article that recapped the bizarre story of her allegedly kidnapping and raping a Mormon missionary in London. The editor "relied on reputable wire services and daily newspapers" in recounting the McKinney story, the court noted. "There was nothing inconsistent or improbable in the articles upon which (the editor) relied which should have prompted her to investigate the reliability of the stories. . . . The sources relied upon . . . are known for their accuracy and are regularly relied upon by local newspapers without independent verification."[147]

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[142] Nesbitt v. Multimedia, Inc., 9 Media L. Rep. (BNA) 1473, 1475-76 (W.D.N.C. 1982).

[143] W. Wat Hopkins, *Negligence Ten Years after* Gertz v. Welch, 93 JOURNALISM MONOGRAPHS 19 (Aug. 1985).

[144] McKinney v. Avery Journal, Inc., 99 N.C. App. 532, 532-33, 393 S.E.2d 295, *cert. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990).

[145] Walters v. Sanford Herald, 31 N.C. App. 233, 236, 228 S.E.2d 766 (1976).

[146] Appleby v. Daily Hampshire Gazette, 478 N.E.2d 721, 726 (Mass. 1985).

[147] *McKinney*, 99 N.C. App. at 532.

What defenses are available to journalists?

In addition to attempting to show that some vital element — usually fault — is absent from the plaintiff's case, defendants in libel actions will often turn to legal defenses to prevent plaintiffs from winning. A defense is simply a legally acceptable justification for publishing defamatory material.

The truth defense

Although the U.S. Supreme Court has said that in most cases libel plaintiffs must prove the falsity of defamatory statements to win, truth still is a libel defense available to journalists.[148] In other words, if a journalist can prove the truth of his or her story, the plaintiff loses. It is important to remember, though, that truth means the charges themselves are true, not merely that you accurately repeated defamatory allegations made by someone else. The defense does not require that every minor detail be correct, just that the defamatory statement is "substantially true," *i.e.*, that the "gist" or "sting" of the story is true. This was well illustrated in a 1993 North Carolina case in which security guard Janice Brewer sued the Hendersonville Times-News, a reporter and a source for saying she was not promoted to chief of security at a development because she had been convicted of "felony assault." In fact, Brewer had been convicted of misdemeanor aggravated assault. A N.C. Superior Court dismissed her complaint, saying that "the 'gist' or 'sting' of the publications at issue here would be no different than had the publications correctly characterized her assault conviction."[149]

The fair report privilege

By far the most important libel defense for journalists is the qualified or conditional privilege that protects accurate, fair, complete and non-malicious reports of official government proceedings and records. This includes accounts of legislative, judicial and quasi-judicial administrative proceedings and records at all levels of government. This qualified privilege, called the fair report privilege, is based on the premise that in a democratic society the citizens have both the right and responsibility of knowing how their government is operating and what government officials do and say. This journalistic privilege, however, is not absolute and can be lost if reports are inaccurate, unfair, incomplete or motivated by an intent to cause harm.

Extent of the privilege. Reports on the official proceedings of all legislative bodies — the U.S. Congress, N.C. General Assembly, city councils, town boards, county commissions and school boards — and their committees or subcommittees are protected against libel actions under the fair report privilege. The privilege covers meetings, public hearings, reports and other official documents, and it applies to statements made by all participants in the proceeding, including members of the public who testify or are given permission to address the legislative body. It is extremely important for journalists to recognize, however, that the privilege may not apply to comments made outside the legislative proceeding itself. For example, the privilege may not apply to an interview with a legislator after the meeting, a phone conversation in which a reporter seeks to clarify or elaborate on what occurred during a meeting or a side conversation between members of the legislative body.

Judicial proceedings and records open to the public are covered by qualified privilege. Statements made during the proceeding by all participants — the judges, attorneys, witnesses, jurors and parties — are privileged if fairly and accurately reported. Likewise, reports based on judicial records, such as warrants, indictments, judicial orders, transcripts, judgments and liens, are covered.

In 2001, the N.C. Court of Appeals recognized the privilege in a case involving a news report of arrest warrants. In *LaComb v. Jacksonville Daily News Co.*,[150] the newspaper accurately reported in its "police

[148] Lambert v. Harrell, 159 N.C. App. 466, 583 S.E.2d 428 (table), 2003 WL 21791656 (2003) (unpublished opinion).

[149] Brewer v. Dungan, 21 Media L. Rep. (BNA) 1926, 1927 (N.C. Super. 1993).

[150] 142 N.C. App. 511, 543 S.E.2d 219, *cert. denied*, 353 N.C. 727, 550 S.E.2d 778 (2001).

blotter" section that Daniel and Gail LaComb were arrested and charged with contributing to the delinquency of a minor. The LaCombs sued for libel because, as the court put it, the newspaper's punctuation and sentence structure were "grammatically lacking."[151] The arrest warrants themselves were ambiguously worded, stating that the defendants "unlawfully, willfully did knowingly . . . cause, encourage and aid [the juveniles] to commit an act, drinking beer and smoking cigarettes, and engage in a sex act." The Daily News reported, "The two were both accused of encouraging cigarette smoking; beer drinking and engaging in sex acts involving a 15-year-old boy and 16-year-old girl." The LaCombs claimed the misplaced semicolon in the news report falsely implied that they themselves were accused of engaging in sex acts with the juveniles.[152]

"Although the fair report privilege has never been explicitly defined by North Carolina case law," the Court of Appeals wrote, "the privilege nonetheless exists to protect the media from charges of defamation."[153] Quoting a federal district court case, the North Carolina court declared that the privilege covers "'reports of the arrest of persons and the charges upon which the arrests are based, as well as other matters involving violations of the law. This privilege remains intact so long as the publication is confined to a substantially accurate statement of the facts and does not comment upon or infer probable guilt of the person accused.'"[154] The court concluded, "Although the semicolon is admittedly misused in the sentence, its use does not cause the article to fail the substantial accuracy test when compared to the warrant."[155]

It is unclear whether the fair report privilege would apply to reports based on judicial documents that have been sealed or to judicial proceedings that are closed to the public, such as adoption proceedings. The appellate courts in this state have never addressed the question of whether fair and accurate articles based on non-public proceedings and documents are privileged. The general rule in other states seems to be that the non-public aspects of the judicial process are not subject to qualified privilege.[156] However, some courts disagree with that general rule. For example, a New York court ruled that a fair and accurate report of a closed juvenile proceeding was entitled to qualified privilege.[157]

The extent of the qualified privilege relative to the activities of executive branch officials is harder to pinpoint. The only North Carolina case in this area involved a news report on a quasi-judicial proceeding, which the court said was clearly privileged. Quasi-judicial refers to proceedings in which administrative officials are required to make judicial-like decisions, such as settling disputes or gathering and evaluating facts and then making decisions based on those facts.[158] In *Kinloch v. News & Observer Publishing Co*., a federal court, applying North Carolina law, held that an article based on a hearing before the Alcoholic Control Board and a report by an ABC hearing examiner was entitled to qualified privilege.[159] The North Carolina appellate courts, however, have never discussed whether qualified privilege applies to other types of executive branch proceedings and records.

Case law suggests, though, that qualified privilege in North Carolina may be even broader and more protective than in other states and may extend to reports on non-governmental matters that are of public interest and concern. In *Kinloch* the court provided a very expansive interpretation of qualified privilege: "The law of North Carolina, which controls this case, is equally clear. *Publication of matters of public interest* is conditionally privileged if fair, accurate, complete and not published for the

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[151] 142 N.C. App. at 514.

[152] *Id*. at 513-14.

[153] *Id*. at 512.

[154] *Id*. at 513 (quoting Piracci v. Hearst, 263 F. Supp. 511, 514 (D.Md. 1966), *aff'd*, 371 F.2d 1016 (4th Cir. 1967).

[155] *Id*. at 514.

[156] PROSSER & KEETON ON THE LAW OF TORTS 837 (5th ed. 1984).

[157] Gardner v. Poughkeepsie Newspapers, Inc., 68 Misc. 2d 169, 326 N.Y.S.2d 913 (1971).

[158] *See* Angel v. Ward, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979).

[159] 314 F. Supp. 602 (E.D.N.C. 1969), *aff'd*, 427 F.2d 350 (4th Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

purposes of harming the person involved, even though the information contained therein is false."[160] In *LaComb*, the N.C. Court of Appeals also referred to the privilege as applying to "media reporting on a matter of public interest, such as an arrest."[161]

Mutual interest privilege. The court in *Kinloch* relied on two early N.C. Supreme Court cases in which qualified privilege was applied to reports about religious organizations. In the first case, decided in 1905, a report of proceedings before the Board of Trustees of Trinity College, published in both a pamphlet distributed to college patrons and general circulation newspapers, was held privileged.[162] Fifty-three years later, the N.C. Supreme Court ruled that a report on conditions of a church mission in Hong Kong was privileged.[163] In both cases, neither of which involved a media defendant, the court relied not on the fair report privilege, which protects journalists when they report on government activities, but on another type of qualified privilege, known as the privilege for communications of mutual interest. The N. C. Supreme Court defined this mutual interest privilege as applying to a statement made "about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) when the statement . . . is made in protection of that interest or in performance of that duty. It must be uttered in the honest belief that it is true."[164]

In 1962 the N.C. Supreme Court again relied on the privilege available for communications of mutual interest, this time to protect letters accusing county officials of election fraud written by the chairman of the N.C. Republican Executive Committee to the governor and State Board of Elections, with copies provided to the media. The court said release of the letters to the press was protected because "every citizen of North Carolina is interested in each State-wide election being properly held in each and every precinct in the State."[165]

Based on those N.C. Supreme Court cases, a federal district court, applying North Carolina law in a 1982 case, held that a newspaper story about a crime was privileged as a communication of mutual interest. In *Nesbitt v. Multimedia*, the court said: "Criminal conduct and activities have consistently been acknowledged as matters of public interest. . . . A newspaper has a valid recognizable interest in publishing reports of criminal investigations and activities and the public has a corresponding interest in receiving this information."[166]

These cases indicate that in North Carolina journalists enjoy a very broad qualified privilege, not only when reporting on official government proceedings and records but also when covering other matters of interest and concern to the public.

Conditions of privilege. Reports of governmental proceedings or records can lose their privileged status if they are inaccurate, unfair, incomplete or motivated by malice. This does not mean, however, that privileged reports must be verbatim accounts or totally free from minor errors. In *Kinloch* the news story contained some inaccuracies, and in *LaComb* faulty punctuation and sentence structure made the report potentially misleading. Nonetheless, both courts found the news articles were substantially accurate. "The law does not require absolute accuracy in reporting. It does impose the word 'substantial' on the

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[160] *Id*. at 606-07 (emphasis added).

[161] 142 N.C. App. at 512.

[162] Gattis v. Kilgo, 140 N.C. 106, 52 S.E. 249 (1905).

[163] Herndon v. Melton, 249 N.C. 217, 105 S.E.2d 531 (1958).

[164] *Gattis*, 140 N.C. at 107. For more recent discussions of the mutual interest privilege, *see* Kinesis Advertising, Inc., v. Hill, 187 N.C. App. 1, 652 S.E.2d 284 (2007); Daimlerchrysler Corp. v. Kirkhart, 148 N.C. App. 572, 561 S.E.2d 276 (2002); Market Am., Inc. v. Christman-Orth, 135 N.C. App. 143, 520 S.E.2d 570 (1999); Phillips v. Winston-Salem/Forsyth Cnty. Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994); Clark v. Brown, 99 N.C. App. 255, 393 S.E.2d 134, *cert. denied*, 327 N.C. 4426, 395 S.E.2d 675 (1990). In those cases, the court defined a communication as privileged if it is made "(1) on subject matter (a) in which the declarant has an interest or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right, or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest." *Clark*, 99 N.C. App. at 262.

[165] Ponder v. Cobb, 257 N.C. 281, 196, 126 S.E.2d 67 (1962).

[166] 9 Media L. Rep. (BNA) 1473, 1477 (W.D.N.C. 1982).

accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings," the *Kinloch* court wrote.[167] Furthermore, the court rejected the plaintiff's arguments that the article was not fair and complete. "It covered the pertinent bases of the examiner's recommendation and plaintiff's statement to the full Board at the August 14 hearing. The transcript of the May 30 hearing consumes 121 pages and the examiner's report is a single-spaced, typewritten document consisting of 21 pages. It was never contemplated that any newspaper could publish more than the highlights of any administrative or judicial proceeding."[168]

There is some confusion in the case law over what type of malice is sufficient to overcome a journalist's claim of qualified privilege. Traditionally the type of malice required to defeat a privilege was ill will or an intent to cause harm. In *Kinloch*, for example, the court said the privilege applied because there was "no suggestion of personal ill-will."[169] In more recent cases, however, courts have tended to combine the traditional definition of malice with the *New York Times v. Sullivan* definition of actual malice. For example, in *Nesbitt* the court said there was "no showing of actual malice either in terms of the traditional ill will or spite or under the *New York Times* standard of knowledge of falsity or reckless disregard."[170]

The neutral reportage defense

A few courts in the United States have accepted a libel defense known as neutral reportage, which is a constitutional defense grounded in the First Amendment. The neutral reportage defense protects impartial news stories about accusations brought against public officials or public figures by reliable and responsible individuals or organizations, even if the charges were made outside official proceedings or records and even if the reporter writing the story doubted the accuracy of the accusations. The North Carolina courts have not discussed whether the neutral reportage defense applies in this state. However, if qualified privilege is as broad as the courts have indicated in such cases as *Kinloch* and *Nesbitt*, this new defense may be encompassed within the fair report privilege defense in North Carolina.

The U.S. Court of Appeals for the Second Circuit first recognized the neutral reportage defense in a 1977 case that resulted from a New York Times article reporting that National Audubon Society officials had accused three prominent scientists of being paid to lie about the effects of DDT on the bird population of North America. The article included the names of the scientists as well as their denials of the charges. The court ruled that the First Amendment protected "accurate and disinterested reporting" of newsworthy charges against public figures made by a "responsible, prominent organization," such as the National Audubon Society, "regardless of the reporter's private views regarding their validity. . . . What is newsworthy about such accusations is that they were made."[171]

A handful of courts have accepted the neutral reportage defense while a few have expressly rejected it. The vast majority of jurisdictions, like North Carolina, have taken no position.

The opinion defense

There are two sources of protection for statements of opinion: the First Amendment and the traditional common law defense of fair comment and criticism.

Constitutional protection. The First Amendment provides protection for two types of opinion statements. The first category consists of exaggerated, loose, figurative language, rhetorical hyperbole or parody, that is, statements no reasonable person would take as declarations of fact. This category

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[167] 314 F. Supp. at 607. The *LaComb* court quoted this passage. 543 S.E.2d at 220.

[168] 314 F. Supp. at 606.

[169] *Id.*

[170] 9 Media L. Rep. (BNA) at 1477.

[171] Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977).

includes such things as calling an employee who crosses a picket line a "traitor"[172] and saying that a developer was engaged in "blackmail" when he refused to sell a piece of property needed for a new high school until the city helped him change the zoning on another piece of property.[173]

The second type of constitutionally protected opinion consists of statements that are incapable of being proven true or false, such as imprecise evaluations like good, bad, untalented and ugly. This protection is simply the logical extension of the Court's decision in *Philadelphia Newspapers v. Hepps,* which requires plaintiffs to prove falsity in libel cases resulting from reports on matters of public concern.[174]

In 2006, the N.C. Court of Appeals affirmed the dismissal of a libel suit by Sybil Daniels, an insurance adjuster, against Metro Magazine and its editor and publisher, Bernie Reeves, saying that all of the allegedly defamatory statements were "either (1) expressions of pure opinion not capable of being proven or disproven; or (2) rhetorical hyperbole which no reasonable reader would believe."[175] In a column, Reeves recounted his experience and dissatisfaction with Daniels and the insurance company for which she worked after his car was stolen and then crashed into a tree. Among other things, Reeves wrote that Daniels spoke to him in a "quiet Gestapo voice" and a "calm, sinister voice," "lapsed into bureaucratic order-giving that would put former Soviet security police to shame" and accused him of stealing his own car.[176] The court said that "Reeves' open and obvious emotion and irrationality, combined with the absurd tone of the piece, greatly detract from his credibility and provide the reader with facts from which his or her own conclusions may be drawn. . . . A reasonable reader would therefore recognize Reeves' statements against plaintiff as an 'expression of outrage,' unsupportive of a claim of libel."[177]

The North Carolina court's reference to providing "the reader with facts" relates to a 1990 U.S. Supreme Court decision, *Milkovich v. Lorain Journal Co.,* in which the Court said that even unverifiable statements of opinion can be actionable if they 1) imply the existence of false, defamatory but undisclosed facts; 2) are based on disclosed but false or incomplete facts; or 3) are based on erroneous assessments of accurate information. Although the Court's opinion is somewhat confusing, it is clear that the Court intended to deny protection for opinions that are based on false or incomplete statements of fact or that imply the author knows — but doesn't share with the audience — detrimental facts to support his or her opinion.[178] The Court explained that the statement "John Jones is a liar" would not be protected opinion because it leaves the audience with the impression the author knows of facts to support that allegation. Because the truth or falsity of such supporting facts can be determined, the statement would not be protected as opinion. Furthermore, the Court said adding the phrase "in my opinion" or "I think" would not necessarily convert the accusation into a protected statement of opinion.[179] The best way for a journalist to ensure that he or she can claim First Amendment protection for statements of opinion is to provide the audience with accurate facts to support the opinions.[180]

The blogger case discussed above, *Lewis v. Rapp*, underscores the importance of providing readers accurate and complete facts to support statements of opinion. Defendant contended that his April 12, 2010, blog post was merely his opinion on a matter of public concern, but the court disagreed.[181] Noting that Rapp failed to include in his post the portion of the Code of Judicial Conduct that exonerated Judge

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[172] Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974).

[173] Greenbelt Co-op Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970).

[174] 475 U.S. 767 (1986).

[175] Daniels v. Metro Magazine Holding Co., L.L.C., 173 N.C. App. 533, 542, 634 S.E.2d 586, 592 (2006).

[176] 173 N.C. App. at 540-41.

[177] *Id*. at 541-42.

[178] 497 U.S. 1, 18-19 (1990).

[179] *Id.*

[180] *See, e.g*., Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724 (1st Cir. 1992).

[181] Lewis v. Rapp, No. COA11–1188, 2012 WL 1512110, at *4 (N.C. Ct. App May 1, 2012).

Lewis of wrongdoing and that he said an attorney friend of his "agreed that there was 'probable cause' for disciplinary action to be taken by the proper authorities," the court said Rapp "attempt[ed] to mislead the readers." Quoting *Milkovich*'s language regarding false or incomplete facts or erroneous assessments of true facts, the appellate court concluded that even though the blog post "was framed as an opinion," it was actually a false assertion of fact, that Judge Lewis had violated judicial ethics. [182]

Fair comment and criticism. Long before the U.S. Supreme Court decided the First Amendment protected some defamatory statements, states provided protection for opinion through a defense known as fair comment and criticism. Until *New York Times v. Sullivan,* the fair comment defense was the primary mechanism used to protect criticism of government officials and candidates for public office. Now the First Amendment is the primary source of such protection, but fair comment remains a viable defense for those who espouse opinions on subjects of legitimate interest and concern to the public, such as the performances of entertainers and athletes; the works of artists and writers; the operation of public institutions, like schools, churches and medical facilities; and the quality of services and products offered to the public, including restaurants, hotels, consumer products and the mass media.

In a 1955 case in which the mayor of Gastonia sued the Gaston Citizen over an editorial criticizing the city's purchase of some property, the N.C. Supreme Court said the fair comment privilege was based on the N.C. Constitution's free press clause. Quoting a New York case, the court said: "'Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Such comments or criticism are not libelous, however severe in their terms, unless they are written maliciously.'"[183] Note that, like the fair report privilege discussed above, the fair comment defense can be destroyed by malice.

The fair comment defense requires that an opinion relate to a matter of legitimate public interest, but this requirement is generally interpreted quite broadly to include any person or organization that participates in public activities, seeks public patronage or support, offers goods or services to the public, or becomes involved in public issues. The opinion, however, must relate to the public aspects of an individual's life.

Just as the First Amendment defense requires a true factual basis for an opinion, the fair comment defense generally requires statements of opinion be based on facts that are either stated in the article, readily available to the public or widely known. Thus a movie reviewer need not provide all the details of a film to support her opinion because the facts are readily available to anyone who chooses to see the film. Or a columnist who criticizes a university president who frequently has been in the news can base his opinion on already publicized facts. The idea here is that the audience needs to know or be provided with the factual basis for opinion statements so it can evaluate their validity. If a factual basis is not provided, the audience might assume the author is privy to defamatory facts, and the opinion may be accorded more credibility than it deserves. The North Carolina appellate courts have never indicated whether the factual basis requirement applies in this state although it is widely accepted elsewhere.

A good example of the factual basis requirement comes from a lawsuit against The New York Times and singer Janis Ian. The Times quoted Ian as saying that another singer, Phoebe Snow, had been "screwed" by her former manager. When the former manager sued, the court held that Ian was protected by the fair comment defense because in her interview she provided true facts to support her opinion. The Times, however, omitted those facts from the article and thus was unable to rely on the fair comment defense.[184]

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[182] *Id.* at *6.

[183] Yancey v. Gillespie, 242 N.C. 227, 229, 87 S.E.2d 210 (1955) (quoting Hoeppner v. Dunkirk Printing Co., 254 N.Y. 95, 172 N.E. 139, 140 (1930). *See also* R.H. Bouligny, Inc., v. United Steelworkers of Am., AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967); Tyson v. L'Eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

[184] Rand v. New York Times, 430 N.Y.S.2d 271 (1980).

Retractions

Under North Carolina law, publishing or broadcasting "a full and fair correction, apology and retraction" in accordance with state law eliminates the possibility of punitive damages in a libel suit.[185] A plaintiff can still win a libel suit if a retraction has been provided, but he or she will only collect actual or compensatory damages. The law provides that before instituting a libel action against a newspaper, periodical or broadcast station, a plaintiff shall inform the defendant, in writing, of the article and/or statements he or she contends are false and defamatory.[186] The N.C. Supreme Court, however, has ruled that failure to provide such notice does not prevent a plaintiff from suing but only eliminates the possibility of punitive damages.[187]

The state statute imposes a number of requirements on the retraction provisions. First, the defamatory statements must have been published or broadcast "in good faith," their falsity the result of "an honest mistake," and the publisher or broadcaster must have had "reasonable grounds for believing the statements . . . were true." Second, the retraction must run within 10 days of the receipt of notice from the plaintiff. A newspaper or periodical must print the retraction "in as conspicuous place and type" as the original article, and a radio or TV station must broadcast the retraction "at approximately the same time of day and by the same sending power so as to be visible and audible as the original acts or words."[188] The notice and retraction provisions do not apply to anonymous communications.[189]

What is the statute of limitations?

In North Carolina, a libel suit must be commenced within one year from the date on which the libelous material was published.[190] Republishing a defamatory statement on a website starts the clock again for purposes of the statute of limitations, a federal court in North Carolina ruled in 2007. In April 2004 the Greensboro News & Record published an article in which it said Anwar Ouazzani-Chadi's first marriage was a "sham" marriage for the purpose of obtaining U.S. citizenship.[191] The newspaper authorized republication of the article on a judicial candidate's website sometime in 2006, and Ouazzani-Chadi filed a libel action in September 2006. The court refused to dismiss the lawsuit against the News & Record for this secondary publication, quoting a 1925 N.C. Supreme Court case: "[T]he author of a defamation . . . is liable for damages caused by or resulting directly and proximately from any secondary publication or repetition which is the natural and probable consequence of his act."[192]

What types of damages are available to libel plaintiffs?

Under North Carolina law, there are two types of damages available to successful libel plaintiffs: actual or compensatory damages, designed to repay the plaintiff for the harm he or she suffered; and punitive damages, designed to punish the defamer and serve as a deterrent. According to the N.C. Supreme Court, actual or compensatory damages "include (1) pecuniary loss, direct or indirect, i.e., special damages; (2) damages for physical pain and inconvenience; (3) damages for mental suffering; and (4) damages for injury to reputation."[193]

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[185] N.C. GEN. STAT. §99-2 (a) (2011).

[186] *Id*. §99-1.

[187] Osborn v. Leach, 135 N.C. 628, 640, 47 S.E. 811 (1904).

[188] N.C. GEN. STAT. §99-2 (b).

[189] *Id*. at §99-3.

[190] *Id*. at §1-54 (3).

[191] Ouazzani-Chadi v. Greensboro News & Record, No. 1:06CV00848, 2007 WL 1362389 at *1 (M.D.N.C. May 8, 2007).

[192] *Id.* (quoting Sawyer v. Gilmers, 189 N.C. 7, 126 S.E. 183, 187 (1925)).

[193] Osborn v. Leach, 135 N.C. at 632.

Both the U.S. Constitution and North Carolina law impose certain restrictions on damage awards. Under the First Amendment, a public official or public figure who sues for libel cannot win, and therefore cannot collect any damages, unless he or she proves actual malice. A private person plaintiff need prove only negligence to collect actual damages but must prove actual malice for punitive damages if the subject of the defamatory report was a matter of public interest.[194]

As discussed above, under North Carolina law, punitive damages are prohibited if a proper retraction was published or broadcast. Plaintiffs claiming libel per quod must plead and prove special damages, as must plaintiffs in trade libel or product disparagement suits.

Where can you be sued?

The question of whether a journalist who lives and works in one state can be sued for libel in another state has existed for as long as publications have crossed the borders separating states. The Internet, however, has complicated the issue and given rise to numerous questions regarding interstate and even international libel suits. The threshold issue is whether a court in one state has "personal jurisdiction" over a citizen of another state. That is, does a court in, say, Virginia have the power to compel a North Carolina citizen to show up in the Virginia court and defend himself or herself against a libel suit. The answer to that question is, it depends. It depends on whether the defendant has certain "minimum contacts" with the state of Virginia such that allowing the lawsuit to proceed does not offend "'traditional notions of fair play and substantial justice.'"[195] What constitutes sufficient "minimum contacts," though, is a complicated question.

In 1984, the U.S. Supreme Court unanimously held that a California court did have personal jurisdiction over a National Enquirer reporter and editor, both of whom lived in Florida, in a libel suit brought by actress Shirley Jones, a California resident.[196] The Supreme Court wrote:

> The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California.[197]

The same day, the Supreme Court decided that a New Hampshire court had jurisdiction over Hustler magazine, an Ohio corporation, in a libel suit brought by a resident of New York.[198] Kathy Keeton sued in New Hampshire, which at the time had a six-year statute of limitations on libel suits, because the statute of limitations had run out in her home state. The Court held that the 10,000 to 15,000 copies of Hustler that circulated in New Hampshire monthly, out of a total circulation of about 1 million, constituted sufficient "minimum contacts" to give the New Hampshire court jurisdiction. Hustler, the Court said, "produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed."[199]

When Internet libel and other types of cases began arising, courts quickly recognized that broad

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[194] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

[195] Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945) (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940)).

[196] Calder v. Jones, 465 U.S. 783 (1984).

[197] *Id*. at 788-89 (footnote omitted).

[198] Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984).

[199] *Id*. at 781.

application of those precedents could mean that a person posting information on the Internet might be haled into court in any of the 50 states. Consequently, courts began fashioning tests to determine when Internet-based contacts were sufficient to trigger personal jurisdiction. The Fourth Circuit, of which North Carolina is a part, has developed such a test, which provides that personal jurisdiction can be asserted over a nonresident if "the person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts."[200] The court, however, has made it clear that simply posting material on the Internet, accessible to anyone anywhere in the world, does not meet that test.

For example, in a libel case brought by the warden of a Virginia prison against two Connecticut newspapers, the Fourth Circuit ruled that merely posting stories on the newspapers' websites was not sufficient contact with the State of Virginia to give a Virginia court jurisdiction over the out-of-state newspapers.[201] The papers had published stories about Connecticut's decision to contract with Virginia to house some of its prisoners because of overcrowding in Connecticut correctional facilities. The warden claimed the stories defamed him, and he filed suit in a Virginia court. For Virginia to have personal jurisdiction, the court said, "[t]he newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers." The websites were "not designed to attract or serve a Virginia audience," the court concluded and, therefore, did not constitute the "minimum contacts" required.[202]

In 2008 the N.C. Court of Appeals found the Fourth Circuit's "reasoning persuasive"[203] and adopted the same approach in a case that resulted from a Georgia man posting numerous statements on Internet bulletin boards calling a North Carolina resident, among other things, "a crook," "a cheat and liar," "a scumbag," and "the equivalent of a molester of boys" and accusing him of illegal conduct.[204] The court said the relevant question was, "Did defendant, through his internet postings, manifest an intent to target and focus on North Carolina readers?" The answer was no. "The fact that some unspecified number of participants in the discussion groups might be North Carolinians does not, however, establish that defendant intended to focus on or target those North Carolina participants." [205] While plaintiff had urged the court to follow the Shirley Jones case, discussed above, and rule that the effect the postings had on the North Carolina resident were sufficient to establish jurisdiction, the court refused to do so, saying that such an approach "would confer jurisdiction in each state in which a plaintiff was affected by internet postings" and eliminate the defense of lack of personal jurisdiction in all Internet defamation cases.[206]

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[200] ALS Scan, Inc. v. Digital Serv. Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002).

[201] Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002).

[202] *Id.* at 263.

[203] Dailey v. Popma, 191 N.C. App. 64, 72, 662 S.E.2d 12, 18 (N.C. Ct. App. 2008).

[204] 191 N.C. App. at 66.

[205] *Id.* at 72.

[206] *Id.* at 73.