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A RATIONALE FOR REFORMING THE INDIANA STANDARD IN PRIVATE FIGURE DEFAMATION SUITS

*Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis
something, nothing,
Twas mine, 'tis his, and his been slave to thousands;
But he that filches me of my good name
Robs me of that which not enriches him
And makes me poor indeed.¹*

I. INTRODUCTION

Recently, the Indiana Supreme Court has placed a significant obstacle in the path of private figure plaintiffs seeking to recover for defamatory statements made by media defendants by requiring application of the actual malice standard.² In so doing, the Indiana Supreme Court placed Indiana among a disturbingly small minority of states that have effectively denied a remedy to an entire class of plaintiffs.³ Take for example the story of an attorney who is defamed for representing an unpopular client or that of a security guard who is accused of bombing a public celebration.⁴ These plaintiffs have an

¹ WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 1.

² *Journal Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind. 1999), *cert. denied*, 120 S. Ct. 499 (1999).

³ Currently, there are only three other states that have placed this substantial burden on private figure plaintiffs: Alaska, *see Rearson v. Fairbanks Publ'g Co.*, 413 P.2d 711, 715 (Alaska 1966); *Gay v. Williams*, 486 F. Supp. 12, 14-16 (D. Alaska 1979) (applying Alaska law); Colorado, *see Diversified Mgmt. Inc. v. Denver Post Inc.*, 653 P. 2d 1103, 1106 (Colo. 1982); and New Jersey, *see Sisler v. Gannet News Co.*, 516 A.2d 1083, 1095 (N.J. 1986).

⁴ These examples are of course based on actual cases brought by private figure plaintiffs across the country. The defamation of an attorney was at the very heart of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and the second example comes from the case of Richard Jewell, the supposed bomber of the 1994 Atlanta Olympic Games. Jewell, a simple security guard was branded a bomber and terrorist by members of the news media well before any proof was found linking him to the bombing. Cynthia L. Cooper, *Judges Side With Media, Despite High Jury Awards, Absence of Actual Malice Dooms Cases*, ABA J., Jan. 2000 at 32. As a result of this defamation, Mr. Jewel is currently unemployed and has suffered irreparable harm to his reputation. *Id.* Also interesting is that while Mr. Jewel was ultimately cleared of any wrongdoing in the Atlanta bombing a person would be hard pressed to find any bold pronouncements from the media telling the public that he was exonerated, while one

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interest in protecting their good names against unwarranted statements about them by the media, while the media has an interest in reporting those events to the general public that truly are of public concern. It is this tension that must be resolved in the private figure defamation context. The negligence standard best addresses this tension and should be enacted for such claims in Indiana.

The application of the actual malice standard in these types of defamation lawsuits conflicts with the express guaranty of a remedy for injury to reputation found in the Remedies Provision of the Indiana Constitution and ignores the limitation on the right of free speech found in the Indiana Constitution.⁵ Furthermore, the negligence standard that is utilized by the vast majority of the states is sufficient to protect the media's freedoms under the First Amendment.⁶ This Note proposes that

would find it equally as easy to find such reports condemning him as a killer and terrorist without any substantial or even minimal proof.

⁵ See *infra* notes 28 to 31 and accompanying text (explaining the definition and application of the actual malice standard). See *infra* notes 100 to 119 and accompanying text (explaining the definition and the application of the negligence standard).

The Indiana Constitution expressly provides: "Section 12. All courts shall be open; and every person, for injury done to him in his person, property, or reputation shall have a remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay." IND. CONST. art. 1 § 12.

⁶ Professor Smolla has identified that 31 states that apply some form of the negligence standard in private defamation actions. RODNEY A. SMOLLA, THE LAW OF DEFAMATION §§ 3.89, 3.93, 3.96, 3.106, and 3.111 (1999). For another identification of those states that do or do not apply a negligence standard in private figure defamation actions, see LIBEL DEFENSE RESOURCE CENTER, 50 STATE SURVEY 1999-2000, MEDIA LIBEL LAWS (1999). The following is a list of those jurisdictions that have adopted a negligence standard defamation actions brought by private figure plaintiffs against media defendants: Alabama, see *Mead Corp. v. Hicks*, 448 So.2d 308, 313 (Ala. 1983); Browning v. Birmingham News, 348 So.2d 455 (Ala. 1977); Arizona see *Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216, 1222 (Ariz. 1977); Arkansas, see *Little Rock Newspapers, Inc. v. Dodrill*, 660 S.W.2d 933, 937-38 (Ark. 1983); California, see *Widener v. Pacific Gas & Elec. Co.*, 75 Cal.App.3d 415, 433, 142 Cal. Rptr. 304, 313 (1977); Connecticut, see *Corbett v. Register Publ'g Co.*, 356 A.2d 472, 476-77 (Conn. Super. Ct. 1975); Delaware, see *Re v. Garnett Co.*, 480 A.2d 662, 666 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553, 557 (Del. 1985); District of Columbia, see *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 90 (D.C. 1980); Florida, see *Miami Herald Publ'g Co. v. Ane*, 458 So.2d 239, 241-42 (Fla. 1984); Georgia, see *Triangle Publ'ns, Inc. v. Chumley*, 317 S.E.2d 534, 536-37 (Ga. 1984); Hawaii, see *Cahill v. Hawaiian Paradise Park Corp.*, 543 P.2d 1356, 1362-67 (Haw. 1975); Idaho, see IDAHO CODE § 6-708; Illinois, see *Troman v. Wood*, 340 N.E.2d 292, 299 (Ill. 1975); Kansas, see *Gobin v. Globe Publ'g Co.*, 531 P.2d 76, 84 (Kan. 1975); Kentucky, see *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 886 (Ky. 1981); Louisiana, see *Wilson v. Capital City Press*, 315 So.2d 393, 397-98 (La. Ct. App. 1975); Maryland, see *General Motors Corp. v. Piskor*, 352 A.2d 810, 814-15 (Md. 1976); Massachusetts, see *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 168 (Mass. 1975); Michigan, see *Rouch v. Enquirer & News of Battle Creek*, 398 N.W.2d 245, 263-65 (Mich. 1986); Minnesota, see *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476,

the application of the actual malice standard to private figure defamation claims in Indiana is not warranted by the Indiana Constitution and that a negligence standard should be adopted in its place. Part II examines the development of defamation law in the State of Indiana under the limitations placed upon the states by the United States Supreme Court.⁷ Part III discusses the inordinate protections and advantages that the actual malice standard provides media defendants in private figure defamation actions.⁸ Part IV explains the mechanics of the negligence standard in such cases.⁹ Part V provides a rationale for the adoption of the negligence standard in private figure defamation claims based on a number of factors, most importantly the provisions of the Indiana Remedies Clause and the Indiana Free Speech Clause.¹⁰ Finally, in Part VI, this Note proposes a statute imposing the negligence standard in private figure defamation actions.¹¹

491-92 (Minn. 1985); Mississippi, *see* *Brewer v. Memphis Publ'g Co.*, 626 F.2d 1238, 1246-47 (5th Cir. 1980) (applying Mississippi law); New Hampshire, *see* *McCusker v. Valley News*, 428 A.2d 493, 494-95 (N.H. 1981); New Mexico, *see* *Marchiondo v. Brown*, 649 P.2d 462, 470 (N.M. 1982); North Carolina, *see* *Walters v. Sanford Herald, Inc.*, 228 S.E.2d 766, 767 (N.C. Ct. App. 1976); Ohio, *see* *Lansdowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979, 983-84 (Ohio 1987); Oklahoma, *see* *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976); Oregon, *see* *Wheeler v. Green*, 593 P.2d 777, 788 (Or. 1979); Pennsylvania, *see* *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406, 410-12 (E.D. Pa. 1978) (applying Pennsylvania law); Rhode Island, *see* *DeCarvalho v. daSilva*, 414 A.2d 806, 812-13 (R.I. 1980); South Carolina, *see* *Jones v. Sun Publ'g Co.*, 292 S.E.2d 23, 24-25 (S.C. 1982); Tennessee, *see* *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 417-18 (Tenn. 1978); Texas, *see* *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 819 (Tex. 1976); Utah, *see* *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 972-76 (Utah 1981); Vermont, *see* *Colombo v. Times-Argus Ass'n, Inc.*, 380 A.2d 80, 82-83 (Vt. 1977); Virginia, *see* *Gazette v. Harris*, 325 S.E.2d 713, 724-26 (Va. 1985); Washington, *see* *Caruso v. Local Union No. 690*, 670 P.2d 240, 244-45 (Wash. 1983); *Bender v. Seattle*, 664 P.2d 492, 503-05 (Wash. 1983); West Virginia, *see* *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 77 (W. Va. 1984); Wisconsin, *see* *Denny v. Mertz*, 318 N.W.2d 141, 150-52 (Wis. 1982); and Wyoming, *see* *Adams v. Frontier Broad. Co.*, 555 P.2d 556, 560-62 (Wyo. 1976).

The State of New York has opted not to follow the actual malice standard or the negligence standard in these suits. SMOLLA at §3.109. Rather, the New York Courts have crafted an intermediary standard referred to as the "gross irresponsibility standard." *Id.* This standard was developed by the New York courts in *Chapdeu v. Utica Observer Dispatch*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (N.Y. 1975). Under this standard a plaintiff may recover if they show by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner. *Id.*

⁷ *See infra* notes 12 to 79 and accompanying text.

⁸ *See infra* notes 80 to 97 and accompanying text.

⁹ *See infra* notes 98 to 121 and accompanying text.

¹⁰ *See infra* notes 122 to 176 and accompanying text.

¹¹ *See infra* notes 177 to 189 and accompanying text.

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II. THE DEVELOPMENT OF MODERN DEFAMATION LAW

The foundation of Indiana's present defamation law is found in early decisions of the Indiana courts and in the common law of defamation. However, understanding the development of Indiana's present defamation law is dependent upon a thorough understanding of the more recent restrictions which the United States Supreme Court has placed upon the individual states' abilities to regulate defamatory speech. This Note now turns its focus to the development of Indiana's defamation law from the early common law concepts of defamation, through the imposition of limits from the United States Supreme Court, to the most recent case on the subject in Indiana, *Journal-Gazette Co. v. Bandido's, Inc.*¹²

A. The Development of Indiana's Defamation Law

Before 1964, the law of defamation was left entirely to the common law of the individual states.¹³ This was largely due to the view

¹² 712 N.E.2d 446 (Ind. 1999), *cert. denied*, 528 U.S. 1005 (1999).

¹³ Defamation, including libel and slander is defined in the RESTATEMENT (SECOND) OF TORTS § 559 (1976). Section 559 states: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* Indiana expressly adopted the Restatement definition of common law defamation. See, e.g., *Hotel & Rest. Employees & Bartenders Int'l Union v. Julie's Rest.*, 233 N.E.2d 784, 790 (1968). Under the Restatement the elements of a common law defamation claim are the following: "(A) a false and defamatory communication concerning another; (B) an unprivileged publication to a third party; (C) fault amounting at least to negligence on the part of the publisher, and (D) either actionability of the statement irrespective of special harm, or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1976). At the common law, there were at least four elements to a *prima facie* case for defamation. The elements are that the plaintiff is required to prove: (A) defamatory language on the part of the defendant; (B) the defamatory language must be of or concerning the plaintiff; (C) there must be publication to a third party who understood it, and (D) there must be damage to the reputation of the plaintiff. See *Zuckerman v. Sonnenschein*, 62 Ill. 115 (1871) (applying the common law defamation standard).

The most common definition of defamation comes from Dean Prosser and from the English common law. Defamation is an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 111 at 737 (4th ed. 1971). The English common law defined defamation to include a publication that "robs a man of his good name, which ought to be more precious to him than his life." *The Case de Libelis Famosis*, 77 Eng. Rep. 250, 251 (1606). This early English case established the elements of a common law defamation action and provided the basis for the *prima facie* elements of a defamation action in this country, including the principle of strict liability in such actions. See *The Case de Libelis Famosis*, 77 Eng. Rep. at 250; see also Van Vechten. Veeder, *The History and Theory*

that the protections of the First Amendment¹⁴ to the United States Constitution that applied to non-defamatory speech did not apply to defamatory speech and therefore could be regulated by the state common law.¹⁵ Under this common law, defamation was a strict liability tort and the only defenses available to the tort were for the publishers to prove that the published statements were true or that they were covered by a privilege that shielded them from liability.¹⁶

of the Law of Defamation, 3 COLUM. L. REV. 546 (1903) (examining the development of American defamation law in general).

See also W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS §111 at 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON] (stating that common law defamation "is made up of the twin torts of libel and slander – the one being, in general, written while the other is oral In either form, defamation is the invasion of the interest in reputation and a good name.")

The Indiana courts have defined defamatory statements as a statement that would hold an individual to hatred, contempt, or ridicule, or cause him to be shunned or avoided, or tend to injure him in his profession, trade, or calling. See *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258 (Ind. 1994); *Owens v. Schoenberger*, 681 N.E.2d 760,763 (Ind. Ct. App. 1997); and *Powers v. Gastineau*, 568 N.E.2d 1020 (Ind. Ct. App. 1991).

¹⁴ The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). In *Chaplinsky*, the court stated that defamatory statements are among the types of speech that are of "no essential part of the exposition of ideas" and are therefore not within the protections of the First Amendment. *Id.*

¹⁶ PROSSER AND KEETON, *supra* note 13, at 815. At the common law, a defamatory statement was presumptively false and the truth was an affirmative defense that the defense had to plead and prove. *Id.* Furthermore, the common law privileges sought to provide some relief from the harshness of strict liability by granting some latitude in matters of social importance. *Id.* Privileges in the defamation context, like privileges throughout tort law are premised on the postulate "that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." *Id.* Generally, there are two different types of privileges available to defendants in defamation actions, namely, (1) absolute privilege and (2) qualified or conditional privilege. 50 AM. JUR. 2d *Libel and Slander* §273 (1995); PROSSER AND KEETON, *supra* note 13, at 816. The common law grants absolute privilege to the following types of communications: (1) judicial proceedings, (2) legislative proceedings, (3) executive communications, (4) communications that the plaintiff has consented to, (5) communications between husband and wife, and (5) media broadcasts of political statements. O. Lee Reed & Jan W. Henkel, *Facilitating the Flow of Truthful Personnel Information: Some Needed Change In The Standard Required To Overcome The Qualified Privilege to Defame*, 26 AM. BUS. L.J. 305, 311 (1988). In some situations the speech lacks the compelling weight justifying the absolute privilege of the communication, still these communications may warrant a conditional or qualified privilege. *Id.* at 312. A qualified privilege differs from an absolute privilege in that it may be defeated upon a showing of malice or on the part of the defendant, whereas an absolute privilege can never be defeated even in spite of any malice on the part of the defendant. *Id.* at 311-12. Prosser and Keeton identify the following interests of a publisher as protected by a qualified privilege: (1) the

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The early decisions of the Indiana courts reflected this common law approach to defamation law.¹⁷ In *Wabash Printing & Publ'g Co. v. Crumrine*,¹⁸ the Indiana Supreme Court adhered to the elements of common law defamation and emphasized that a showing of actual malice was not required to recover in such cases.¹⁹ Indiana continued to follow the traditional common law principles of defamation law well into the late 1960's.²⁰ As late as 1968, the Indiana courts still adhered to

interest of the publisher in defending himself from defamation claims, (2) the interest in protecting others by publishing defamatory material that defend the interests of someone other than the publisher, (3) when the publisher and the recipient have a common interest and the communication is reasonably designed to protect or further it, (4) communications to those who act in the public interest, and (5) fair comment on matters of public concern. PROSSER AND KEETON, *supra* note 13, at 825-832. For an in depth discussion and analysis of the common law development of absolute and qualified privilege in the defamation context see M.M. Slaughter, *The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society*, 14 CARDOZO L. REV. 351 (1992).

¹⁷ See *infra* notes 18 to 23 and accompanying text.

¹⁸ 21 N.E. 904 (Ind. 1889).

¹⁹ *Id.* at 905. The court stated that, "[t]he question of malice was not material in this case. A person injured by the publication of a libelous article, or the speaking of false and slanderous words, is entitled to compensation for the injury sustained, whether the person speaking the words or publishing the article did so maliciously or not." *Id.* at 904-05. This reasoning is reiterated in a number of Indiana decisions: *Johnson v. Stebbins*, 5 Ind. 364, 366-67 (1854) (stating that publications which tend "to degrade, disgrace, or injure the character of a person" are defamatory without regard for the intention of the publisher); *Gabe v. McGinnis*, 68 Ind. 538, 547 (1879) (holding that there was no requirement that a plaintiff must show that the defendant published defamatory statements about him with malice); *Prosser v. Callis*, 19 N.E. 735, 735-36 (Ind. 1889) (holding that a newspaper publication about a county auditor was libelous even though there was no intention to defame the plaintiff and stating that any publication that tends to degrade, disgrace, or injure the character of a person or bring him into contempt, hatred or ridicule is defamatory); *Cronin v. Zimmerman*, 88 N.E. 718, 720 (Ind. Ct. App. 1909) (stating that the weight of authority in Indiana and throughout the country is "to the effect that any publication which tends to hold a person up to scorn or ridicule is defamatory and libelous"). See also *De Armond v. Armstrong*, 37 Ind. 35 (1871); *Bain v. Myrick*, 88 Ind. 137 (1882); *Hake v. Brames*, 95 Ind. 161 (1884); *Crocker v. Hadley*, 1 N.E. 734, 734-35 (Ind. 1885); *Patchell v. Jaqua*, 33 N.E. 132 (Ind. Ct. App. 1893); *Hamilton v. Lowery*, 71 N.E. 54 (Ind. Ct. App. 1904).

It is also necessary here to address an area that has served to frustrate many commentators, judges, and law students in the defamation context, the difference between actual malice as set out in *New York Times* and common law malice. The differing definitions of these concepts have served to confuse many and this confusion recently led the United States Supreme Court to instruct lower courts to phrase jury instructions in a more careful and understandable way for jurors to understand when assessing fault. See *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (stating that in place of the term actual malice, jury instructions should contain references to "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.") Prior to *New York Times*, actual malice in the defamation context referred to the subjective state of mind of the defendant towards the plaintiff; it referred to the defendant's spite, hatred, or ill will

and enforced the traditional common law of defamation.²¹ In *Zurzolo*, the Appellate Court of Indiana held that malice is not an element of a cause of action for defamation.²² Furthermore, the court stated that the existence of malice was only required where the exercise of a qualified privilege is in question or it would affect the measure of punitive damages awarded.²³

towards the plaintiff. Thomas Edward Powell, *The Truth Will Not Set You Free in Nebraska: Actual Malice and Nebraska's "Truth Plus Motive" Defense*, 72 NEB. L. REV. 1236, 1231 (1993) [hereinafter Powell]. See also *Di Salle v. P.G. Publ'g Co.* 544 A.2d 1345, 1364 (Pa. Super. Ct. 1988), cert. denied, 492 U.S. 906 (stating that common law malice focused exclusively on the defendant's disposition towards the plaintiff at the time of the wrongful act and describing common law malice as conduct which is outrageous, wanton, reckless, willful, oppressive, the result of bad motive, or reckless indifference to the rights of others); and *Mahoney v. Adirondack Publ'g Co.* 517 N.E.2d 1365 (N.Y. 1987).

On the other hand, constitutional actual malice refers to the state of mind of the defendant in regards to the veracity of the published statements and does not have anything to do with the defendant's hatred or ill will towards the plaintiff. See *supra* Powell at 1242. These differences in the definitions of actual malice and common law malice do not render any reference to the old common law cases untenable in assessing the position of defamation law in the modern context. This view oversimplifies the holdings to these cases and avoids the deeper meaning of them. It is quite easy to say that since the definitions have changes, we have no reason to look at the old common law defamation cases. This view avoids the one similarity between the actual malice and the common law malice definitions that is the same: both refer to the subjective state of mind of the defendant, one towards a person and the other towards a statement. The above cited cases from the early days of Indiana's defamation law all stand for the proposition that at the common law, this state did not require a showing of any subjective culpability on the part of a defamation plaintiff. The modern implication of this is that the negligence standard, which judges the actions of a media defendant by objective criteria, is more in tune with the history and traditions of this state, at least where private figure plaintiffs are concerned.

²⁰ See *infra* note 21 and accompanying text.

²¹ See, e.g., *Hotel and Rest. Employees and Bartenders Int'l Union v. Zurzolo*, 233 N.E.2d 784 (Ind. Ct. App. 1968) (applying the common law defamation standard). In *Zurzolo*, the defendant union published libelous leaflets about the plaintiff in which they informed members of other unions that the plaintiff hated unions, that he did not pay his employees fair wages, and that members of other unions should avoid doing business with the plaintiff. *Id.* at 789. As a result of the libelous statements, plaintiff's business dramatically fell, and he brought a defamation action against the union for the publication of the defamatory material. *Id.* at 789-90.

²² *Id.* at 791.

²³ *Zurzolo*, 233 N.E.2d. at 791. This case was decided after the Supreme Court required actual malice in order to establish defamation in the landmark case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Yet in *Zurzolo*, the Indiana court still did not require actual malice where the plaintiff, a private individual, filed suit against an entity that regularly published newsletters, circulars, and leaflets. *Zurzolo*, 233 N.E.2d. at 791.

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B. Interjection of First Amendment Protections Into State Defamation Common Law

Although the states were primarily responsible for the regulation of defamatory speech through their own common law under the reasoning that such speech was not within the protections of the first amendment for a long period of time,²⁴ the United States Supreme Court curtailed the freedom of the states to regulate defamatory statements in the landmark case *New York Times Co. v. Sullivan*.²⁵ In *New York Times*, the Supreme Court removed some of the powers that the states traditionally invoked for the regulation of defamation to ensure the guarantees and protections of the First Amendment.²⁶ The Supreme Court held that state defamation laws could not allow a public official to recover damages for a defamatory falsehood regarding their conduct as public officials.²⁷ The only exception that the Court allowed was that public officials could recover if they proved with "convincing clarity" that the statements were made with "actual malice."²⁸ The Court defined "actual malice" as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not."²⁹ The Court reasoned that the First Amendment should protect debate on public issues and diminish the threat of libel judgments, thereby reducing the incentive of the media to self-censor its coverage of important events.³⁰

In subsequent opinions, the Court expanded upon the reasoning and holding of *New York Times*. A few years after the decision in *New York Times*, the Court refined the meaning of actual malice in *St. Amant v.*

²⁴ See *supra* note 13 and accompanying text.

²⁵ 376 U.S. 254 (1964). The case arose when the *New York Times* ran an advertisement that alleged civil rights abuses on the part of the Montgomery Alabama Police Chief. *Id.* at 256. The Alabama trial court applied the common law standard of liability and instructed the jury that the statements were libelous per se; under Alabama law, falsity, malice, and injury were all presumed, *id.* at 262. The jury returned a verdict in favor of the plaintiff for \$500,000. *Id.* at 256. In a unanimous opinion, the Supreme Court reversed. *Id.* at 264.

²⁶ See *supra* note 14.

²⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

²⁸ *Id.* at 280.

²⁹ *Id.*

³⁰ *Id.* at 279. The Court stated that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions, and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'" *Id.* The Court also emphasized a "profound national commitment" to the free flow of ideas and a recognition that this freedom "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270.

Thompson.³¹ In *St. Amant*, the Court clarified the meaning of “reckless disregard” within the meaning of actual malice. The meaning of “reckless disregard” was fixed at whether the particular defendant “entertained serious doubts as to the truth of his publication.”³² The Court emphasized that the focus of this inquiry was not whether a reasonable person in the defendant’s position would have published the article without further investigation.³³ Not only did the Court clarify the meaning of actual malice in its subsequent decisions; but, it also expanded the types of plaintiffs that were required to meet the actual malice standard. In *Curtis Publishing Co. v. Butts*,³⁴ the requirement of proving actual malice was extended to lawsuits involving actions by “public figures.”³⁵

³¹ 390 U.S. 727 (1968). This case arose when St. Amant, a candidate for public office in the state of Louisiana, made a televised political speech, during which he read aloud questions that he had asked of a union member, Albin. *Id.* at 728. Those answers falsely charged Thompson, a local sheriff, with criminal conduct. *Id.* Thompson quickly filed a defamation suit, claiming that the publication had “imputed gross misconduct” and “inferred conduct of the most nefarious nature.” *Id.* at 729. The Louisiana trial court was satisfied that Thompson had sufficiently pleaded and proved actual malice, but unlike the Supreme Court, the trial court interpreted the standard as one of a reasonably prudent publisher. *Id.* at 730.

³² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

³³ *Id.*

³⁴ 388 U.S. 130 (1967). In *Curtis*, the plaintiff, Butts, an athletic director at the University of Georgia, brought a libel action against Curtis Publishing for publishing an article in the *Saturday Evening Post* that accused him of fixing football games with another university. *Id.* at 135. Since Butts was paid from a private fund, he could not be construed as a public figure under *New York Times*. *Id.* at 135. However, the Court found that Butts position as athletic director plus the amount of “independent public interest” in him elevated him to the status of a public figure. *Id.* at 154.

³⁵ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967). The Court defined public figures as people, who although not public officials, “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern of society.” *Id.* In later decisions the Court would further refine the meaning of “public figure” for purposes of applying the actual malice standard. For example, in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974), the Court drew a distinction between public figures for all purposes and public figures for limited purposes. *Id.* at 345. The Court stated that a person may achieve “such persuasive power and influence” that he becomes a public figure for all purposes and for all contexts. *Id.* The Court defined the more commonly occurring public figure for a limited purpose as a person who has “thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Id.* But in either event, the Court stated that the person “invite[d] attention and comment.” *Id.*

C. *Shifting the Focus of the Inquiry; Rosenbloom v. Metromedia, Inc.*³⁶ and *Gertz v. Robert Welch Inc.*³⁷

As the Court expanded the scope of the actual malice standard to include more and more types of plaintiffs, eventually the Court was asked to determine the applicability of the actual malice standard to suits involving private figure plaintiffs and media defendants. The Court's decisions in this area are marked by two cases that represent different ends of the defamation spectrum. These two cases also present the most relevant insight into the present state of Indiana's defamation law on private figure plaintiffs and media defendants. An exploration of these opinions and the principles contained within them begins with *Rosenbloom v. Metromedia, Inc.*³⁸

In *Rosenbloom* the Court, in a plurality opinion, concluded that all plaintiffs, regardless of their status as a private figure or a public figure, must meet the *New York Times* standard of actual malice in defamation actions regarding matters of general or public concern.³⁹ In

³⁶ 403 U.S. 29 (1971).

³⁷ 418 U.S. 323 (1974).

³⁸ 403 U.S. 29 (1971). This case arose when Rosenbloom, a distributor of nudist magazines, and others were arrested by the Philadelphia Police Department for distributing allegedly obscene material. *Id.* at 32-33. A radio station owned by the defendant broadcast a newscast in which it wrongfully assumed and reported Rosenbloom's guilt and referred to him and those he was arrested with as "smut merchants," "girlie-book peddlers" and referred to the confiscated materials as "obscene." *Id.* at 33-34. Rosenbloom was acquitted of all the obscenity charges against him and obtained a ruling that the materials were not obscene. *Id.* at 36. Armed with his acquittal and this ruling, Rosenbloom filed a libel action in federal district court. *Id.* He claimed that his acquittal proved that the books were not obscene, the statements made by the radio station were false, and that the statements referring to him as a "smut merchant" and a "girlie-book peddler" were false. *Rosenbloom*, 403 U.S. at 36. See also *Rosenbloom v. Metromedia Inc.*, 289 F. Supp. 737 (E.D. Pa. 1968). The jury returned a verdict in favor of Rosenbloom in the amount of \$25,000 in general damages and \$725,000 in punitive damages, which was subsequently reduced to \$250,000 by the trial judge. *Rosenbloom*, 403 U.S. at 40.

³⁹ *Id.* at 43-44. The Court stated, "We honor the commitment to robust debate on public issues, which embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*

Justice Brennan's opinion was joined by Chief Justice Burger and Justice Blackmun. Justice Black would have gone even farther than Justice Brennan. He stated in his opinion that the First Amendment "does not permit the recovery of libel judgments against the news media even when the statements are broadcast with knowledge they are false." *Id.* at 57. Justice White, in his opinion, stated that the *New York Times* actual malice standard should only apply to those reporting on the official actions of public servants and to reporting on those involved in or affected by their official action. *Id.* at 55. Justices Harlan, Stewart, and Marshall all dissented and adopted a position similar to that later taken by the

his plurality opinion, Justice Brennan gave four justifications for the Court's emphasis on the subject matter of the alleged defamatory statements rather than focusing on the status of the plaintiff.⁴⁰ First, Brennan wrote that the protections of the First Amendment are based upon a "profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open . . ."⁴¹ Second, it is inappropriate to distinguish among public and private figure plaintiffs because public figures have as great an interest in their reputation as private figures despite the misconception that public figures have a greater ability to protect their interest in their reputation.⁴² Third, private individuals should not be able to insulate themselves from the public when they become involved in issues of general or public concern.⁴³ Finally, Brennan stated that a negligence standard does not provide adequate guidance for the media to gauge its actions and the indeterminate nature of this standard would result in an unallowable "chilling effect" on the First Amendment rights of the media.⁴⁴

Three years after the *Rosenbloom* plurality, the composition and temperament of the Court had changed.⁴⁵ These changes are evident in

Court. Justice Douglas did not join in this opinion because, according to one commentator, he was under great criticism for his liberal opinions in obscenity cases, a peripheral issue in *Rosenbloom*. See CHARLES LAWHORNE, *THE SUPREME COURT AND LIBEL* at 76 (1981). It is very likely that he would have joined Justice Black in holding that First Amendment does not allow any recovery in libel actions against the media. *Id.*

⁴⁰ *Rosenbloom*, 403 U.S. at 42-43.

⁴¹ *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 43 (1971) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁴² *Rosenbloom*, 403 U.S. at 46. The plurality stated that few prominent people "command media attention to counter criticism." *Id.* Additionally, when public figures can obtain retractions or corrections from the media, the readers or viewers of those corrections are far less likely to pay the same level of attention to them that they gave to the defamatory statements in the first place. *Id.*

⁴³ *Id.* at 48.

⁴⁴ *Id.* at 50. Justice Brennan called the negligence standard an "elusive standard" and opined that the negligence standard would lead to a standard where "fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred." *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 50 (1971).

⁴⁵ Some members of the court who had created the *Rosenbloom* plurality were no longer on the court at the time that *Gertz* was decided. For instance, Justice Hugo Black, who would have gone even farther in protecting the media in the defamation context than Justice Brennan, died in 1971, and was replaced by the appointment of Justice Lewis F. Powell by President Nixon. WILLIAM B. LOCKHART, ET. AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS* 1552 (8th ed. 1996). Other changes in the court at this time included the appointment of the present Chief Justice, William Rehnquist, in 1972, filling the vacancy left by Justice John Marshall Harlan. *Id.* These changes in the Court were significant enough to bring a different outcome for private figure plaintiffs within a three year period.

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the decision handed down by the Court in *Gertz v. Robert Welch Inc.*⁴⁶ In *Gertz*, the Court repudiated the position that it took in *Rosenbloom* and recognized that distinctions among various classes of plaintiffs may justify the application of different standards in defamation suits.⁴⁷ The Court recognized the legitimate state interest in providing a remedy to private individuals who are harmed by defamatory falsehoods and balanced this interest against the need to avoid self-censorship by the media.⁴⁸ The Court concluded that the application of the *New York Times* test as proposed by the *Rosenbloom* plurality in private figure defamation claims would unduly abridge the states' legitimate interest in protecting citizens' reputations to an unacceptable degree.⁴⁹ Under this reasoning,

⁴⁶ 418 U.S. 323 (1974). The case arose when the *American Opinion*, a monthly publication by the John Birch Society published an article about Gertz. *Id.* at 325. Gertz was an attorney representing a family in civil proceedings against a police department for shooting and killing a youth related to the family. *Id.* at 326. The article referred to Gertz as the "architect" of a "communist frameup" of the policeman. *Id.* The article also falsely alleged that Gertz had a criminal record and that he had been an officer in a "communist front organization" that advocated violent seizure of the government. *Id.* The statements were all false, but the editor of the monthly paper relied on the reputation of the article's author and did not verify the statements. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 326 (1974). Gertz brought an action for defamation and was awarded \$50,000. *Id.* at 329. The trial court granted a judgment n.o.v., concluding that the plaintiff had failed to meet his burden of proof under the actual malice standard. *Id.* The appellate court affirmed. *Id.* The United States Supreme Court reversed. *Id.* at 324. Justice Powell wrote the majority opinion and was joined by Justices Stewart, Marshall, Rehnquist, and interestingly, Blackmun. *Gertz*, 418 U.S. at 324. It was actually Blackmun that cast the deciding vote in the case and, in so doing, he abandoned his adherence to the reasoning that he set out in the *Rosenbloom* plurality opinion just three years before.

⁴⁷ *Id.* at 346. In shifting the inquiry from the content of the alleged defamatory statements to the status of the plaintiff for determining the applicability of the actual malice standard, the court stated: "The public or general interest test for determining the applicability of the *New York Times* standard to private defamation action inadequately serves both of the competing values at stake." *Id.* While this is so for determination of actual damages, the Court still required that even for a private figure plaintiff to recover punitive damages against a media defendant, the plaintiff still had to meet the requirements of constitutional actual malice as expressed in *New York Times*. *Id.* at 348.

⁴⁸ *Gertz*, 418 U.S. at 340. The Court expressed its reluctance to force the states to give up their interest in providing a remedy to damage to an individual's reputation. *Id.* The Court stated, "The need to avoid self-censorship by the news media is not the only societal value at issue. . . . The legitimate state interest underlying the law of libel is the compensation of the individual for the harm inflicted on them by defamatory falsehood." *Id.* at 341.

⁴⁹ *Id.* at 345-47. The Court expressed its reluctance to make the states give up their legitimate state interest in providing a remedy for injury to reputation of the individual. *Id.* at 346. This would have been the effective result if the Court had forced the *New York Times* actual malice standard on the states in private figure defamation claims. The Court stated, "We would not lightly require the states to abandon this purpose, for as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no

the states are freed from applying the *New York Times* actual malice standard in private defamation actions and are permitted to adopt their own standard for such lawsuits as long as those standards do not apply liability without fault.⁵⁰

When reaching its conclusion that the states' interest in protecting the reputations of its citizens allowed the states to enact a different standard for private figure defamation actions, the Court propounded two reasons for the distinction among plaintiffs.⁵¹ First, public figures generally do have greater access to the channels of the media and can much more easily counteract a defamatory statement made about them than a private figure who does not enjoy the same type of virtual open access to the media.⁵² Second, an individual who assumes a role in the public eye must accept certain intrusions into his life as part of his involvement in public affairs.⁵³ According to the *Gertz* majority, there is no such assumption for any private individuals.⁵⁴ Based on these justifications the Court reasoned that private individuals are "not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."⁵⁵

D. The Adoption of the Actual Malice Standard for Private Figure Defamation Suits in Indiana.

Indiana responded quickly to the United States Supreme Court's invitation to the states to adopt their own standards of liability in private figure defamation actions.⁵⁶ In *Aafco Heating & Air Conditioning v.*

more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Gertz*, 418 U.S. at 341 (quoting *Rosenbloom v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

⁵⁰ *Gertz*, 418 U.S. at 345.

⁵¹ *Id.* at 344-45.

⁵² This position is polar opposite of that taken by the *Rosenbloom* plurality. See *supra* note 41 and accompanying text. In breaking with the reasoning of the *Rosenbloom* plurality the Court stated: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344 (emphasis added).

⁵³ The Court referred to this distinction as "a compelling normative consideration underlying the distinction between public and private defamation plaintiffs." *Id.* at 345.

⁵⁴ See *id.*

⁵⁵ *Id.* at 346.

⁵⁶ The Indiana courts were presented with an opportunity to make the determination for the state within only one year of the United States Supreme Court's decision in the *Gertz* case. See *infra* note 59 and accompanying text.

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Northwest Publications,⁵⁷ Indiana became the first state of the post-*Gertz* era to adopt the *New York Times* actual malice standard in defamation actions brought by private figures.⁵⁸ In *Aafco*, the defendant's newspaper, the Gary Post Tribune, published a story alleging that a fire, which killed two small children, was caused by the plaintiff's failure to properly install a furnace in the house.⁵⁹ These reports were false and the local fire department proved that the actual cause of the fire was the improper use of electrical extension cords by the homeowner.⁶⁰ *Aafco* brought a defamation claim against the defendant to recover for the damage to its reputation in the community when it was accused falsely of killing two small children. The defendants moved for summary judgment, which the trial court granted.⁶¹ In affirming the grant of summary judgment, the Indiana Court of Appeals adopted the actual malice standard for private figure plaintiffs, embracing the reasoning and approach of the *Rosenbloom* plurality.⁶²

The *Aafco* court acknowledged that the *Rosenbloom* plurality was not binding upon the states following the decision in *Gertz* and that it was free to choose the standard that Indiana would employ.⁶³ However, the court chose to enact the actual malice standard of *Rosenbloom* rationale, under the theory that it provides the greatest level of protection to the media.⁶⁴ As the United States Supreme Court in *Gertz*

⁵⁷ 321 N.E.2d 580 (Ind. Ct. App. 1974), cert. denied, 424 U.S. 913 (1975).

⁵⁸ Indiana was the first court in the post-*Gertz* era to adopt this standard. Alaska had the standard in place for some time even before the *Gertz* decision and the other two jurisdictions that apply the actual malice standard in private figure defamation actions did not adopt that standard until the 1980's. See *supra* note 6.

⁵⁹ *Aafco Heating and Air Conditioning Co. v. Northwest Publ'ns Inc.*, 321 N.E.2d 580, 583 (Ind. Ct. App. 1974), cert. denied, 424 U.S. 913 (1975).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 586. The *Aafco* court stated, "We adopt a standard that requires the private individual who brings a libel action involving an event of general or public interest to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false." *Id.*

⁶³ *Aafco*, 321 N.E.2d at 585.

Finally, the states are given the option to define their own standard of constitutional privilege for the defamation of private individuals, but the standard must not provide for liability without fault. The definitional option left to the states is either a *Gertz* or *Rosenbloom* conceptualized privilege. We choose the latter.

Id.

⁶⁴ The *Aafco* court echoed the reasoning of the *Rosenbloom* plurality in comparing the negligence standard and the actual malice standard. *Id.* The *Aafco* court stated that the negligence standard assumes that society has a greater interest in the reputation of private individuals than in preserving the reputation of public figures. *Id.* at 585. The court stated

weighed the competing interests in that case, the *Aafco* court also performed a balancing test of its own.⁶⁵ The court weighed the individual's interest in protecting its good name and reputation against the protections provided to the media by the Indiana Constitution.⁶⁶ According to the court, the protections of the Indiana Constitution⁶⁷ require that all discussions on matters of "general or public concern"⁶⁸ be free of all forms of impairment. Therefore, the state constitution requires that private figure plaintiffs meet the *New York Times* actual malice standard whenever statements are made on a matter of general or public interest.⁶⁹

For many years, the *Aafco* decision was the controlling statement of Indiana's defamation law in regard to actions by private figure plaintiffs, despite other Indiana courts questioning the wisdom of the application of the actual malice standard.⁷⁰ The Indiana Supreme Court

that drawing such a line "between 'public' and 'private' figures makes no sense in terms of our constitutional guarantees of free speech and press." *Id.* at 587.

⁶⁵ *Aafco*, 321 N.E.2d at 585.

⁶⁶ *Id.*

⁶⁷ The Indiana Constitution provides in pertinent part: "No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." IND. CONST. art. I § 9.

⁶⁸ Indiana has broadly interpreted the phrase "general or public concern" in relation to defamation claims. Whether a matter is of general or public concern for the purposes of applying the actual malice standard is a determination that is made by the trial courts. *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1336 (N.D. Ind. 1997). The question is whether the subject is of public interest and is not affected by the participation of a private individual. *Id.* at 1337. The following matters have been held matters of "general or public concern": the purchase and operation of a local TV station, *Perry v. Columbia Broad. Sys.*, 499 F.2d 797 (7th Cir. 1974) (applying Indiana law); a news release about a hospital's ability to provide quality health care, *St. Margaret Mercy Healthcare Centers, Inc. v. Ho*, 663 N.E.2d 1220, 1224 (Ind. Ct. App. 1996); a community meeting addressing matter of education and housing, *Near East Side Cmty. Org. v. Hair*, 555 N.E.2d 1324 (Ind. Ct. App. 1990); a private individual who appeared before a grand jury and talked to reporters about her son who was under investigation, *Cochran v. Indianapolis Newspapers*, 360 N.E.2d 233 (Ind. Ct. App. 1978); college football, *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330, 1337 (N.D. Ind. 1997).

⁶⁹ *Aafco*, 321 N.E. 2d at 586.

⁷⁰ Many subsequent decisions of the Indiana appellate courts followed the reasoning of the *Aafco* court. See, e.g., *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1087 (7th Cir. 1990) (applying Indiana law and stating that despite skepticism among some Indiana judges the Seventh Circuit will continue to apply the actual malice standard for such cases arising under Indiana law until the Supreme court or the legislature speaks on the matter); *Henrichs v. Pivarnik*, 588 N.E.2d 537 (Ind. Ct. App. 1992) (stating that it does not make any sense to distinguish among plaintiffs in defamation actions); *Near East Side Community Organization*, 555 N.E.2d at 1329 (stating that *Aafco* applies equally to private and public figure plaintiffs). But see *Cochran*, 360 N.E.2d at 233 (another division of the Indiana Court

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did not clarify matters for over 20 years from the decision in *Aafco*. Finally, the Indiana Supreme Court expressly clarified Indiana's law: actual malice. This decisive adoption of the actual malice standard in private figure defamation cases came in *Journal-Gazette Co. v. Bandido's*.⁷¹

In *Bandido's*, a Mexican restaurant brought a defamation suit against the defendant newspaper for allegedly defamatory statements published about the cleanliness of the restaurant's facilities.⁷² The case was tried before a jury and *Bandido's* was awarded \$985,000 in damages.⁷³ The *Journal-Gazette* appealed the judgment and the appellate court reversed, finding that the requirement of actual malice was not met. *Bandido's* appealed to the Indiana Supreme Court which upheld the appellate determination.⁷⁴

In affirming the determination of the appellate court, the Indiana Supreme Court expressly adopted the *Aafco* approach to private figure defamation claims,⁷⁵ and left no doubt as to what the law in Indiana governing these suits is now. While adopting this approach to private figure defamation suits, the Indiana Supreme Court began by stating that it has a long history of adhering to precedent and that it has a firm commitment to protecting the freedoms that are guaranteed by the

of Appeals stating that but for the other division's decision in *Aafco*, it would have adopted the negligence standard for such lawsuits, and criticizing, while still applying, the actual malice standard to a private figure plaintiff).

⁷¹ 712 N.E.2d 446 (Ind. 1999), cert. denied, 120 S. Ct. 499 (1999).

⁷² *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 449 (Ind. 1999), cert. denied, 120 S. Ct. 499 (1999). The *Journal Gazette* had run an article that addressed a series of health inspections that local health inspectors had conducted at the restaurant. *Id.* The headline that ran with the story stated: "Health Board shuts doors of *Bandido's* Inspectors find rats, roaches at local eatery." *Id.* at 450. While the health board did shut down the restaurant, the inspectors never actually discovered any rats. *Id.*

⁷³ *Id.* at 470.

⁷⁴ *Bandido's, Inc.*, 712 N.E.2d at 451. Chief Justice Shepard dissented and Justice Dickson dissented in a particularly lengthy and sharp dissent from the majority that took the opposite view and advocated a negligence standard in Indiana for such lawsuits. *Id.* at 471 (Shepard, C.J., dissenting) and *Id.* at 489 (Dickson, J., dissenting).

⁷⁵ The *Bandido's* Court stated that:

Today we expressly adopt the *Aafco* approach establishing an actual malice standard in matters of public or general concern for private individual plaintiffs. For nearly twenty three years the law in Indiana has been that both private individuals and public figures must prove actual malice in order to recover in a defamation suit. . . . Because we find no pressing reason to change the law, we affirm *Aafco* to be the law in Indiana.

Id. at 451.

freedoms of speech and of the press.⁷⁶ The court approvingly quoted and adhered to the reasoning from both *Aafco* and *Rosenbloom*. The same justifications for the actual malice standard given in those decisions were followed and amplified by the Indiana Supreme Court. The court reasoned that Indiana does not have an interest in preferring a private figure's interest in his or her reputation over that of a public figure through the imposition of the lower negligence standard.⁷⁷ Next, the court used the often advanced justification that private individuals can obtain access to the channels of mass communication as easily as a public figure to refute defamatory statements.⁷⁸ Finally, the court criticized the negligence standard for the potential of self-censorship that it may cause among the members of the media.⁷⁹

Bandido's is the last in the line of the cases that shape Indiana's defamation law. At this time, Indiana is clearly applying the actual malice standard in private figure defamation cases. This Note now turns its focus to another provision of the Indiana Constitution that has also recently been interpreted by the Indiana Supreme Court as a guarantee of a remedy for Hoosier plaintiffs, the Indiana Remedies Provision. The application of the actual malice standard is in conflict with this section's express provisions and cannot stand because it effectively denies relief to Hoosier plaintiffs.

III. PROTECTIONS THAT ACCRUE TO MEDIA DEFENDANTS UNDER THE ACTUAL MALICE STANDARD

The application of the actual malice standard places significant obstacles in the paths of plaintiffs by affording inordinate protections to media defendants.⁸⁰ First, there is the definition of actual malice itself.⁸¹

⁷⁶ *Id.*

⁷⁷ *Bandido's, Inc.*, 712 N.E.2d at 452.

⁷⁸ *Id.*

⁷⁹ *Id.* at 453. The court stated: "Such a rule would curtail the freedom of the press and undermine our attempt to protect speech that relates to matters of general or public concern." *Id.*

⁸⁰ Defendants are benefited and plaintiffs therefore frustrated by the subjective nature of the definition of the actual malice standard, the heightened evidentiary requirements of the actual malice standard, and the doctrine of independent appellate review of lower court findings in defamation claims applying the actual malice standard. Thomas Kane, Note, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan In the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755 (1999) [hereinafter Kane]. See also Sharon A. Mattingly, *To Quote or Note to Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637 (1990) (identifying the subjective nature of the definition of actual malice, the heightened standard of proof required, the convincing clarity standard and summary judgment, and independent appellate review of lower court factual findings as obstacles to

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Under the *St. Amant* definition of actual malice, which has been adopted by the Indiana courts, a plaintiff has to prove the defendant's subjective state of mind without a baseline of reasonableness for comparison.⁸² According to many commentators, the application of this definition of actual malice and the attendant burdens that it places upon plaintiffs is simply too great for a plaintiff to overcome, effectively barring them from prevailing on the matter.⁸³

Not only does the definition in and of itself pose a severe problem for plaintiffs, but two procedural protections have also arisen for defendants from the application of the actual malice standard. First, under the actual malice standard the plaintiff is required to prove the existence of actual malice by clear and convincing evidence.⁸⁴ This is an intermediate standard of proof that presumably rests above the preponderance standard and below the beyond a reasonable doubt

a plaintiff's recovery). The requirements of the actual malice standard subject plaintiffs to a rigorous burden that is as broad and as vague as the term "public interest"; this requirement effectively denies redress to a private individual who has not consented to media exposure. Joseph Kent Brown, Note, *Florida Defamation Law and the First Amendment: Protecting the Reputational Interests of the Private Individual*, 11 FLA. ST. U. L. REV. 197, 227 (1983).

⁸¹ For the *St. Amant* definition of actual malice, see *supra* note 32 and accompanying text. Also, for a more detailed explanation and comparison of the meaning of "actual malice" under the common law and under *New York Times* see *supra* note 19.

⁸² See Kane, *supra* note 82, at 774 (stating that the *St. Amant* definition of "actual malice" is a highly subjective culpability requirement and that it requires a plaintiff prove the subjective state of mind of the defendant at the time of publication without any reference to what a reasonable person would have done in their situation).

⁸³ See Lackland H. Bloom Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 252 (1985) (referring to the application of the actual malice standard to claims brought by private figures as an "insurmountable barrier" to a plaintiff's recovery); Kane, *supra* note 80, at 775 (stating that "in application", the actual malice standard is often an "insurmountable obstacle" for plaintiffs in defamation claims); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 802 (stating that when the costs of a plaintiff prevailing are raised to the point that recovery is nearly impossible there is a risk of underdeterrence because a plaintiff will not bring a claim). One commentator has stated that the *Rosenbloom* actual malice/public interest approach provided a "virtual carte blanche" for media defendants. James Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 206 (1976). Robertson notes that of over a hundred reported decisions dealing with the media under the actual malice/public interest standard, only six found violations by the media. *Id.* As a practical matter, most defamation defendants prevail when a showing of actual malice is required of the plaintiff. Annotation, *State Constitutional Protection of Allegedly Defamatory Statements Regarding Private Individual*, 33 A.L.R. 4th 212 (1984); see also L. ELDRIDGE, *THE LAW OF DEFAMATION* §51 at 270-271 (1992).

⁸⁴ See *supra* note 28 and accompanying text (explaining that the court requires this level of proof under *New York Times*).

standard.⁸⁵ Obviously, the heightened evidentiary requirement imposes a greater burden on the plaintiff seeking to prove actual malice. However, the enormity of the obstacle that the clear and convincing standard places upon plaintiffs is not just the standard itself, but the standard and its relation to the granting of a motion for summary judgment.

The United States Supreme Court considered the relationship between the clear and convincing standard and the granting of a summary judgment motion in *Anderson v. Liberty Lobby*.⁸⁶ Normally, when a trial court considers a motion for summary judgment, the court must determine that there are no genuine issues of material fact such that the moving party is entitled to a judgment as a matter of law.⁸⁷ The moving party always bears the burden of establishing that there is no genuine issue of material fact; the nature of this showing may depend on the standard of proof that is required at trial.⁸⁸ In *Anderson*, the Supreme Court concluded that the requirement of a clear and convincing standard of proof under the actual malice standard imposed a greater burden on the plaintiff when responding to a defendant's summary judgment motion.⁸⁹ The Court stated that the clear and convincing standard required that when determining a motion for summary judgment the

⁸⁵ ROGER C. PARK, ET AL., EVIDENCE LAW § 4.05 at 90-91 (1998). The clear and convincing standard is an intermediate evidentiary standard. *Id.* Park describes the standard as follows: "A middle ground lies between 'preponderance of the evidence' and 'beyond a reasonable doubt.'" *Id.* at 91. In some contexts, proof must be 'clear and convincing'. *Id.* The term, of course, is no more easily defined than the others, but it certainly falls between the extremes. *Id.* Park also refers to one state's definition of the clear and convincing standard. *Id.* North Dakota defines the standard as that evidence which "leads you to a firm belief or conviction that the allegations are true. This is a higher standard of proof than proof by the greater weight of the evidence. The evidence presented need not be undisputed to be clear and convincing." *Id.* at 91 n. 17. See also JOHN W. STRONG, ET AL., MCCORMICK ON EVIDENCE § 340 at 575 (4th ed. 1992) (stating that the clear and convincing standard is a "more exacting measure of persuasion" than a preponderance standard and that this standard has historically been applied where the court believes that a certain type of action should be discouraged).

⁸⁶ 477 U.S. 242 (1986).

⁸⁷ The granting of summary judgments in the Federal Courts is governed by Federal Rule of Civil Procedure 56(c). The rule provides in pertinent part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56(c).

⁸⁸ See JACK H. FRIEDENTHAL, ET. AL., CIVIL PROCEDURE § 9.3 at 442-448 (2d. ed. 1995) [hereinafter FRIEDENTHAL] for an extended explanation and discussion on the mechanics of a motion for summary judgment.

⁸⁹ *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

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trial court must inquire whether the evidence presented is such that a jury, applying that standard, could reasonably find for either party.⁹⁰ If a jury can make such a finding, then the plaintiff's claim will not withstand the motion for summary judgment. The result of this ruling is that plaintiffs must present a greater amount of evidence merely to withstand summary judgment and go to trial than they would have to under the more common preponderance standard in civil cases.⁹¹ While *Anderson* was interpreting a Federal Rule, many states followed the Supreme Court's approach.⁹² Indiana is among these states; and, since Indiana is one of only four states that still require that private figure plaintiffs must prove actual malice when the media defames them, the benefits of the *Anderson* approach to summary judgment are enjoyed by media defendants in the Indiana Courts.⁹³

⁹⁰ *Id.* at 252.

⁹¹ This decision essentially substituted the standard for a directed verdict, or a judgment as a matter of law as the Rules of Civil Procedure presently refer to them, for the summary judgment standard of Rule 56(c) in summary judgment proceedings that required the application of the clear and convincing evidentiary standard. The standard for a judgment as a matter of law is contained in Federal Rule of Civil Procedure 50(a)(1) and provides in pertinent part:

If during a trial by jury a party has been fully hears on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or a defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

FED. R CIV. P. 50(a)(1).

By employing this standard the Court significantly increased the non-moving party's burden, thus facilitating the granting of summary judgment motions in favor of a moving party. FRIEDENTHAL, *supra* note 88, at 445 n.25. See also David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 499 (1991) (stating that the enhanced requirements for nonmoving parties on a motion for summary judgment essentially places a much higher burden on the non-moving parties than they normally confront in these matters. As a result, judges are more likely to decide these cases, not juries, and they are more likely to find for the moving party than the nonmoving party).

⁹² While the *Anderson* case did interpret a Federal Rule of Civil Procedure, the states could easily follow the Court's rationale because state civil procedure rules so often mirror, or are virtually the same as the Federal Rules. For example, Indiana Rule of Trial Procedure 56(c) provides that: "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IND. R. TR. P. 56(c). This state civil procedure rule is materially identical to the provisions of the Federal Rule of Civil Procedure.

⁹³ The Indiana Court of Appeals recognized a special rule for defamation cases in *Heeb v. Smith*, 613 N.E.2d 416, 419-20 (Ind. Ct. App. 1993). In *Heeb*, the Court of Appeals adopted the *Anderson* standard and held that a plaintiff can withstand a defendant's summary

The final major advantage that the application of the actual malice standard affords to media defendants, like the application of heightened evidentiary requirements in summary judgment proceedings, is also procedural in nature. This benefit is derived from the doctrine of "independent appellate review" of lower court findings by the appellate court.⁹⁴ This doctrine was established and exercised by the Court in *New York Times*.⁹⁵ Subsequently the Court has stated that the Constitution requires that an appellate court independently review lower court findings to determine if the actual malice standard can be met.⁹⁶ The danger posed by this doctrine to plaintiffs is again fairly

judgment motion only if the plaintiff presents clear and convincing evidence of actual malice. *Id.* However, a split has developed in the Indiana Court of Appeals as to whether the heightened evidentiary standard required by the actual malice standard should be applied to summary judgment proceedings. In *Chester v. Indianapolis Newspapers*, 553 N.E.2d 137 (Ind. Ct. App. 1990), the court held that a plaintiff does not need to meet the heightened evidentiary standards by proving actual malice by clear and convincing evidence in order to survive a summary judgment motion, even though that standard is required at trial. However, federal courts applying Indiana defamation law have applied the heightened evidentiary standard based on the reasoning that a judicial attitude more favorable to summary judgment should be employed to avoid a chilling effect on the media. *Faddell v. Minneapolis Star and Tribune Co.*, 425 F. Supp. 1075 (N.D. Ind. 1976), *aff'd*, 557 F.2d 107 (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). While the Indiana Supreme Court has denied transfer in the state cases that split on the issue, it seems likely that, with the emphasis from the United States Supreme Court on the more frequent use of summary judgments, as evidenced by *Anderson*, and given the fact that the more recent Indiana case law does incorporate the heightened evidentiary standard that the Indiana Courts will continue to do so unless the Indiana Supreme Court says otherwise.

⁹⁴ The doctrine of independent appellate review allows an appellate court to examine the entire trial record to ensure that the plaintiff can prove the existence of actual malice with convincing clarity. Sharon A. Mattingly, *To Quote or Not to Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637, 1648 (1990). The Second Circuit has stated that the First Amendment requires that an appellate court review the facts without any deference to the factual findings of the trial court. *Bery v. City of New York*, 97 F.3d 689, 691 (2d Cir. 1996). The application of independent appellate review is limited to crucial or critical facts before the court, issues of non-critical facts continue to be examined under the clearly erroneous standard. L. Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review for First Amendment Free Speech Cases*, 31 CREIGHTON L. REV. 387, 394 (1998). Non-critical facts are those facts which are not essential to the rule or standard that it at issue in the appeal; however, the definition of critical facts had never been stated with sufficient clarity by the Supreme Court. *Id.*

⁹⁵ *New York Times*, 376 U.S. at 284-85. Here the Court actually examined the findings of the lower court to determine if Sullivan could make out a case for actual malice. According to one commentator, the Court did this because it feared that the Alabama court would find actual malice no matter what constitutional standard was imposed. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 167-82 (1991). Thus the Court was not concerned with judicial economy but with what the Alabama courts might have done at the time. *Id.*

⁹⁶ *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984). In *Bose* the court stated that because a defamation claim seeks to deprive a statement of First Amendment

clear. Under this principle, appellate courts can strike the factual findings of a jury, even in the absence of some clear error from the lower court.⁹⁷

IV. THE NEGLIGENCE STANDARD: ITS MECHANICS AND APPLICATION

The mechanics of the negligence standard for cases involving media defendants and private figure plaintiffs are grounded in the well known and established principles of negligence.⁹⁸ The application of negligence principles in the defamation context does not and should not differ markedly from other areas of tort law.⁹⁹ A negligence cause of action arises when a duty owed to another to act reasonably is breached and the breach causes actual harm or injury.¹⁰⁰ The burden of proof in a negligence cause of action is on the plaintiff who must show by a preponderance of the

protections, the question of whether the evidence is sufficient to do so is not just a question for the finder of fact. *Id.* at 511. The Court went on to state that: "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." *Id.* The application of an independent appellate review of the factual findings of a lower court is in direct conflict with Federal Rule of Civil Procedure 52(a), which establishes that an appellate court can only review the factual determinations of a trial court when there is some clear error on the part of the lower court. FED. R. CIV. P. 52(a). In *Bose*, the Court avoided this conflict by stating that Rule 52(a) does not expressly forbid the independent review of lower court findings. *Bose*, 466 U.S. at 499.

Indiana has adopted the use of independent appellate review for defamation claims. *Bandido's, Inc.*, 712 N.E.2d at 455. In *Bandido's*, the Indiana Supreme Court stated that, "We believe the language in the cases cited *supra* indicates that the Supreme Court has mandated that appellate courts use independent examination of the whole record as the standard of review when proof of actual malice is required as a matter of federal constitutional law in defamation cases." *Id.* at 455-56. See also *Elliot v. Roach*, 409 N.E.2d 661, 687 (Ind. Ct. App. 1980) (stating that in the defamation context, the appellate court must make an independent examination of the facts to determine if the record could constitutionally support a verdict in favor of the plaintiff).

⁹⁷ The application of independent appellate review by the courts has favored media defendants. See Gary Anthony Paranzino, Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of Bose Corp. v. Consumers Union of United States, Inc.*, 71 CORNELL L. REV., 477, 482 (1986).

⁹⁸ ROBERT D. SACK & SANDRA S. BROWN, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 5.9.1.1 at 343 (2d ed. 1994) [hereinafter SACK].

⁹⁹ Lackland H. Bloom Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 339 (1985) [hereinafter Bloom].

¹⁰⁰ PROSSER AND KEETON, *supra* note 13, at 164-65. There are four elements to a negligence cause of action: (1) A duty or an obligation, recognized by the law, requiring the person to conform to a certain standard of behavior, for the protection of others against unreasonable risks, (2) a failure on the persons part to conform to the standard required; a breach of the duty, (3) a reasonably close causal connection, both in fact and proximate, and (4) actual loss or damage resulting to the interest of another. *Id.*

evidence that the defendant failed to act in conformity with legally acceptable minimum standards of behavior and that the statements were false.¹⁰¹ The Restatement provides that an act is negligent when it creates an unreasonable risk of harm.¹⁰² The risk of an action is unreasonable when the risk is so large that it outweighs what the law regards as the utility of the act or of the manner in which it is done.¹⁰³ The negligence standard is also often stated in terms of a reasonable person test. Generally, the negligence standard permits recovery if the plaintiff proves that the defendant knew, or with the exercise of reasonable care should have

¹⁰¹ *Id.* at 239. In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 768-69 (1986), the United States Supreme Court held that, at least when the media defendant publishes speech of public concern, a private figure plaintiff can not recover damages without also showing that the statements were false. *Id.* This requirement is not a retreat to the burdens of the actual malice standard, but allows the press adequate breathing space for the exercise of its First Amendment freedoms. This view is also consistent with basic negligence principles which require that the plaintiff show falsity to make proof of fault. See RESTATEMENT (SECOND) OF TORTS § 613 cmt. f (1976). However, it is possible to show that that defendant acted negligently by publishing a statement with no supporting documents or verification and still not be able to prove that the statement was false. *Id.* The concept is procedurally sound as well, because it simply complies with the basic principle that a plaintiff make out all of the elements of his claim and avoids jury confusion as to who has to prove what. See Joan E. Schaffner, Note, *Protection Of Reputation Versus Freedom of Expression Striking a Manageable Compromise In the Tort of Defamation*, 63 S. CAL. L. REV. 435 (1990) [hereinafter Schaffner].

¹⁰² RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1976). For the full text of §580B and comment g see *infra* note 110.

¹⁰³ Section 291 of the Restatement provides:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

RESTATEMENT (SECOND) OF TORTS §291 (1976). In *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947), Judge Learned Hand established the classic equation for negligence. If the probability of the harm is P, the injury is L and the burden is B, then liability depends upon whether B is less than L multiplied by P. *Id.* at 173. Therefore if $B < PL$, then a defendant is negligent. For those who prefer the language of economics the standard is stated thusly: If the cost of prevention exceeds the benefit of accident avoidance, society would be better off to forgo accident prevention. Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972). For an excellent evaluation of the law of defamation in terms of economic thought and theory see Gary L. Lee, Note, *Strict Liability Versus Negligence: An Economic Analysis of the Law of Libel*, 1981 B.Y.U. L. REV. 398. In any event, the negligence balancing in the defamation context requires the balancing of several factors. Schaffner, *supra* note 101, at 475. Those factors in favor of the plaintiff include: (1) the value of reputation to society, (2) the risk of injury to the plaintiff's reputation, and (3) the gravity of the injury to the plaintiff's reputation. *Id.* Those factors in favor of the defendant include: (1) the value of information dissemination to society, and (2) the additional cost of increased fact verification necessary to avoid injury, in terms of both time and money to the defendant. *Id.*

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known, that a statement was either false or would create a false impression.¹⁰⁴ This standard has been applied throughout the law of torts and is readily applicable to media defendants.¹⁰⁵

Among those states that have enacted a negligence standard as the basis for assessing a media defendant's conduct when a private figure brings a defamation claim, a split has developed over the proper basis for the negligence standard.¹⁰⁶ The split is centered upon whether the basis for assessing a defendant's conduct should be the reasonably prudent person or the standard of practice in the industry.¹⁰⁷ The reasonable person standard is grounded in the classic negligence inquiry: did the defendant act as a reasonably prudent person when they published the allegedly

¹⁰⁴ The negligence formula looks for a breach of one's duty to exercise reasonable care toward another that results in harm to that person. If the injured party can prove a causal connection between his injuries and the defendant's failure to use reasonable care, the defendant will be liable. W. PROSSER, HANDBOOK ON THE LAW OF TORTS, §30 at 143 (4th ed. 1971). The use of ordinary care is measured according to the conduct of a reasonably prudent person, and when the person is a skilled professional, his conduct is measured according to the skill normally exercised within the profession. *Id.* at 149.

The RESTATEMENT (SECOND) OF TORTS § 580B provides that when the defendant is a member of the media and the plaintiff is a private figure, the applicable standard is negligence. See *infra* note 110 for the full text of the Restatement's negligence provisions.

¹⁰⁵ SACK, *supra* note 98, at 343; *Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 697 (Md. 1976). In *Jacron*, the Maryland Supreme Court stated: "The adoption of a negligence standard in cases of private defamation hardly introduces a radical concept to tort law. The application of the negligence standard in tort cases is so well established that juries can safely be expected to comprehend the term when applied in defamation cases." *Id.*

¹⁰⁶ See Bloom, *supra* note 99, at 341. See also SACK, *supra* note 98, at 344.

¹⁰⁷ Some of the states that employ a reasonable person standard when assessing a media defendant's negligence are: Tennessee; see *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); Washington; see *Taskett v. King Broad. Co.*, 546 P.2d 81 (Wash. 1976); Illinois; see *Troman v. Wood*, 340 N.E.2d 292 (Ill. 1975); Kentucky; see *McCall v. Courier Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1982), *cert denied*, 456 U.S. 975 (1982); Ohio; see *Landsowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979 (Ohio 1987); Oregon, see *Bank of Oregon v. Independent News*, 693 P.2d 35 (Or. 1985); Virginia, see *Richmond Newspapers Inc. v. Lipscomb*, 362 S.E.2d 32 (Va. 1987); and Arkansas; see *KARK-TV v. Simon*, 656 S.W.2d 702 (Ark. 1983).

Some of the states that utilize an industry practice standard when assessing a media defendant's negligence are: Arizona; see *Peagler v. Phoenix Newspapers, Inc.*, 560 P.2d 1216 (Ariz. 1977); Delaware; see *Re v. Gannet Co.*, 480 A.2d 662 (Del. Super. Ct. 1984); Georgia; see *Triangle Publ'ns, Inc. v. Chumley*, 317 S.E.2d 534 (Ga. 1984); Iowa; see *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989); Maryland; see *Jacron Sales Co. v. Sindorf*, 350 A.2d 688 (1976); Massachusetts; see *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721 (Mass. 1985); Minnesota; see *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476 (Minn. 1985); Kansas; see *Gobin v. Globe Publ'g Co.*, 531 P.2d 76 (Kan. 1985); Oklahoma; see *Martin v. Griffin Television Inc.*, 549 P.2d 85 (Okla. 1976); and Utah; see *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981).

defamatory material.¹⁰⁸ The second standard is essentially one of professional malpractice where professional standards are used to determine negligence, much like they are used for doctors and attorneys.¹⁰⁹ Thus, under the professional malpractice standard the inquiry is: did the defendant act as a reasonable member of the media in publishing the

¹⁰⁸ See *infra* note 111.

¹⁰⁹ See Hugh J O'Halloran, Comment, *Journalistic Malpractice: The Need for a Professional Standard of Care in Defamation Cases*, 72 MARQ. L. REV. 63 (1988) [hereinafter O'Halloran]. The standard assesses the negligence of a media defendant based on whether the defendant exercised the skill and knowledge normally possessed by a member of the journalistic profession. *Id.* at 77.

While perhaps not as well known as the ethical codes for the legal and medical professions, the journalistic profession does have ethical standards for its members. A fine example of these ethical codes for journalists are those set out by the Radio-Television News Directors Association ("RTNDA"). The code that the RTNDA sets out reads as follows:

The responsibility of radio and television journalists is to gather and report information of importance and interest to the public accurately, honestly and impartially.

The members of the Radio-Television News Directors Association accept these standards and will:

(1) Strive to present the source or nature of broadcast news material in a way that is balanced, accurate and fair.

A. They will evaluate information solely on its merits as news, rejecting sensationalism or misleading emphasis in any form.

B. They will guard against using audio or video material in a way that deceives the audience.

C. They will not mislead the public by presenting as spontaneous news any material which is staged or rehearsed.

D. They will identify people by race, creed, nationality or prior status only when it is relevant.

E. They will clearly label opinion and commentary.

F. They will promptly acknowledge and correct errors.

(2) Strive to conduct themselves in a manner that protects them from conflicts of interest, real or perceived. They will decline gifts or favors which would influence or appear to influence their judgments.

(3) Respect the dignity, privacy and well-being of people with whom they deal.

(4) Recognize the need to protect confidential sources. They will promise confidentiality only with the intention of keeping that promise.

(5) Respect everyone's right to a fair trial.

(6) Broadcast the private transmissions of other broadcasters only with permission.

(7) Actively encourage observance of this Code by all journalists, whether members of the Radio-Television News Directors Association or not.

Id. (quoting RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION CODE OF BROADCAST NEWS ETHICS (1987)).

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allegedly defamatory material. The Restatement (Second) of Torts adopts a negligence standard that is assessed using the professional malpractice standard.¹¹⁰

There are numerous arguments on both sides of this debate. The most often cited reason for the reasonable man standard is that if the professional malpractice standard were adopted, the media would be able to set the standard by which it would be ultimately judged.¹¹¹ Advocates of the journalistic malpractice standard contend that the standard better balances the competing interests between the media's rights and the plaintiff's interest in their reputation and that the standard provides for uniformity in standards and results.¹¹² However, as a practical matter, the

¹¹⁰ The RESTATEMENT (SECOND) OF TORTS provides:

§ 580B. DEFAMATION OF PRIVATE PERSON

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

- (a) knows that the statement is false and that it defames the other,
- (b) acts in reckless disregard of these matters, or
- (c) acts negligently in failing to ascertain them.

RESTATEMENT (SECOND) OF TORTS § 580B (1977).

While 580B does not specify what standard will be used to assess the negligence standard that it sets out for the defamation of private individuals, the official comment to the section is enlightening on the subject. The official comment g provides that:

The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession. (See § 299A). Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though a custom is not controlling. (See § 295A). If the defendant is an ordinary citizen, customs of the community as a whole may be relevant.

RESTATEMENT (SECOND) OF TORTS § 580B cmt. g (1977).

¹¹¹ See O'Hallorhan, *supra* note 109, at 80. Both the Tennessee and the Illinois Supreme Courts strongly rejected the professional malpractice standard. The Tennessee Supreme Court stated: "This is an ordinary negligence test that we adopt, not a 'journalistic malpractice' test whereby liability is based upon a departure from supposed standards of care set by the publishers themselves." *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978). Similarly, the Illinois Supreme Court rejected the journalistic malpractice standard by stating that to do so would "permit that paper to establish its own standards." *Troman v. Wood*, 340 N.E.2d 292, 299 (Ill. 1975).

¹¹² O'Halloran, *supra* note 109, at 78 (arguing that a professional malpractice standard shields the media from unwarranted liability and unwarranted self-censorship). See also Bloom, *supra* note 99, at 342 (stating that the professional malpractice standard provides uniformity and guidance to both juries and the media as to what constitutes negligence and what does not). For a general discussion on the merits of the professional malpractice basis

choice that a jurisdiction elects may not really matter.¹¹³ Under an ordinary reasonable person standard, the fact finder must determine how the reasonable person would behave under similar circumstances.¹¹⁴ The reasonable person is not placed in a vacuum during this analysis.¹¹⁵ Therefore, even under the reasonable person standard, factors such as professional ethics and standards of practice qualify as conditions that a reasonable person in the media defendant's position would consider relevant.¹¹⁶

Aside from the basis by which a defendant's actions are assessed under the negligence standard, its adoption by a jurisdiction may carry other ramifications as well. Specifically, the adoption of the negligence standard may bring other principles closely associated with negligence into the defamation context.¹¹⁷ Most notable are the theories of contributory negligence and comparative fault.¹¹⁸ While the authority on the workings of these negligence concepts is wide and varied, it is still conceivable that these concepts may become a part of defamation actions when the applicable standard for assessing the media defendant's actions is negligence.¹¹⁹

under the negligence standard in claims against the media, see Note, *In Defense of Fault in Defamation Law*, 88 YALE L.J. 1735, 1738 (1979).

¹¹³ Bloom, *supra* note 99, at 344.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* The contention that the choice of the basis for assessing the negligence standard does not matter, in practical effect, is warranted by the most basic principles of negligence. A basic instruction in the law of torts tells us that negligence is assessed under a standard of how a reasonable person would have acted in the same or similar circumstances. If a person has superior knowledge, skill, or intelligence that is superior to that of an ordinary person, the law of negligence demands that the person act consistent with it. PROSSER AND KEETON, *supra* note 13, at 185; see also RESTATEMENT (SECOND) OF TORTS § 289 cmt. m (1976). Under this basic principle the law has held milk haulers, hockey coaches, expert skiers, construction inspectors, and doctors to higher standards of care by considering their special skills or knowledge when carrying out the reasonable person negligence analysis. PROSSER AND KEETON, *supra* note 13, at 185. There is no reason to believe that courts which have adopted the reasonable person standard will ignore evidence of relevant professional customs, practice, and ethics. See generally PROSSER AND KEETON, *supra* note 13, at § 111.

¹¹⁷ SACK, *supra* note 98, at 346.

¹¹⁸ *Id.* Contributory negligence or comparative fault may become a factor when, plaintiff utters false or misleading statements or makes no statement at all. *Id.* Theoretically, under the principles of comparative fault and contributory negligence, the plaintiff may have to account for their own lack of reasonable care. *Id.* at 346-47

¹¹⁹ See, e.g., *Greenberg v. C.B.S., Inc.*, 419 N.Y.S.2d 988 (N.Y. App. Div. 1979) (holding that defendant's summary judgment motion could not be granted under New York's gross negligence standard). One reason for the lack of cohesive authority on the role of these

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These are the rather simple and easily understandable workings of the negligence standard.¹²⁰ It is the classic test of negligence and does not break any new ground.¹²¹ The standard is well known throughout the law and to those who practice it. This Note now turns its focus to explaining why the actual malice standard for private figure plaintiffs is unwarranted and why the Indiana General Assembly, by statute, should enact a negligence standard for such litigation.

V. A RATIONALE FOR INDIANA'S ADOPTION OF THE NEGLIGENCE STANDARD

The adoption of the negligence standard by the Indiana General Assembly is warranted on a number of bases. First, there are the mandates of the Indiana Constitution itself. Next, there is the intention of the framers of the Indiana Constitution. Third, the history and tradition of Indiana's defamation law supports such a standard. Fourth, the reasoning of fellow state legislatures and Supreme Courts also supports such a standard. Fifth, the negligence standard avoids the inequities associated with the actual malice standard. Finally, the negligence standard adequately protects the interests of the media and therefore is a better vehicle for balancing the competing interests of defamed plaintiffs and media defendants.

The benefits afforded to defendants by the application of the actual malice standard in defamation claims brought by private figure plaintiffs effectively preclude those plaintiffs from an adequate remedy.¹²² Thus, Indiana is faced with a choice between two alternative common law policies that seek to balance the competing interests in an individual's good name and the interest in a free press; one is more favorable to plaintiffs and the other is less so.¹²³ When faced with such alternative common law approaches, the courts and the legislature can look to a number of sources for guidance on which of the conflicting policies to adopt.¹²⁴

negligence principles in the defamation concept is the relative recency of the adoption of the negligence standard by most jurisdictions. See Bloom, *supra* note 99, at 389.

¹²⁰ See *supra* notes 100 to 104 and accompanying text.

¹²¹ See *supra* note 105 and accompanying text.

¹²² See *supra* notes 80 to 85 and accompanying text.

¹²³ This choice between the actual malice standard and the negligence standard in cases where a private figure brings suit against a media defendant is the same choice that the United States Supreme Court allowed the individual states to make in *Gertz*. See *supra* note 51 and accompanying text.

¹²⁴ It is the traditional role of the highest court of a state to determine the common law of that state, even when that determination results in innovative growth and change in a

A. The Provisions of the Indiana Constitution

First among these sources of guidance in determining which common law policy to apply are the provisions of the state constitution.¹²⁵ Here, the relevant state constitutional provision that is most enlightening is the Indiana Remedies Provision, which commands that Indiana citizens shall have a remedy for injury to reputation.¹²⁶ The

state's common law. *Walker v. Rinck*, 604 N.E.2d 591, 594 (Ind. 1992). The strength of the common law is in its ability to adapt and meet the changing needs of society. *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972). The supreme court can not close its eyes to the legal and social needs of society, and the supreme court should not hesitate to alter, amend, or abrogate the state common law. *Id.*

The power and ability of the Indiana General Assembly to change the common law with the stroke of pen, or rather with the raising of arms, is well supported by authority within the state. *N. Ind. Pub. Serv. Co. v. Citizens Action Coalition*, 548 N.E.2d 153, 159 (Ind. 1989) (stating that the legislature has the power to change the common law when it sees fit) *Foster v. Evergreen Healthcare*, 716 N.E.2d 19, 25 (Ind. Ct. App. 1999) (stating that an abrogation of the common law will be implied where the statute is enacted which undertakes to cover the entire subject treated and was clearly designed as a substitute for the common law, or where the two laws are so repugnant that both in reason can not stand). *Thompson v. Ferdinand Sesquicentennial Comm.*, 637 N.E.2d 178, 180 (Ind. Ct. App. 1994) (holding that the legislature has the authority and the power to modify or abrogate the common law); *S.E. Ind. Natural Gas Co., v. Ingram*, 617 N.E.2d 943, 953 (Ind. Ct. App. 1993) (stating that the members of the Indiana General Assembly have the authority and the ability to change or abrogate the common law as they see fit).

¹²⁵ *Bals v. Verduczo*, 600 N.E.2d 1353, 1355 (Ind. 1992). In *Bals*, the court stated that when it is faced with a choice between common law policies, it will base its decision in part on the principles found in the relevant provisions of the Indiana Constitution. *Id.* See also *Bandido's Inc.*, 712 N.E.2d at 470 (Boehm, J., concurring) (stating that looking to the constitution does provide guidance when determining which common law policy to adopt); *Id.* at 486 (Dickson, J., dissenting) (stating that the court should follow the *Bals* rule and look to the Remedies Provision of the Indiana Constitution in reaching its conclusion).

¹²⁶ Indiana Constitution Article I, Section 12 provides in pertinent part: "All Courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have a remedy by due course of law." IND. CONST. art. 1 § 12 (emphasis added). Curiously, the slim majorities in *Aafco* and *Bandido's* adopt the application of the actual malice standard to private figure plaintiff actions against media defendants without even mentioning the guarantee of a remedy to reputation, let alone actually addressing it.

The words of the Indiana Remedies Provision are substantially similar to the provisions of analogous sections of other state constitutions. John H. Bauman, *Remedies Provisions In State Constitutions And The Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 243-45 (1991) [hereinafter Baumann]. The words of the various state remedies provisions are essentially the same with minor variations; some phrase their provisions as commands by stating that citizens shall have a remedy. David Schuman, *The Right To A Remedy*, 65 TEMP. L. REV. 1197, 1201-02 (1992). Bauman identified that 39 state constitutions contain some form of remedies provision. Baumann, *supra*, at 244-45. Of these thirty-nine, the following explicitly or implicitly provide for a remedy for injury to reputation or character: ALA. CONST. art I, §13; ARIZ. CONST. art 2, § 11; ARK. CONST. art. 2, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. 1, § 10; DEL. CONST. art. 1, § 9; ILL. CONST. art. 1, § 12; IND. CONST. art. 1, § 12; KY. CONST., Bill of Rights, § 14.; LA. CONST. art. 1, § 22; ME. CONST. art. 1, § 19; MASS.

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Indiana Supreme Court has previously looked to the provisions of the Indiana Remedies Provision when determining which alternative common law principles should apply in Indiana. In *Bals v. Verducco*, the court looked to the Remedies Provision to allow an employee to sue an employer for injury to reputation for statements published in an employee evaluation report.¹²⁷ The court has also looked to other provisions of the Indiana Constitution in adopting differing common law standards and new causes of action.¹²⁸

Of course the Remedies Provision of the Indiana Constitution is not the only germane section of the Indiana Constitution in the debate over the wisdom of the continued application of the actual malice standard to private figure plaintiffs. The mandates of the Indiana Free Speech Clause also play an important role.¹²⁹ The Indiana Free Speech clause is thought by many to be more protective of free speech rights than its federal counterpart.¹³⁰ There is ample authority supporting the view that state constitutional provisions may always provide more protection than the federal constitution, but that they may never supply less protection than the federal constitution.¹³¹ Indeed, this is the very

CONST. art 11, pt. 1; MINN. CONST. art. 1, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. 1, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. art. 14, pt. 1; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. 2, § 6; OR. CONST. art. 1, § 10; PA. CONST. art. 1, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. 1, § 17; TEX. CONST. art. 1, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; WASH. CONST. art. 1, § 10; W. VA. CONST. art. 3 § 17; WIS. CONST. art. 1, § 8; WYO. CONST. art. 1, § 8.

When a state constitution contains an express provision that citizens shall have a remedy for injury to reputation, this translates into an argument in favor of the negligence standard for private figure plaintiffs, because that standard is more consistent with providing injured private individuals with a remedy when they are defamed by a media defendant. William F. Cuozzi & Lee Sporn, Note, *Private Lives and Public Concerns: The Decade Since Gertz v. Robert Welch, Inc.*, 51 BROOK. L. REV. 425, 441-42 (1985) [hereinafter Cuozzi & Sporn].

¹²⁷ 600 N.E.2d 1353, 1355 (Ind. 1992) See also *supra* note 125.

¹²⁸ See, e.g., *Van Dusen v. Stotts*, 712 N.E.2d 491 (Ind. 1991). Recently, the Indiana Supreme Court interpreted the Remedies Provision as guaranteeing medical malpractice plaintiffs a right to a remedy and struck down the occurrence based statute of limitations found in the Indiana Medical Malpractice Act. *Id.*

¹²⁹ Indiana's Free Speech Clause is found in Article I, Section 9 of the Indiana Constitution. The provision states: "No law shall be passed, restraining the . . . right to speak, write, or print, freely, on any subject whatever, but for the abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9 (emphasis added).

¹³⁰ The freedom of speech is found in the First Amendment to the United States Constitution. That amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. 1. See *infra* note 131.

¹³¹ The states courts and legislatures have broad powers to provide greater protection of individual rights than the minimums set forth in the Federal Constitution. William J.

argument that is advanced as the primary justification for Indiana's continued application of the actual malice standard in private figure defamation actions.¹³²

This contention is flawed for several reasons. First, there is no state authority supporting the contention that the Indiana Free Speech Clause requires the application of the actual malice standard to cases brought by private figure plaintiffs.¹³³ Second, the Indiana Free Speech Clause limits its protections in situations where the right is abused.¹³⁴ The decisions in *Aafco* and *Bandido's* simply ignored this condition on the protections of the clause.¹³⁵ This failure to address the abuse provisions of the Indiana Constitution undermine any argument for the continued application of the actual malice standard to private figure plaintiffs. The tort of defamation constitutes an abuse of the freedoms contained in

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). Justice Brennan suggests that a recent trend in Supreme Court opinions, to conservatively construe the Bill of Rights, has caused the states to turn to the provisions of their individual state constitutions. *Id.* at 495-502.

¹³² In *Aafco Heating and Air Conditioning Co. v. Northwest Publ'g Co.*, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1975), the Indiana Court of Appeals found that "Indiana's constitutional protection of freedom of expression requires that the interchange of ideas upon all matters of 'general or public interest' be unimpaired." *Id.* The court reasoned that this conclusion was required by the provisions of Article I, Section 9 of the Indiana Constitution. *Id.* In *Journal-Gazette v. Bandido's*, 712 N.E.2d 446 (Ind. 1999), the majority opinion does not expressly mention the Indiana Free Speech clause; but, the majority does refer to its commitment to the free interchange of ideas and cites approvingly to the reasoning from *Aafco*. *Id.* In his concurring opinion, Justice Boehm addresses the state constitutional provisions and concludes that the Indiana Free Speech Clause demands the application of the actual malice standard, even though he also recognizes the constitutional guaranty of a remedy for injury to reputation. *Id.* at 471 (Boehm, J., concurring).

¹³³ The *Aafco* court did not cite to any state authority for this contention. *Aafco*, 321 N.E.2d at 586. Rather, it relied on the reasoning of the *Rosenbloom* plurality. *Id.* That reasoning involved the interpretation of the federal Free Speech Clause; and, in any event, the United States Supreme Court itself discredited the *Rosenbloom* reasoning merely three years later in *Gertz*. See Cuozzi & Sporn, *supra* note 126, at 459. The *Aafco* Court's failure to even address the abuse provision of the Free Speech Clause was pointed out by the lone dissenter in *Aafco*, Justice Garrard. *Aafco*, 321 N.E.2d at 591-94 (Garrard, J., dissenting). He wrote "[I] find no merit in [the majority's] ready assumption that Article 1, Section 9 of the Indiana Constitution provides a broader privilege in defense of libel than appears in the First Amendment. Any plain reading of Section 9 must dispel such a notion." *Id.* at 593-94 (Garrard, J., dissenting). This same failure is evident in the *Bandido's* majority opinion and in Justice Boehm's concurrence. See generally *Bandido's*, 712 N.E.2d at 469.

¹³⁴ See *supra* note 129 for the full text of the Indiana Free Speech Clause, which conditions its protections on citizens not abusing the rights that the clause guarantees.

¹³⁵ See *supra* notes 132-33 and accompanying text. Also, it is interesting to note that while the *Aafco* court included the full text of the Indiana Free Speech Clause in its opinion, it still failed to address the abuse clause in its opinion. Cuozzi & Sporn, *supra* note 126, at 460.

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Article I, Section 9.¹³⁶ Not only does recent Indiana authority support the fact that defamation constitutes a violation of the abuse provisions of the Free Speech clause, but the weight of authority from fellow states also reaches this conclusion.¹³⁷ Many states have similar abuse provisions in their state constitutions.¹³⁸ Most states have interpreted their abuse provisions in favor of plaintiffs and have rejected the position that Indiana follows despite the abuse provisions of Article 1, Section 9.¹³⁹ A

¹³⁶ This contention was made by Justice Dickson in his *Bandido's* dissent and this position is consistent with recent Indiana decisions explaining the benefits, protections, and limitations of the Indiana Free Speech Clause. See *Bandido's*, 712 N.E.2d at 473-91. Furthermore, in *Price v. Indiana*, 622 N.E.2d 954 (Ind. 1993), the Indiana Supreme Court stated:

Section 9 was certainly not intended to create a private warrant by which an individual might impair the fundamental rights of private persons. Our common law of torts, the mechanism by which we vindicate such private encroachments, makes this clear. *When the expressions of one person cause harm to another in a way consistent with common law tort, an abuse under Section 9 has occurred.*

Id. at 963-64 (emphasis added); see also *Gibson v. Kincaid*, 221 N.E.2d 834 (Ind. Ct. App. 1966) (stating that the freedoms of Section 9 may be abused when the expression of them infringes upon the rights of another).

¹³⁷ This is not the only place in this note where the reasoning of fellow states is enlightening. The reasoning of other states also compels a more modern interpretation of the Remedies Clause. See *infra* notes 156 to 163 and accompanying text.

¹³⁸ For example, the Kentucky Free Speech Clause states, "Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write, and print on any subject, *being responsible for the abuse of that liberty*." KY. CONST. § 8 (emphasis added). The Illinois Free Speech Clause provides "[A]ll persons may speak, write and publish freely, *being responsible for the abuse of that liberty*." ILL. CONST. art. I, § 4 (emphasis added). Other states that include an abuse provisions in their free speech clauses include: Kansas; see KAN. CONST. BILL OF RIGHTS § 11; Oklahoma; see OKLA. CONST. art. II, § 22; Oregon; see OR. CONST. art. I, § 8; Iowa, see IOWA CONST. art. I, § 7; Virginia; see VA. CONST. art. 1, § 12; and Wisconsin; see WIS. CONST. art. I, § 3.

¹³⁹ See, e.g., *McCall v. Courier-Journal*, 623 S.W.2d 882, 886 (Ky. 1981) (holding that the abuse provision of the state free speech guaranty required the adoption of the negligence standard to adequately protect private reputational interests); *Troman v. Wood*, 340 N.E.2d 292, 299 (Ill. 1975) (holding that the public interest test advanced in *Rosenbloom* could not stand under the abuse provisions of the Illinois free speech clause and adopting a negligence standard for private figure defamation); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976) (concluding that the abuse provision of the state constituting differentiated the state free speech guaranty substantially from the federal constitutional guaranty and that this difference required the adoption of the negligence standard.); *Jones v. Palmer Communications Inc.*, 440 N.W.2d 884, 898 (Iowa 1989) (interpreting the abuse provisions of the Iowa Constitution as requiring the adoption of the negligence standard to protect the reputational interests of private figures); *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985) (reasoning that the abuse provision of the Virginia free speech clause requires that those who abuse the right be responsible for that abuse and concluding that the negligence standard best serves this purpose); *Denny v. Mertz*, 318 N.W.2d 141, 150

plain reading of Article 1, Section 9, coupled with the recent holdings of the Indiana Supreme Court regarding the abuse provision and the reasoning of fellow states with similar provisions, points to one conclusion: that the proper applicable standard of fault in private figure defamation actions is the negligence standard and not the actual malice standard.

B. *The History and Tradition of Indiana's Defamation Law*

Another source of guidance as to which standard should govern private figure defamation claims in Indiana is the history and tradition of Indiana's defamation law.¹⁴⁰ Indiana has long recognized the importance of providing a remedy for injury to reputation.¹⁴¹ This is due in large part to the state's interest in providing a remedy for injury to reputation, protecting individuals from attacks on their personal reputations.¹⁴² Indiana's case law shows a trend reflecting this state interest and the provision of a remedy for injury to reputation to those who are defamed.¹⁴³ Prior to the *Aafco* decision, Indiana had a long history of achieving the state's interest and providing a remedy for injury to one's reputation without any requirement that the plaintiff show actual malice.¹⁴⁴ This history should not be quickly ignored when

(Wis. 1982) (holding that the negligence standard complies with the freedom of speech and the abuse provisions of the Wisconsin Constitution).

¹⁴⁰ See, e.g., *Bandido's Inc.*, 712 N.E. 2d at 473-91 (Dickson, J., dissenting).

¹⁴¹ As early as 1847, the Supreme Court of Indiana recognized the potential harm that defamatory statements could have on the reputation of an individual. See *Armentrout v. Moranda*, 8 Blackf. 426 (Ind. 1847) (stating that defamatory communications were those that injured reputation). See also *Johnson v. Stebbins*, 5 Ind. 364 (1854) and *State ex rel. Lopez v. Killgrew*, 174 N.E. 808 (Ind. 1931) (both cases recognizing that injury to the reputation of an individual is the focus of defamation law).

¹⁴² The central concern of defamation law is the reputation of the individual who has been defamed. Indiana has recognized that the state has an interest in protecting the reputations of individuals. *Aafco*, 321 N.E.2d at 588. The court also stated in *Aafco* that this interests include preserving an individual's privacy and standing in the community. *Id.*

¹⁴³ See *supra* note 19.

¹⁴⁴ See *supra* notes 19 and 21. At least one other jurisdiction has justified its adoption of the negligence standard based on its tradition of not requiring a showing of actual malice in defamation actions. See *Phillips v. Evening Star*, 424 A.2d 78 (D.C. 1980), *cert denied*, 451 U.S. 989 (1981). The court reasoned that since publishers of defamatory falsehoods were held strictly liable under the District of Columbia's common law, the District's common law tradition expressed a clear tradition and preference for protecting the reputations of citizens. *Id.* at 87. The court noted that while *Gertz* required it to abandon strict liability, it reasoned that the district's tradition required the utmost protection for private individuals and that this translated into an adoption of the negligence standard. *Id.* This is exactly the type of common law analysis that the *Gertz* opinion intended the states to make in determining which standard would be followed in a particular jurisdiction. See *Cuozzi & Sporn, supra* note 126, at 445.

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determining which of the available standards should apply in cases brought by private figure plaintiffs against media defendants.¹⁴⁵

C. *The Intention of Indiana's Constitutional Framers*

Next, in determining to apply the actual malice standard or the negligence standard in suits initiated by private figure plaintiffs, the intentions of the framers of the Indiana Constitution are relevant. In ascertaining the intended meaning of the Indiana Remedies Provision, one must look to the language of the provision, and to the purpose and structure of the state constitution.¹⁴⁶ The present Indiana Constitution was written in 1851, replacing the constitution that had been in effect since Indiana became a state in 1816.¹⁴⁷ The provisions of the remedies clauses in these two constitutions vary significantly.¹⁴⁸ The variations are indicative of the framers' intent at the time of the adoption of the

¹⁴⁵ See *Nelson v. Parker*, 687 N.E.2d 187, 190 (Ind. 1997) (recognizing the importance of settled rules in property law and that stability is desirable to predict outcomes); *Marsillett v. Indiana*, 495 N.E.2d 699, 704 (Ind. 1986). Chief Justice Shepard, writing for the majority, stated as follows: "Under the doctrine of stare decisis, this Court adheres to a principle of law which has been firmly established. Important policy considerations militate in favor of continuity and predictability in the law. Therefore, we are reluctant to disturb long-standing precedent which involves salient issues." *Id.*

¹⁴⁶ *Indiana Gaming Comm'n v. Moseley*, 643 N.E.2d 296, 298 (Ind. 1994). The language of the constitutional provision, history surrounding its passage, and the structure of the constitution are all factors that are examined in interpreting the Indiana Constitution. *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1316 (Ind. 1988). This approach to interpreting state constitutional provisions is known as the "primary" approach to state constitutional provisions and is most often identified with former Oregon Supreme Court Justice Hans Linde; under this approach the text, history, structure, and underlying values of a state constitution are all examined when interpreting a state constitution. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992). Under this approach, essentially the state supreme courts turn to their state constitutions and interpret it much the same way that the United States Supreme Court has interpreted the United States Constitution. See *Id.* Rather than merely immediately turning to the United States Supreme Court's application of some federal constitutional provision to the states and following that reasoning, the state supreme courts look to their own constitutions and create a separate source of constitutional law. See *Id.*

¹⁴⁷ Indiana's first constitution was adopted in 1816, this was superseded by the present Constitution, which was adopted on November 1, 1851. *Union Ins. Co. v. Indiana*, 401 N.E.2d 1372, 1374 (Ind. Ct. App. 1980). See also *Fordyce v. Indiana*, 569 N.E.2d 357, 361 (Ind. Ct. App. 1991).

¹⁴⁸ For the full text of the present Remedies Provision, see *supra* note 5. The original provision was found in Article 1, Section 11 of the 1816 Indiana Constitution. That provision stated: "That all courts shall be open and every person for injury done to him in his person, property, or reputation shall have a remedy by due course of law; and right and justice administered without delay." IND. CONST. art. 1, § 11 (1816).

1851 Constitution.¹⁴⁹ There are two significant differences between the two provisions.¹⁵⁰ First, the first sentence of the 1851 constitution is made up of two independent clauses; this indicates that the framers intended that two different rights be preserved by the provision.¹⁵¹ Thus the provisions of the 1851 Constitution protect the right to open courts and the right to a remedy for the injuries stated in the section.¹⁵² Second, the framers added additional words to the final sentence of the 1816 Remedies Provision.¹⁵³ The addition of these words indicates that not only did the framers intend that the right to a remedy be protected, but

¹⁴⁹ One method of discerning legislative intent and interpreting statutes is to compare the language and structure of the previous statute with the language and structure of the present enactment. *Gingerich v. Indiana*, 93 N.E.2d 180, 181-82 (Ind. 1950). The rules of discerning the legislative intent for statutory enactments are applied equally when discerning the intention for the adoption of constitutional provisions. *State v. Nixon*, 384 N.E.2d 152, 156 (Ind. 1979). These cases stand for the proposition that Indiana does in fact follow the "primacy approach" to interpreting the provisions of the Indiana state constitution. See *supra* note 145. For a discussion on the interpretation of the Indiana Bill of Rights and the resurgence of it as a means and source for relief and arguments by parties see Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

¹⁵⁰ The modern version of the Remedies Clause includes a semi-colon in the middle of the first sentence and includes the word "completely" in the second sentence of the clause. The original version of the remedies clause was only one sentence and did not include the word "completely." See *supra* notes 5 and 148.

¹⁵¹ The inclusion of a semi-colon in the modern version of the Remedies Clause creates two independent clauses. This may seem like a small or superficial distinction to some, but the Indiana courts think differently. The Indiana Supreme Court stated that, "The constitution was carefully made, and every word in it was carefully chosen to express the intention of the constitutional convention." *Allen v. Van Buren Township of Madison County*, 184 N.E.2d 25, 29 (Ind. 1962). The Indiana Court of Appeals interpreted this construction of Article 1, § 12 as creating the rights to access to the courts and a separate right to a remedy in tort for all Indiana citizens. *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997), *transfer granted, opinion vacated*, 698 N.E.2d 1192 (Ind. 1998), *aff'd*, 711 N.E.2d 1273 (Ind. 1999).

¹⁵² See *Martin*, 674 N.E.2d at 1024. The court recognized the preservation of two independent rights by this provision. The first is the right to access to an open court system. *Id.* The second is the right to a remedy for the injuries covered by the provision which entails all torts. *Id.*

¹⁵³ Compare *supra* note 5 and note 148. Note that the modern version of the Remedies Clause provides that justice be administered "completely," whereas the original provision contains no such guarantee.

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that the right was to a complete tort remedy for their injuries.¹⁵⁴ Naturally, among these are defamation claims.¹⁵⁵

D. Other States' Reasons for Adoption of the Negligence Standard Under State Remedies Clauses

Finally, a highly persuasive source that provides guidance in determining which of the available common law policies to apply in Indiana is the reasoning and holding of other state supreme courts and appellate courts that have heard the issue.¹⁵⁶ The vast majority of the state supreme courts and appellate courts have mandated that the negligence standard should apply to private figure defamation claims.¹⁵⁷ There are some decisions among these mandates from the other state supreme and appellate courts that are particularly compelling in the present situation, because some of these state supreme and appellate courts have relied upon the guarantees of their state's remedies provision in adopting the negligence standard.¹⁵⁸ The Oregon Court of Appeals adopted the negligence standard in *Bank of Oregon v. Independent News*.¹⁵⁹ The Oregon Court of Appeals refused to apply the actual malice standard in this case, because the imposition of that standard would

¹⁵⁴ The court recognized this in *Martin*. See *Martin*, 674 N.E.2d at 1025. While the term completely does not mean that every plaintiff must recover, it does mean that every plaintiff will at least have the opportunity to recover for his injuries, this is impossible for private figure plaintiffs under the application of the actual malice standard given the obstacles that it places in their path. *Id.*

¹⁵⁵ See *supra* note 13.

¹⁵⁶ The Indiana Supreme Court and Appellate Courts have often looked to the reasoning and holdings of other state courts in choosing among various common law alternatives. See, e.g., *Terra Haute Regional Hosp. v. Trueblood*, 600 N.E.2d 1358, 1360 (Ind. 1992) (looking at the reasoning of the Arizona Supreme Court in determining whether the trial court may compel the production of the medical records of non-party patients who have not waived the physician-patient privilege); *Highshew v. Kushto*, 134 N.E.2d 555 (Ind. 1956) (adopting statements made by the Illinois Supreme Court in regards to jury instructions in tax cases); *Johnson v. Hickman*, 507 N.E. 2d 1014, 1017-18 (Ind. Ct. App. 1987) (seeking guidance from the supreme courts of other states in determining whether an insured has any contractual rights to change the agent of record designation as shown on business records of the insured); *Pigman v. Ameritech Publ'g Co.*, 641 N.E.2d 1026, 1031-32 (Ind. Ct. App. 1994) (examining the holdings of other state supreme courts in assessing the liability of a telephone directory publisher for omitting an attorney's advertisement from the phone directory). Indeed, many state courts look to courts of another state to assist them in making some determinations. See Robert A. Maragola, *Independent State Constitutional Adjudication In Massachusetts: 1988-1998*, 61 ALBANY L. REV. 1625 (1998).

¹⁵⁷ See *supra* note 6.

¹⁵⁸ See *infra* notes 159 to 163.

¹⁵⁹ 670 P.2d 616 (Or. Ct. App. 1983).

have conflicted with the express provisions of the Oregon Constitution.¹⁶⁰

Likewise, the Illinois Supreme Court refused to adopt the actual malice standard for private figure plaintiffs suing media defendants in *Troman v. Wood*.¹⁶¹ Indeed many jurisdictions, at least in part, have relied upon the provisions of a remedies guarantee in refusing to apply the actual malice standard in these types of cases.¹⁶² As the Oregon Court of Appeals did not adopt the actual malice standard, the Illinois Supreme Court refused to impose the burden of the actual malice standard upon private figure plaintiffs on the grounds that such a standard would abrogate the purpose of Illinois' guarantee of a remedy for injury to reputation.¹⁶³

¹⁶⁰ The Oregon Remedies Clause provides as follows: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property or reputation." OR. CONST. art. I, § 10. In *Bank of Oregon*, the court reasoned that the provision expressly guarantees a right to a remedy for injury to one's reputation. *Bank of Oregon*, 670 P.2d at 625. The court reasoned that since the free speech provisions of the Oregon Constitution did not provide any greater protections than the First Amendment, the application of the actual malice standard to suits brought by private figure plaintiffs would violate the guarantees of Article I, section 10 of the Oregon Constitution. *Id.* at 626-27.

¹⁶¹ 340 N.E.2d 292 (Ill. 1975).

¹⁶² See, e.g., *Gobin v. Globe Publ'g Co.*, 531 P.2d 76 (Kan. 1975); *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161 (Mass. 1975); *Thomas H. Maloney & Sons v. E. W. Scripps Co.*, 334 N.E.2d 494 (Ohio Ct. App. 1974). In all of these cases, the state courts looked to the remedies clauses of the various state constitutions when determining which standard to apply to private figure plaintiffs and media defendants.

¹⁶³ The Illinois Remedies Clause provides that "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." ILL. CONST. art. I, § 12. The Illinois Supreme Court stated that the Illinois Constitution expressly provided Illinois citizens with the right to a remedy for injury to reputation. *Troman*, 340 N.E.2d at 297. The court held that the application of the actual malice standard to suits brought by private figure plaintiffs against media defendants could not stand under this provision, because it so severely limited their chance to recover for the injuries they sustained. *Id.* The Illinois Supreme Court examined the reasoning of the Indiana Court of Appeals and would not accept the reasoning in that case, stating that *Aafco* was based on the slim majority interpretation that the Indiana Constitution provided more freedom of the speech and press guarantees than the First Amendment. *Id.* at 299. See *supra* notes 132-33 and accompanying text for criticism of the *Aafco* interpretation.

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E. *The Negligence Standard Best Serves the Competing Interests of the Media and Private Figure Plaintiffs*

Indiana's adoption of the negligence standard best serves the competing interests of the media and private figure plaintiffs.¹⁶⁴ First, the adoption of the negligence standard in Indiana would wipe away the procedural and evidentiary benefits that media defendants currently enjoy under the application of the actual malice standard.¹⁶⁵ Under the negligence standard, the plaintiff must show that the defendant was negligent by a preponderance of the evidence.¹⁶⁶ This avoids the imposing requirement of "clear and convincing" evidence of actual malice.¹⁶⁷ Furthermore, under the negligence standard, the Indiana appellate would not conduct an independent judicial review of the record in a private figure defamation case.¹⁶⁸ Rather, under the negligence standard the courts simply consider the evidence in a manner that is most favorable to the judgment, along with all reasonable inferences and reverse only if there is lack of proof on an essential element of a claim.¹⁶⁹

¹⁶⁴ The interest of the media is, of course, freely publishing matters that are of legitimate public concern, while private figures have an interest in their good name.

¹⁶⁵ See *supra* notes 80 to 97 and accompanying text for a discussion of the benefits to media defendants under the actual malice standard.

¹⁶⁶ The preponderance of the evidence standard is the typical burden of proof that the plaintiff carries in a negligence claim under existing Indiana law. The preponderance of the evidence standard is defined as "more likely than not" and requires only that the factfinder's mind be tipped only slightly in favor of one side. ROGER C. PARK ET AL., EVIDENCE LAW §4.04 at 87 (1998). Park clarifies this definition by using the example of a typical negligence claim, where he states that a plaintiff must offer enough evidence on duty, breach, causation, and damages to slightly tip the sentiment of the jury in its favor. *Id.*

¹⁶⁷ For an explanation of the clear and convincing standard of proof and its burdens on private figure plaintiffs, see *supra* notes 84-86 and accompanying text. The objective nature of the negligence standard does not warrant the clear and convincing standard of the actual malice standard; as the negligence standard continues to be applied by courts around the country, a body of precedent defining journalistic malpractice will develop with sufficient clarity to provide guidance to journalists, attorneys, judges and juries. See Bloom, *supra* note 99, at 394.

¹⁶⁸ See *supra* note 166.

¹⁶⁹ This is what both Justice Boehm and Justice Dickson refer to as the "conventional standard" for appellate review of jury determinations in Indiana. *Bandido's, Inc.*, 712 N.E.2d at 469 (Ind. 1999) (Boehm, J., concurring), *cert denied*, 120 S. Ct. 499 (1999); *Id.* at 489 (Dickson, J., dissenting). Indeed, the courts in Indiana have repeatedly held that appellate courts will normally not conduct an independent review of the determinations made by a jury. Rather what these two justices refer to as "the conventional standard of appellate review" is commonly referred to as the clearly erroneous level of appellate review. The standard has been stated in Indiana as:

In addition to these procedural inequities that the negligence standard alleviates, its adoption is also warranted on the grounds that private figures do not typically enjoy the access to media outlets that public figures typically do and the fact that private figures do not voluntarily expose themselves to the public eye.¹⁷⁰ These reasons for the adoption of the negligence standard require little more than ordinary common sense to grasp. Private individuals do not normally seek out the press and hope to have their name and image plastered all over newspapers and television broadcasts. Furthermore, private individuals simply do not enjoy the access to the media that public figures most often do.¹⁷¹

Take for example a newspaper running a story on the sexual preference of a city council member, as opposed to the same story on a teacher in a local high school. Common sense dictates that the public figure will have greater access to the channels of the media by which he can clear his name and reputation; whereas, the private figure teacher has been defamed and will not have the access to the media required to repair his reputation.¹⁷² Even if he did, there is another aspect to access to the media that not many commentators or courts have yet addressed: the media savvy of the public figure as opposed to that of a private figure. Returning to the above example, we can reasonably expect the city council member to be well versed in handling the media, he probably even has a considerable staff whose sole purpose is to deal with the media. Now return to the teacher, a lone accused private figure who has never faced the harsh glare of a television camera. Which do you think will better be able to address the statements made about him by

In reviewing the sufficiency of evidence in a civil case, we will decide whether there is substantial evidence of probative value supporting the trial court's judgment. We neither weigh the evidence nor judge the credibility of witnesses but consider only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. Only if there is a lack of evidence or evidence from which a reasonable inference can be drawn on an essential element of the plaintiff's claim will we reverse a trial court.

Magnavox Fort Wayne Employee's Credit Union v. Benson, 331 N.E.2d 46, 49 (Ind. Ct. App. 1975).

¹⁷⁰ These are the primary justifications for the adoption of the negligence standard in private figure defamation cases. In fact, it was these two premises upon which the United States Supreme Court based the *Gertz* decision. While these justifications may seem like just reiterating the old reasoning of the Court, the strength of their assertions can not be doubted even to this day; and, they still provide a compelling justification for the adoption of the negligence standard.

¹⁷¹ See *supra* notes 52-55 and accompanying text.

¹⁷² See *supra* note 52 and accompanying text.

the media? Obviously, the public figure has the better experience and expertise to handle the situation.

This example shows the power that the traditional justifications for the negligence standard hold and why they should not be dismissed so readily as simply words that courts around the nation have mimicked from the Supreme Court's reasoning in *Gertz*.¹⁷³ By basing fault on the reasonableness of the media defendant's actions, the private figure is assured of at least the possibility that he will recover, despite the fact that he is not experienced with handling life under the public eye; and, despite the fact that he does not enjoy the significant access to the media that public figures typically do.

Many who argue against the imposition of the negligence standard in private figure defamation cases claim that the standard is too favorable to plaintiffs; and, therefore the standard results in unacceptable self-censorship by the media.¹⁷⁴ However, this was the very point of the *Gertz* decision: to alleviate the burdens on a private figure plaintiff in stating his case against a media defendant.¹⁷⁵ While *Gertz* lessens the burden on the private figure plaintiff, it does not automatically follow that the media will be the victim of plaintiff-imposed censorship because the media can still utilize summary

¹⁷³ See *supra* notes 52-55 for an explanation of the *Gertz* rationale.

¹⁷⁴ Robert Franklin, *What Does Negligence Mean In Defamation Cases?*, 6 COM./ENT. L.J. 259 (1984). Professor Franklin relies on two studies that he has conducted as well as a study conducted by the Libel Defense Resource Center. These studies suggest that plaintiffs tend to be more successful in negligence cases than in actual malice cases. The number of negligence cases relied on by these studies however is relatively small, given that they were all conducted only within a decade of the *Gertz* decision and are not contrary to other empirical data showing the harshness of the actual malice standard towards private figure plaintiffs. See *supra* note 83. See also Robert S. Gilmore, Comment, *Attacking the Negligence Rule in Defamation of Private Plaintiffs: Embers Supper Club v. Scripps Howard's Broadcasting Co.*, 47 OHIO ST. L.J. 503, 515 (stating that the public's right to being informed on matters of public interest should not be cut short by the dangers of self-censorship under the negligence standard); Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 89 (1975) (arguing that the First Amendment requires the protection of societies right to be informed about any issue that is of public concern). Others suggest that media self-censorship is fueled under the negligence standard because that standard often requires the media to seek appellate level review of most trial court decisions, thus increasing the cost of litigation and therefore providing a greater incentive for self imposed censorship. David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 460 (1975); Gerald G. Ashdown, *Gertz and Firestone: A Study In Constitutional Policymaking*, 61 MINN. L. REV. 645, 673 (1977).

¹⁷⁵ See *supra* notes 51-55 and accompanying text.

judgment proceedings to defeat claims made against them.¹⁷⁶ All of this suggests that the negligence standard does not translate into greater self-censorship by the media, but rather best serves the competing interests of the media and private figures.

This Note now turns its focus to a proposal that will enact the negligence standard as the basis for proving fault in the private figure defamation context. What follows is a proposed statute reforming the law of defamation in Indiana.

VI. A PROPOSAL FOR STATUTORY REFORM

A. Introductory Remarks

What follows is a proposed bill for consideration by the Indiana General Assembly enacting the negligence standard as the basis for liability in defamation actions brought by private figure plaintiffs against media defendants. This proposed statute is not a proposal for the

¹⁷⁶ While under the negligence standard the media does not enjoy the benefits of the clear and convincing standard, the use of summary judgment is still an effective tool for the media to protect itself under the negligence standard. See Bloom, *supra* note 99, at 390. See also Cynthia J. Rhodes, *Defamation Law - Libel and Slander - Private Individual Required to Show Actual Malice To Prove Defamation Where Topic of Speech is of Genuine Public Concern*, *Sisler v. Gannet Co.*, 104 N.J. 256, 516 A.2d 1083 (1986), 19 RUTGERS L.J. 177 (1987) (stating that the application of the negligence standard does not rob media defendants of the effectiveness of the summary judgment motion and summary judgments continue to be obtained by media defendants in claims brought by private individuals under the negligence standard). By way of example in all of the following cases, the media defendants prevailed on motions for summary judgment, directed verdicts, or judgment notwithstanding the verdict: *Valentine v. C.B.S., Inc.*, 698 F.2d 430 (11th Cir. 1983) (affirming a grant of summary judgment under applicable provisions of state law); *Turner v. Harcourt, Brace, Jovanovich*, 5 Media L. Rep. (BNA) 1437 (W.D. Ky. 1979) (granting the defendant's motion for summary judgment when plaintiff failed to establish negligent publication); *Lake Havasu Estates, Inc., v. Reader's Digest Ass'n*, 441 F. Supp 489 (S.D.N.Y. 1977) (granting summary judgment for the defendant); *Phillips v. Washington Post Co.*, 8 Media L. Rep. (BNA) 1835 (D.C. Super. Ct. 1982) (granting defense motion for summary judgment); *Karp v. Miami Herald Publ'g Co.*, 359 So.2d 580 (Fla. Dist. Ct. App. 1978) (affirming a grant of summary judgment for the defendant); *El Amin v. Miami Herald Publ'g Co.*, 9 Media L. Rep. (BNA) 1079 (Fla. Cir. Ct. 1983) (granting the defense motion for summary judgment); *LeBouf v. Times Picayune Publ'g Corp.*, 327 So.2d 430 (La. Ct. App. 1975) (reversing the verdict for the plaintiff); *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935 (Mass. 1979) (affirming the grant of defendant's motion for summary judgment); *Walters v. Sanford Herald Inc.*, 228 S.E.2d 766 (N.C. 1976) (granting summary judgment for the defendant); *Horvath v. Ashtabula Tel.*, 8 Media L. Rep. (BNA) 1657 (Ohio Ct. App. 1982) (reversing the verdict for the plaintiff); *Benson v. Griffin Television, Inc.*, 593 P.2d 511 (Okla. 1979) (upholding the trial court's grant of summary judgment for the defendant); *KARK-TV v. Simon*, 656 S.W.2d 702 (Ark. 1983) (reversing the verdict in favor of the plaintiff).

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wholesale reformation of defamation law in Indiana or anywhere else. That topic has spawned volumes of literature and proposals that are not the focus of this Note.¹⁷⁷ This Note proposes a statutory enactment of the negligence standard rather than a model judicial acceptance of that standard largely for reasons of removing the decision from judicial discretion. The experience in other states that have judicially adopted the negligence standard for private figure defamation actions is that sometimes the courts may waiver in their adherence to the standard and deviate from it to the detriment of plaintiffs and the interests the standard protects.¹⁷⁸ The following statutory proposal clearly defines the parameters that the judiciary is to follow in assessing the claims of private figure plaintiffs and leaves little room for a judicial interpretation that would free the courts from its requirements.

B. A Proposed Statute

Title I: Act and Purpose

This Act shall be known as the Protection and Privacy Act. The purpose of this act is to give full effect to the provisions of the Indiana Constitution that provide that all citizens of this state shall have a complete remedy for the tort of defamation and that all citizens of this state shall be responsible for their abuses of one of, if not the most fundamental of rights, that of free speech.

¹⁷⁷ While it is not the primary focus of this Note to address all of the various proposals and literature on the great debate going on over the future of defamation law in the United States, anybody interested in this area would do well to begin with M. Linda Dragas, Comment, *Curing A Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113 (1995). The author of this comment does an excellent job of setting out the various proposals that presently occupy the time and writings of many commentators in the field. In addition, this comment lists the major recent proposals for national reform and assesses the potential impact of each.

¹⁷⁸ The danger of judicial vacillation between the two standards came to fruition in the State of Illinois. While applying the negligence standard to private figure defamation actions for many years under the reasoning of *Troman v. Wood*, 340 N.E.2d 292 (Ill. 1975), the Illinois courts seemed to have retreated from it in the case of *Colson v. Stieg*, 433 N.E.2d 246 (Ill. 1982). For an analysis of the impact that this case has had on Illinois defamation law and therefore the impact that such judicial vacillation may cause in any state with a judicially imposed negligence standard for private figure defamation actions, see James R. Bayer, *Defamation: Extension of the "Actual Malice" Standard to Private Litigants Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E.2d 246 (1982), 59 CHI.-KENT L. REV. 1153 (1983).

Official Comment

The express legislative purpose of this statute is to provide that a negligence standard is followed in all defamation actions brought by private figure plaintiffs against media defendants in the state of Indiana.

Title II: Definitions

In all actions filed within the scope of the provisions of this act, the following definitions shall apply.

(A) Defamation Action: A Defamation Action is any cause of action filed within the courts of the State of Indiana that alleges, pursuant to the rules of pleading, the legally recognized elements of a cause of action for an injurious falsehood, including the torts of libel or slander.

(B) Private Figure: A private figure is any citizen of the State of Indiana who

- (i) Has not voluntarily thrust themselves into the forefront of any particular public debate, controversy, or event; or,*
- (ii) Does not willingly and publicly take a role, including but not limited to the formation, dispute, and resolution of important public policy questions or of other areas or concern to society; or*
- (iii) Has not voluntarily and willingly achieved a level of notoriety and fame attributable to a public official or public figure as described in Section C(iii) of this act.*

(C) Public Figure: For purposes of this Act, a Public Figure is any Citizen of the State of Indiana who:

- (i) Has been elected to a public office of any municipal, county, or state office and the communications are related to the officials conduct in regards to their official duties as a public official.*
- (ii) Any person who willingly and publicly places themselves at the forefront or center of any public debate on matters of public policy or of high social concern, for the purposes of that particular public policy question or high societal concern.*

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- (iii.) *Any person who has voluntarily and willingly achieved a level of fame or notoriety where their public actions or statements substantially impact or impede a matter of public policy.*

(D) *Media Defendant: For purposes of this Act a Media Defendant may be any:*

- (i.) *Commercial or non-commercial radio or television broadcaster which allegedly broadcasts or otherwise disseminates allegedly defamatory material regarding a private figure; or*
- (ii.) *Commercial or non-commercial publisher of newspapers, newsletters, bulletins, periodicals, or other widely distributed publication which allegedly publishes or otherwise disseminates allegedly defamatory and damaging statements about a private figure.*

Official Comment

Note the definitions of private and public figures for the purposes of this act. Under these definitions, the determination of a private or public figure plaintiff is grounded in the actions of that plaintiff themselves.¹⁷⁹ A person may become a public figure by willingly placing themselves among those attempting to shape the public policy of the State of Indiana. There will no doubt be some judicial determination when assessing these criteria. However, the voluntary nature of the acts conferring the public figure moniker on citizens greatly serves the interest of protecting the private figure plaintiff. No longer can the media create public figures by unilaterally deciding that the person's life is an appropriate subject for the entire state to learn about. Absent some voluntary action on the part of the private citizen, he will never be considered a public figure under this act.

The definition of media defendants is purposely broad to account for publishers and broadcasters that may not seem like media defendants to the average person. Take for example a national labor union that publishes a weekly newsletter to its members. Under the

¹⁷⁹ For an understanding of the differences that courts have recognized among private and public figures and the manner in which a person is classified as a member of one of these groups for the purposes of defamation law, see *supra* notes 35-38 and accompanying text.

definition as provided in this Act, the Union may be held to account for its defamatory statements if the plaintiff ultimately proves those facts.¹⁸⁰

Title III: Procedural Requirements

In all actions brought pursuant to this act the trial and appellate courts of the State of Indiana shall strictly adhere to the requirements of the Indiana Rules of Trial Procedure. The courts of this state shall not create separate rules of procedure and evidence for defamation actions brought by private figure plaintiffs.

Official Comment

The express legislative purpose section of the Act entitled "Procedural Requirements" is to wipe away the judicially created doctrines of clear and convincing evidence, independent appellate review, and the higher burden of proof on the non-moving party.¹⁸¹ All of these doctrines are procedural and evidentiary in nature. It is the job of this General Assembly to determine which rules the trial and appellate courts of this state will follow. Those courts shall follow the Indiana Rules of Trial Procedure and the Indiana Rules of Evidence when evaluating actions filed pursuant to the coverage of this act. The courts of this state shall not create their own procedures and rules when this Body has provided the parameters by which those courts shall function.

Title IV: Proof of Fault: Actual Damages

In all actions filed pursuant to this act a private figure plaintiff may recover actual damages from a media defendant which has published defamatory communications regarding that private figure upon a showing, by the preponderance of the evidence; that the media defendant failed to exercise the proper degree of care, skill, and learning that a reasonable member of the defendant's profession would have exercised if confronted with the same or similar circumstances as the defendant.

Official Comment

Title IV of the act imposes the negligence standard as the applicable standard of fault for the determination of whether a media

¹⁸⁰ For a similar factual situation from an actual case, see *supra* notes 21-22.

¹⁸¹ The procedural and evidentiary inequities that private figure plaintiffs suffer as a result of the application of the actual malice standard in defamation actions against media defendants are explained in Part III of this Note. See *supra* notes 80-97 and accompanying text for an understanding of the mechanics and results of these inequities.

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defendant is liable for the publication of defamatory statements about a private figure plaintiff. The Act imposes a negligence standard that is based upon a professional duty of care.¹⁸² Thus, it is not incorrect to refer to this in a sense as a sort of professional malpractice standard for members of the media. This is the viewpoint that a number of other states have adopted, as well as the view in the Restatement (Second) of Torts.¹⁸³ In choosing a standard of professional negligence, the Act ensures that the actions of the media defendant will not be judged in a vacuum. In other words, the defendant's actions will not simply be judged on the reasonable person standard, but on the reasonable member of the same profession standard. This standard ensures that factors such as the common practice in the industry, the actual practice in the industry, codes of professional conduct, and the opinions of experts in the field will all be used in assessing the defendant's negligence.¹⁸⁴ Under a strict application of the plain reasonable person standard, the consideration of such relevant factors could never be totally guaranteed. This portion of the act also limits plaintiff's recovery of damages actually caused by the defendant's negligence. This is in keeping with the constitutional requirements imposed on the awarding of damages in defamation cases in *Gertz*.¹⁸⁵

As an example of the Act's standard, take the case of an air conditioning contractor who is accused in the local newspaper of installing faulty furnaces. The article reports that one of these furnaces started a fire and killed two small children.¹⁸⁶ The defendant newspaper obtained its information from a source before the fire inspector determined the cause of the fire. The newspaper ran another story after the inspector completed the investigation, which concluded that it was the parents' own negligent use of extension cords and not the furnace that caused the fire. The reporter failed to confirm his first story with the official records of the fire inspector. His editor and others at the paper also failed in this respect. After the paper ran the story, the plaintiff's business dramatically declined, because people believed the business was responsible for the deaths of two small

¹⁸² For an explanation on the two different possible baselines for the application of the negligence standard in private figure defamation actions against media defendants, see *supra* notes 107-10 and accompanying text.

¹⁸³ For a listing of the states that employ a standard of industry practice, see *supra* note 107. For the text of the Restatement provision requiring the professional malpractice premise as the basis for assessing a media defendant's fault under a negligence standard in private figure defamation actions, see *supra* note 110.

¹⁸⁴ For an example of such professional standards, see *supra* note 109.

¹⁸⁵ See *supra* note 49.

¹⁸⁶ This comment is based largely on the facts from *Aafco*. See *supra* note 59 and accompanying text.

children. Under this portion of this statute, the plaintiff only has to prove that the reporter and other responsible parties at the newspaper were professionally negligent in failing to confirm the story. Maybe they were, maybe they were not, the matter is for a jury to decide after it has heard evidence from both sides as to the reasonableness of the defendant's actions.

The jury may hear testimony from other reporters and other expert witnesses on the common practices of the newspaper industry when it is publishing stories. Perhaps the reporter had a reliable source for the information and acted reasonably in relying on the information. Or perhaps it is the common practice of reporters to always verify information that can easily be obtained by simply checking in public records. Assuming that the plaintiff in this action is able to prove by a preponderance of the evidence that the defendant newspaper was negligent, the plaintiff will only be able to recover the amount of damages actually caused by the defamatory falsehoods. Here, that would be an amount equal to the amount of lost business that the plaintiff suffered as a result of the defendant's negligent publication.

Title V: Proof of Fault: Punitive Damages

(A) Punitive damages shall be allowed by the terms of this Act.

(B) Such damages may be awarded only upon a showing by the plaintiff, under the preponderance of the evidence standard: that the particular defendant actually engaged in serious doubt as to the veracity of the defamatory statements. Punitive damages shall not be based on objective criteria, but based only upon the subjective intent or belief of the particular defendant.

Official Comment

In deference to requirements imposed upon all of the states by the United States Supreme Court, Title VI of the Act recognizes that the plaintiffs must prove that the defendant entertained serious doubts as to the veracity of the statements at the time of publication to recover any punitive damages from the defendant. This is commonly referred to as actual malice under the *New York Times* standard.¹⁸⁷ This act avoids that terminology in accordance with the wishes of the U.S. Supreme Court to

¹⁸⁷ For a definition of constitutional actual malice, see *supra* note 19.

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avoid the term "actual malice" and instead emphasize the subjective intent of the defendant in regard to the veracity of the statements themselves.¹⁸⁸

The difference between the requirements of this section and the previous one can not be stressed enough. The prior section assesses the conduct of the defendant and the awarding of actual damages based on the objective criteria of the negligence standard. The next section of the act requires that the plaintiff prove that the particular defendant in their case entertained doubts as to the veracity of the statements at the time of publication. This is a subjective standard, whereas the preceding section is based on an objective standard. Only upon such a showing of subjective culpability by the defendant is the plaintiff allowed to recover punitive damages. Both sections addressing the issue of damages do not place monetary limits on the amounts of damages that a plaintiff may request, be entitled to, or receive. The courts of this state have ample power under the Indiana Rules of Trial Procedure promulgated by this body to ensure that any monetary judgments awarded to a plaintiff do not shock the judicial conscience. The legislature encourages the trial courts of this state to use such provisions when appropriate and no longer sees the need to limit the decisions of citizens who sit on juries by dictating to these citizens what they may and may not award to plaintiff when it is these jurors, sitting the court room and seeing the evidence, not the legislature, who are best equipped to fix the amount of damages.

Title VI: Privileges

The following privileges shall be available to defendants in all actions filed pursuant to the terms of this act:

Any broadcast, publication or other dissemination of defamatory material within the scope of this Act shall not be considered defamatory when made:

- (1) In the proper discharge of an official duty;*
- (2) In any publication of or any statement made in any legislative or judicial proceeding;*
- (3) In a communication, without a failure of due care, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the*

¹⁸⁸ For an explanation of the differences between the actual malice standard and the common law standard of actual malice, see *supra* note 19.

communication innocent, or who is requested by the person interested to give the information; or

(4) By a fair and true report, without negligence, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made.

Official Comment

The final portion of the act codifies both the absolute and conditional privileges that defendants in defamation actions have long enjoyed under the common law.¹⁸⁹ These privileges apply with equal force as they did under the common law. The privileges are included within the provisions of the act to acknowledge that defendants do have plenty of opportunity under this act to still prevail when they are sued by private figure plaintiffs and to make those privileges more readily accessible to defense counsel. These defenses do not need to be buried in our case law, but need to be readily available for defendants, so that they may adequately prepare for the trial and appellate process.

VII. CONCLUSION

It is unavoidable in a society that places great emphasis on both the private individual's interest in a good reputation and the media's interest in informing the public that these competing interests will eventually clash. This is evident from the numerous cases on both the federal and state level that deal with the defamation of private individuals by the media. These competing interests are best served by the negligence standard and not by the actual malice standard. The vast majority of the states have recognized this and it is time for Indiana to join those jurisdictions by enacting a statute providing for the negligence standard in such cases. The application of the negligence standard will not result in mass self-censorship by the media, but will serve to promote responsible journalism and protect the privacy of private individuals. The Indiana General Assembly has the power to enact and should enact the negligence standard. The proposed legislation in this Note provides the vehicle for the Indiana General Assembly to do just that and, in so doing, to place Indiana among those states who recognize the importance of balancing the competing interests involved.

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¹⁸⁹ For an explanation of the various privileges available at the common law to defendants in media defendants, see *supra* note 16.

