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Kentucky Law Survey: Torts

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Torts

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INTRODUCTION

This Survey will analyze the recent Kentucky Supreme Court decision of *McCall v. Courier-Journal & Louisville Times Co.*,[1] in which the Court adopted a negligence standard of liability for libel actions by private individuals against the media.[2] The Court also recognized a new cause of action in Kentucky—false light invasion of privacy.[3]

The case was an action for libel and invasion of privacy brought by John McCall, a Louisville attorney, following the publication of an article in *The Louisville Times* on March 17, 1976.[4] The article[5] reported the results of an investigation by two *Times* reporters, Richard Krantz and Tom Van Howe, into allegations that McCall had offered to "fix" a criminal case for $10,000. In reversing the court of appeals' affirmance of summary judgment for the *Times*,[6] the Kentucky Supreme Court held that: (1) the article was defamatory as a matter of law;[7] (2) the "neutral reportage" privilege is not recognized in Kentucky;[8] (3) simple negligence is the post-*Gertz* standard of care to which

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[1] 623 S.W.2d 882 (Ky. 1981) (per curiam).

[2] *Id.* at 886.

[3] *Id.* at 889.

[4] *Id.* at 884.

[5] The Louisville Times, Mar. 17, 1976, at A1, col. 5 (Home-Early Edition). The article also appeared in other editions of the *Times*.

[6] 623 S.W.2d at 884.

[7] *Id.* at 885. See notes 19-23 *infra* and the accompanying text for a discussion of the Court's holding on this point.

[8] *Id.* at 887. See notes 44-49 *infra* and the accompanying text for a discussion of the Court's cursory treatment of the privilege defense.

a newspaper will be held in libel actions brought by private citizens;[9] and (4) the invasion of privacy tort of false light, as formulated by the Restatement (Second) of Torts, is actionable in Kentucky.[10]

The article giving rise to the *McCall* case was a *Louisville Times* investigative report[11] detailing McCall's dealings with Kristie Frazier, a defendant charged with drug trafficking in Jefferson Circuit Court. While conducting an investigation of "alleged harassment of the [Jefferson County's] drug community,"[12] reporters Krantz and Van Howe interviewed Frazier. Frazier told the reporters that she had contacted McCall concerning legal representation in her criminal case and that McCall had offered to represent her, guaranteeing her that for $10,000 she would " 'walk in the courtroom and turn around and walk back out.' "[13] Frazier and a witness to Frazier's conversation with McCall both signed affidavits in support of their allegations that McCall's $10,000 fee represented an offer to "fix" Frazier's case.[14]

Krantz and Van Howe, hoping to obtain conclusive evidence of McCall's offer to "fix" Frazier's case, persuaded Frazier to secretly tape record her next meeting with McCall. Krantz and Van Howe's examination of the transcript of the recorded conversation revealed evidence of possible violations of legal ethics,[15] but, in their own words, "[t]he Times found no indication of any 'fix.' "[16]

Despite its failure to uncover meaningful proof of Frazier's charge that McCall had offered to "fix" her case, the *Times* re-

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[9] *Id.* at 886. See notes 51-77 *infra* and the accompanying text for a discussion of the negligence standard.

[10] *Id.* at 887-88. See notes 89-135 *infra* and the accompanying text for a discussion of false light invasion of privacy.

[11] The Louisville Times, Mar. 17, 1976, at A1, col. 5 (Home-Early Edition).

[12] 623 S.W.2d at 883.

[13] *Id.* at 884.

[14] *Id.* at 883-84.

[15] *Id.* at 884-85. The possible violations of legal ethics were that McCall proposed a contingency fee in a criminal case, and that McCall suggested to Frazier that he could improperly influence a judge. *Id.* at 891 (Lukowsky, J., concurring in part and dissenting in part). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) & DR 9-101(C) (1971).

[16] The Louisville Times, Mar. 17, 1976, at A1, col. 5 (Home-Early Edition).

ported the McCall investigation in a lengthy article, focusing upon the ethical violations.[17] McCall subsequently brought suit against the *Times*, as well as reporters Krantz and Van Howe, for libel and invasion of privacy. McCall's libel claim centered upon one paragraph in the article which repeated Frazier's charge of an offer to "fix": "The Times requested that Miss Frazier tape-record the conversation because the newspaper was attempting to investigate her allegations that McCall had offered to 'fix' her case for $10,000. However, The Times found no indication of any 'fix.'"[18]

I. LIBEL

Libel is the publication, in written form,[19] of a false and defamatory statement about another.[20] A statement is defamatory if it tends to subject one to "hatred, ridicule, contempt, or disgrace, or tend[s] to induce an evil opinion of him in the minds of right thinking people."[21] Kentucky courts have expressly held that statements which charge an attorney with unprofessional conduct are defamatory.[22] The *McCall* Court, determining that the *Times* article suggested that McCall "solicit[ed] a high legal fee for the purpose of fixing a case or bribing a judge," held the article to be defamatory as a matter of law.[23] The Court then

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[17] *Id.*

[18] *Id.*

[19] Register Newspaper Co. v. Worten, 111 S.W. 693 (Ky. 1908). The advent of radio, television and sound amplification devices, which enable spoken words to be disseminated to large numbers of people, has blurred the traditional distinction between libel and slander: that slander is oral defamation while libel refers to written or printed defamation. *See* 1 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 5.9 (1956) [hereinafter cited as HARPER & JAMES]; 50 AM. JUR. 2d *Libel and Slander* §§ 4-5 (1970). "Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." RESTATEMENT (SECOND) OF TORTS § 568(1) (1977).

[20] *See* 111 S.W. at 697; RESTATEMENT (SECOND) OF TORTS § 568, at 177 (1977).

[21] Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d 84, 86 (Ky. 1966). A statement is defamatory if it tends to "harm the reputation or to deter such people from associating with the person" who is defamed. 1 HARPER & JAMES, *supra* note 19, § 5.1, at 350.

[22] *E.g.*, Massengale v. Lester, 403 S.W.2d 701, 702 (Ky. 1966), *cert. denied*, 385 U.S. 1019 (1967); Baker v. Clark, 218 S.W. 280, 283 (Ky. 1920).

[23] 623 S.W.2d at 885.

moved to a consideration of the principal issue in *McCall*—"the impact of the decision of the Supreme Court of the United States in *Gertz v. Robert Welch, Inc.* . . . on the libel law of Kentucky."[24]

The constitutionalization of the law of defamation began in 1964 with *New York Times Co. v. Sullivan.*[25] In the *New York Times* case, the Supreme Court held that public *officials* could not recover damages for libel unless they could establish with "convincing clarity" that the defendant had "actual malice"—actual knowledge of the statement's falsity or conduct exhibiting reckless disregard for its truthfulness.[26] In *Curtis Publishing Co. v. Butts,*[27] the Court extended the *New York Times* holding to libelous statements about public *figures.*[28] The constitutional protection afforded publishers of libelous statements about public officials and public figures was further bolstered in *St. Amant v. Thompson,*[29] which held that proof of the "reckless disregard for truth or falsity" component of the "actual malice" standard required a showing that the defendant "in fact entertained serious doubts as to the truth of his publication."[30] This series of victories for the press and first amendment rights reached its zenith in *Rosenbloom v. Metromedia, Inc.,*[31] when a plurality of the Court held that the criterion triggering application of the *New York Times* rule was not whether the plaintiff was a public official or public figure, but whether the allegedly libelous state-

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[24] *Id.* at 889 (Lukowsky, J., concurring in part and dissenting in part) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

[25] 376 U.S. 254 (1964). *New York Times Co. v. Sullivan* has not been neglected in the law review literature. *See, e.g.,* Berney, *Libel and the First Amendment—A New Constitutional Privilege,* 51 VA. L. REV. 1 (1965); Meiklejohn, *Public Speech and the First Amendment,* 55 GEO. L.J. 234 (1966); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L.Q. 581 (1964).

[26] 376 U.S. at 279-80.

[27] 388 U.S. 130 (1967).

[28] *Id.* at 155. In a subsequent decision, the Court defined a public figure as one who assumes a role of "especial prominence in the affairs of society," usually by virtue of having "thrust" himself "to the forefront of particular public controversies." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). *See generally* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[29] 390 U.S. 727 (1968).

[30] *Id.* at 731.

[31] 403 U.S. 29 (1971).

ment involved an issue of "public or general concern."[32]

In *Gertz v. Robert Welch, Inc.*,[33] the United States Supreme Court retreated from the public interest test of *Rosenbloom* and reinstated the public official/public figure test of the *New York Times* case and the *Curtis* decision.[34] *Gertz* held that the *New York Times* "actual malice" standard of liability is not constitutionally required in defamation actions by *private* individuals and the Court assigned the task of establishing the requisite standard of liability to the states,[35] subject to certain limitations. The Court identified the following limitations: the states cannot "impose liability without fault;"[36] "the substance of the defamatory statement [must make] 'substantial danger to reputation apparent;' "[37] and, finally, recovery for the libel must be limited to "actual" injury, with punitive damages permissible only upon a showing of knowing falsity or reckless disregard for the truth.[38] *Gertz* represents the Supreme Court's delimitation of federal constitutional preemption of state defamation law. Federal law (the *New York Times* case and its progeny) controls only when public officials or public figures are involved; state defamation law controls, subject to the minimal constitutional limitations of *Gertz*, when a private individual is defamed.[39]

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[32] *Id.* at 52.

[33] 418 U.S. 323 (1974).

[34] *Id.* at 346. The Court labeled "[t]he extension of the *New York Times* test proposed by the *Rosenbloom* plurality . . . unacceptable." *Id.*

[35] *Id.* at 347.

[36] *Id.*

[37] *Id.* at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. at 155 n.10).

[38] Gertz v. Robert Welch, Inc., 418 U.S. at 349.

[39] There are a number of excellent law review articles on the *Gertz* decision. *See, e.g.*, Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1976-77); Eaton, *American Law of Defamation through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *Defamation Since* Gertz v. Robert Welch, Inc.: *The Emerging Common Law*, 10 RUT.-CAM. L.J. 519 (1979); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976).

A. *Kentucky's Post-*Gertz *Standard of Liability: Simple Negligence*

A person who repeats defamatory statements made by another becomes a "republisher" of the defamation, and is independently liable for the defamatory impact of the statement.[40] That the republisher accurately quotes and identifies the source of the statement or accompanies the statement with the disclaimer that he does not believe the statement to be true is not a defense to the republisher's liability.[41] The law disregards the republisher's actual intentions or motives and considers the republisher as having adopted the defamatory statement as his own.[42] The libel claim in *McCall* was based upon republished liability—the *Louisville Times'* republication of Frazier's allegation that McCall had offered to "fix" her case. The newspaper's disclaimer, "the Times found no indication of any 'fix,'" did not constitute a defense to the libel action.[43]

In an attempt to avoid the imposition of republisher liability, the *Louisville Times* urged the Court[44] to adopt the "neutral reportage" privilege,[45] which shields the media from republisher li-

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[40] *See* Gearhart v. WSAZ, 150 F. Supp. 98 (E.D. Ky. 1957); Nicholson v. Rust, 52 S.W. 933, 934 (Ky. 1899); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 768 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 578 (1977). See Painter, *Republication Problems in the Law of Defamation*, 47 VA. L. REV. 1131 (1961), for an excellent discussion of republisher liability.

[41] *See* 52 S.W. 933; W. PROSSER, *supra* note 40, § 113, at 768; RESTATEMENT (SECOND) OF TORTS § 578 comment e (1977).

[42] *See* Evans v. Smith, 21 Ky. (5 T.B. Mon.) 363, 364 (1827) ("[o]ne who details slander, which he has heard from others *endorses it* . . . .") (emphasis added).

[43] 623 S.W.2d at 890, 894 (Lukowsky, J., concurring in part and dissenting in part). "Truth" is, of course, a complete defense to an action for libel. Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d at 87. A republisher, however, cannot avail itself of the defense of truth by establishing that it was true that the original publisher made the defamatory statement; the republisher must establish the truth of the underlying charge. RESTATEMENT (SECOND) OF TORTS § 581A comment e (1977). In *McCall*, the *Louisville Times* would have had to establish the truthfulness of the charge that McCall offered to "fix" Frazier's criminal case, not the truthfulness of the fact that Frazier made the accusation.

The longstanding rule that the defendant has the burden of establishing truth in a libel action may have been abolished by Gertz v. Robert Welch, Inc., 418 U.S. 323. See notes 78-88 *infra* and the accompanying text for a discussion of the impact of *Gertz*.

[44] McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d at 886.

[45] There exist two longstanding common law privileges to republisher liability: the

ability when it accurately and disinterestedly republishes defamatory statements of fact which concern matters of significant public interest.[46] The leading case is *Edwards v. National Audubon Society, Inc.*[47] In *Edwards*, the Second Circuit held priv-

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reporter's privilege and the privilege of fair comment. The reporter's privilege protects the fair and accurate republication of a defamatory statement, even if the reporter knows the statement is false, when the republication is included in an account of official judicial, legislative or governmental proceedings which concern a matter of legitimate public interest. *See* Greenfield v. Courier-Journal & Louisville Times Co., 283 S.W.2d 839 (Ky. 1955); Paducah Newspapers, Inc. v. Bratcher, 118 S.W.2d 178 (Ky. 1938); Begley v. Louisville Times Co., 115 S.W.2d 345 (Ky. 1938); 1 HARPER & JAMES, *supra* note 19, at § 5.24; W. PROSSER, *supra* note 40, § 118, at 830-33; RESTATEMENT (SECOND) OF TORTS § 611 (1977). The reporter's privilege in Kentucky is also secured by statute. KY. REV. STAT. ANN. § 411.060 (Bobbs-Merrill 1972) [hereinafter cited as KRS]. The reporter's privilege has been elevated to a constitutional immunity in certain instances. *See* Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 496 (1975) ("[T]he First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records."); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 13 (1970) ("[c]onstitutionally impermissible" to impose liability for accurate report of what was said at public hearing before a city council).

The qualified privilege of fair comment protects statements of *opinion* regarding matters of legitimate public concern, when the statements are based on true or privileged statements of fact. Pulverman v. A.S. Abell Co., 228 F.2d 797 (4th Cir. 1956); Democrat Publishing Co. v. Harvey, 205 S.W. 908 (Ky. 1918); 1 HARPER & JAMES, *supra* note 19, at § 5.28. In New York Times Co. v. Sullivan, 376 U.S. 254, the Supreme Court, in effect, bestowed constitutional status upon fair comment by creating a constitutional privilege to defame public officials, absent a showing of "actual malice." The constitutional case for fair comment was strengthened in *Gertz v. Robert Welch, Inc.* when the Court stated: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339-40. *See* Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981). The American Law Institute has taken the position that the common law privilege of fair comment is now obsolete, insofar as mere expression of opinion is concerned. RESTATEMENT (SECOND) OF TORTS § 580A comment a (1977). A mere expression of opinion should be distinguished, however, from an opinion which "implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.* at § 566.

[46] The "neutral reportage" privilege encompasses only defamatory statements of fact, as distinguished from statements of opinion protected as fair comment. See note 45 *supra* for a discussion of fair comment. In effect, "neutral reportage" represents an extension of the reporter's privilege from reports of official proceedings to reports of all matters of public interest. See note 45 *supra* for a discussion of the common law reporter's privilege. *See generally* Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469 (1979); Note, *Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Republication*, 58 TEX. L. REV. 623 (1980); Comment, *Constitutional Privilege to Republish Defamation*, 77 COLUM. L. REV. 1266 (1977).

[47] 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

ileged a republication by the *New York Times* of defamatory accusations made by a spokesman for the National Audubon Society. The court deemed the republication privileged because it found the defamatory statements "newsworthy."[48] The *McCall* Court rejected the "neutral reportage" privilege in summary fashion,[49] rendering the *Louisville Times* potentially liable to McCall as a republisher of Frazier's defamatory allegation.

At common law the publisher (and the republisher) of a defamatory statement was strictly liable for the consequences of his defamatory statements, regardless of innocent motives, good intentions or lack of fault.[50] *Gertz*, however, expunged strict liability from defamation law and forced the states to adopt fault-based liability standards for defamation.[51] The facts of *McCall*—the republication by a newspaper of defamatory remarks made about a private individual[52]—forced the Kentucky Supreme Court to confront *Gertz*'s mandate to abrogate common law strict liability and to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[53] The *McCall* Court chose a simple negligence standard,[54] stating:

> We have given considerable thought to an appropriate standard, recognizing the far-reaching effects of this ruling on the rights and duties of the press in this state. We are also aware of

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[48] *Id.* at 120. The Third Circuit rejected *Edwards* and the "neutral reportage" privilege in Dickey v. CBS, Inc., 583 F.2d 1221 (3d Cir. 1978). *Accord* Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977).

[49] 623 S.W.2d at 887.

[50] *See* Ray v. Shemwell, 217 S.W. 351 (Ky. 1919); W. PROSSER, *supra* note 40, § 113, at 771. As one commentator noted:

> The common law held that, except for the requirement of publication to a third party (for which either intent or negligence had to be shown) a defendant is held strictly liable even for innocent defamations, even though the resulting consequences were not intended and he was not negligent in gathering the facts upon which the publication was based.

Spencer, *Establishment of Fault in Post-Gertz Libel Cases*, 21 ST. LOUIS U.L.J. 374, 377 (1977).

[51] See the text accompanying notes 33-39 *supra* for a discussion of the holding in *Gertz*.

[52] Both litigants in *McCall* conceded that McCall was a private individual, not a public figure or public official, for purposes of applying *Gertz*. 623 S.W.2d at 885.

[53] Gertz v. Robert Welch, Inc., 418 U.S. at 347.

[54] The Kentucky Court of Appeals had previously chosen to apply a negligence stan-

> the fundamental right of private individuals to be free from being defamed.
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> The Kentucky Constitution guarantees freedom of the press, but holds newspapers accountable for abusing that liberty.
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> . . . Kentucky Const., Sec. 8, mandates that we adopt a standard which adequately protects the private individual from defamation. We choose simple negligence.[55]

In choosing a negligence standard of care,[56] the Kentucky Supreme Court aligned itself with the majority among those states that have expressly chosen a post-*Gertz* standard of liability. Of the sixteen states that have chosen a standard, thirteen have chosen simple negligence.[57] Three states, deeming the press deserving of greater protection, have adopted more stringent tests. Colorado[58] and Indiana[59] have retained the pre-*Gertz* standard

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dard of care in a libel case by a private individual against a newspaper. *See* E.W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700, 703 (Ky. Ct. App. 1978).

[55] 623 S.W.2d at 886.

[56] The negligence standard of care in libel cases by private individuals against the news media has been widely discussed in the law reviews. *See, e.g.*, Anderson, *supra* note 39; Ashdown, *supra* note 39; Phillips, *Defamation, Invasion of Privacy, and the Constitutional Standard of Care,* 16 SANTA CLARA L. REV. 77 (1975); Robertson, *supra* note 39; Spencer, *supra* note 50; Note, *In Defense of Fault in Defamation Law,* 88 YALE L.J. 1735 (1979); Comment, *The Defamation Action for Private Individuals: The New Fault Standards,* 14 S.D.L. REV. 163 (1977).

[57] *See* Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216, 1222 (Ariz. 1977); Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356, 1366 (Hawaii 1975); Troman v. Wood, 340 N.E.2d 292, 299 (Ill. 1976); Gobin v. Globe Publishing Co., 531 P.2d 76, 84 (Kan. 1975); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 697 (Md. 1976); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 164 (Mass. 1975); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 334 N.E. 2d 494, 497 (Ohio Ct. App. 1974), *cert. denied,* 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85, 89 (Okla. 1976); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 818 (Tex. 1976), *cert. denied,* 429 U.S. 1123 (1977); Seegmiller v. KSL, Inc., 626 P.2d 968, 969 (Utah 1981); Taskett v. KING Broadcasting Co., 546 P.2d 81, 85 (Wash. 1976). The District of Columbia has also adopted a negligence standard. *See* Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 87 (D.C. 1980). In addition to the above jurisdictions, the American Law Institute has also adopted a negligence standard. *See* RESTATEMENT (SECOND) OF TORTS § 580B (1977).

[58] Walker v. Colorado Springs Sun, Inc., 538 P.2d 450, 457 (Colo. 1975) "[W]hen a defamatory statement has been published concerning [a private individual], but the matter involved is of public or general concern, the publisher . . . will be liable . . . if, and only if, he knew the statement to be false or made the statement with reckless disregard for whether it was true or not.").

[59] Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321

set out in *Rosenbloom v. Metromedia, Inc.*,[60] requiring that a private individual prove knowing falsity or reckless disregard of the truth when the defamatory publication is a matter of public or general concern.[61] New York has opted for a similar standard, requiring a showing of the media's gross negligence when "the content of the [allegedly defamatory] article is arguably within the sphere of legitimate public concern."[62]

Despite its overwhelming acceptance by the state courts, the simple negligence standard of care is unsatisfactory because it fails to provide a newspaper with any reliable guidelines to which it can conform its conduct with relative assurance that it has protected itself from a libel suit. Any action governed by a negligence standard would ultimately hinge upon a jury's determination of reasonableness. It is highly unlikely that a newspaper could accurately predict whether some future jury would consider its editorial decision to publish a defamatory statement reasonable or unreasonable. Therefore, in order to protect itself, the newspaper will at times decline to publish statements even though a jury would have found a decision to publish reasonable.[63] The negligence standard of care exacts too dear a price for the protection of private citizens from reputational damage. Self-

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N.E.2d 580, 586 (Ind. Ct. App. 1974) ("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.").

[60] 403 U.S. 29 (1971).

[61] *Id.* at 52. See the text accompanying notes 31-32 *supra* for a statement of the holding in *Rosenbloom*.

[62] Chapadeau v. Utica Observer-Dispatch, Inc., 341 N.E.2d 569, 571 (N.Y. 1975).

[63] *See* Ashdown, *supra* note 39, at 673; Robertson, *supra* note 39, at 251. In *Rosenbloom v. Metromedia*, Justice Brennan discussed the inadequacy of utilizing a negligence standard:

> [T]he vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate "breathing space" for these great freedoms. Reasonable care is an "elusive standard" that "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." Fear of guessing wrong must inevitably cause self-censorship and thus create the danger that the legitimate utterance will be deterred.

403 U.S. at 50 (quoting Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)) (citation omitted).

censorship[64] of statements concerning matters of public interest which may, in fact, be true is so high a price to pay when the newspaper, operating under daily deadlines and unsure of the statements' truthfulness at the time, fears the consequences of a potential libel judgment and decides not to publish the statements.

Although negligence is a creature of the common law and a familiar concept to all state courts, this familiarity has not necessarily resulted in a smooth transfer of negligence concepts from physical torts to defamation.[65] The *McCall* Court's two attempts to formulate an appropriate negligence standard of care exemplify this difficulty. First, the Court adopted Tennessee's formulation of the negligence standard of care for defamation actions concerning private individuals: "The appropriate question to be determined from a preponderance of the evidence is whether the defendant exercised reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication before publishing it."[66] The Court then enunciated a second standard, supposedly the equivalent of the first: "Another way of stating the standard is that a private plaintiff may recover on a showing of simple negligence, measured by what a reasonably prudent person would or would not have done under the same or similar circumstances."[67]

Inspection reveals the two "equivalent" standards to be neither satisfactory nor synonymous. The first standard is too narrow in its scope, focusing only upon the reasonableness of the newspaper's investigation of the defamatory publication. Arguably, in *McCall*, the *Louisville Times* exercised due care in "checking on" the truthfulness or untruthfulness of Frazier's allegations. The critical inquiry should be whether the *Times*, once

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[64] Self-censorship, in this context, occurs "whenever a reporter or editor omits a word, a passage, or an entire story, not for journalistic reasons but because of the possible legal implications." Anderson, *supra* note 39, at 430-31.

[65] "Much of that vocabulary [of negligence law as applied to the physical torts] is inappropriate, confusing, or incomprehensible when applied to communications torts." *Id.* at 480.

[66] 623 S.W.2d at 886 (quoting Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (1978)).

[67] 623 S.W.2d at 886.

its investigation raised doubts as to the truthfulness of those allegations, was acting reasonably when it *republished* the allegations despite those doubts.[68]

One could find some reason to doubt the truthfulness of almost any statement; the issue should not be whether some doubt exists, but whether an *unreasonable degree* of doubt exists. In *St. Amant v. Thompson*,[69] the United States Supreme Court held that "actual malice" liability required a showing that the defendant entertained *serious* doubts as to the truthfulness of the defamatory statement.[70] Negligence liability, in comparison, should require a lesser degree of doubt, perhaps a showing of "significant" doubt.[71] Proper determination of the *Louisville Times'* negligence in *McCall* requires an inquiry into whether the *Times* doubted or should have had significant doubts about the truthfulness of Frazier's allegations when it republished those allegations. The first standard espoused by the *McCall* Court ignores this critical aspect of the due care issue.

The second *McCall* standard,[72] unlike the first, is broad enough in scope to inquire into the reasonableness of both the investigation and the publication of the allegedly defamatory statement. The problem with the second standard is that its generalized reasonableness requirement allows the jury to base its determination of liability upon immaterial factors such as the newspaper's accurate republication, the fairness or disinterestedness of the newspaper's report, and the newsworthiness of the defam-

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[68] After all, it is the republication of the defamation, not the investigation, which causes the injury.

Kentucky and Tennessee are not the only jurisdictions to formulate post-*Gertz* negligence standards of care which place sole emphasis upon the reasonableness of the newspaper's investigation of the defamatory matter. *See, e.g.*, Peagler v. Phoenix Newspapers, Inc., 560 P.2d at 1222 (Ariz.); Seegmiller v. KSL, Inc., 626 P.2d at 974 (Utah); Taskett v. KING Broadcasting Co., 546 P.2d at 85 (Wash.).

[69] 390 U.S. 727 (1968).

[70] *Id.* at 731. See the text accompanying notes 29-30 *supra* for a discussion of *St. Amant v. Thompson.*

[71] The term "significant doubt" has been substituted for the term "unreasonable doubt" for the purpose of distinguishing it from the criminal law concept of "reasonable doubt." See the text accompanying note 77 *infra* for a definition of "significant doubt."

[72] The standard mandates conduct equivalent to "what a reasonably prudent person would or would not have done under the same or similar circumstances." 623 S.W.2d at 886.

atory statement. When the *McCall* Court rejected the "neutral reportage" privilege,[73] its message was clear: neither the accuracy of the newspaper's republication, nor the fairness and disinterestedness of the newspaper report, nor the newsworthiness of the defamatory statement, can justify a libelous republication.[74] The second *McCall* standard, because it contains no language which might serve to prevent the jury from considering these immaterial factors, gives the jury an opportunity to resurrect the "neutral reportage" privilege in its determination of the defendant's negligence liability.[75]

Both *McCall* standards are deficient. The first standard is too narrow in scope; it considers only the newspaper's investigation of the defamatory allegation, and ignores a more important factor—the defendant's doubts as to the truthfulness of the defamatory statement at the time of republication.[76] The second *McCall* standard is too broad; it permits the jury to base its determination of negligence liability on immaterial factors.

An adequate standard of care should focus the jury's attention on the defendant's degree of doubt and, at the same time, prevent the jury from considering immaterial factors such as the newsworthiness of the defamatory statement or the fairness and accuracy of the republication. Based on these guidelines, an adequate post-*Gertz* negligence standard of care can be formulated as follows:

> Considering all the circumstances, at the time of publication did the defendant have, or in the exercise of due care, should he have had, (at a minimum) significant doubts as to the truthfulness of the defamatory publication; if so, you must find for the plaintiff. "Significant doubt" exists when a reason-

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[73] *Id.* at 887.

[74] See notes 45-49 *supra* and the accompanying text for a discussion of the "neutral reportage" privilege and the Kentucky Supreme Court's treatment of it.

[75] In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Supreme Court stated: "Nothing in the Constitution requires that assessment of fault in a civil case tried in a state court be made by a jury, nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court." *Id.* at 461. Although they may not be constitutionally bound to do so, it is almost certain that the states will continue the common law practice of letting the jury decide issues of negligence.

[76] See notes 68-71 *supra* and the accompanying text for a discussion of the first *McCall* standard.

> able person, in the same or similar circumstances, would consider his belief as to the truthfulness of a defamatory statement to be outweighed by his doubts as to the statement's truthfulness *and* the severity of the resulting reputational harm. A significant doubt is less than serious doubt.[77]

Central to the determination of whether a defendant's doubts were "significant" is the severity of the resulting reputational damage; the same degree of uncertainty or doubt may be significant or insignificant depending upon the seriousness of the defamatory allegation. For example, assume that in *McCall* Frazier had alleged, in addition to her allegation that McCall had offered to "fix" her criminal case, that McCall had also offered to "fix" a parking ticket she had received. Assume too, that the *Louisville Times'* investigation of Frazier's allegations raised the same doubts as to each charge: Frazier and her friend were of questionable veracity; the tape recording of Frazier's second meeting with McCall revealed no corroborative evidence; and McCall vehemently denied both charges. In this case, the quantum of doubt as to the truthfulness of each allegation would be identical, but the seriousness of the charge to offer to "fix" a criminal case could render that doubt significant, while the relatively trivial allegation of an offer to "fix" a parking ticket could cause that doubt to be deemed insignificant or slight.

B. *The Impact of* Gertz *on Other Areas of Kentucky Defamation Law*[78]

After adopting simple negligence as the appropriate standard, and enunciating two negligence standards of care, the *McCall* Court made a curious statement: "The adoption of this

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[77] Two states have formulated post-*Gertz* negligence standards of care similar to this author's proposal. *See* Troman v. Wood, 340 N.E.2d at 299 (Ill. 1975) ("[R]ecovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief."); Gobin v. Globe Publishing Co., 531 P.2d at 84 (Kan. 1975) ("[A] publisher or broadcaster . . . is liable . . . when the assertion of the falsehood is the result of the publisher's or broadcaster's negligence and when the substance of the assertion makes substantial danger to reputation apparent . . . .").

[78] Whether *Gertz* applies only to libel suits brought against media defendants or to all libel actions, even when brought against private individuals, is uncertain at the present

standard does not imply any change in the basic common law and statutory rules of libel and slander as expressed and interpreted by this court in the past. See *Wilson v. Scripps-Howard Broadcasting Co. . . .*"[79] What is curious about the statement is the Court's citation to *Wilson v. Scripps-Howard Broadcasting Co.*;[80] if the Court adopted the holding of *Wilson*, Kentucky's "basic common law and statutory rules of libel and slander" *would* be changed.

In Kentucky defamation law, it is well established both by case law[81] and by statute[82] that the defendant has the burden of proving the truth of the defamatory statement as an affirmative defense. In *Wilson*, however, the Sixth Circuit held that "[a]s a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity."[83] The court in *Wilson* based its reversal of the well-settled burden of proving truth upon two aspects of *Gertz*. First, as a practical matter, it would be "impossible" for a plaintiff to prove a newspaper negligent without first establishing the alleged defamatory statement to be false. Proof of falsity, the *Wilson* court stated, is "inevitably linked" to the plaintiff's post-*Gertz* proof of negligence.[84] Secondly, the court reasoned that the common law placement of the burden of proving truth upon the defendant operated, in effect, as a presumption of falsity; such a presumption, in a close case, would operate to impermissibly impose "liability without

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time. *Compare* Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) *and* Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Or. 1977) *and* Fleming v. Moore, 275 S.E.2d 632 (Va. 1981) (all holding that *Gertz* does not apply to non-media defendants) *with* Jacron Sales Co. v. Sindorf, 350 A.2d 688 (holding that *Gertz* applies to media and non-media defendants alike). *See generally* Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974).

[79] McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d at 886 (citing Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981)).

[80] 642 F.2d 371 (6th Cir. 1981).

[81] Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d at 87; Brents v. Morgan, 299 S.W. 967 (Ky. 1927).

[82] KRS § 411.045 (1972) states in part: "In actions of libel or slander, the defendant may state the truth of the alleged libel or slander . . . ."

[83] 642 F.2d at 376.

[84] *Id.* at 375.

fault."[85] The reasoning in *Wilson*, which is in accord with both the Restatement (Second) of Torts[86] and the holdings of other courts,[87] is sound and should be adopted in Kentucky. After *Gertz*, the defamed plaintiff must establish that the defendant was at least negligent in publishing the particular defamation; it is difficult to conceive, however, just how the plaintiff can establish that it was unreasonable for the defendant to publish the defamatory statement unless the statement is first proven to be false.

Instead of supporting the *McCall* Court's statement that Kentucky defamation law remains basically unchanged by *Gertz*, *Wilson* directly contradicts it. Until the Kentucky Supreme Court clarifies its ambiguous citation[88] to *Wilson*, it will remain unclear, in defamation suits brought by private individuals against the media, whether the plaintiff has the burden of proving the falsity of the allegedly defamatory publication or whether the defendant has the burden of proving its truthfulness as an affirmative defense.

II. FALSE LIGHT INVASION OF PRIVACY

In part II of *McCall*, the Kentucky Supreme Court considered McCall's invasion of privacy claims.[89] McCall's complaint had alleged that Krantz and Van Howe had invaded his privacy by sending Frazier into his office with a concealed tape recorder.[90] McCall's amended complaint alleged that the *Louisville Times* article had placed McCall "in a false light before the members of the general public."[91] Only the false light claim was considered by the Court in *McCall*.[92]

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[85] *Id.*

[86] RESTATEMENT (SECOND) OF TORTS § 580B comment j (1977).

[87] *See* Troman v. Wood, 340 N.E.2d at 299; Jacron Sales Co. v. Sindorf, 350 A.2d at 698.

[88] According to A UNIFORM SYSTEM OF CITATION rule 2.2(a) (13th ed. 1981), the signal "*see*" indicates that the "[c]ited authority directly supports the proposition." Certainly *Wilson* does not directly support the *McCall* Court's statement that Kentucky's defamation law remains otherwise unchanged by the adoption of a negligence standard.

[89] 623 S.W.2d at 887.

[90] *Id.*

[91] *Id.* (emphasis omitted).

[92] *Id.* The *McCall* Court's decision to decide the privacy claims only on the basis of

A. *The False Light Cause of Action*

The tort of invasion of privacy has been defined as not one tort, but a complex of four distinct torts, each addressing in some way an interference with the "right to be let alone."[93] The four distinct causes of action for invasion of privacy are: (1) intrusion upon the seclusion of another; (2) unauthorized appropriation of the name or likeness of another; (3) public disclosure of private facts about another; and (4) placing another before the public in a false light.[94] Kentucky has recognized the tort of invasion of privacy for most of this century.[95] During this time, Kentucky courts have recognized valid causes of action for: intrusion upon seclu-

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false light is indeed interesting. The false light issue was neither argued nor briefed before either the court of appeals or the Kentucky Supreme Court. *Id.* at 889 (Lukowsky, J., concurring in part and dissenting in part). The late Justice Lukowsky dissented form part II of the *McCall* opinion, stating: "[The majority's] fervor to decide an abstract question of law without the framework of a concrete case and the advantage of briefing and argument escapes me." *Id.*

The Court did not rule on McCall's claim that his right of privacy was invaded when the *Louisville Times* reporters sent Frazier into his office with a concealed tape recorder. That claim was based upon Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971). In *Dietemann*, the media defendants, investigating charges of medical quackery, gained admission to the plaintiff doctor's office on a ruse, and proceeded secretly to photograph the doctor and tape record his conversations. The *Dietemann* court found the defendant liable for wrongful intrusion upon seclusion, stating:

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or any segment of it that the visitor may select.

Id. at 249.

Under present Kentucky law, it seems clear that it is not an invasion of privacy for one party secretly to tape record a conversation with another. *See* Commonwealth v. Brinkley, 326 S.W.2d 494 (Ky. 1962). *See also* KRS § 526.010 (1975) (exempting an eavesdropper from criminal liability when one of the conversants has consented to the eavesdropping). Because the *McCall* Court did not decide the issue, it remains to be seen whether Kentucky will follow *Dietemann* and refuse to exempt secret tape recordings of another's conversation from privacy claims when a media defendant is involved.

[93] W. PROSSER, *supra* note 40, § 117, at 804.

[94] *Id.*

[95] *See, e.g.*, Wheeler v. P. Sorenson Mfg. Co., 415 S.W.2d 582 (Ky. 1967); Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d 84; Sellers v. Henry, 329 S.W.2d 214 (Ky. 1959); Lucas v. Moskins Stores, 262 S.W.2d 679 (Ky. 1953); Perry v. Moskins Stores, 249 S.W.2d 812 (Ky. 1952); Pangallo v. Murphy, 243 S.W.2d 496 (Ky. 1951);

sion;[96] appropriation of another's name or likeness;[97] and public disclosure of private facts.[98]

Until *McCall*, however, no Kentucky court had ever granted a privacy cause of action in a case involving an allegedly false statement. In *McCall*, the Kentucky Supreme Court adopted the tort of false light invasion of privacy[99] which is enunciated in section 652E of the Restatement (Second) of Torts:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[100]

The false light cause of action is relatively simple;[101] however, uncertainty as to the proper constitutional restrictions upon false light complicates an otherwise simple equation. In a pre-*Gertz* decision, *Time, Inc. v. Hill*,[102] the United States Supreme Court extended the constitutional privilege enunciated by the *New*

Voneye v. Turner, 240 S.W.2d 588 (Ky. 1951); Gregory v. Bryan-Hunt Co., 174 S.W.2d 510 (Ky. 1943); Trammell v. Citizens News Co., 148 S.W.2d 708 (Ky. 1941); Rhodes v. Graham, 37 S.W.2d 46 (Ky. 1931); Jones v. Herald Post Co., 18 S.W.2d 972 (Ky. 1929); Brents v. Morgan, 299 S.W. 967; Douglas v. Stokes, 149 S.W. 849 (Ky. 1912); Foster-Milburn Co. v. Chinn, 120 S.W. 364 (Ky. 1909). *See generally* Bunch, *Kentucky's Invasion of Privacy Tort—A Reappraisal*, 56 KY. L.J. 261 (1967-68); Lisle, *The Right of Privacy (A Contra View)*, 19 KY. L.J. 137 (1930-31); Moreland, *The Right of Privacy To-day*, 19 KY. L.J. 101 (1930-31); Ragland, *The Right of Privacy*, 17 KY. L.J. 85 (1928-29); Comment, *Torts—Right of Privacy in Kentucky*, 38 KY. L.J. 487 (1949-50).

[96] Rhodes v. Graham, 37 S.W.2d 46.

[97] Douglas v. Stokes, 149 S.W. 849; Foster-Milburn v. Chinn, 120 S.W. 364.

[98] Lucas v. Moskins Stores, 262 S.W.2d 679; Voneye v. Turner, 240 S.W.2d 588; Trammell v. Citizens News Co., 148 S.W.2d 708; Brents v. Morgan, 299 S.W. 967.

[99] 623 S.W.2d at 887-88.

[100] RESTATEMENT (SECOND) OF TORTS § 652E (1977).

[101] The defenses to a claim of false light invasion of privacy include the truth of the matter asserted as well as the absolute and qualified privileges of defamation law. *See* Brents v. Morgan, 299 S.W. 967; Prosser, *Privacy*, 48 CALIF. L. REV. 383, 419-21 (1960). The false light plaintiff may recover damages for the harm to the plaintiff's privacy interest, reasonable mental distress and special damages. RESTATEMENT (SECOND) OF TORTS § 652H (1977).

[102] 385 U.S. 374 (1967).

York Times case to media defendants in false light privacy actions. In *Hill*, the Supreme Court held that the plaintiff could not "redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."[103] In *Gertz v. Robert Welch, Inc.*,[104] however, the Supreme Court characterized the public interest/public concern test for determining the application of *New York Times Co. v. Sullivan* as "unacceptable."[105] Because *Gertz* was a defamation action, and not a privacy action, its impact upon *Hill* is uncertain; at the least, *Gertz* raises substantial doubt as to the current validity of *Time, Inc. v. Hill.*[106] The *McCall* Court acknowledged the uncertainty of this issue, stating that if *Gertz* did apply, a simple negligence standard would govern; but, lacking any express indication by the United States Supreme Court that *Gertz* modified or overruled *Time, Inc. v. Hill*,[107] the Kentucky Court chose to abide by the "actual malice" standard of the latter.[108] As long as a private individual must prove knowing falsity or reckless disregard for the truth in order to recover for false light invasion of privacy, the newly adopted cause of action will be of little practical significance to Kentucky plaintiffs.

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[103] *Id.* at 388.

[104] 418 U.S. 323 (1974). See notes 33-39 *supra* and the accompanying text for a discussion of *Gertz*.

[105] 418 U.S. at 346.

[106] After *Gertz*, the continued vitality of the *Hill* decision is in substantial doubt. There seems to be no justification for holding the false-light victim to a higher burden of proof than his private counterpart in a defamation action. The only conceivable basis for doing so is to assume either that the false-light victim's interest in his privacy is less weighty than the defamation victim's interest in his reputation, or that the defendant in a false-light case has a correspondingly greater interest in publishing than a defamation defendant does. Neither seems persuasive as a general proposition.

Phillips, *supra* note 56, at 99. *See also* Rinsley v. Brandt, 446 F. Supp. 850 (D. Kan. 1977) (district court holding that *Gertz* did overrule *Time, Inc. v. Hill*).

[107] In Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974), a false light invasion of privacy action, the Supreme Court declined to address the impact of *Gertz* upon *Time, Inc. v. Hill. Id.* at 250-51.

[108] McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d at 889.

B. *False Light and Defamation*

Both the validity and the necessity of the tort of false light invasion of privacy have been questioned since the tort was first described by Dean Prosser in a 1960 law review article.[109] The long-standing criticism of false light centers on its similarity to the law of defamation, and its dissimilarity to the law of privacy.[110] False light does not protect a privacy interest;[111] it protects a reputational one,[112] as does defamation.[113] As one commentator questioned: "Is it an invasion of privacy to say falsely of a man that he is a thief?"[114]

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[109] *See* Prosser, *supra* note 101. Prosser stated:

> The question may well be raised, and apparently still is unanswered, whether this branch of the tort is not capable of swallowing up and engulfing the whole law of public defamation . . . . If that turns out to be the case, it may well be asked, what of the numerous restrictions and limitations which have hedged defamation about for many years, in the interest of freedom of the press and in the discouragement of trivial and extortionate claims? Are they of so little consequence that they may be circumvented in so casual and cavalier a fashion?

Id. at 401. *See generally* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962); Note, *False Light: Invasion of Privacy?*, 15 TULSA L.J. 113 (1979) [hereinafter cited as Note, *False Light*]; Note, *Privacy in the First Amendment*, 82 YALE L.J. 1462 (1973).

[110] *See* Bloustein, *supra* note 109; Kalven, *supra* note 109; Prosser, *supra* note 101; Wade, *supra* note 109; Note, *False Light*, *supra* note 109.

[111] The law of privacy protects the right of a person to live free from unnecessary and unreasonable inspections of his personal affairs; privacy protects an interest in mental tranquility. *See* Wade, *supra* note 109, at 1094; Note, *False Light*, *supra* note 109, at 118-19.

[112] Prosser, *supra* note 101, at 400, 422.

[113] W. PROSSER, *supra* note 40, § 111, at 737.

[114] Kalven, *supra* note 109, at 340. Another commentator suggested:

> There is a logical inconsistency between requiring on the one hand that a matter be private and, on the other, that it be false.
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> . . . This illogic arises from the fact that the person referred to in the statement cannot intend to keep private a matter which, in her own mind, does not exist. If the statement is false, then the person about whom it is made would have no reason to be aware of the subject matter. It must be questioned, therefore, how that individual can desire to keep the subject matter of the publication a private matter.

Note, *False Light*, *supra* note 109, at 125-26.

The Restatement (Second) of Torts suggests that in a case where both a false light and a defamation cause of action may be brought, the plaintiff should not be allowed to avoid any applicable limitations to recovery under defamation law by resort to the false light cause of action.[115] The Restatement's suggestion is sound: the false light cause of action should only be applied to areas of reputational harm to which defamation law has inadequately responded. Examples of such areas of reputational harm include the following: "publicly falsely attributing to the plaintiff some opinion or utterance;"[116] "the use of the plaintiff's picture to illustrate a book or an article with which he has had no reasonable connection;"[117] and "the use of the plaintiff's name, photograph and fingerprints in a public 'rogues' gallery of convicted criminals, when he has not in fact been convicted of any crime."[118] In areas of reputational damage where defamation law has traditionally provided an adequate remedy, as in *McCall*, the false light action should not be applied.

The critics' concerns notwithstanding, the Kentucky Supreme Court in *McCall* legally adopted false light into the family of Kentucky tort law. In a comparison between defamation and false light many similarities appear, while the differences are only of degree. Both protect the interest in reputation,[119] and both require falsity.[120] An actionable false light statement, however, need not be defamatory[121]—tending to "subject [one] to hatred, ridicule, contempt, or disgrace."[122] It must only be "highly offensive to a reasonable person."[123] False light has a greater publication requirement than defamation: to be actionable in

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[115] *See* RESTATEMENT (SECOND) OF TORTS § 652E comment e (1977).

[116] Prosser, *supra* note 101, at 399.

[117] *Id.* at 398-99.

[118] *Id.*

[119] *See* W. PROSSER, *supra* note 40, § 111, at 737.

[120] *See* Note, *False Light*, *supra* note 109, at 131.

[121] W. PROSSER, *supra* note 40, § 117, at 813.

[122] Bell v. Courier-Journal & Louisville Times Co., 402 S.W.2d at 86. See note 21 *supra* for further discussion of what constitutes a defamatory statement.

[123] A statement is "highly offensive to a reasonable person" when "the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." RESTATEMENT (SECOND) OF TORTS § 652E comment c (1977).

false light the publication must extend to the general public,[124] but defamation's publication requirement is satisfied by publication to only one person other than the plaintiff.[125] These differences between false light and defamation balance neatly; false light requires a lesser degree of offensiveness than defamation, while defamation has a lesser publication requirement than false light.

Any statement objectionable enough to be defamatory will be, *a priori*, highly offensive to a reasonable person and actionable in false light. Therefore the only element of a false light cause of action which a plaintiff able to bring a defamation action must be concerned with is false light's greater publication requirement. If "publicity" is present, and arguably it will always be present when a media defendant is involved, then nothing prevents the plaintiff with a defamation action from also bringing a false light action.

There are at least two possible advantages to bringing a false light action rather than a defamation action, only one of which is available under present Kentucky law. The first possible advantage for the false light plaintiff is the avoidance of the statute of limitations for defamation actions. In a state where the specific defamation statute of limitations is shorter than that state's general tort statute of limitations, a time-barred defamation action may nevertheless be timely if brought as a false light claim.[126] This advantage is unavailable in Kentucky, however, because both its libel and slander statute of limitations and its general tort statute of limitations are one year in length.[127]

The second possible advantage to bringing an action for false light is the inapplicability of defamation retraction statutes.[128] Section 411.051 of the Kentucky Revised Statutes (KRS) prevents a plaintiff in a libel action against a newspaper from recovering punitive damages if the defendant newspaper makes a "conspi-

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[124] Note, *False Light*, *supra* note 109, at 132.

[125] 1 HARPER & JAMES, *supra* note 19, § 5.15, at 390.

[126] *See, e.g.*, Rinsley v. Brandt, 446 F. Supp. 850.

[127] *Compare* KRS § 413.140(1)(d) (Cum. Supp. 1980) *with* KRS § 413.140(1)(a) (Cum. Supp. 1980).

[128] *See* Werner v. Times-Mirror Co., 14 Cal. Rptr. 208 (Dist. Ct. App. 1961) (court considering whether defamation retraction statutes should be applied to privacy actions).

cuous and timely publication of a correction after receiving a sufficient demand for correction."[129] This limitation on recovery would not apply to a false light claim. An even more restrictive retraction statute, KRS section 411.061,[130] limits a defamed plaintiff's recovery in defamation from a radio or television station to only special damages, provided the requisite retraction is made. The avoidance of this "specials-only" restriction should make false light a very attractive alternative action for plaintiffs defamed by radio or television stations.

Thus the benefits of bringing a false light action instead of, or in addition to, a defamation action are inviting: a lesser showing of offensiveness is required,[131] and restrictive retraction statutes can be avoided.[132] Yet, the benefits notwithstanding, the false light tort has one overriding disadvantage: as formulated by the *McCall* Court, the requisite standard of fault that the plaintiff must establish is "actual malice"—knowing falsity or reckless disregard for the truth.[133] Therefore, unless and until the Kentucky Supreme Court holds that *Time, Inc. v. Hill*[134] is overruled or modified by *Gertz v. Robert Welch, Inc.*,[135] enabling false light plaintiffs to recover on a showing of negligence, this newly adopted member of the Kentucky tort family will be "treated like a stepchild" by most Kentucky plaintiffs.

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[129] KRS § 411.051 (1972).

[130] KRS § 411.061 (1972).

[131] See notes 121-23 *supra* and the accompanying text for a comparison of the degree of offensiveness required for defamation as opposed to that required for false light.

[132] See notes 128-30 *supra* and the accompanying text for a discussion of retraction statutes applicable to defamation actions.

[133] McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d at 885. See notes 102-08 *supra* and the accompanying text for a discussion of the "actual malice" standard.

[134] 385 U.S. 374 (1967).

[135] 418 U.S. 323 (1974).