

May 2012

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Recommended Citation

Julie J. Srochi, *Must Peaches be Preserved at all Costs? Questioning the Constitutional Validity of Georgia's Perishable Produce Disparagement Law*, 12 GA. ST. U. L. REV. (2012).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol12/iss4/18>

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MUST PEACHES BE PRESERVED AT ALL COSTS? QUESTIONING THE CONSTITUTIONAL VALIDITY OF GEORGIA'S PERISHABLE PRODUCT DISPARAGEMENT LAW

INTRODUCTION

As cognizant members of society, people demand access to information regarding the safety of a variety of products, perishable or not, so that they may make informed choices about the use, consumption, and purchase of these goods. For this reason alone, it may be chilling to learn that many state legislatures, including the Georgia General Assembly, have introduced legislation aimed at "anyone badmouthing the state's agricultural products."¹

A constant tension exists between open and unfettered debate on issues of public concern and protection of the rights of individuals or businesses who may suffer at the hands of speakers who overstep their bounds. While freedom of speech is at the core of our democratic society, the courts and state legislatures are mindful that some speech warrants governmental interference.² Speech involving public health and safety issues is weighed against the protection of the reputation or integrity of those who may be harmed by that speech. This Note examines the struggle between the public's desire for and right to information and the state's interest in protecting areas of vital economic importance, such as the state's agricultural integrity, which the Georgia General Assembly has deemed necessary to address.

1. *Nutty Law Bans Slander of Celery*, ATLANTA J. & CONST., Apr. 29, 1993, at A16.

2. For example, the 1983 Georgia Constitution provides: "*Freedom of speech and of the press guaranteed.* No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects *but shall be responsible for the abuse of that liberty.*" GA. CONST. art I, § 1, ¶ 5 (emphasis added). See *K. Gordon Murray Productions, Inc. v. Floyd*, for the proposition that "[a]ny invasion of the constitutional rights of others . . . would be an 'abuse of that liberty,' and is not constitutionally protected." 125 S.E.2d 207, 212 (Ga. 1962).

Georgia recently enacted the Action for Disparagement of Perishable Food Products or Commodities.³ This statute was presumably introduced to provide a cause of action for injuries arising from the disparagement of agricultural products⁴ and in direct response to the Alar scare⁵ that prompted the case of *Auvil v. CBS "60 Minutes" (Auvil I)*.⁶

In *Auvil I*, eleven Washington apple growers filed suit against CBS "60 Minutes," Columbia Broadcasting System (CBS), National Resources Defense Council, Inc. (NRDC), Fenton Communications, and Retlaw Enterprises, Inc. based on a segment broadcast on the CBS television program "60 Minutes" that criticized the apple industry's use of the chemical Alar.⁷ The broadcast created a nationwide scare that caused apple sales to plummet.⁸ The ensuing class action raised fundamental First Amendment issues.⁹

This Note begins, in Part I, by addressing the common law development of the tort of trade libel, otherwise known as product disparagement, and its relationship to the tort of defamation, as well as its defenses. Most significantly, the First Amendment standards of protection set out in *New York Times Co. v. Sullivan*¹⁰ as they relate, or should relate, to product disparagement will be discussed. Part II examines the case that gave rise to the enactment of disparagement laws, protecting those individuals in the agricultural chain whose livelihood could

3. O.C.G.A. §§ 2-16-1 to -4 (Supp. 1995) (effective July 1, 1993).

4. The statute was introduced on January 13, 1993 as HB 124 by Rep. Henry Reaves of the 178th District, Chairman of the House Agriculture and Consumer Affairs Committee.

5. Alar is the trade name for the chemical daminozide, which is sprayed on apples and other produce, such as peanuts, to increase their shelf life, and allegedly increases the risk of cancer if consumed. See Bruce E.H. Johnson & Susanna M. Lowy, *Does Life Exist on Mars? Litigating Falsity in a Non-"Of and Concerning" World*, COMM. LAW.: J. OF MEDIA, INFO. & COMM. L., Summer 1994, at 1, 20. The bill is said to have been proposed based on "concerns expressed among Georgia farmers." Jim Wooten, *New Law Will, as Intended, Shut People Up*, ATLANTA J. & CONST., Apr. 30, 1993, at A14. However, pesticide and agricultural chemical companies are said to be lobbying diligently for this type of protective legislation on a national level. *Id.*

6. *Auvil v. CBS "60 Minutes" (Auvil I)*, 800 F. Supp. 928 (E.D. Wash. 1992).

7. *Id.* at 930.

8. Timothy Egan, *Apple Growers' Lawsuit Puts New Focus on Food Scares*, MIAMI HERALD, July 30, 1991, at 10A.

9. Nicholas K. Geranos, *Apple Growers Suing '60 Minutes'*, BOSTON GLOBE, Nov. 29, 1990, at 74.

10. 376 U.S. 254 (1964).

be crippled by the dissemination of disparaging information about their products. Finally, Parts III and IV address the tension between free speech and protection of the agricultural integrity of the State of Georgia by raising possible challenges to the statute as currently written and comparing it with similar legislation recently enacted in other states.

I. DEVELOPMENT OF THE TORT OF PRODUCT DISPARAGEMENT

The elements of the common law tort of product disparagement, also known as trade libel or disparagement of quality, include falsity, injury to pecuniary interests, publication, special damages, malice, and absence of privilege.¹¹ The tort of "injurious falsehood" has recently been described as encompassing both the common law torts of slander of title and its offshoot, trade libel.¹² Product disparagement is now regarded by some commentators as a subset of the broader tort of injurious falsehood.¹³ The *Restatement (Second) of Torts*, in recognition of the constitutional protections afforded in defamation law over the last thirty years, established a liability principle for the publication of an injurious falsehood that:

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

11. RODNEY A. SMOLLA, *LAW OF DEFAMATION* §§ 11.02[2] to -[3] (1994); see, e.g., *Copeland v. Carpenter*, 45 S.E.2d 197, 198 (Ga. 1947). The burden of proof as to falsity is on the plaintiff. SMOLLA, *supra*, § 11.02[2][a][ii]. Special damages must be pleaded and proven for the plaintiff to prevail. *Id.* § 11.02[2][d]. While there is no agreement as to the definition of malice as it relates to this tort, malice is required in one of three forms: "(1) intent to cause harm; (2) recklessness; [or] (3) spite or ill will." *Id.* § 11.02[2][e] (citing W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 128, at 969-70 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]).

12. *PROSSER & KEETON*, *supra* note 11, § 128, at 962-63. The *RESTATEMENT (SECOND) OF TORTS* § 623A cmt. a (1989) [hereinafter *RESTATEMENT*] also uses this term to describe both slander of title and trade libel. Slander of title actions relate to disparagement of a person's title to property, see *RESTATEMENT*, *supra*, § 624, and will not be addressed in this Note. Trade libel relates to the disparagement of the quality of property. See *id.* § 626.

13. See *PROSSER & KEETON*, *supra* note 11, § 128; SMOLLA, *supra* note 11, § 11.02[1].

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.¹⁴

These same liability rules apply to actions for the disparagement of quality of property or trade libel¹⁵ and for “the publication of matter disparaging the quality of another’s land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other’s interests in the property.”¹⁶

A. *The Relationship Between Disparagement and Defamation*

Although the torts of defamation and product disparagement are closely aligned, a common-law action for defamation differs in that it does not require the plaintiff to plead or prove either malice or special damages in order to be successful on a claim.¹⁷ At least one commentator suggests that there are substantial similarities between actions for defamation and injurious falsehood (the umbrella term for *slander* of title and trade libel)¹⁸ as the same speech may provide a cause of action for either one.¹⁹ Dean Prosser, however, argued against an analogy between the two torts and referred to the association as “unfortunate” and a hindrance to the development of injurious falsehood.²⁰ The distinction between the two lies in the interest each is designed to protect: defamation specifically redresses

14. RESTATEMENT, *supra* note 12, § 623A.

15. *E.g.*, *System Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1140-41 (3d Cir. 1977); *Gee v. Pima County*, 612 P.2d 1079 (Ariz. Ct. App. 1980); *Menefee v. Columbia Broadcasting Sys., Inc.*, 329 A.2d 216, 220 (Pa. 1974); RESTATEMENT, *supra* note 12, § 626.

16. RESTATEMENT, *supra* note 12, § 626.

17. ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 11.1.4.1 (2d ed. 1994). The defamation plaintiff must show that: (1) the statement was false; (2) no privilege attached to the publication; and (3) there was *at least* negligence in the publication of the defamatory statement “of and concerning” the plaintiff. RESTATEMENT, *supra* note 12, § 588.

18. The names of these two torts exhibit their close connection with the tort of defamation.

19. SMOLLA, *supra* note 11, § 11.02[4]. Some courts agree that a complaint labelled as trade libel can “be read as sounding in defamation.” *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 (E.D. Pa. 1983); *see also Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 224 (N.J. 1986).

20. PROSSER & KEETON, *supra* note 11, § 128, at 963.

injury to reputation,²¹ while disparagement governs injury to property, including products or services.²²

Prior to the introduction of constitutional privileges in 1964, which vastly changed the law of defamation, differences existed between the two torts that made it easier to prevail in a defamation action.²³ Greater deference was accorded to plaintiffs in defamation actions, who suffered injury to reputation, than to plaintiffs in product disparagement actions, who sought only the protection of business interests.²⁴ At common law, defamation was a strict liability tort; there was a presumption that the defendant's statement was false, which could only be overcome by proof that the statement was in fact true.²⁵ Additionally, the plaintiff was not required to prove that the defendant acted with malice or prove special damages in order to recover.²⁶ Alternatively, a plaintiff in a disparagement action is required to establish that the statement was in fact false, was made with malice, and caused actual pecuniary loss.²⁷

B. *Constitutionalizing the Law of Defamation*

While the Constitution of the United States, through the First Amendment, has always afforded freedom of speech protections,²⁸ it was not until 1925 that the Supreme Court determined "freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and

21. SACK & BARON, *supra* note 17, § 2.4.1.

22. *Id.* § 11.1.1.

23. The extra burdens imposed on a plaintiff in a product disparagement action include: (1) establishing that the disparaging statement was false, as opposed to relying on a presumption of falsity, which a defamation plaintiff was entitled to do; (2) proving that the publisher acted without privilege; (3) proving malice; and (4) demonstrating that special damages were suffered as a result of the false statement. *Id.* § 11.1.4.1; *see also* RESTATEMENT, *supra* note 12, § 651.

24. *See* RESTATEMENT, *supra* note 12, § 626 cmt. b.

25. Rawn H. Reinhard, Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 DUKE L.J. 727, 730 (citing RESTATEMENT (SECOND) OF TORTS § 581A cmt. b (1976)).

26. *Id.* at 730-731 (citing RESTATEMENT OF TORTS § 580 (1938) and RESTATEMENT (SECOND) OF TORTS §§ 569-70 (1976)).

27. SACK & BARON, *supra* note 17, § 11.1.4.1.

28. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances." *Id.*

'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."²⁹ However, "the Constitution [] does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."³⁰ This Note does not discuss all the existing constitutional standards; it is restricted solely to those standards relating to product disparagement.

1. Actual Malice Standard of Protection

In 1964, the United States Supreme Court determined in the seminal case of *New York Times Co. v. Sullivan*,³¹ that in order for a public-official plaintiff to prevail in a defamation action, the public official must show that the statements made refer to his official conduct and that they were made by the defendant with actual malice.³² In other words, the statements were made with knowledge that they were false or with reckless disregard as to their truth.³³

This rule was later expanded to include public figures.³⁴ Additionally, it appears that the Court, in a plurality opinion, extended the constitutional rule to protect defamatory statements about private figures "involving matters of public or general concern."³⁵ However, this extension was repudiated three years later in *Gertz v. Robert Welch, Inc.*,³⁶ when the Court held that

29. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). While some commentators argue that this excerpt was dicta, guarantees of the First Amendment, including freedom of speech and of the press, have been held applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Fiske v. Kansas*, 274 U.S. 380, 387 (1927), incorporates free speech, and in *Near v. Minnesota*, 283 U.S. 697, 707 (1931), the Supreme Court found: "It is no longer open to doubt that the liberty of the press . . . is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

30. *Gitlow*, 268 U.S. at 666.

31. 376 U.S. 254 (1964).

32. *Id.* at 279-80.

33. *Id.*

34. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). See *infra* text accompanying note 44 for the definition of a public figure.

35. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971) (plurality opinion).

36. 418 U.S. 323, 337 (1974).

just because a statement involves an issue of public concern, it is not automatically entitled to constitutional protection.³⁷

Freedom of speech and of the press on issues of public concern are of the utmost importance, and the constitutional limitations placed on attempts to repress free expression “[were] fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”³⁸ The Court has reasoned that debate in the public arena “should be uninhibited, robust, and wide-open”³⁹ and as a result, “erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁴⁰

The Court in *Gertz* held that private-figure plaintiffs are not required to prove that a defendant’s statements were made with actual malice, however, proof of some degree of fault is required in order to prevail.⁴¹ The Court, in addressing a private-figure plaintiff’s claim on a matter of public concern, held that the First Amendment requires some fault be shown before it will impose liability *and* actual malice must be shown before plaintiff is entitled to recover presumed or punitive damages.⁴² The defendant in *Gertz* attempted to characterize the plaintiff, who had briefly held an appointed governmental position, as a public figure subject to the *New York Times* standard, but the Court rejected this notion.⁴³ However, two types of public figures were identified by the Court: (1) the “all purpose” public figure who has achieved general fame or notoriety in the community, and (2) the “limited purpose” public figure who has voluntarily thrust himself into a matter of public concern.⁴⁴ Both of these types of public figures are subject to the heightened standard for recovery.⁴⁵

37. *Id.* at 345-46.

38. *New York Times*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

39. *Id.* at 270.

40. *Id.* at 271-72 (citations omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

41. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-47 (1974).

42. *Id.* at 349-50.

43. *Id.* at 351-52.

44. *Id.*

45. *Id.* This heightened standard for recovery is necessitated because these “public figures” have “assume[d] special prominence in the resolution of public questions.” *Id.*

Commentary on matters of public concern lie at the core of the First Amendment,⁴⁶ and as a result, “federal and state courts proceeding on *constitutional analysis* have recognized that information concerning products intended for human consumption . . . or other matters of public health, require the plaintiff to prove actual malice to sustain a claim for defamation.”⁴⁷

On the other hand, the Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁴⁸ refused to impose constitutional limits on speech in a defamation suit involving a private-figure plaintiff and speech of private concern.⁴⁹ Although speech of this nature is not wholly unprotected by the First Amendment, the Constitution’s role is slightly diminished when “[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.”⁵⁰ A plaintiff need not show actual malice in order to recover punitive damages for speech of a strictly private nature.⁵¹ However, when the speech is an expression on a matter of public concern, the plaintiff must establish constitutional malice before an award for presumed damages may be entered.⁵²

2. *Burden of Proof as to Falsity*

In the case of *Philadelphia Newspapers, Inc. v. Hepps*,⁵³ the *Philadelphia Inquirer* published five articles alleging that Maurice Hepps and other Thrifty Store franchisees had mafia

46. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

47. *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 228 (N.J. 1986) (emphasis added); see, e.g., *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 272 (3d Cir. 1980); *Edwards v. National Audubon Soc’y, Inc.*, 556 F.2d 113, 121 (2d Cir.), cert. denied, 434 U.S. 1002 (1977).

48. 472 U.S. 749 (1985).

49. *Id.* at 761.

50. *Id.* at 760 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)).

51. *Id.* at 761 (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest [in preserving private reputation] adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’”).

52. *Id.*

53. 475 U.S. 767 (1986).

connections and that they used these organized crime connections to influence governmental processes.⁵⁴ Based on these articles, Hepps brought suit for defamation in a Pennsylvania state court.⁵⁵

At that time, Pennsylvania adhered to the common-law presumption that an individual's reputation was good, and therefore, statements defaming the individual were presumptively false.⁵⁶ The trial court concluded that the plaintiff should bear the burden of proving that the alleged defamatory statements were in fact false, and held that the Pennsylvania statute that placed the burden of proving the *truth* of the statements on the defendant was violative of the federal Constitution.⁵⁷ The Pennsylvania Supreme Court remanded the case for a new trial because "the burden of showing truth on the defendant did not unconstitutionally inhibit free debate."⁵⁸

The United States Supreme Court reversed and held that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."⁵⁹ The Court acknowledged that by requiring the plaintiff to prove falsity, some falsehood would be protected from liability.⁶⁰ However, it reiterated that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."⁶¹

3. *The "Of and Concerning" Requirement*

In a defamation action, the plaintiff has the burden of showing that the allegedly defamatory statements are "of and concerning"⁶² him or her.⁶³ A statement is "of and concerning"

54. *Id.* at 769.

55. *Id.* at 770; see *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984).

56. *Hepps*, 475 U.S. at 770.

57. *Id.* at 771.

58. *Id.* (citing *Hepps*, 485 A.2d at 382-87).

59. *Id.* at 768-69.

60. *Id.* at 778.

61. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

62. The Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Rosenblatt v. Baer*, 383 U.S. 75 (1966), constitutionalized the "of and concerning" requirement in defamation actions involving public officials.

63. See, e.g., *Cox Enters., Inc. v. Bakin*, 426 S.E.2d 651, 654 (Ga. Ct. App. 1992) (plaintiff was not named in 29 of the 31 newspaper articles; thus, the court found, as a matter of law, that the articles were not "of and concerning" plaintiff and were not

the plaintiff when it refers to the plaintiff personally.⁶⁴ In addition to establishing the public official and actual malice rules, *New York Times* suggests that the First Amendment requires that the speech be "of and concerning" the plaintiff.⁶⁵ However,

it could possibly have been read to imply that the requirement derives from the due process clause of the Fourteenth Amendment and ultimately from the state's definition of the tort of defamation, and hence that it is merely an element which the state is presumably free to require or not as it sees fit.⁶⁶

In any event, the Court in *Rosenblatt v. Baer*⁶⁷ made it clear that the requirement is derived directly from the First Amendment.⁶⁸ In *Rosenblatt*, the allegedly libelous newspaper column commented on the operation of a government-owned recreational facility.⁶⁹ The plaintiff, who had previously been a member of the commission responsible for administering the facility, sued for libel.⁷⁰ Although "[t]he column on its face contain[ed] no clearly actionable statement"⁷¹ in that "no reference [was] made to [the plaintiff],"⁷² the trial judge instructed the jury that it could award damages in the absence of evidence that the statements were "of and concerning" the plaintiff.⁷³

actionable), *cert. denied*, 114 S. Ct. 193 (1993); *Sims v. KIRO, Inc.*, 580 P.2d 642, 646 (Wash. Ct. App. 1978) (comments broadcast by television station did not refer specifically to plaintiff retailer, but instead referred generally to bicentennial memorabilia merchandisers; thus, these comments could be submitted to a jury "only if it could be said that they clearly refer to the plaintiff"), *cert. denied*, 441 U.S. 945 (1979); RESTATEMENT, *supra* note 12, § 564.

64. *Rosenblatt v. Baer*, 383 U.S. 75, 83 (1966).

65. *New York Times*, 376 U.S. at 288-92.

66. *Blatty v. New York Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988).

67. 383 U.S. 75 (1966).

68. *Blatty*, 728 P.2d at 1182; *see also* *Barger v. Playboy Enters., Inc.*, 564 F. Supp. 1151, 1153 (N.D. Cal. 1983) (noting the "constitutional significance" of the "of and concerning" requirement), *aff'd*, 732 F.2d 163 (9th Cir.), *cert. denied*, 469 U.S. 853 (1984).

69. *See Rosenblatt*, 383 U.S. at 77.

70. *Id.* at 79.

71. *Id.*

72. *Id.*

73. *Id.* at 79-80. "[T]he jury could award him damages if it found that the column cast suspicion indiscriminately on the small number of persons who composed the former management group, *whether or not* it found that the imputation of misconduct

The defamation award was reversed by the Supreme Court because of the trial court's erroneous instruction.⁷⁴ The Court held that a defamation plaintiff's claim would be "constitutionally insufficient" if it did not satisfy the "of and concerning" requirement even in the absence of governing state law imposing such a prerequisite: "under *New York Times* . . . [the defamation plaintiffs would be] required to show *specific reference*."⁷⁵

C. Application of First Amendment Protections to Product Disparagement Actions

Some courts and commentators believe that in recent years plaintiffs have resorted to creative pleading techniques to transform defamation actions into causes of action for intentional infliction of emotional distress, "false light" invasion of privacy, and "intrusion" invasion of privacy, among other claims, in an attempt to circumvent the First Amendment protections afforded certain defamation defendants.⁷⁶ This practice is scorned by at least one commentator, who urges that First Amendment limitations should, as a matter of law, apply to product disparagement actions as well as to defamation actions, and that product disparagement defendants should be afforded heightened protection to encourage the free flow of commercial information, which is critical in modern society.⁷⁷

was specifically made of and concerning him." *Id.* (emphasis added).

74. *Id.* at 82.

75. *Id.* at 82-83. The Court in *New York Times* determined that the First Amendment required the plaintiff to show explicitly that the alleged defamatory statements were "of and concerning" him because to find otherwise would be "to invite the spectre of prosecutions for libel . . . , which the Constitution does not tolerate . . ." See *id.* at 81 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 290-92 (1964)).

76. See, e.g., *Dworkin v. Hustler Magazine, Inc.*, 668 F. Supp. 1408 (C.D. Cal. 1987), *aff'd*, 867 F.2d 1188 (9th Cir.), *cert. denied*, 493 U.S. 812 (1989); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988); *Reader's Digest Ass'n v. Superior Ct.*, 690 P.2d 610, 624 (Cal. 1984) ("The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action.") (emphasis added), *cert. denied*, 478 U.S. 1009 (1986); *Johnson & Lowy*, *supra* note 5, at 20.

77. See Lisa M. Arent, Note, *A Matter of "Governing" Importance: Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*, 67 IND. L.J. 441, 445 (1992); see also Vincent Brannigan & Bruce Ensor, *Did Bose Speak Too Softly?: Product Critiques and the First Amendment*, 14 HOFSTRA L. REV. 571, 572 (1986) (urging that "product critiques are entitled to the highest level of first amendment protection").

The United States Supreme Court has determined that claims such as intentional infliction of emotional distress⁷⁸ and invasion of privacy⁷⁹ are subject to the same First Amendment limitations as those of defamation claims, when the case involves a media defendant on issues of public concern. Lower courts have begun to follow suit. The California Supreme Court in *Blatty v. New York Times Co.*⁸⁰ stated that “[a]lthough the limitations that define the First Amendment’s zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement.”⁸¹

The Supreme Court has yet to address whether claims of product disparagement are subject to these constitutional principles.⁸² In its only product disparagement action, the Court in *Bose Corp. v. Consumers Union of United States, Inc.*⁸³ was not called upon to determine whether it was proper to apply the *New York Times* actual malice rule because no challenge was made to the district court’s characterization of the producer of loudspeakers as a public figure.⁸⁴ While the Court did not express its views on the district court’s ruling, it applied the actual malice standard in its analysis of the case.⁸⁵ Nevertheless, several lower courts have expressed the view that the First Amendment protections that govern defamation actions

78. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

79. *See Time, Inc. v. Hill*, 385 U.S. 374 (1967).

80. 728 P.2d 1177 (Cal. 1986) (applying First Amendment’s “of and concerning” requirement to a trade libel claim), *cert. denied*, 485 U.S. 934 (1988).

81. *Id.* at 1182; *see, e.g., Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991).

82. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513 (1984), in which the Court refused to express its views as to whether the *New York Times* actual malice standard must be fulfilled by a public-figure plaintiff in order to prevail in a product disparagement suit.

83. 466 U.S. 485 (1984).

84. *Id.* at 489-90, 492.

85. *Id.* at 513.

should also apply in product disparagement actions.⁸⁶ However, courts are not in complete accord on this issue.⁸⁷

As to the “of and concerning” requirement in product disparagement actions, lower courts have not ruled consistently.⁸⁸ Whether a statement that disparages one’s goods or services must fulfill the “of or concerning” requirement raises the same type of questions as those regarding the defamation of a group of people.⁸⁹ In determining whether a defamatory statement is “of and concerning” a group of plaintiffs in an action for libel or slander, generally, in order to prevail, the group must consist of no more than twenty-five members.⁹⁰ While there is no set limit as to the number of plaintiffs who may sue on a group libel theory, plaintiffs in a large group are less likely to prevail because it may be difficult for the reader to understand that the communication “refer[s] to any particular member of the group.”⁹¹

The district court in the State of Washington recently determined that all the apple growers in a product disparagement action could prevail on a “group libel” theory because the

86. *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057-58 (9th Cir. 1990); *Flotech, Inc. v. E.I. DuPont de Nemours & Co.*, 814 F.2d 775, 777 n.1 (1st Cir. 1987); *Quantum Elecs. Corp. v. Consumers Union*, 881 F. Supp. 753, 763 (D.R.I. 1995) (public-figure plaintiff “required to surmount the lofty barrier of the *New York Times* standard to succeed in opposing . . . product disparagement claim[.]”); *Simmons Ford, Inc. v. Consumers Union*, 516 F. Supp. 742, 744 n.4 (S.D.N.Y. 1981) (holding that proof of actual malice is essential to claim of product disparagement when a public-figure plaintiff and media defendant are involved); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1270-71 (D. Mass. 1981), *rev’d on other grounds*, 692 F.2d 189 (1st Cir. 1982), *cert. granted*, 466 U.S. 485 (1984); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 465 A.2d 953, 957 n.2 (N.J. Super. Ct. Law Div. 1983), *aff’d*, 516 A.2d 220 (N.J. 1986). Whether constitutional protections should apply in product disparagement actions should be decided “not by a mechanistic application of terms such as ‘public figure’ and ‘public controversy’ but rather by an independent examination of the First Amendment and other competing societal values involved in the context of business defamation.” *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 465 A.2d 953, 959 (N.J. Super. Ct. Law Div. 1983).

87. *See, e.g., Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983).

88. *See Auvil I*, 800 F. Supp. 928, 935-36 (E.D. Wash. 1992) (stating “of and concerning” requirement “does not mesh neatly with disparagement theory”); *cf. Gintert v. Howard Publications, Inc.*, 565 F. Supp. 829, 837 (N.D. Ind. 1983) (applying “of and concerning” standard).

89. SACK & BARON, *supra* note 17, § 11.1.4.3.

90. *See id.* § 2.8.4 (citing RESTATEMENT (SECOND) OF TORTS § 564A, cmt. b (1977)).

91. *Golden North Airways, Inc. v. Tanana Publishing Co.*, 218 F.2d 612, 618 (9th Cir. 1954).

products common to all of them—apples—were negatively affected by the television broadcast on pesticide-treated apples, whether their apples were chemically treated, or not.⁹²

In contrast, the district court in *Gintert v. Howard Publications, Inc.*⁹³ held that a group of 165 property owners could not prevail on a disparagement claim brought based on a newspaper article reporting an alleged correlation between the environmental condition of their neighborhood lake and a high incidence of cancer in the community.⁹⁴ According to a leading commentator, this court “took into account what the Washington court apparently ignored, that the ‘group libel’ doctrine does not arise solely out of the scope and nature of the harm that is likely to befall members of a large, defamed group.”⁹⁵ That harm must be weighed against the serious interference with the free flow of information on matters of public interest that would result if large groups were entitled to bring such actions on behalf of its members.⁹⁶ In essence, the public would suffer because the media would be unable and unwilling to continue to provide information of public concern if they were forced into constant fear of “vexatious lawsuits.”⁹⁷

II. THE *AUVIL*⁹⁸ CASES

A body of case law has emerged recently in the area of product disparagement that suggests that the constitutional limitations imposed on defamation plaintiffs may also be applied to disparagement suits.⁹⁹ The Federal District Court for the Eastern District of Washington recognized that product

92. *Auvil I*, 800 F. Supp. at 932-36.

93. 565 F. Supp. 829 (N.D. Ind. 1983).

94. *Id.* at 837.

95. SACK & BARON, *supra* note 17, § 11.1.4.3.

96. *Michigan United Conservation Clubs v. CBS News, Inc.*, 485 F. Supp. 893, 899-900 (W.D. Mich. 1980) (holding that a group of one million hunters could not maintain action for defamation unless individual members could persuade the court that statements were personally applicable), *aff'd*, 665 F.2d 110 (6th Cir. 1981).

97. *Id.* at 900.

98. *See Auvil I*, 800 F. Supp. 928 (E.D. Wash. 1992); *Auvil v. CBS “60 Minutes,” (Auvil II)*, 800 F. Supp. 941 (E.D. Wash. 1992); *Auvil v. CBS “60 Minutes,” (Auvil III)*, 836 F. Supp. 740 (E.D. Wash. 1993), *aff'd*, *Auvil IV*, 67 F.3d 816 (9th Cir. 1995), *petition for cert. filed*, 64 USLW 7605 (U.S. Feb. 26, 1996).

99. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1985); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980); *Blatty v. New York Times Co.*, 728 P.2d 1177 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988).

disparagement claims are subject to the First Amendment restrictions that govern defamation actions.¹⁰⁰

A. Background

In 1989, after significant studies by governmental agencies, the Environmental Protection Agency (EPA) announced its finding that UDMH, Alar's metabolite, was a likely human carcinogen¹⁰¹ and started taking the chemical off the market.¹⁰² In response, the National Resources Defense Council (NRDC), a not-for-profit public interest group, published a study called *Intolerable Risk: Pesticides in Our Children's Food* that expressed concerns about the unacceptably high levels of carcinogenic chemicals that remained on fruits and vegetables most commonly consumed by children.¹⁰³ The CBS "60 Minutes" broadcast at issue in this case, entitled "'A' Is For Apple," explored the concerns raised by the NRDC report, specifically discussing the health risks posed by Alar and other chemicals.¹⁰⁴

Following this broadcast, a group of eleven Washington state apple growers filed suit for defamation and product disparagement against CBS "60 Minutes" and others,¹⁰⁵ alleging that they were damaged by the broadcast of the investigative report criticizing the use of Alar in apple production.¹⁰⁶

B. Group Libel Theory Allowed in *Auvil I*

The district court denied CBS's motion to dismiss the apple growers' complaint, concluding that these plaintiffs could indeed proceed on a group libel theory,¹⁰⁷ even though it agreed that

100. *Auvil I*, 800 F. Supp. at 937.

101. *Amici Curiae* Brief for Appellees at 3, *Auvil III*, 67 F.3d 816 (9th Cir. 1995) (No. 93-35963) (citing EPA Memorandum from William Pepelko through William Farland, Director, Carcinogen Assessment Group, to Eileen Claussen, Director, Characterization and Assessment Division 2 (Jan. 9, 1987)), *petition for cert. filed*, 64 USLW 7605 (U.S. Feb. 26, 1996).

102. *Id.*

103. *See Auvil I*, 800 F. Supp. at 930.

104. *See id.* at 937-38, 940.

105. *See supra* note 7 and accompanying text.

106. *Auvil I*, 800 F. Supp. at 928.

107. *Id.* at 935-36. The court noted that under both the dilution and identification theories associated with group libel these plaintiffs could proceed. *Id.* Under the theory of dilution, if a class consists of a large number of members, none of them suffers injury truly personal to them. *Id.* at 935. However, in a disparagement suit,

had this been a defamation action, the growers surely could not fulfill the “of and concerning” requirement.¹⁰⁸ The court noted that the traditional “of and concerning” requirements should not be invoked outside the defamation area because this would “be tantamount to counseling potential disparagors that they are home free if only they succeed in wreaking damage on a sufficient number of manufacturers.”¹⁰⁹

C. *Burden of Proving Falsity on Plaintiff*

The district court in *Auvil III*¹¹⁰ ultimately determined that the broadcast was entitled to First Amendment protection.¹¹¹ It determined that “[i]n a disparagement case, plaintiff carries the initial burden of proof to show that an objectionable statement is false and made with actual malice.”¹¹² The court found that the plaintiffs failed to carry their burden of proof as to the falsity of the broadcast’s message.¹¹³ As a result, the court granted CBS’s motion for summary judgment.¹¹⁴ The court concluded that it was “not unmindful of the wide ranging affect [sic] this broadcast had on Washington’s apple industry.”¹¹⁵ However, because the broadcast was about an issue of public concern, it raised fundamental free speech and free press issues that required heightened protection.¹¹⁶

there can be no dilution because there are personal monetary interests at stake. *Id.* “It would matter not a whit whether all of the apple orchards in the state were owned by a single corporation or, as here, by thousands of ‘ma and pa’ operations. The injury would be the same. The injury is merely distributed among a larger universe.” *Id.* at 935-36.

The test for determining whether a class has reasonably been identified for purposes of prevailing under the group libel doctrine is whether “(1) the class [is] small enough so that the derogatory communication may be reasonably understood to apply to each class member; or (2) the circumstances of the publication reasonably suggest that some particular member was targeted.” *Id.* at 936. The court concluded that despite the size of the class, “the broadcast clearly targeted every apple in the United States *whether it was treated with Alar or not.*” *Id.* “The message ‘apples give kids cancer’ sounds an explicit, particularized and unmistakably concrete alarm to the consuming public to run, not walk, away from that apple stand.” *Id.*

108. *Id.* at 933.

109. *Id.* at 936.

110. *Auvil III*, 836 F. Supp 740 (E.D. Wash. 1993).

111. *Id.* at 742-43.

112. *Id.* at 742 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)); *Auvil I*, 800 F. Supp. 928, 937 (E.D. Wash. 1992).

113. *Auvil III*, 836 F. Supp. at 743.

114. *Id.*

115. *Id.*

116. *Id.* The court determined that “[a] news reporting service is not a scientific

Recently, the Ninth Circuit Court of Appeals affirmed the district court's ruling in *Auwil III*.¹¹⁷ The circuit court found that the appellant apple growers had "failed to raise a genuine issue of material fact" as to the falsity of the CBS broadcast concerning the use of Alar.¹¹⁸ The growers argued that they could prove the falsity of the overall message of the broadcast and thus satisfy their burden of proof as to falsity.¹¹⁹ The court rejected this notion and found support for its decision in the *Restatement*, which required that the growers prove the "falsity of the *statement[s]*," not the overall message.¹²⁰ The uncertainty that would arise from basing a falsity analysis on the broad message of a broadcast would "raise[] the spectre of a chilling effect on speech."¹²¹

D. Response for Protective Legislation

The Alar scare resulting from the CBS "60 Minutes" broadcast pushed pesticide and agricultural companies into action.¹²² An aggressive campaign to have perishable product disparagement bills introduced in many states began, and to date, eleven states have enacted such bills.¹²³ Additionally, this type of legislation has been introduced in Delaware, Minnesota, and

testing lab and these services should be able to rely on a scientific government report when they are relaying the report's results," and to hold otherwise "would so chill debate that the freedom of speech would be at risk." *Id.*

117. *Auwil IV*, 67 F.3d 816 (9th Cir. 1995), *petition for cert. filed*, 64 USLW 7605 (U.S. Feb. 26, 1996).

118. *Id.* at 823.

119. *Id.* at 822.

120. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 651(1)(c)). The court reasoned that "[b]ecause a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability." *Id.*

121. *Id.*

122. *The New Threat to Core Speech: Suits Spur Product Disparagement Statutes*, NEWS MEDIA & L., Summer 1994, at 3 [hereinafter *New Threat*].

123. See ALA. CODE §§ 6-5-620 to -625 (Supp. 1995); ARIZ. REV. STAT. ANN. § 3-113 (Supp. 1995); COLO. REV. STAT. ANN. §§ 35-31-101, -104 (Supp. 1994); FLA. STAT. ANN. § 865.065 (West 1994); O.C.G.A. §§ 2-16-1 to -4 (Supp. 1995); IDAHO CODE §§ 6-2001 to -2003 (Supp. 1995); LA. REV. STAT. ANN. §§ 3:4501-4504 (West Supp. 1995); MISS. CODE ANN. § 605 (1994); OKLA. STAT. ANN. tit. 2, §§ 3010-3012 (West Supp. 1996); S.D. CODIFIED LAWS ANN. §§ 20-10A-1 to -4 (1995); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001-004 (West Supp. 1996).

Washington¹²⁴ and is currently pending in Illinois, Nebraska, Ohio, Pennsylvania, and South Carolina.¹²⁵

III. THE NEW GEORGIA LAW

Taking its lead from the State of Colorado,¹²⁶ Georgia enacted an Action for Disparagement of Perishable Food Products or Commodities that took effect on July 1, 1993.¹²⁷ Because the Georgia legislature determined that

the production of agricultural and aquacultural food products and commodities constitutes an important and significant portion of the state economy and that it is imperative to protect the vitality of the agricultural and aquacultural economy for the citizens of this state . . . [it created] a cause of action for producers, marketers, or sellers to recover damages for the disparagement of any perishable product or commodity.¹²⁸

A suit for disparagement may be instituted against anyone who willfully or maliciously disseminates "false information that a perishable food product or commodity is not safe for human consumption."¹²⁹ False information is defined as that which is "not based upon reasonable and reliable scientific inquiry, facts, or data."¹³⁰ Both compensatory and punitive damages are available as remedies.¹³¹ An action for damages for perishable product disparagement must "be commenced within two years after the cause of action accrues."¹³²

A. Shortcomings in the Language of the Statute

Several constitutional questions arise in connection with the Georgia statute. First, by presuming that a statement is

124. *New Threat*, *supra* note 122, at 4.

125. James Grossberg et al., *Food Disparagement Bills Defeated in California Enacted in Oklahoma and Texas*, LIBELLETTER (Libel Defense Resource Ctr., New York, N.Y.), June 1995, at 13 [hereinafter LIBELLETTER].

126. *Nutty Law Bans Slander of Celery*, ATLANTA J. & CONST., Apr. 29, 1993, at A16.

127. O.C.G.A. §§ 2-16-1 to -4 (Supp. 1995).

128. *Id.* § 2-16-1.

129. *Id.* § 2-16-2(1).

130. *Id.*

131. *Id.* § 2-16-3.

132. *Id.* § 2-16-4.

actionable if it is false, meaning “not based upon reasonable and reliable scientific inquiry, facts, or data,”¹³³ the law appears to eliminate the “actual malice” standard of protection set out in *New York Times Co. v. Sullivan*.¹³⁴ If information is *deemed* false, the plaintiff in a disparagement claim under this statute may be relieved of proving that the defendant had “knowledge that [the communication] was false or [was made] with reckless disregard of whether it was false or not.”¹³⁵

Second, the Georgia law appears to place the burden of proof on the defendant, rather than the plaintiff, who, according to the United States Supreme Court in *Philadelphia Newspapers, Inc. v. Hepps*,¹³⁶ is to bear the burden of proof as to falsity in libel actions against media defendants involving matters of public concern.¹³⁷ If the language of Code section 2-16-2(1), specifically, the phrase “deemed to be false,” was intended to create a presumption of falsity, it thereby places the affirmative burden of proving that the statements are true on the defendant and eliminates the constitutional protection.¹³⁸ Alternatively, the courts could interpret the statute’s language as meaning that the plaintiff must prove that the defendant’s disparagement is “not based upon reasonable and reliable scientific . . . data,”¹³⁹ which probably passes constitutional muster.¹⁴⁰ Additionally, the Georgia statute ignores the “of and concerning” requirement by creating a cause of action for an infinite number of plaintiffs.¹⁴¹

133. *Id.* § 2-16-2(1).

134. 376 U.S. 254 (1964).

135. *New York Times*, 376 U.S. at 280.

136. 475 U.S. 767 (1986).

137. *Id.* at 777-79.

138. O.C.G.A. § 2-16-2(1) (Supp. 1995).

139. *Id.*

140. *Hepps*, 475 U.S. 767 (1986). It is important to note that even in a common-law tort action for product disparagement, the burden of proof as to falsity is on the plaintiff, as is proof of some form of malice on the part of the defendant. *See supra* notes 11-16 and accompanying text.

141. O.C.G.A. § 2-16-2(3) (Supp. 1995). The “[p]roducers, processors, marketers, and sellers” who are provided this cause of action include “the entire chain from grower to consumer.” *Id.*

B. Arguments Advanced Against the Legislation Before the Georgia Judiciary

A recent challenge to the Georgia statute was filed in Fulton County Superior Court on April 7, 1994¹⁴² by two consumer advocacy groups who regularly provide information to citizens regarding pesticide residues in food, irradiation of food, and other matters of public interest.¹⁴³ Essentially, the suit was filed to defend the right of citizens to be educated about the foods they consume.¹⁴⁴ The two advocacy groups, whose missions are to scrutinize the practices and products of the agricultural industry, sought to have the statute declared unconstitutional.¹⁴⁵

These plaintiffs filed suit against the State of Georgia because they were fearful of future suits that might be instituted against them under Code section 2-16-3.¹⁴⁶ The court, by an order dated September 27, 1994, granted the defendant's motion to dismiss.¹⁴⁷ The court found that no legal interest was created in the State of Georgia through the legislative grant of a private cause of action under Georgia's Perishable Product Disparagement Act and, additionally, that no justiciable controversy was raised by the plaintiffs' action.¹⁴⁸

This finding was upheld by the Georgia Court of Appeals.¹⁴⁹ A petition for writ of certiorari was filed with the Georgia Supreme Court by the public awareness groups challenging the statute; however, the court declined review of the appeal.¹⁵⁰ The

142. Action for a Clean Environment v. Georgia, Civil Action No. E-27136 (Fulton County Super. Ct. filed Apr. 7, 1994).

143. The two groups are Action for a Clean Environment and Parents for Pesticide Alternatives.

144. See Memorandum in Opposition to Defendant's Motion to Dismiss, Action for a Clean Environment v. Georgia (Fulton County Super. Ct.) (Civil Action No. E-27136) (filed June 15, 1994).

145. The plaintiffs filed their complaint, petitioning the court to declare that O.C.G.A. § 2-16-1 to -4 violates the Georgia Constitution and the First Amendment of the U.S. Constitution.

146. See Plaintiffs' Complaint for Unconstitutional Restriction of the Right to Free Speech at 3, Action for a Clean Environment v. Georgia (Fulton County Super. Ct. 1994) (Civil Action No. E-27136).

147. Order of Dismissal, Action for a Clean Environment v. Georgia (Fulton County Super. Ct. 1994) (Civil Action No. E-27136).

148. *Id.*

149. Order, Action for a Clean Environment v. Georgia (Ga. Ct. App. 2d Div., May 4, 1995) (No. A95A0602).

150. Petition for writ of cert. filed May 22, 1995.

statute could still be challenged when someone is actually sued under it.

C. Potential Challenges to the Statute

Although no such case has ever been before any court, one commentator indicates, interestingly enough, that the plaintiff's argument in *R.A.V. v. City of St. Paul*¹⁵¹ may help a product disparagement law challenger to prevail on a theory that the statute impermissibly targets speech of those critical of the pesticide and agricultural communities.¹⁵² In *R.A.V.*, a city ordinance banning certain "fighting words" related specifically to the subjects of "race, color, creed, religion or gender" was found unconstitutional because the city "impose[d] special prohibitions on those speakers who express views on disfavored subjects."¹⁵³ In essence, the Georgia statute proscribes certain speech regarding agricultural and aquacultural perishable products, but *no* other products, which could potentially be challenged under the First Amendment principles governing content neutrality set out in *R.A.V.*¹⁵⁴

Should a challenge be raised questioning the meaning of the language "willful or malicious" in Code section 2-16-2(1),¹⁵⁵ the potential challenger may run into the same problem that the plaintiff did in *Straw v. Chase Revel, Inc.*¹⁵⁶ In *Straw*, the publisher of the *Business Opportunities Digest*, J.F. Straw, filed a defamation action against one of his rival publishers, Chase Revel, for allegedly defamatory statements made about his publication in the rival publication, *Entrepreneur Magazine*.¹⁵⁷ The plaintiff sought to have Georgia Code section 51-5-5 declared unconstitutional because it allowed for the inference of malice.¹⁵⁸ The court declined to hold that this section was

151. 505 U.S. 377 (1992).

152. *New Threat*, *supra* note 122, at 5.

153. *R.A.V.*, 505 U.S. at 391.

154. *Id.* at 383-84. Certain categories of speech, for example, defamation, may, "consistently with the First Amendment, be regulated *because of [its] constitutionally proscribable content*"; however, although "the government may proscribe libel[,] . . . it may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.*

155. O.C.G.A. § 2-16-2(1) (Supp. 1995).

156. 813 F.2d 356 (11th Cir.), *cert. denied*, 484 U.S. 856 (1987).

157. *Id.* at 358-59.

158. *Id.* at 362-63. "In all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be

unconstitutional because it “clearly relate[d] to O.C.G.A. § 51-5-1, which requires that a statement be ‘false and malicious’ in order to constitute libel. This means malice in the common law sense, not actual malice.”¹⁵⁹ The court stated that the constitutional issue would arise only if a public-figure plaintiff and media defendant were involved, and in that instance, actual malice could *not* be presumed.¹⁶⁰ The court concluded that “[i]n such cases, the potential constitutional pitfalls posed by § 51-5-5 may be avoided by the trial judge, who need only explain what common law malice means under § 51-5-5, and carefully distinguish it from actual malice.”¹⁶¹ A future court may, in a case challenging Georgia’s perishable product disparagement law’s constitutionality, judicially graft the “actual malice” standard onto the statute as the court did in *Straw*.

IV. COULD THE STATUTE HAVE BEEN DRAFTED DIFFERENTLY TO AVOID ANY CONSTITUTIONAL PITFALLS?

While some states have chosen not to implement comparable statutes,¹⁶² others have recently enacted similar legislation.¹⁶³ A Louisiana statute, as drafted, offers no solution to the potential problems from which the Georgia law suffers. The Louisiana statute appears to eliminate the “actual malice” standard by

rebutted by proof. In all cases, such proof shall be considered in mitigation of damages. In cases of privileged communications, such proof shall bar a recovery.” O.C.G.A. § 51-5-5 (1982).

159. *Straw*, 813 F.2d at 363 n.7.

160. *Id.*

161. *Id.*

162. States that have considered enacting agricultural product disparagement statutes but have rejected such legislation include Delaware, Iowa, North Dakota, Washington, and Wyoming. LIBELLETTTER, *supra* note 125, at 13.

163. Texas’s proposed statute was defeated by the state Senate, in which the sentiment of one senator was that “by affording a cause of action ‘for slandering an asparagus,’ the bill would ‘treat vegetables better than . . . members of the legislature.’ ” *Amici Curiae* Brief for Appellees, at 33 n.32, *Auvil IV*, 67 F.3d 816 (9th Cir.) (No. 93-35963) (1994) (quoting a state Senator from Texas and cited in *Senate Rejects Food Product Disparagement Bill*, UNITED PRESS INT’L, May 20, 1993). The Texas legislation, defeated in 1993, was reintroduced in 1995 and was enacted just three short months after its introduction. LIBELLETTTER, *supra* note 125, at 13. The bill passed was “a boiled-down version of the original measure.” Sherry C. Tuell, *Shut Up and Eat/Texas House Tentatively Approves Bill Making Libel of Fruits, Veggies Possible*, HOUS. CHRON., Mar. 30, 1995, at 1. In response to First Amendment concerns raised by opponents of the legislation, the bill was amended to place the burden of falsity on the plaintiff. *Id.*; see TEX. CIV. PRAC. & REM. CODE ANN. § 96.003 (West Supp. 1996).

requiring only that the speaker “knows or should have known” of the falsity of the statement.¹⁶⁴ Based upon this language, the plaintiff need only show that the defendant was negligent, while the constitutional standard requires a showing that the defendant knew the statement was false or acted with reckless disregard of its falsity.¹⁶⁵ In addition, the Louisiana statute contains a presumption of falsity.¹⁶⁶ Another possible shortcoming in Louisiana’s statute is that it creates a cause of action for disparagement, which is available to “[a]ny producer of perishable agricultural or aquacultural food products who suffers damage as a result of another person’s disparagement of any such perishable agricultural or aquacultural food product,”¹⁶⁷ thereby disregarding the “of and concerning” requirement.

Alabama’s statute presumes falsity if the information “is not based upon reasonable and reliable scientific inquiry, facts, or data.”¹⁶⁸ The statute additionally seeks to eliminate any constitutionally required actual malice protection.¹⁶⁹

An Idaho statute, enacted in 1992, appears to be the least harsh of all the new statutes because it expressly preserves all First Amendment protections.¹⁷⁰ Code section 6-2002(1)(d)

164. LA. REV. STAT. ANN. § 3:4502(1) (West Supp. 1995). The full text of § 3:4502(1) states:

“Disparagement” means dissemination to the public in any manner of any false information that the disseminator knows or should have known to be false, and which states or implies that a perishable agricultural or aquacultural food product is not safe for consumption by the consuming public. Such information is presumed to be false when not based upon reasonable and reliable scientific inquiry, facts, or data.

Id. Arizona’s statute also permits recovery if defendant “knows or should have known” that the information disseminated was false, thereby sidestepping the actual malice standard. ARIZ. REV. STAT. ANN. § 3-113(E)(1) (Supp. 1995); *see also* FLA. STAT. ANN. § 865.065(2)(a) (West 1994); OKLA. STAT. ANN. tit. 2, § 3012 (West Supp. 1996).

165. *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

166. LA. REV. STAT. ANN. § 3:4502(1) (West Supp. 1995).

167. *Id.* § 3:4503 (emphasis added).

168. ALA. CODE § 6-5-621(1) (Supp. 1995).

169. *See id.* § 6-5-623, which provides that “[i]t is no defense under this article that the actor did not intend, or was unaware of, the act charged.” *Id.* (emphasis added). This section proposes that defendants will be held strictly liable.

170. IDAHO CODE §§ 6-2002 to -2003 (Supp. 1995). The full text of § 6-2003, which creates the cause of action, is as follows:

(1) A producer of perishable agricultural food products who suffers actual damages as a result of another person’s disparagement of the producer’s product may bring an action for actual damages in a court of competent jurisdiction.

requires that the defendant's statement be made with actual malice,¹⁷¹ and Code section 6-2002(1)(a) provides that the "of and concerning" requirement must be fulfilled.¹⁷² Further, the burden of proving the falsity of the statement rests with the plaintiff.¹⁷³

Unfortunately, none of these statutes has, as of yet, been judicially interpreted. However, when the original Idaho legislation was introduced in 1992, the Attorney General issued her opinion of the bill, as drafted, and concluded that "it raised First Amendment 'concerns . . . of sufficient magnitude that a reviewing court would likely find' such legislation 'unconstitutional.'" ¹⁷⁴ In response, the legislature modified the statute so as to avoid any constitutional pitfalls.¹⁷⁵

CONCLUSION

Georgia's Action for Disparagement of Perishable Food Products or Commodities was created to protect those in the agricultural food chain—from producers to consumers—from false statements that disparage their perishable products. This is an admirable goal because the state's economy is best served by

(2) The plaintiff shall bear the burden of proof and persuasion as to each element of the cause of action and must prove each element by clear and convincing evidence.

(3) The plaintiff may only recover actual pecuniary damages. Neither presumed nor punitive damages shall be allowed.

(4) The disparaging factual statement must be clearly directed at a particular plaintiff's product. A factual statement regarding a generic group of products, as opposed to a specific producer's product, shall not serve as the basis for a cause of action.

(5) Notwithstanding any limitation contained in chapter 2, title 5, Idaho Code, an action under the provisions of this chapter must be commenced within two (2) years after the cause of action accrues and not thereafter.

(6) This statutory cause of action is not intended to abrogate the common law action for product disparagement or any other cause of action otherwise available.

Id. § 6-2003.

171. *Id.* § 6-2002(1)(d). "The defendant made the statement with actual malice, that is, he knew that the statement was false or acted in reckless disregard of its truth or falsity." *Id.*

172. *Id.* § 6-2002(1)(a). "The published statement is of or concerning the plaintiff's specific perishable agricultural food product." *Id.* (emphasis added).

173. *Id.* § 6-2003(2).

174. *Amici Curiae* Brief for Appellees at 33, *Auvil IV*, 67 F.3d 816 (9th Cir.) (No. 93-35963) (1994) (citing Op. Idaho Atty. Gen., at 11 (Feb. 28, 1992) (regarding House Bill 593—Product Disparagement)).

175. See IDAHO CODE § 6-2001 to -2003 (Supp. 1995).

protecting its interests in agriculture. Georgia depends on its peach and peanut farmers, among others, to harvest successfully to help assure Georgia's future job creation, economic growth, and active participation in interstate commerce.

However, because this statute attempts to prohibit certain speech, it will have to overcome constitutional hurdles should it ever be challenged. Lack of the "actual malice" standard of protection, coupled with the presumption of falsity problem, creates First Amendment concerns.

The law, as currently written, appears to preserve peaches at all costs, but if peaches are the pits, should the public be denied a right to know?

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