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NORTH DAKOTA JUMPS ON THE AGRICULTURAL DISPARAGEMENT LAW BANDWAGON BY ENACTING LEGISLATION TO MEET A CONCERN ALREADY ACTIONABLE UNDER STATE DEFAMATION LAW AND FAILING TO HEED CONSTITUTIONALITY CONCERNS

I. INTRODUCTION

The newest trend in defamation law is aimed at protecting the agricultural economies of individual states. For that reason, it comes as little surprise that North Dakota, an agricultural powerhouse,[1] has enacted an anti-disparagement law aimed at protecting not only the state's agricultural products, but its agricultural practices as well.[2] Termed everything from "veggie libel laws"[3] to "sirloin slander bills,"[4] these new statutes have cropped up in thirteen states over the past seven years.[5] Generally, these laws allow agricultural producers to bring a claim for damages against individuals who make false assertions about a producer's products.

From the perspective of the agricultural industry, the purpose of these laws is to provide producers with some recourse when they are

1. North Dakota agricultural production generates $1.3 billion in annual state economic revenue. Jerry Doan, *Agricultural Defamation No Laughing Matter*, BISMARCK TRIB., Feb. 23, 1997, at 4D.

2. *See* N.D. CENT. CODE §§ 32-44-01 to -04 (1997).

3. *See* Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agriculture Disparagement Laws*, 15 VA. ENVT. L.J. 403, 412 (1995-1996) (stating that this is a collective name for the various state disparagement laws).

4. *See* Doan, *supra* note 1, at 4D (arguing that this as an inappropriate term for North Dakota's legislation).

5. *See* ALA. CODE §§ 6-5-620 to -622 (1996) (allowing any person who produces, markets, or sells a perishable food product to bring a claim for disparagement); ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1995) (permitting anyone who transports, ships, sells, or markets a perishable food product to bring a disparagement action); COL. REV. STAT. ANN. § 12-16-115(1)(c) (West Supp. 1996) (providing that it is an unlawful act to intentionally make false statements about the condition or quality of farm products); FLA. STAT. ANN. § 865.065 (West Supp. 1996) (encompassing actions for the disparagement of any agricultural or aquacultural food product or commodity produced within the state); GA. CODE ANN. §§ 2-16-1 to -4 (Harrison 1994 & Supp. 1996) (providing a cause of action to any individual in the "entire chain from grower to consumer"); IDAHO CODE §§ 6-2001 to -2003 (Supp. 1996) (providing a cause of action to producers of perishable agricultural food products); LA. REV. STAT. ANN. §§ 4501 to 4504 (West Supp. 1996) (allowing a claim to any producer of perishable agricultural or aquacultural food products); MISS. CODE ANN. §§ 69-1-251 to -257 (Supp. 1994) (providing a cause of action to any producer of perishable agricultural or aquacultural food products); N.D. CENT. CODE §§ 32-44-01 to -04 (Supp. 1997) (providing a claim to both producers and agricultural organizations for the disparagement of both agricultural products and practices); OHIO REV. CODE ANN. § 2307.81 (Anderson Supp. 1996) (providing a claim to any producer or seller of an agricultural or aquacultural product); OKLA. STAT. ANN. tit. 2, §§ 3010 to 3012 (West Supp. 1996) (limiting recovery to the disparagement of perishable agricultural food products); S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (Michie 1995) (providing an action for the disparagement of both agricultural products and practices); TEX. CIV. PRAC. & REM. CODE ANN. § 96.001 (West Supp. 1996) (allowing a claim against anyone who disparages perishable food products).

injured financially by false statements.[6] However, inquiry reveals that several of these statutes may be challenged on the basis that they violate the First Amendment's principles of free speech[7] and provide producers with an avenue to circumvent the stringent common law requirements of product disparagement. Consequently, the debate involves the extent to which the First Amendment will protect speech that is particularly harmful to a state's economic well-being.[8]

This Note will discuss the constitutionality of North Dakota's recently enacted agricultural disparagement statute and attempt to provide alternative solutions that will not violate fundamental notions of free speech for states desiring to protect their agrarian economies. Furthermore, this Note will illustrate how North Dakota's legislature might have prematurely passed the legislation to meet a particular concern that could have been addressed through existing common law defamation or disparagement.

Part II of this Note will compare the common law torts of defamation and product disparagement and provide an overview of the constitutional history surrounding defamation claims. Part III will detail the incidents in Washington state which prompted that state's apple growers to bring suit to recover their financial losses. Particular focus will be given to *Auvil v. CBS*,[9] a common law disparagement decision denying the apple growers recovery and inciting the passage of several state agricultural disparagement statutes. Part IV will provide an overview of some of the general features of state agricultural disparagement statutes. Part V will discuss the contents of North Dakota's agricultural law and the unique legislative history behind its enactment. Finally, Part VI will analyze the constitutionality of North Dakota's statute and describe alternatives to the present statute.

6. *See, e.g.*, *Hearing on HB 1176 Before the Senate Agriculture Comm.*, 55th Leg. Sess. (N.D. 1997) [hereinafter *Hearing*] (statements of Senator Terry Wanzek, Chairman of Senate Agriculture Committee).

7. "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." U.S. CONST. amend. I.

8. *See* David J. Bederman, *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135, 145 (1997) (stating that the main purpose of the various agricultural disparagement statutes is to protect state agricultural and aquacultural economies).

9. 800 F. Supp. 928 (E.D. Wash. 1992), *aff'd*, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1567 (1996).

II. DEFAMATION AND DISPARAGEMENT: TWO DISTINCT COMMON LAW TORTS

Before addressing the constitutionality of North Dakota's agricultural disparagement statute, it is helpful to look at the approach traditionally taken in defamation and disparagement actions. This will aid in understanding the changes the United States Supreme Court has made to defamation over the previous thirty years. While both defamation and disparagement address injury stemming from the communication of false statements, each originated to protect a very separate interest.[10] Defamation actions were developed to provide recovery for damage to an individual's reputation,[11] while disparagement claims were intended to protect product and property interests.[12] Consequently, the original elements of each tort were very different.[13]

A. DEFAMATION AND ITS COMMON LAW ELEMENTS

Defamation involves the "unprivileged publication of false and defamatory statements concerning a plaintiff"[14] and encompasses the "twin torts" of libel and slander.[15] The traditional requirements of a defamation action differed from the tort's elements today. Before 1965, defamation was a strict liability tort in the sense that the plaintiff was relieved from proving any fault on the part of the defendant making the defamatory statement.[16] In other words, prior to 1965, an individual making a statement was not relieved of liability even if that individual had a reasonable basis for believing the statement was true.[17] Additionally, in a pre-1965 defamation action, the falsity of the defendant's statement was presumed.[18] As a result, a defendant could only avoid

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10. Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 907-19 (1992)

11. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter PROSSER & KEETON].

12. *See* RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1976) [hereinafter RESTATEMENT].

13. *See* Rawn Howard Reinhard, *The Tort of Disparagement and the Developing First Amendment*, 1987 DUKE L.J. 727, 730-32 (1987) (providing a historical analysis of both defamation and disparagement); *see also* Langvardt, *supra* note 10, at 907-19 (discussing the history of defamation and injurious falsehood claims).

14. Langvardt, *supra* note 10, at 907 (citing RESTATEMENT, *supra* note 12, § 558).

15. PROSSER & KEETON, *supra* note 11, § 111, at 771. Slander involves a written publication, while libel is the oral publication of a defamatory statement. *Id.*

16. Langvardt, *supra* note 10, at 909 (citations omitted).

17. *Id.* at 909-10.

18. *Id.*

liability for the defamatory statement by showing its truthfulness.[19] Finally, damages were also presumed under the traditional approach.[20] That is, a plaintiff was not required to prove actual injury to reputation from the defendant's defamatory statement.[21] While the presumption of damages has been called an "oddity of tort law,"[22] this presumption developed because harm to reputation was normally expected to result from a defamatory statement.[23] These presumptions remained in effect until the 1960s when the Supreme Court began applying First Amendment theories to the tort.[24]

Defamation's first common law element was a requirement that the defendant's statement concern or be about the plaintiff, often referred to as the "of and concerning" requirement.[25] While the defamatory statement did not need to specifically mention the plaintiff by name, it was necessary that a reasonable person could conclude that the statement described the plaintiff.[26]

The second element required that the defendant's statement be of a defamatory nature.[27] A statement was considered defamatory if it affected an individual's reputation, specifically lowering the individual in the esteem of the community or deterring others from associating with

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19. *See* PROSSER & KEETON, *supra* note 11, § 116, at 839 (stating that the well settled common law rule before the Supreme Court altering defamation's constitutional requirements was that truth was an affirmative defense).

20. Lisa Magee Arent, *A Matter of "'Governing' Importance: Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection*," IND. L.J. 441, 447 (1992). Defamation cases in which the plaintiff was allowed to presume damages included libel claims and four specific instances of slander including: statements imputing criminal activity, repugnant diseases, unchastity, and statements affecting an individual's business or trade. *Id.* at 447 n.33 (citation omitted).

21. *See* Langvardt, *supra* note 10, at 911 (citing RESTATEMENT, *supra* note 12, §§ 622 cmt. a, 623 cmt. a (noting, however, that a plaintiff could show proof of actual injury and emotional distress to increase the amount recovered)).

22. *See* Langvardt, *supra* note 10, at 911 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974)).

23. RESTATEMENT, *supra* note 12, § 621 cmt. a.

24. *See generally* 2 FOWLER V. HARPER ET AL., THE LAW ON TORTS, § 5.0, at 4-5 [hereinafter HARPER].

25. *See* Langvardt, *supra* note 10, at 908 (citing RESTATEMENT, *supra* note 12, § 559). The "of and concerning" requirement was identified as a constitutional requirement in 1966. *See* Rosenblatt v. Baer, 383 U.S. 75, 81-82 (1966). The facts of this case involved a columnist who published an article about a ski recreation area. *Id.* at 78. The supervisor for the group of county commissioners in charge of the ski area filed a suit for libel claiming that the columnist had made false statements about him. *Id.* The Court held that the plaintiff supervisor was required to show that the defendant's statement specifically referenced him. *Id.* at 81 (citing New York Times v. Sullivan, 376 U.S. 254, 290-92 (1963)). Because the plaintiff commissioner failed to show that the article specifically referenced him, the libel claim was constitutionally lacking. *See generally Rosenblatt*, 383 U.S. at 82-87.

26. *See* Semple, *supra* note 3, at 417 (stating that the defamatory statement must be understood as referring to the plaintiff) (citations omitted).

27. *See* Langvardt, *supra* note 10, at 908.

the individual.[28] However, it was not necessary that a third party believe that the defendant's statement was true.[29]

The third element of defamation at common law was the publication requirement.[30] Publication involved the communication of the defamatory statement by the defendant to one person other than the defamed.[31] Without the requirement of a third party hearing the defamatory statement, there would be no diminishment of the plaintiff's reputation.[32]

B. DISPARAGEMENT AND ITS COMMON LAW ELEMENTS

Disparagement[33] provides economic recovery for defamatory statements made about the quality of a person's products or property.[34] Historically, economic injury has been valued less than injury to reputation, and this is reflected in disparagement's more demanding common law elements.[35] However, defamation and disparagement shared two of the same common law elements. Specifically, both torts required the defamatory statement be published[36] and "of and concerning" the plaintiff.[37]

Disparagement differed from defamation with respect to the following elements: fault, falsity, and recovery of damages.[38] First, a plaintiff in a disparagement action is required to prove the defendant's intent to

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28. *Id.* (citing RESTATEMENT, *supra* note 12, § 559). *See also* PROSSER & KEETON, *supra* note 11, § 111, at 773 (classifying a statement as defamatory if it subjects the plaintiff to hatred, contempt or ridicule, or causes the plaintiff to be shunned or avoided).

29. *See* PROSSER & KEETON, *supra* note 11, § 111, at 780-83 (noting that a third party need only understand that the statement is meant in a defamatory sense).

30. *See* Langvardt, *supra* note 10, at 910 (citations omitted).

31. RESTATEMENT, *supra* note 12, § 577(1).

32. *See* HARPER, *supra* note 24, § 5.15, at 119-20 (citations omitted); *see also* RESTATEMENT, *supra* note 12, § 577 cmt. b (stating that there is no loss to reputation until a third party hears the defamatory statement).

33. Disparagement encompasses two actions: slander of title and trade libel. *See* Reinhard, *supra* note 13, at 728-29. Slander of title developed in the 16th century and referred to a false statement concerning the ownership of property, while trade libel involved a disparaging statement about the quality of an individual's goods and surfaced as a tort 300 years later. *Id.* at 729. However, today commentators often refer to an injury to property interests from a false statement as injurious falsehood. *See* Eric M. Stahl, *Can Generic Products be Disparaged? The "Of and Concerning" Requirement After Alar and the New Crop of Agricultural Disparagement Statutes*, 71 WASH. L. REV. 517, 519 n.10 (1996). A falsehood concerning the quality of an individual's products is often referred to as slander of goods, trade libel, or product disparagement. *Id.* However, when the false statement concerns ownership, not a good, the tort is termed slander of title. *Id.*

34. PROSSER & KEETON, *supra* note 11, § 128, at 962.

35. Arent, *supra* note 20, at 446-47. *See also* RESTATEMENT, *supra* note 12, § 623A cmt. g (stating that "[f]rom the beginning, more stringent requirements were imposed upon the plaintiff seeking to recover for injurious falsehood in three important respects—falsity of the statement, fault of the defendant, and proof of damage").

36. *See supra* notes 30-32 and accompanying text (regarding the publication requirement).

37. *See supra* notes 25-26 and accompanying text (addressing the "of and concerning" requirement).

38. Semple, *supra* note 3, at 420; *see also* Langvardt, *supra* note 10, at 916-19 (describing where common law disparagement departed from defamation).

injure or fault.[39] In contrast, defamation was originally a strict liability tort and thus, the defendant's fault was presumed.[40] However, this presumption has never been available to an individual bringing a disparagement action and the plaintiff in a disparagement case has always been required to show evidence of the defendant's wrongful intent to injure or fault.[41]

Defamation and disparagement also differed with respect to proof of falsity requirements. A plaintiff bringing a claim for disparagement was required to show that the defendant's statement was false.[42] Unlike defamation, a disparagement plaintiff has never been entitled to a presumption that the statement was false.[43] As mentioned previously, in a defamation action the defendant's statement was originally presumed false and this presumption could only be overcome if the defendant proved that the statement was true.[44]

Finally, recovery of damages also differed. In an action for disparagement, a plaintiff is required to fulfill a special damage requirement.[45] Under this requirement, the plaintiff must show actual pecuniary loss stemming from the defendant's false statement in order to recover either nominal or punitive damages.[46] In comparison, damages under a common law defamation action were presumed.[47]

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39. RESTATEMENT, *supra* note 12 § 623 A cmt. d.

40. *See supra* notes 16-17 and accompanying text (discussing this presumption). The presumption of fault was eliminated by the Supreme Court and now the Court requires different levels of fault focusing on the classification of the plaintiff party as either a public or private individual. Semple, *supra* note 3, at 421; *see also infra* notes 51-54 (explaining the Supreme Court's elimination of the fault presumption).

41. Reinhard, *supra* note 13, at 730 (stating that "a showing of an intent to injure has always been required in disparagement action"); *see also* PROSSER & KEETON, *supra* note 11, § 128 at 969-70. However, the courts are not uniform in their fault requirements. *See* Semple, *supra* note 3, at 419 (recognizing the two different liability approaches). Some courts follow the Restatement approach which requires that the plaintiff show the defendant recognized, or should have recognized, that the publication would harm the plaintiff. *Id.* (citations omitted); *see also* RESTATEMENT, *supra* note 12, § 623A. The second approach merely requires the plaintiff to show that the defendant acted with common law malice, meaning the defendant acted with hate, spite, or ill will. *See* Semple, *supra* note 3, at 419-20 (citing Systems Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140-41 (3rd Cir. 1977) (applying a common law malice standard in a slander of title case)).

42. *See supra* notes 18-19 and accompanying text (addressing the presumption of falsity under common law defamation).

43. *See* Langvardt, *supra* note 10, at 916 (citing RESTATEMENT, *supra* note 12, §§ 623A cmt. g, 651).

44. Langvardt, *supra* note 10, at 909 (citing PROSSER & KEETON, *supra* note 11, § 116, at 839). Defamation's presumption of falsity has been removed by the Supreme Court in most defamation actions. *Id.*; *see also infra* notes 64-68 and accompanying text (discussing further the *Hepps* case which removed this presumption).

45. Langvardt, *supra* note 10, at 918 (citing PROSSER & KEETON, *supra* note 11, § 128, at 970-971; RESTATEMENT, *supra* note 12, §§ 623A, 633, 651).

46. Langvardt, *supra* note 10, at 918.

47. *See supra* notes 20-24 and accompanying text (discussing defamation damages under common law).

In summary, a plaintiff bringing a defamation action prior to 1965 was only required to show that the statement was published and "of and concerning" the plaintiff because the defendant's fault, the falsity of the defamatory statement, and damages were all presumed under the common law approach. However, an individual bringing a claim for disparagement had to meet more onerous requirements. First, the disparagement plaintiff had to prove that the statement was both published and "of and concerning" the plaintiff. In addition, the defendant's fault, the falsity of defamatory statement, and actual pecuniary loss stemming from the statement had to be proven by the plaintiff. Therefore, the two torts were quite distinguishable under common law.

C. THE CONSTITUTIONALIZATION AND EVOLUTION OF DEFAMATION LAW

The distinction between common law defamation and product disparagement significantly narrowed with the constitutionalization[48] of defamation law beginning with the United States Supreme Court's 1964 landmark decision in *New York Times Co. v. Sullivan*.[49] A series of cases followed *New York Times* in which the Court further interpreted and clarified defamation law.[50] These cases heightened the requirements for defamation, and thus, recovery under defamation and disparagement became quite similar.

1. *Fault Requirement Implemented*

In *New York Times*,[51] the Supreme Court concluded that fault would no longer be presumed in defamation actions involving a public official plaintiff and a statement about that individual's official conduct.[52] Rather, the public official would be required to prove that the defendant's statement was made with actual malice or with "knowledge that it

48. Arent, *supra* note 20, at 450-51. Constitutionalization of defamation law means that the Supreme Court recognized a need to modify the common law elements of defamation to recognize the First Amendment's freedom of speech and freedom of press clauses. *See* Langvardt, *supra* note 10, at 923; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (1985) (White, J., concurring) (stating "New York Times Co. v. Sullivan was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander").

49. 376 U.S. 254 (1964).

50. *See generally*, Arent, *supra* note 20, at 450-54 (describing the progeny of cases following *New York Times*); *see also* Langvardt, *supra* note 10, at 923-34 (providing an analysis of several United States Supreme Court cases altering the common law requirements of defamation).

51. This case involved a defamation action brought by Sullivan, who supervised the Montgomery city police, against a newspaper for publishing alleged falsehoods in an advertisement. *New York Times*, 376 U.S. at 256. The advertisement suggested that civil rights demonstrators had been harassed by the Montgomery police. *Id.* at 258-59. The lower courts concluded that the newspaper's statements did concern Sullivan and that the newspaper had acted maliciously in publishing the article. *Id.* at 262-64.

52. *Id.* at 279-80.

was false or with reckless disregard of whether it was false or not."[53] The Court reasoned that this heightened standard of proof would prevent a chilling effect on the criticism of public officials.[54]

This fault requirement was expanded further in the Court's plurality opinion in *Rosenbloom v. Metromedia, Inc*.[55] *Rosenbloom* involved a radio report concerning the arrest of Mr. Rosenbloom on charges of possession of obscene material.[56] The Supreme Court concluded that the *New York Times* actual malice standard for public figure plaintiffs should also extend to cases involving matters of public interest.[57] Therefore, private and public figure plaintiffs were required to prove that the defendant made the defamatory statement with knowledge of its falsity or with reckless disregard of its truth if the issue involved one of public interest or concern.[58]

In *Gertz v. Robert Welch, Inc.*,[59] the Supreme Court expressly rejected the public interest approach.[60] Specifically, the Court held that the actual malice standard should only be applied to public figure plaintiffs and that private figure plaintiffs should be entitled to a lower fault standard.[61] Commentators refer to this lower fault standard as lying somewhere between the *New York Times* actual malice requirement and the strict liability approach that defamation actions originally followed.[62] In addition, states were granted the authority to set their own fault

53. *Id.*

54. *Id.* at 270 (emphasizing the Supreme Court's commitment to the principle that debate on public issues should be "uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant attacks on the government"). Shortly after *New York Times*, the Supreme Court extended the actual malice requirement to public figure plaintiffs. *See* Curtis Publishing Co., v. Butts, 388 U.S. 130, *reh'g denied*, 389 U.S. 889 (1967). The Court provided a few reasons for extending the actual malice standard to public figures. *Id.* at 164-65. These included the similarities between the two groups in developing public policy, as well as the ability of both groups to counter any criticism against them through the media. *Id.*

55. 403 U.S. 29 (1971) (plurality), *overruled by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

56. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 33 (1971).

57. *Id.* at 43-44 (stating "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event . . . not the participant's prior anonymity or notoriety").

58. *Id.* at 52. Mr. Rosenbloom was unable to meet this fault requirement and the radio station's right to broadcast the allegations against him was upheld. *Id.* at 55-57.

59. 418 U.S. 323 (1974).

60. *Id.* at 346-50. *Gertz* involved an action against a newspaper organization for allegations that Gertz, a Chicago attorney, was a Communist or part of a Communist conspiracy. *Id.* at 325-27.

61. *Id.* at 342-45. The Supreme Court distinguished private figures from public figures and officials. *Id.* at 344. Only public plaintiffs would be required to meet the actual malice fault standard in bringing a defamation action. *Id.* The Court's conclusion was based on two reasons. First, public officials and figures have greater access to media channels to contradict any false statements. *Id.* at 344. And secondly, public figures have placed themselves into the spotlight, and therefore increased the chances that they would be subject to false and defamatory statements. *Id.* at 345.

62. *See* Langvardt, *supra* note 10, at 926.

standards for private figure plaintiffs provided they did not implement liability without fault.[63] Nonetheless, even after *Gertz*, courts will no longer presume a defendant's fault in making the defamatory statements. Instead, private and public figure plaintiffs will now be required to prove some degree of fault on the part of the defendant making the defamatory statement.

2. *Plaintiff Bears Burden of Proof on Issue of Falsity*

While the common law presumption of fault was eliminated in *New York Times*, it was not until 1986 that the Supreme Court removed defamation's common law presumption of falsity in *Philadelphia Newspapers, Inc. v. Hepps.*[64] The issue in *Hepps* was whether a private party plaintiff or a media defendant bore the burden of proof on the issue of falsity when a defamation claim involved an issue of public importance.[65] The Court held that the common law falsity presumption must give way to the constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages in cases involving a media defendant and a statement of public interest.[66] Recognizing that this shifting of the burden of proof to the plaintiff might protect some false statements, the Court explained that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[67] Consequently, a plaintiff bringing a defamation action against a media defendant for publishing a matter of public importance may no longer benefit from a presumption of falsity.[68]

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63. *Gertz*, 418 U.S. at 347-48 (stating that "[o]ur accommodation to the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*"); *see also* HARPER, *supra* note 24, § 5.0, at 13-14 (discussing the different liability approaches available to the states and noting that most courts allow private figure plaintiffs to recover by simply showing negligence). North Dakota appears to have implemented more of a common law malice standard in its civil libel statute. *See* N.D. CENT. CODE § 14-02-03 (1997) (stating that libel is a false statement which "exposes any person to hatred, contempt, ridicule, or obloquy").

64. 475 U.S. 767 (1986).

65. *Id.* at 776-77. This case involved a defamation action brought by Hepps, the principle stockholder in a corporation franchising a chain of stores, against a Philadelphia newspaper. *Id.* at 769. The newspaper published several articles stating Hepps had links to organized crime, which he used to influence decisions in government. *Id.*

66. *Id.* at 776-77.

67. *Id.* at 778 (quoting *Gertz*, 418 U.S. at 341).

68. *See* Langvardt, *supra* note 10, at 930 n.171 (recognizing, however, that the presumption might still be applicable to claims involving a private figure plaintiff and either a statement of public concern or a non-media defendant).

3. *Presumption of Damages Eliminated*

In addition to altering the fault requirement, the *Gertz* Court also addressed concerns with the presumption of damages in defamation cases.[69] Of particular concern was the presumption's potential to hinder free speech.[70] In *Gertz*, the Court concluded that recovery for either presumed or punitive damages would be limited to instances where the plaintiff proved the defendant had made the defamatory statement with actual malice.[71] If the private party plaintiff failed to meet this minimum fault requirement, recovery would be limited to compensation for the actual injury.[72]

Several years later, the Supreme Court rejected this approach to damages in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[73] At issue was whether the *Gertz* rule dictating that a private party plaintiff cannot be awarded presumed and punitive damages without showing actual malice applied where the statement about the private figure plaintiff involved a matter of only private concern.[74] The plurality, along with two concurring justices, retreated from the "status of the plaintiff" approach in *Gertz* and concluded that whether the matter was of public interest would also be one of the factors concerning damages.[75] Thus, the actual malice requirement is no longer required for the recovery of presumed or punitive damages where the action involves a private figure plaintiff and an issue of private concern.

4. *Application of Defamation's Constitutional Requirements to Product Disparagement Cases*

New York Times and its progeny have dramatically altered the elements of common law defamation. Specifically, the presumptions of fault, falsity, and damages have been eliminated. As a result, a current

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69. *See Gertz*, 418 U.S. at 348-50; *see also* Semple, *supra* note 3, at 426-27 (discussing the Supreme Court's retreat from presumed damages).

70. *See Gertz*. 418 U.S. at 348-50.

71. *Id.* at 349 (stating that "[s]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing or knowledge of falsity or reckless disregard for the truth").

72. *Id.* at 350 (providing some examples of actual damages including impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering).

73. 472 U.S. 749 (1985) (plurality).

74. Langvardt, *supra* note 10, at 929-930 (citation omitted). *Dun & Bradstreet* involved the liability of a credit reporting agency for issuing false financial information about the plaintiff company to several subscribers. *Dun & Bradstreet*, 472 U.S. at 751-52. The jury awarded the plaintiff company $50,000 in compensatory damages and $300,000 in punitive damages. *Id.*

75. *Id.* at 761-63 (footnote omitted). Following this approach, the Court concluded that the plaintiff company was entitled to the damage award without having to prove actual malice because the false report concerning the plaintiff's financial status was not a matter of public interest. *Id.*

defamation action looks quite similar to an action for disparagement today.

The Supreme Court has never explicitly stated whether defamation's constitutional requirements extend to product disparagement actions. However, in *Bose v. Consumers Union of United States, Inc.*,[76] the Supreme Court affirmed the lower court's application of the actual malice fault standard to a product disparagement case suggesting that defamation's constitutional limitations generally apply to product disparagement actions.[77] In *Bose,* the Bose Corporation brought a product disparagement action against the publisher of *Consumer Reports* magazine for statements made about the quality of the corporation's stereo speaker systems.[78] The trial court determined that the similarities between defamation and disparagement warranted the application of defamation's constitutional requirements to product disparagement actions.[79] As a result, the Bose Corporation, as plaintiff, was required to prove that the defendant publisher made the statements about the plaintiff's speaker systems with actual malice.[80] Consumer Union appealed, however, because Bose did not challenge the trial court's ruling that it was a public figure triggering the application of the actual malice fault standard, the issue on appeal was limited to Consumer Union's liability.[81] Consequently, when the case reached the Supreme Court the application of the actual malice standard to a product disparagement case was not at issue.[82] Nevertheless, the Supreme Court upheld the trial court's application of the actual malice standard to the product disparagement case.[83]

Indeed, since *Bose*, several lower courts have taken the Supreme Court's acceptance of the trial court's decision as an extension of

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76. 466 U.S. 485 (1984).

77. *See id.* at 513 (stating that "[w]e may accept all of the purely factual findings of the district court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence" that Consumer Reports "prepared the . . . article with knowledge that it was false or with the reckless disregard of the truth"). *See also* Vincent Brannigan & Bruce Ensor, *Did Bose Speak Too Softly?: Product Critiques and the First Amendment*, 14 HOFSTRA L. REV. 571, 572-76 (1986) (discussing the *Bose* case and specifically the extension of defamation's constitutional protections to actions for product disparagement).

78. Bose Corp. v. Consumers Union of U.S., Inc., 508 F. Supp. 1249, 1253 (1981).

79. *Id.* at 1270-71.

80. *Id.*

81. Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 189, 191 (1982). Consumer Union appealed both the finding of liability and the assessment of damages. *Id.* During oral argument, the Bose Corporation did not dispute the trial court's finding that the corporation was a public figure. *Id.* at 194. In addition, Bose conceded that the rule from *New York Times* was applicable to this case and accepted the trial court's conclusion that the actual malice standard applies to product disparagement cases. *Id.*

82. *See* Langvardt, *supra* note 10, at 736-37 (citations omitted).

83. *See supra* note 77 and accompanying text (discussing the Supreme Court's holding in *Bose*).

defamation's constitutional requirements to product disparagement actions.[84] Thus, defamation's constitutional requirements provide a starting point for an analysis of the constitutionality of North Dakota's agricultural disparagement law.[85]

III. COMMON LAW PRODUCT DISPARAGEMENT CLAIM FAILS TO PROVIDE RECOVERY TO WASHINGTON'S APPLE PRODUCERS

Before analyzing North Dakota's disparagement statute, however, it is necessary to examine a Washington state product disparagement case involving the state's apple producers. In this case, the apple growers' failure to recover under a product disparagement claim prompted the agricultural industry to lobby for the enactment of state agricultural disparagement statutes.

A. APPLE PRODUCERS SUFFER HARDSHIP

On February 26, 1989, the Columbia Broadcasting System (CBS) television program, "60 Minutes," broadcast a segment linking Alar,[86] a chemical sprayed on apples, to cancer.[87] The segment was based primarily upon a report published by the National Resources Defense Council (NRDC), an environmental advocacy group, and focused upon health

84. *See, e.g.*, Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 932-33 (E.D. Wash. 1992) (analyzing the First Amendment's "of and concerning" requirement in a case involving the product disparagement of apples); Blatty v. New York Times Co., 728 P.2d 1177, 1184 (Cal. 1986); *cert. denied*, 485 U.S. 934 (1988) (concluding that the constitutional limitations on defamation law, including the "of and concerning" requirement are not peculiar to defamation actions, but apply to all claims whose gravamen is the alleged injurious falsehood of a statement); Unelklo Corp. v. Rooney, 912 F.2d 1049, 1057-58 (9th Cir. 1990) (finding that claims for product disparagement were subject to the same First Amendment requirements which governed actions for defamation where they were based on statements made by television personality about a product); Quantum Elec. v. Consumers Union of U.S., Inc., 881 F. Supp. 753, 763 n. 12 (D.R.I. 1995) (stating that the *New York Times* actual malice standard applies to both defamation and disparagement actions where the plaintiff is a public figures); Flotech, Inc. v. E.I. Du Pont de Nemours Co., 627 F. Supp. 358, 370 (D. Mass. 1985) *aff'd*, 814 F.2d 775, 777 n.1 (1st Cir. 1987) (applying the "of and concerning" requirement in a product disparagement action involving an oil treatment ingredient); Dairy Stores, Inc. v. Sentinel Publishing Co., 486 A.2d 344, 345 (1985), *aff'd on other grounds*, 516 A.2d 220 (N.J. 1986) (recognizing that *Bose* extends the actual malice standard to product disparagement cases).

85. *See* Semple, *supra* note 3, at 422 (noting that while the Supreme Court in *Bose* did not state specifically whether defamation jurisprudence applies to product disparagement, the Court held that the product disparagement issue raised in the case fit within the breathing space that gives life to the First Amendment). At least one commentator has reasoned that the constitutionality of agricultural disparagement statutes should be assessed according to defamation jurisprudence because speech concerning the safety of agricultural products can be categorized as "speech that matters" and because any potential errors in that speech may fit within "the breathing space that gives life to the First Amendment." *See id.* at 422-23.

86. Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 930 (E.D. Wash. 1992) [hereinafter Auvil I]. Alar is the common name for the chemical daminozide which was used by the apple industry to improve fruit appearance, increase size, lengthen shelf life, and decrease fruit disorders. *Id.*

87. *See id* at 937-41 (providing a full transcript of the broadcast entitled "'A' is for Apple").

risks associated with the use of Alar and other pesticides in fruit production.[88] Following the segment, both apple and apple product sales dropped dramatically, and several public schools even refused to serve apples in their cafeterias.[89] The industry suffered losses totaling more than $500 million.[90] Producers were forced into bankruptcy and many towns dependent upon apple revenues suffered an economic crisis.[91] Producers turned to the legal system for help.[92]

B. AUVIL I: "OF AND CONCERNING" REQUIREMENT FULFILLED

In response to their financial hardship, eleven apple growers brought a class action on behalf of 4,700 Washington state apple producers against the NRDC, CBS and several CBS affiliate stations in Yakima County Superior Court.[93] CBS moved to have the suit dismissed, alleging that the broadcast was not "of and concerning" any specific grower or growers.[94] However, the district court concluded that all apples, whether treated with Alar or not, were implicated as dangerous in the broadcast and the growers were allowed to proceed with their claim for product disparagement under a group libel theory.[95]

C. AUVIL II: APPLE GROWERS FAIL TO PROVE FALSITY OF THE STATEMENTS

Fifteen months later, the district court granted CBS's second motion for summary judgment, concluding that the growers could not prove the broadcast statements were false.[96] The court specifically examined three

88. *Id.* at 930. The segment focused on the Environmental Protection Agency's knowledge that Alar breaks down into a carcinogen. *Id.* The report also asserted that children faced a greater risk from Alar and other chemicals because children consume large amounts of apple products. *Id.*

89. *See* Semple, *supra* note 3, at 409 (citation omitted).

90. Jerry Jackson, *Bashing Beef? Be Careful of State Libel Law*, ORLANDO SENTINEL, Aug. 23, 1997, at A6.

91. *Auvil I*, 800 F. Supp. at 931.

92. *See* Bederman, *supra* note 8, at 141-44 (providing a progression of the *Auvil* case through the courts).

93. *Auvil I*, 800 F. Supp. at 931. The action was removed on diversity grounds to the Eastern District of Washington, where summary judgment was entered in favor of the affiliate stations and the claims against them were dismissed. *Id.* at 933-37.

94. *Id.* at 933. The growers conceded that if this were a defamation action, none of the individual growers would be able to satisfy the "of and concerning" requirement. *Id.* at 933. Thus, the growers argued that because the group was implicated and harmed by the CBS broadcast, they as a unit met the "of and concerning" requirement. *Id.* at 932-34.

95. *Id.* at 935-37 (stating that the universal nature of the hazard was discussed in the segment and therefore the broadcast was clearly about the Alar tainted apples). *But see* Stahl, *supra* note 33, at 527-29 (discussing the flaws in the *Auvil* court's reasoning that the broadcast was "of and concerning" all apples and growers). The parties were then given 90 days to proceed with discovery on the issues of falsity and malice. *Auvil I*, 800 F. Supp. at 937.

96. *See* Auvil v. CBS "60 Minutes," 836 F. Supp. 740, 743 (E.D. Wash. 1993) [hereinafter Auvil II].

factual allegations raised in the broadcast including that Alar was the most potent cancer-causing agent, an imminent hazard, and that it was most harmful to children.[97] Recognizing that the plaintiff growers carried the burden as to the falsity of these statements, the court concluded that the growers had failed to prove that any of these three assertions were in fact false, and granted summary judgment to CBS.[98]

D. AUVIL III: ACTION DISMISSED

The growers appealed the district court's summary judgment ruling that the growers had failed to offer evidence sufficient to present a genuine issue of fact on the falsity of the CBS broadcast.[99] Specifically, the growers argued that summary judgment as to falsity was improper because the implied message from the broadcast as a whole could be proven false.[100] On appeal, the court referred to the Restatement definition of product disparagement to determine whether the lower court applied the appropriate standard of proof as to falsity.[101] The Restatement provides that a claim for product disparagement will be established where a defendant "published a knowingly false statement harmful to the interests of another and intended such publication to harm the plaintiff's pecuniary interests."[102] Yet, the Restatement also instructs that the plaintiff must prove the falsity of the disparaging statement.[103]

Applying this standard, the appeals court rejected the growers' argument that they only needed to prove that the broadcast's whole message contained a false message.[104] Instead, the court concluded that the statements themselves were the primary concern, not the whole message.[105] Furthermore, the court dismissed the idea of allowing the jury to decide the issue of falsity, recognizing that this would only lead to uncertainty for broadcasters.[106] This uncertainty would, in turn, lead to a chilling of speech.[107]

97. *See id.* at 742-43. These three issues are derived from the plaintiff growers' assertion that the message of the broadcast was that "[b]ecause of the use of daminozide, apples pose an imminent health hazard of causing cancer especially in children." *Id.* at 742.

98. *See id.* at 743 (stating that "[e]ven if CBS' statements are false, they were about an issue that mattered, cannot be proven as false and therefore must be protected").

99. *See* Auvil v. CBS "60 Minutes," 67 F.3d 816, 819 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1567 (1996) [hereinafter Auvil III].

100. *Id.* at 822.

101. *Id.* at 820 (following the approach taken by a Washington state appellate court decision, Waechter v. Carnation Co., 485 P.2d 1000, 1003-04 (Wash. Ct. App. 1971), because there were no Washington state cases dealing directly with a product disparagement cause of action).

102. *Id.* (citing RESTATEMENT, *supra* note 12, § 623A).

103. *Id.* at 820 (citing RESTATEMENT, *supra* note 12, §§ 623A, 651(1)(c)).

104. *Id.* at 822.

105. *Id.*

106. *Id.*

107. *Id.*

The *Auvil* trilogy illustrates the difficulty and inability of Washington's apple producers to recover damages under a tort claim for common law product disparagement. Following the growers' failure to recover damages, the agriculture industry became interested in designing legislation that would allow for recovery in similar situations.[108] The dismissal of the apple growers' suit provided the industry and its lobbyists with the fuel it needed to press for state product disparagement statutes.[109]

IV. STATE AGRICULTURAL DISPARAGEMENT STATUTES

Although one might have expected Washington to be the first state to adopt product disparagement legislation,[110] it was Louisiana that first enacted a statute prohibiting the disparagement of agricultural products in 1991.[111] Since that time, twenty-nine states have considered similar legislation.[112] While the statutes share the purpose of protecting the agricultural or aquacultural economies of the state,[113] the statutes contain some different provisions concerning the class of plaintiffs, scope of the action, and damage provisions.[114]

Many of the statutes limit recovery to strictly plaintiff producers by defining "producer" as the individual growing or producing the food product.[115] However, a few other provisions extend the class of plaintiffs to include not only those who grow the product but also those who

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108. *See* Marianne Lavelle, *Food Abuse: Basis for Suits 13 States Say You Can Libel a Fruit; Oprah Sued for Knocking Hamburger*, NAT'L L. J., at A1 (1997).

109. *See* Semple, *supra* note 3, at 411 (stating that the dismissal of the growers suit ignited the argument for lobbyists pushing for agricultural disparagement laws). *See also* Bederman, *supra* note 8, at 144 (stating that after the apple growers failed to recover, agribusiness became interested in creating a new cause of action that would allow for recovery where common law disparagement had failed).

110. While Washington considered agricultural disparagement legislation during the 1995 legislative assembly, the measure was not enacted. *See* H.B. 1098, 54th Leg., Reg. Sess. (Wash. 1995).

111. *See* LA. REV. STAT. ANN. §§ 3:4501 to 4504 (West Supp. 1998).

112. *See supra* note 5 (listing the 13 states that have already enacted agricultural product disparagement legislation); *see also* S.B. 492, Reg. Sess. (Cal. 1995); S.B. 311, Leg. Sess. (Del. 1991); S.B. 234, 89th Gen. Assem., Reg. Sess. (Ill. 1995); H.B. 106, 76th Gen. Assem. Reg. Sess. (Iowa 1995); S.B. 445, Leg. Sess. (Md. 1996); H.B. 5808, 88th Leg., Reg. Sess. (Mich. 1995); H.R. 2804 78th Leg., Reg. Sess. (Minn. 1994); H.R. 1720 87th Leg., 2d Reg. Sess. (Mo. 1994); L.B. 367, 94th Leg., 1st Sess. (Neb. 1995); H.R. 5159, 205th Leg., 1st Reg. Sess. (N.J. 1992); H.B. 949, 179th Gen. Assem., Reg. Sess. (Pa. 1995); S.B. 160, Statewide Sess. (Pa. 1995); S.B. 160 Statewide Sess. (S.C. 1995); H.R. 4706 Statewide Sess. (S.C. 1994); H.B. 735, Adjourned Reg. Sess. (Vt. 1996); H.B. 1098, 54th Leg., Reg. Sess. (Wash. 1995); A.B. 702, 92d Leg., Reg. Sess. (Wis. 1995); H.R. 308, 53d Leg., Gen. Sess. (Wyo. 1995).

113. *See* Bederman, *supra* note 8, at 145.

114. *See id.* at 144-50 (providing a discussion of various state disparagement statutes).

115. *See, e.g.*, S.D. CODIFIED LAWS § 20-10A-2 (Michie 1995) (stating that a cause of action exists for damage resulting from the disparagement of any perishable agricultural food product to any producer of the perishable food product).

market or sell the product,[116] produce or ship the product,[117] and even consumers of the product.[118]

The scope of the action also differs among the various product disparagement statutes. While all of the statutes protect agricultural products, some of the statutes extend protection to aquacultural products as well.[119] In addition, South Dakota's statute provides an action for the disparagement of agriculture products and agricultural practices.[120]

While all the disparagement statutes provide for compensatory damages, just one limits the state from collecting punitive damages.[121] Additionally, two of the statutes specifically provide for the recovery of punitive damages if the statement is made with intent to hurt the agricultural producer.[122] Lastly, attorney's fees and court costs are available under a few of the provisions.[123]

V. NORTH DAKOTA'S AGRICULTURAL DISPARAGEMENT LAW

Following the lead of twelve states,[124] the North Dakota legislature enacted the Agricultural Product Defamation Act during the 1997

116. *See* ALA. CODE § 6-5-622 (Supp. 1997) (defining producer broadly to include "any person who produces, markets or sells a perishable food product").

117. *See* ARIZ. REV. STAT. ANN. § 3-113 (A) (West Supp. 1997) (providing that "[a] producer, shipper, or association that represents producers or shippers" may bring an action for false claims against perishable agricultural food products).

118. *See* GA. CODE ANN. § 2-16-2(3) (Harrison 1994) (stating that a product disparagement action is available to anyone in the "entire chain from grower to consumer").

119. *See, e.g.*, ARIZ. REV. STAT. ANN. § 3-113(E)(2) (West Supp. 1997); LA. REV. STAT. ANN. § 4502(2) (West Supp. 1998); FLA. STAT. ANN. § 865.065(2)(b) (West 1994).

120. *See* S.D. CODIFIED LAWS § 20-10A-1(3) (Michie 1995).

121. *See* IDAHO CODE § 6-2003(3) (Supp. 1997) (stating that only actual pecuniary damages can be recovered).

122. *See, e.g.*, S.D. CODIFIED LAWS § 20-10A-2 (Michie 1995) (allowing the court to provide any other appropriate relief); OHIO REV. CODE ANN. § 2307.81(E) (providing for punitive damages in the amount of three times the compensatory damages).

123. *See* ARIZ. REV. STAT. ANN. § 3-113(C) (providing for attorney's fees and court costs to the successful party); *see also* OHIO REV. CODE ANN. § 2307.81(C) (Anderson Supp. 1996) (providing that attorney's fees and court costs are appropriate when the plaintiff establishes that the defendant knew or should have known that the information was false).

124. *See supra* note 5 (listing the states that have implemented agricultural disparagement statutes).

legislative session.[125] Commentators have referred to these product disparagement statutes as being "tailor-made causes of action."[126] A look at North Dakota's law, along with its unique legislative history, reveals that it is no exception.[127]

The North Dakota disparagement statute provides for an action against anyone who "willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false," about an agricultural product or management practice.[128] If a court or jury determines that the defendant acted with malice in making the statement, the plaintiff is entitled to treble damages.[129] A unique feature of North Dakota's law permits an association to bring an action on behalf of an agricultural producer or class of agricultural producers if the disparaging statement refers to an entire group or class of agricultural producers or products.[130] However, in this situation, only actual damages or injunctive relief can be recovered.[131] Finally, the action contains a two

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125. *See* N.D. CENT. CODE §§ 32-44-01 to -04 (Supp. 1997). Section 32-44-02 reads as follows:

> A person who willfully or purposefully disseminates a false and defamatory statement, knowing the statement to be false, regarding an agricultural producer or an agricultural product under circumstances in which the statement may be reasonably expected to be believed and the agricultural producer is damaged as a result, is liable to the agricultural producer for damages and other relief allowed by law in a court of competent jurisdiction, including injunctive relief and compensatory and exemplary damages. If it is found by a court or jury that a person has maliciously disseminated a false and defamatory statement regarding an agricultural product or agricultural producer, the agricultural producer may recover up to three times the actual damages proven and the court must order that the agricultural producer recover costs, disbursements, and actual reasonable attorneys' fees incurred in the action.

Section 32-44-03 states:

> In addition to the provisions of section 32-44-01, if a false and defamatory statement is disseminated referring to an entire group or class of agricultural producers or products, a cause of action arises in favor of each producer, regardless of the size of the group or class. Each cause of action by a producer or an association representing an agricultural producer in such case is limited to the actual damages of the producer, injunctive relief, and exemplary damages.

This legislation was introduced as House Bill 1167 by Representative Eugene Nicholas, Chairman of the House Agriculture Committee. Similar legislation was introduced during the 1995 Session, but passage of the bill failed.

126. *See* Bederman, *supra note* 8, at 136 (describing the idea of a tailor-made tort for agriculture disparagement as disturbing, particularly conflicting with the notions of free speech). Bederman states that "[i]t is no surprise that agribusiness concerns would try to craft a tailor-made tort of agricultural disparagement." *Id.* at 167.

127. *See generally* Julie J. Srochi, *Must Peaches be Preserved at All Costs? Questioning the Constitutional Validity of Georgia's Perishable Product Disparagement Law*, 12 GA. ST. U. L. REV. 1223, 1240-44 (providing an an in-depth analysis of Georgia's agricultural disparagement statute and an evaluation of its constitutionality).

128. *See* N.D. CENT. CODE § 32-44-02 (Supp. 1997).

129. *Id.*

130. *See id.* § 32-44-03.

131. *Id.*

year statute of limitations period which begins tolling on the date the false and defamatory statement is communicated.[132]

A. LEGISLATIVE HISTORY

As mentioned, there is some unique history behind North Dakota's disparagement statute. During the legislative session, this bill received a substantial amount of attention and press coverage.[133] Although one might have expected the lobbying efforts for the bill to have come from the cattle or grain industry, the driving force behind the enactment of the law was the North Dakota Equine Ranching Association.[134] The North Dakota Equine Ranching Association consists of twenty-nine family ranches[135] which collect pregnant mares' urine (PMU) to be used in the production of the pharmaceutical, Premarin.[136]

During the legislative hearings, North Dakota equine ranchers told of their experiences with animal rights groups and national media programs publishing stories which claimed the ranchers were mistreating and abusing their horses in the practice of collecting the urine.[137] The medical industry and women also testified in support of the bill, emphasizing the importance of PMU in the production of Premarin and its medical benefits.[138] While several other groups expressed their support

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132. *See id.* § 32-44-04.

133. *See, e.g.*, Tony Bender, *Reasons for not Horsing With Free Speech*, BISMARCK TRIB., Feb. 17, 1997, at 4A; Doan, *supra* note 1, at 4D; Frederick Kirschenmann, *Farmers Should Oppose Ag Slander Bill*, FARGO FORUM, Feb. 21, 1997. The issue also received press prior to the 1997 legislative session. *See, e.g.*, Jack Zaleski, *Misanthropic PETA is at it Again*, FARGO FORUM, Apr. 1996; *PETA's Charges are Flimsy*, FARGO FORUM, Mar. 3, 1995.

134. The equine ranching industry is more than 50 years old and involves the care and handling of horses for the collection of pregnant mares' urine (PMU). *Hearing, supra* note 6 (information presented by Cal Rolfson, representing the North Dakota Equine Ranching Association). The urine is collected in a suspension device and then sold to companies for use in the production of pharmaceuticals. *Id.* A typical rancher cares for about 157 horses. *Id.*

135. These ranches are located in 11 north central North Dakota counties including: Montrail, Ward, Bottineau, McHenry, Pierce, Rolette, Benson, Towner, Cavalier, Ramsey, and Foster. *Hearing, supra* note 6 (information provided by the North Dakota Equine Ranching Association). These ranches are the only operations in the United States collecting (PMU) for pharmaceutical production. *Id.*

136. Premarin is an estrogen replacement therapy and is used to help relieve symptoms of menopause and treat osteoporosis. *See* Nursing 1996 Drug Handbook 721 (David Moreau et al. eds. Springhouse Corp. 1996).

137. *See Hearing, supra* note 6 (testimony of Kevin Frith, Donald Bryant, and Vernon Gustafson, North Dakota equine ranchers). The allegations of mistreatment and abuse were later dismissed by the North Dakota Board of Animal Health, the United States Department of Agriculture, and the American Association of Equine Practitioners. *Id.*

138. *See Hearing, supra* note 6 (letter to Agriculture Committee from Dr. Thomas P. Hutchens, M.D.). Dr. Hutchen's letter stated that estrogen replacements made from mare urine have benefits over replacements made from synthetic estrogen. *Id.; see also Hearing, supra* note 6 (statements of Senator Donna Nalewaja, co-sponsor of H.B. 1176). Senator Nalewaja's testimony emphasized the benefits attributed to Premarin. *Id.* Specifically, this pharmaceutical benefits eight million women during menopause. *Id.*

for the bill,[139] no other agricultural producer or group mentioned a specific incident of product disparagement that the legislation was intended to cure.[140]

B. NORTH DAKOTA'S "TAILOR-MADE" STATUTE

There appear to be several "tailor-made" qualities in North Dakota's law. First, the statute provides a cause of action for agricultural practices as well as products.[141] This provision expands the group of potential plaintiffs to include individuals like the equine ranchers, who do not specifically produce animals or plants. Additionally, North Dakota's statute defines "agricultural products" to include the products of a plant or animal and the agricultural practices used in the production of such products.[142] Without this expanded definition, the equine ranchers would not be allowed to bring an action against the individuals alleging they mistreated the horses in the collection of the urine.[143]

Secondly, associations are permitted to bring a cause of action on behalf of individual members.[144] This feature also appears to be tailored to the equine ranchers. Not only do the twenty-nine equine ranches in North Dakota belong to North Dakota's Equine Ranching Association, but many belong to the North American Equine Ranching Information Council (NAERIC).[145] As a result, these associations or any of the various associations representing equine ranchers could bring actions on the ranchers' behalf should they be unable to bring the action on their own. This option would not be possible without the inclusion of this provision in North Dakota's statute.[146]

Finally, treble damages can be recovered under North Dakota's law.[147] The inclusion of this provision is arguably targeted at those specific groups, the animals rights groups and national media programs, that have already made false statements about the equine ranchers.[148]

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139. *See Hearing, supra* note 6 (Senate Standing Committee Report). Among the agriculture groups testifying in support of H.B. 1176 included: the Agriculture Coalition, the North Dakota Farm Bureau, the North Dakota Grain Dealers, the North Dakota Farmers Union, and the North Dakota Stockmen's Association. *Id.*

140. *Id.*

141. *See* N.D. CENT. CODE § 32-44-02 (Supp. 1997).

142. *See id.* § 32-44-01(2).

143. *See id.*

144. *See id.* § 32-44-03.

145. *See, e.g., Hearing, supra* note 6 (testimony of North Dakota equine rancher, Kevin Frith) (describing his involvement in four various horse and equine ranching associations).

146. *See* N.D. CENT. CODE § 32-44-03.

147. *See id.* § 32-44-02.

148. *See Hearing, supra* note 6 (testimony of North Dakota equine rancher, Donald Bryant) (detailing the incidents surrounding the targeting of his ranching operation by the Inside Edition television program).

These organizations and news programs are quite powerful and merely limiting recovery to actual damage would arguably not stop them from publishing falsehoods. In this author's opinion, adding the possibility of a treble damage award might be enough to deter these large organizations from continuing their present practices in the state.

VI. CONSTITUTIONAL CRITIQUE OF NORTH DAKOTA'S LAW

The constitutionality of North Dakota's or any other state's agricultural product disparagement statute has yet to be determined. Currently, there have been just two reported cases challenging state agricultural product disparagement laws. In *Action for a Clean Environment v. Georgia*,[149] the challenge to Georgia's law was dismissed because the action failed to contain an actual controversy.[150] However, what was touted as the first test of these laws' constitutionality involved Texas' false disparagement and perishable food products law.[151] A group of Texas cattle ranchers initiated a lawsuit against Oprah Winfrey and her production company, Harpo, for agricultural disparagement in a federal court in Amarillo, Texas.[152] The plaintiff ranchers' action maintained that Winfrey's remarks about beef caused a decline in cattle prices.[153] However, without explanation, the judge ruled that the cattlemen could not proceed under the Texas agriculture disparagement law.[154]

Because the Supreme Court appears to have approved the application of defamation's constitutional requirements to product disparagement actions in *Bose*, defamation's constitutional requirements will provide a starting point for a constitutional evaluation of North Dakota's agricultural disparagement statute.[155] Applying these requirements to the statute reveals that the some of the First Amendment's constitutional requirements may have been overlooked, and the statute is therefore

149. 457 S.E.2d 273 (Ga. Ct. App. 1995).

150. Action for a Clean Environment v. Georgia, 457 S.E.2d 273, 274 (Ga. Ct. App. 1995). This action challenged Georgia's disparagement statute and was brought by the American Civil Liberties Union on behalf of two food safety groups fearing possible lawsuits. *Id.* at 273. The ACLU challenged the statute seeking to have the statute declared unconstitutional. *Id.*; *see generally*, Srochi, *supra* note 127, at 1242 (providing an in-depth analysis of this case).

151. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001-.004 (West Supp. 1996).

152. *See* Lavelle, *supra* note 108, at 3. During a segment of the "Oprah" show, Oprah and her guests were discussing bovine spongiform encephalopathy, commonly referred to as "mad cow" disease. *Id.* While one of her guests was discussing the practice of feeding cattle protein to other cattle, the practice believed to be responsible for transmitting the disease in England, Winfrey said to her viewing audience, "It has just stopped me cold from eating another burger!" *Id.*

153. Jackson, *supra* note 90, at A6.

154. Sue Anne Pressley, *Oprah Winfrey Wins Case Filed by Cattlemen*, WASH. POST, Feb. 27, 1998, at A3. As a result of this ruling, the case proceeded under a common law business defamation challenge. *Id.*

155. *See supra* notes 84-85 and accompanying text (discussing the extension of defamation requirements to cases involving product disparagement).

arguably unconstitutional. First, the statute fails to require that the defamatory statement be "of and concerning" a particular plaintiff's product or practice.[156] Secondly, the statute improperly places the burden of proof on the defendant to prove that what was said about the product or practice was true.[157] Finally, while the statute requires a showing of actual malice before an individual is entitled to bring a claim for agricultural disparagement,[158] this actual malice standard requirement is not extended to the punitive damage portion of the statute.[159]

A. STATUTE CONTAINS NO "OF AND CONCERNING" REQUIREMENT

As previously mentioned, the "of and concerning" requirement was an original common law element of both defamation and disparagement.[160] However, this requirement was clearly identified as a constitutional element of defamation by the United States Supreme Court in the *Rosenblatt* case.[161] North Dakota's disparagement statute could face a constitutional challenge on the grounds that the statute fails to require the defendant's statement be "of and concerning" the plaintiff.[162]

Although the Supreme Court has yet to address the issue of whether this constitutional requirement extends to disparagement cases, the California Supreme Court has heard one case commenting on this particular issue.[163] In *Blatty v. New York Times, Inc.*, the court stated that the limitations that define the First Amendment zone of protection are not peculiar to defamation actions, but apply to all claims whose gravamen is

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156. *See* N.D. CENT. CODE § 32-44-03 (Supp. 1997) (allowing any producer to recover for defamatory statements made about another agricultural producer or product). *See infra* part VI.A. (discussing the absence of an "of and concerning" provision in North Dakota's statute).

157. *See generally* N.D. CENT. CODE §§ 32-44-01 to -04 (failing to identify who bears the burden of proof as to each of the tort's elements); *see also infra* part VI.B. (describing how the statute improperly shifts the burden of proof to the defendant speaker).

158. *See* N.D. CENT. CODE § 32-44-01(6) (defining "knowing the statement to be false" with the definition associated with actual malice).

159. *See id.* § 32-44-02 (using the term "maliciously" rather than the Supreme Court's requirement of "actual malice").

160. *See supra* notes 25-26 and accompanying text (discussing the "of and concerning" requirement at common law).

161. *See supra* note 25 (describing the *Rosenblatt* case).

162. *See* Bederman, *supra* note 8, at 160 (discussing the absence of this requirement in most agricultural disparagement statutes). Specifically, Bederman reasons that many state agricultural disparagement statutes are constitutionally deficient because they eliminate the common law "of and concerning requirement." *Id.* While Bederman recognizes that courts have applied this requirement unevenly, he notes that some nexus of injury between the class of plaintiffs and the injurious statement must be shown. *Id.* However, since many disparagement statutes lack this requirement, individuals in the chain from grower to consumer could sue for a general statement made by a journalist or food safety advocate. *Id.* (citations omitted).

163. *See* Blatty v. New York Times, Inc., 728 P.2d 1177, 1182-83 (Cal. 1986), *cert. denied*, 485 U.S. 934 (1988). *Blatty* involved an action brought by an author against a newspaper because the newspaper failed to include the author's work in a best-seller list. *Id.* at 1179.

alleged falsehood.[164] The California court concluded that the First Amendment requires that the falsehood specifically refer to the plaintiff in some manner, regardless of whether the claim is for defamation.[165] Thus, a right of action for injurious falsehood should be granted to only those who are the direct object of criticism, not those who merely complain of non-specific statements that caused hurt.[166] The court reasoned that both logical and pragmatic concerns compelled that the "of and concerning" requirement extend to all claims, regardless of their label.[167]

While some cases have interpreted the "of and concerning" requirement to mean that the false statements must refer to the plaintiff personally,[168] other courts only require that there be some type of nexus between the class of plaintiffs and the false statement.[169] Under either definition, the "of and concerning" requirement helps ensure that only those individuals "who are the direct object of criticism" can bring a disparagement action.[170]

A second reason for extending defamation's constitutional "of and concerning" requirement to disparagement actions is rooted in two Supreme Court cases. First, the Supreme Court in *Rosenblatt*, concluded that the "of and concerning" element is a constitutional requirement of defamation; and then in *Bose*, the Court affirmed a lower court's application of defamation's constitutional actual malice fault requirement to a product disparagement case. Read together, these cases support an extension of defamation's "of and concerning" constitutional requirement to product disparagement actions.[171]

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164. *Id.* at 1182.

165. *See id.* at 1183.

166. *Id.* (recognizing that allowing a plaintiff who is not identified to bring an action poses an "unjustifiable threat to society").

167. *Id.* at 1184. If constitutional requirements were only applicable to actions classified as "defamation," free speech and free press would not be protected because a plaintiff could improperly title their claim as one for disparagement to avoid the constitutional requirements. *Id.*

168. *See* Sims v. Kiro, Inc., 580 P.2d 642, 646 (Wash. Ct. App. 1978) (finding that the plaintiff failed to show he was referred to in a telecast because the telecast did not identify or picture the plaintiff and the statements made by the defendant were of a general nature).

169. Bederman, *supra* note 8, at 160 (citing Golden North Airways, Inc. v. Tanana Publ'g. Co., 218 F.2d 612, 618 (9th Cir. 1954) (stating that plaintiffs in a large group are more likely to recover under a claim for disparagement than defamation because it is more difficult to show that defamatory statements refer to "a particular member of the group").

170. *Id.* at 160 (citing *Blatty*, 728 P.2d at 1183).

171. *See supra* note 84 and accompanying text (discussing the lower court's extension of defamation's constitutional requirements to actions for product disparagement by several lower courts).

However, North Dakota's provision fails to explicitly state that the false statement must refer to the plaintiff.[172] Instead, the law provides that any producer can recover damages for a statement "regarding an agricultural producer or an agricultural product."[173] The statute further defines "producer" as "any person engaged in growing, raising, distributing, or selling an agricultural product, or manufacturing the product for consumer use,"[174] making the potential class of plaintiffs extremely broad. This expansive definition arguably allows a plaintiff to recover when the defamatory statements concern products that the producer only has an economic interest in, rather than requiring the defamatory statements be directed at the plaintiff's particular products.[175]

In summary, not only has California's Supreme Court concluded that the "of and concerning" requirement is a constitutional requirement of disparagement, but the *Bose* case is being relied upon by lower court's as an extension of defamation's constitutional requirements to product disparagement. North Dakota's statute fails to require that the defamatory statements specifically reference the plaintiff's agricultural products or practices and thus, the statute is open to possible challenge.

B. BURDEN OF PROOF SHOULD BE CLEARLY PLACED ON THE PLAINTIFF

In the *Hepps* case, the Supreme Court reasoned that in all defamation actions the burden of proof as to the falsity of the defendant's statement must be placed on the individual bringing the action.[176] As a result, North Dakota's statute could face a constitutional challenge for failing to meet this requirement. Instead of placing the burden squarely upon the plaintiff, North Dakota's disparagement statute appears to eliminate the plaintiff's obligation to prove falsity by improperly placing the burden of proof on the defendant speaker to show that the

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172. One commentator has referred to the absence of this requirement as a direct response to the Alar dispute where under the common law non-growers, including apple juice and apple sauce producers, were unable to bring a claim because they failed to meet the "of and concerning" requirement. *See* Semple, *supra* note 3, at 430.

173. N.D. CENT. CODE § 32-44-02 (Supp. 1997). The scope of who may bring a claim under the disparagement laws differs. While most define a "producer" as a person who grows or produces the perishable product, some states have implemented a broader definition. *See, e.g.*, ALA. CODE §§ 6-5-620 (Supp. 1997) (extending a cause of action to anyone who sells or markets the agricultural products); GA. CODE ANN. §§ 2-16-1 to -4 (Harrison 1994 & Supp. 1997) (providing a claim to any individual in the "entire chain from grower to consumer"); ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1997) (allowing shippers to also bring forth an action).

174. N.D. CENT. CODE § 32-44-01(1).

175. For example, under North Dakota's disparagement statute, beet grower A could bring an action for disparagement even if the defamatory statement was directed at grower B's beets if the statement caused injury to grower A. Therefore, even though the statements were not "of and concerning" A's beets, under the statute, A could bring forth an action.

176. *See supra* notes 64-68 and accompanying text (discussing the *Hepps* case).

defamatory statement was truthful.[177] Not only is the statute silent with respect to who carries the burden on this element,[178] but the statute incorporates a very broad definition for "false statement."[179]

The statute defines "false statement" as a statement not based upon "reasonable and reliable scientific inquiry, data, or facts."[180] If the plaintiff shows that the statement is not based upon "reasonable" and "reliable" scientific evidence, it is presumed to be false.[181] Therefore, the plaintiff is only required to show that the statement was not based upon "reasonable" and "reliable" scientific evidence, rather than showing that the statement was false. Furthermore, the nature of scientific inquiry makes the issue of falsity difficult to prove because often there are legitimate differences in scientific opinion that exist until hypotheses are tested and refined.[182] The situation becomes a battle of scientific evidence and the defendant will likely be required to prove the truth of the statements by offering and convincing a fact finder of the "reliability" of the scientific basis relied upon in making the assertions.[183] However, placing the burden of proof as to falsity of the statement on the defendant has been declared a direct constitutional violation of the speaker's First Amendment right to free speech.[184] Therefore, North Dakota's statute could face a constitutional challenge on this basis.

C. PUNITIVE DAMAGES NOT PERMITTED WITHOUT SHOWING OF ACTUAL MALICE

Finally, a constitutional challenge could also be made concerning the punitive damage portion of the North Dakota statute.[185] As mentioned, the Supreme Court, in *Gertz*, concluded that presumed or punitive damages would only be awarded in defamation actions where the plaintiff proved the defendant made the false statement with actual malice.[186]

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177. *See* Semple, *supra* note 3, at 429-31 (discussing the absence of this requirement in many of the veggie libel laws).

178. *But see* IDAHO CODE § 6-2003(2) (Supp. 1997) (stating that "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").

179. *See* N.D. CENT. CODE § 32-44-01(5) (defining "false statement").

180. *Id.*

181. *See* Semple, *supra* note 3, at 439 (citation omitted).

182. *See* Lavelle, *supra* note 108, at 2 (explaining that one critic has stated that under this expanded definition, it would have been illegal to criticize pesticides, such as DDT, which were thought to be safe according to data considered to be "reasonable" and "reliable" at that time).

183. *See* Semple, *supra* note 3, at 440-41.

184. *See Hepps*, 475 U.S. at 776-77.

185. Because North Dakota's statute appears to meet the actual malice fault standard with respect to a plaintiff bringing a claim for product disparagement, this section of the note is exclusively analyzing the punitive damage portion of the statute contained in N.D. CENT. CODE § 32-44-02.

186. *See supra* notes 69-75 and accompanying text (discussing the *Gertz* case's analysis of damages).

Section 32-44-02 of the North Dakota Century Code explicitly provides for an award of treble damages if a person "maliciously" disseminates a false and defamatory statement.[187] Instead of referring to the "actual malice" standard, the statute uses the term "malicious" which has been found by some courts to be less onerous than the "actual malice" standard.[188] As a result, the statute arguably conflicts with the constitutional requirement that punitive damages may only be permitted where the plaintiff proves that a media defendant acted with *New York Times* "actual malice."[189]

While one might argue that "malicious" means actual malice, this argument has been explored and rejected by at least one commentator.[190] To pass constitutional muster, North Dakota should have specifically used the terms "actual malice" in the treble damages section of its statute to avoid any confusion over what fault standard was required. A court could interpret the use of the term "malicious" as a reference to the common law requirement and only require the plaintiff to show that the statement was deliberately calculated to injure,[191] which falls below the level of fault the Supreme Court requires for allowing punitive damages.

VII. AN ALTERNATIVE TO NORTH DAKOTA'S CURRENT STATUTE

Evaluating the constitutionality of North Dakota's statute is purely an academic exercise. However, the injury suffered by North Dakota's PMU ranchers and other agricultural producers in the country is a legitimate concern impacting not only them, but their respective state economies. Therefore, it is important to examine and evaluate some alternatives to North Dakota's present statute. This will not only provide some options for those states currently considering agricultural product disparagement legislation, but will also afford North Dakota's legislature with some alternatives.

A. PRESERVING CONSTITUTIONALITY THROUGH AMENDMENT

One possible solution to the constitutional defects in North Dakota's statute is amending the current statute to incorporate the missing

187. *See* N.D. CENT. CODE § 32-44-02 (Supp. 1997).

188. *See* Srochi, *supra* note 127, at 1243-44 (citing Straw v. Chase Revel, Inc., 813 F.2d 356, 363 n.7) (finding that "malicious" means common law malice, not actual malice).

189. *See Gertz*, 418 U.S. at 349.

190. *See* Bederman, *supra* note 8, at 154 n.150 (stating that just because the statute refers to "malicious dissemination" does not necessarily mean that the statute is recognizing the standard enunciated in *New York Times*).

191. *See id.*

constitutional requirements. While North Dakota and several other states have failed to meet these requirements, Idaho has made an attempt to implement the constitutional requirements.[192] Idaho's statute could serve as a model for North Dakota, and other states, to ensure their respective statutes meet constitutional minimums.[193]

First, Idaho's provision contains two separate phrases ensuring that the "of and concerning" requirement is met.[194] The statute requires the false factual statement be "of and concerning the plaintiff's specific perishable agricultural food product"[195] and also be "clearly directed at a particular plaintiff's product."[196] Because of these references, there is no confusion over who is entitled to bring a product disparagement claim and generic products are excluded from recovery.[197]

Secondly, Idaho's law clears up any potential confusion over who bears the burden of proof on each of the tort's elements. The statute specifically states that "[t]he 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."[198] Additionally, Idaho's

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192. IDAHO CODE § 6-2003 reads 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.
(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 continued 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.

IDAHO CODE § 6-2003 (Supp. 1997).

193. One might question why only Idaho has implemented what appears to be constitutional legislation. Prior to the Idaho state legislature enacting product disparagement legislation, the Idaho Attorney General's office was asked to provide a constitutional analysis of a draft bill. *See* Bederman, *supra* note 8, at 149 (referring to the Letter from Idaho Attorney General's Office to Senator Herb Carlson, Idaho State Senator, concerning House Bill 593 (Feb. 28, 1992)); *see also Hearing*, *supra* note 6 (a copy of this letter can be found in the House and Senate Committee materials on H.B. 1176). The Attorney General's office conveyed constitutional concerns with the draft legislation. *See id.* Consequently, Idaho passed legislation that met these concerns. *See id.*

194. IDAHO CODE § 6-2002(1)(a).

195. *Id.* § 6-2002(1)(a).

196. *Id.* § 6-2003(4).

197. *See* Bederman, *supra* note 8, at 148-49 (stating that this requirement excludes a cause of action for generic products in Idaho).

198. IDAHO CODE § 6-2003(2). *But see* N.D. CENT. CODE §§ 32-44-01 to -04 (Supp. 1997) (offering no direction on the issue of who bears the burden of proof as to the tort's elements).

law does not attempt to define "false statement."[199] North Dakota's definition of false statement only adds confusion to who bears the burden as to falsity of the false statement, and arguably opens the door to constitutional challenge.[200] On account of these two differences, Idaho's statute places the burden of proof squarely on the plaintiff's shoulders.

And finally, Idaho's statute prohibits an award of either presumed or punitive damages.[201] Specifically, it limits recovery to only the amount of the "actual pecuniary damages."[202] North Dakota could benefit from following this approach and eliminating its treble damage provision. This would clear up the confusion and constitutional problems the statute faces in awarding treble damages without requiring the plaintiff to prove actual malice.[203]

B. THE ENACTMENT OF A PRODUCT DISPARAGEMENT STATUTE WAS NOT NECESSARY FOR THE RANCHERS OR OTHER AGRICULTURAL PRODUCERS TO RECOVER

North Dakota's statute can be amended to rid the law of its constitutional defects, but the need for such a law at all poses an interesting question. In analyzing the circumstances surrounding North Dakota's agricultural disparagement statute, it appears that the North Dakota legislature could have resisted the push by lobbyists to implement this law. Even without the statute, the equine ranchers and other producers could still bring actions under existing state defamation law.

It seems that an important principle of defamation law was overlooked regarding the equine ranchers' situation. Although the ranchers were lobbying for product disparagement protection, one could argue that it was really damage to their reputation that was suffered. Often defamation and disparagement are mistaken for one another and distinguishing between injury to reputation and injury to economic interests becomes difficult, especially when the falsehood concerns the

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199. IDAHO CODE § 6-2002 (providing no definition of false statement). *But see* N.D. CENT. CODE § 32-44-01(5) (providing that a false statement is one not based upon "reasonable and reliable scientific inquiry, facts, or data").

200. *See supra* note 173-81 and accompanying text explaining the burden problems associated with using such a broad definition of false statement.

201. IDAHO CODE § 6-2003(3).

202. *Id.*

203. Alternatively, the treble damage provision could be preserved and the constitutional problem cured by removing the reference to "malicious" and inserting the terms "actual malice" into the statute. *See* N.D. CENT. CODE § 32-44-02.

plaintiff's business or products.[204] Determining what claim to proceed under is not only difficult, but significant because it may place the plaintiff in a more favorable position to recover damages.[205]

The legislative history behind the implementation of North Dakota's statute revolved around the plight of the state's PMU ranchers.[206] Although other agricultural organizations supported the measure, it was the concerns expressed by the PMU industry that appeared to be the primary force behind the legislation.[207] Moreover, there were no other incidents of product disparagement that the supporters stated the bill was intended to address.[208] Thus, one might ask whether the equine ranchers would be able to recover for the falsehoods directed at them had the legislature not enacted the measure.

In states where agricultural disparagement statutes have not been enacted, producers are not left without recourse. Often times, an agricultural producer can still proceed under state defamation laws. Similarly, North Dakota's equine ranchers could have brought an action under the state's defamation laws.[209] Furthermore, the facts surrounding the equine ranchers injury from the falsehood indicates that they would have successfully recovered under these statutes.

The animal rights groups and national media programs were not communicating falsehoods about the equine ranchers' product, but were instead publishing falsehoods concerning the ranchers mistreatment and abuse of their horses. Thus, their situation clearly had "reputational . . . notions lurk[ing] in the background."[210] The falsehoods clearly went beyond injuring ranchers economic interest in their product, because the falsehoods injured reputation. Thus, the ranchers claim arguably rested in defamation, rather than product disparagement.

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204. *See* Langvardt, *supra* note 10, at 920 (stating that allowing corporations and not just natural persons to bring defamation suits, as well as product disparagement suits, has led to the blurring of the two torts because often a false statement which adversely affects economic interests also damages the reputation of the corporate plaintiff).

205. *Id.* at 920-21 n.118 (recognizing that in Brown & Williamson Tobacco Co. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), plaintiff's ability to characterize the case as one for defamation was extremely beneficial because the plaintiff could not meet injurious falsehood's damage requirement of showing economic loss stemming from the false allegation, however under a claim for defamation plaintiff recovered $1,000,000 in presumed damages).

206. *See supra* Part V.A. (discussing the legislative history of North Dakota's disparagement statute).

207. *Id.*

208. *See supra* note 139-40 and accompanying text (noting that the hearings on H.B. 1176 revealed no other specific incidents of agricultural disparagement that the legislation was intended to cure).

209. *See* N.D. CENT. CODE § 14-02-03 (1997) (providing a cause of action for civil libel); § 14-02-04 (1997) (providing a cause of action for civil slander).

210. *See* Langvardt, *supra* note 10, at 922 (using this phrase to describe the intermingling of the two torts).

Furthermore, North Dakota's civil and libel statutes, do not limit recovery to reputational injury, but allow actions for individuals who suffer injury to their occupation, trade, and profession.[211] As a result, agricultural producers who suffer injury to reputation or business from false statements about their occupation or profession could bring an action under either of these statutes.[212] For example, under North Dakota's civil libel statute, libel is defined as a false and unprivileged communication which causes an individual "to be shunned or avoided, or which has a tendency to injure the person in the person's *occupation*."[213] Similarly, North Dakota's civil slander statute provides an action for libel where the publication tends to injure one regarding *profession*, *trade*, or *business*, either by imputing disqualifications which the *occupation* requires or imputing something to lessen the *business' profits*.[214] These statutes provide for recovery to those individuals who suffer economic injury to their profession or occupation, rather than limiting recovery to incidents of personal injury. As a result, producers have a remedy when false statements are published about their products or practices. Thus, the necessity of North Dakota's disparagement statute is questionable.

VIII. CONCLUSION

North Dakota's agriculture disparagement statute was prematurely enacted to meet the laudable concerns of the state's equine ranching industry. However, the assertions made against the ranchers appear to be rooted in defamation, rather than product disparagement. In addition, North Dakota's civil libel and slander statutes are quite broad extending recovery to injury or economic loss suffered in an individual's occupation or profession. Therefore, existing state libel and slander laws would have adequately provided recovery to the state's agricultural producers.

But more importantly, North Dakota's statute, like those passed in twelve other states, may likely face constitutional challenge. While North Dakota's statute appears to have implemented some constitutional requirements, the law could be declared unconstitutional for failing to meet the "of and concerning" requirement, improperly placing the burden as to falsity on the defendant speaker, and awarding punitive damages without the necessary fault requirement. Until amended, the statute arguably continues to inhibit free speech.

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211. *See* N.D. CENT. CODE §§ 14-02-03; 14-02-04.
212. *Id.*
213. *See id.* § 14-02-03 (emphasis added).
214. *See id.* § 14-02-04 (emphasis added).