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Brief for Petitioner Fourth Annual Benton National Moot Court Competition Briefs, 19 J. Marshall L. Rev. 1124 (1986)

Andrew B. Sommerman

Carmody C. Baker

Rodney J. Paasch

NO. 85-211

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
OCTOBER TERM 1985

DAVID GORDON,
Petitioner,
- vs. -
RICHARD DOUGLAS, d/b/a
EZ CONSTRUCTION COMPANY,
Repondent.

On Appeal
From the Appellate Court of the
State of Marshall

BRIEF FOR PETITIONER

Attorneys For Petitioner:
Carmody C. Baker
Rodney J. Paasch
Andrew B. Sommerman
The South Texas College of Law

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER SINCE GORDON WAS NOT THE PUBLISHER OF THE ALLEGED DEFAMATORY COMPUTER MESSAGE

II. WHETHER THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER SINCE EZ CONSTRUCTION COMPANY DID NOT PROVE THAT GORDON ACTED WITH ACTUAL MALICE.

III. WHETHER THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER SINCE EZ CONSTRUCTION COMPANY DID NOT PLEAD SPECIAL DAMAGES REQUIRED FOR PRODUCT DISPARAGEMENT ACTIONS.

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TO THE SUPREME COURT OF THE STATE OF MARSHALL:

Petitioner, David Gordon, respectfully submits this brief in support of his request for a reversal of the opinion of the Appellate Court of the State of Marshall and an affirmance of the Circuit Court's summary judgment.

OPINIONS BELOW

The opinion of the Appellate Court of the State of Marshall is reproduced in Appendix A and appears in the Record on Appeal. (R. 1-4). The opinion of the Circuit Court of Plymouth County is unpublished.

JURISDICTION

A formal statement of jurisdiction is omitted pursuant to Rule III(F) of the Benton National Moot Court Competition Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions relevant to the determination of the case at bar are the first and fourteenth amendments to the United States Constitution. *See* Appendix B.

STATEMENT OF THE CASE

I. NATURE OF THE PROCEEDINGS:

The case originated in the Circuit Court of Plymouth County, State of Marshall. (R. 1). The Respondent, plaintiff-appellant below, filed suit for defamation against the Petitioner, defendant-appellee below. (R. 1). The Circuit Court granted the Petitioner's motion for summary judgment. (R. 4). The Appellate Court, in cause no. 85-070, reversed the Circuit Court's granting of the summary judgment and remanded the case for trial. (R. 4). On July 15, 1985, this Court, in cause no. 85-211, issued an Order Granting Petition For Leave To Appeal in order to consider the issues raised in the Appellate Court opinion. (R. 5).

II. SUMMARY OF THE FACTS:

Petitioner David Gordon is the owner of a personal home computer which he programmed for use as an electronic bulletin board network. (R. 1-2). Mr. Gordon provides his "Gordotalk" network as a means of communication for people who are interested in home repairs and do-it-yourself carpentry. (R. 2). Anyone who has a computer equipped with a modem can access "Gordotalk" to read the messages posted in the network. (R. 2).

To post a message on the bulletin board, one must register as a user, pay a $20 annual fee, and receive a password that permits messages to be entered into the system. (R. 2-3). Mr. Gordon does not usually known the identity of the users since most use a "moni-

ker" or nickname when sending a money order to receive a password. (R. 3). Passwords are sent to the users in stamped self-addressed envelopes they provide, usually to a blind box number. (R. 3). This makes keeping track of the users both impractical and economically infeasible. (R. 3). Mr. Gordon makes no profit from the service he provides; the $20 annual fee merely covers the cost of the system's operation. (R. 2-3).

While Mr. Gordon was out of town on a vacation on March 17, 1984, a defamatory message directed at the Respondent was entered into the bulletin board. (R. 2). The message stated that the Respondent was not a licensed contractor and that his work frequently did not meet building code requirements. (R. 2). This computer message disappeared from the computer bulletin board before Mr. Gordon returned home and was contacted by the Respondent. (R. 3-4).

Respondent brought suit in the Circuit Court of Plymouth County for defamation and sought presumed damages of $400,000. (R. 1). The Circuit Court granted summary judgment for the Petitioner, Mr. Gordon. (R. 4). The Respondent appealed to the Appellate Court of the State of Marshall which reversed the summary judgment. (R. 4).

The Marshall Appellate Court held that Gordon was the publisher of the computer message since he had control of the bulletin board. (R. 4). The Appellate Court also declared that the Respondent was not required to prove actual malice since the Petitioner was not a public official or public figure and since the alleged defamatory statement was not a matter of public concern. (R. 4). The Petitioner now asks this Court to reverse the decision of the Marshall Appellate Court and affirm the Circuit Court's summary judgment.

SUMMARY OF THE ARGUMENT

I.

The Petitioner did not prepare and issue the alleged defamatory statement for public distribution, nor did he repeat the statement. Mere control over the equipment utilized for circulating the message is insufficient to prove that the Petitioner was the publisher. The undisputed facts in the record demonstrate that Petitioner was out of town at the time the statement appeared on his computer network and did not return until after the statement disappeared. Such lack of control cannot subject Petitioner to liability. A finding by this Court that the Petitioner was not the publisher requires an affirmance of the Circuit Court's summary judgment.

II.

The strict liability standard recognized under the common law of the State of Marshall is contrary to the United States Constitution. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the United States Supreme Court prohibited recovery in a defamation action without at least some showing of fault. *Gertz* protects a defendant from strict liability regardless of whether or not the defendant is a member of the media.

Under *Gertz*, actual malice must be shown in order to obtain presumed damages when the defamatory statement is a matter of public concern. The alleged defamatory computer message in this case is a matter of public concern because of the nature of the service Respondent provides. As a building contractor, Respondent's work involves compliance with official requirements and potentially effects a large segment of the populace. It therefore qualifies as a matter of public concern.

Even if the issue is not deemed a matter of public concern, the Court should hold under Marshall state law that a defamation plaintiff must prove actual malice in order to recover presumed damages. The State of Marshall is not restricted to the limited rights announced in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S.Ct. 2939 (1985), that required the issue to be one of public concern before actual malice need be shown to obtain presumed damages.

Petitioner asks this Court to find under the United States Constitution and Marshall state law that actual malice is required for presumed damages. Respondent cannot prove that Petitioner acted with actual malice because the facts show he was not aware of the defamation at the time of its publication. Absent the malice element, the Respondent has failed as a matter of law to state a cause of action for defamation, and the Circuit Court's summary judgment should be affirmed.

III.

The Marshall Appellate Court incorrectly reversed the Circuit Court's summary judgment by considering the Respondent's pleadings and allegations as a personal defamation action, when if anything, it is an action for product disparagement. Product disparagement requires that special damages be specifically pled. Without an allegation of special damages, the Respondent's complaint does not state facts sufficient to constitute a valid cause of action. Thus this Court should affirm the summary judgment granted by the Circuit Court.

I. THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER SINCE GORDON WAS NOT THE PUBLISHER OF THE ALLEGED DEFAMATORY COMPUTER MESSAGE.

The Respondent, Douglas and EZ Construction Company, initiated a defamation action that attempts to impose liability upon Petitioner Gordon for a statement which appeared on his computer network, "Gordotalk."[1] Petitioner moved for a summary judgment, asserting that he was not a publisher of the computer message and that the Respondent had failed to allege that the Petitioner acted with "actual malice." (R. 4). The Circuit Court granted the Petitioner's summary judgment. (R. 4). The Marshall Appellate Court subsequently reversed and remanded the cause of action, and the Petitioner Gordon now appeals to this Court for relief.

The Petitioner respectfully requests that this Court recognize that Gordon was not the publisher of material which appeared on "Gordotalk." The burden of proof to show that Gordon was the publisher rests squarely with the Respondent, Douglas d/b/a EZ Construction Company. *See Conley v. Southern Import Sales, Inc.*, 382 F. Supp. 121, 124 (M.D. Ala. 1974); *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059, 1063 (E.D. Pa. 1969). A finding by this Court that the Respondent failed to sufficiently state a cause of action for defamation requires the reversal of the Appellate Court and the affirmance of the Circuit Court's summary judgment. *Ginsburg v. Black*, 237 F.2d 790, 793 (7th Cir. 1956), *cert. denied*, 353 U.S. 911 (1957).

A. Gordon Did Not Originate Or Disseminate The Computer Message.

The basic concept of tort liability requires that a defendant commit an act or neglect to perform an act for which he had a duty. *Anonymous*, Kings Bench (1466). In actions for common law defamation, the act of publication is a prerequisite for liability. *United States Steel Corp. v. Darby*, 516 F.2d 961, 963 (5th Cir. 1975). Publication is considered a communication of a defamatory statement to someone other than the party being defamed. *Lewis v. Time, Inc.*, 83 F.R.D. 455, 463 (E.D. Cal. 1979); Restatement (Second) of Torts § 581 (1977). Thus Gordon can only be held liable for publication of a defamatory statement if he is proved to be the publisher or communicator of the statement.

The undisputed facts in the record do not support the Appel-

1. For the full text of the Marshall Appellate Court Opinion, see Appendix A.

late Court's contention that Gordon was the author of the alleged defamatory statement. Generally, a person who originates and disseminates a defamatory statement is classified as a publisher. *See* Prosser and Keeton, Torts § 113 (5th ed. 1984). A re-publisher, or one who only repeats a statement, can also be held liable, since a person who repeats defamation endorses it. *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933). It would be impossible for Gordon to be deemed the publisher since he was on vacation at the time of publication and had no knowledge of the statement until after it had been removed from his computer network. (R. 3-4); *see Folwell v. Miller*, 145 F. 495 (2d Cir. 1906). Since Gordon did not prepare and issue the statement for public distribution, or repeat it, he cannot be considered the "publisher" of the message.

Courts have decided that a defendant must have "a direct hand in disseminating the material authorized by another" in order to be deemed a publisher. *Anderson v. New York Telephone Co.*, 35 N.Y.2d 746, 748, 320 N.E.2d 647, 649, 361 N.Y.S.2d 913, 914 (1974); *see also* Note, *Must the Telephone Company Censor to Avoid Liability for Libel: Anderson v. New York Telephone Co.*, 38 Alb. L. Rev. 317 (1974) (hereinafter cited as "Note, *Anderson*"). The fact that Gordon was out of town when the defamatory message mysteriously appeared and disappeared on the computer bulletin board belies the very idea that Gordon could have taken an active role in its publication.

B. Gordon Did Not Maintain Any Control Over The Statement's Dissemination.

The Appellate Court erroneously concluded that Gordon was the publisher of the computer message since he had "control" of the computer network. The facts clearly indicate, however, that Gordon merely registers computer users to post messages and does not screen the messages before they are dispersed throughout the computer network. (R. 2-3). This control of the equipment used to facilitate defamatory activity is not sufficient to establish that Gordon had an active role in its publication. The supplier of the mode of communication can only be liable as a publisher if he maintains control of the message or statement, not just the equipment that is used for dissemination. *Anderson*, 320 N.E.2d at 649. For example, the court in *Maheu v. Hughes Tool Co.*, 352 F. Supp. 1179 (C.D. Cal. 1973), granted a summary judgment and concluded that the defendants who merely controlled the communication equipment used in press conferences, and not the transmitted statements, could not be considered publishers in a defamation action.

This reasoning has been upheld even where a defendant had

knowledge of defamatory material being disseminated by equipment he controlled. In *Anderson v. New York Telephone Co.*, 320 N.E.2d at 649, a third party encouraged people over public radio to call and listen to a defamatory message about the plaintiff Anderson on a recording machine. The defendant telephone company refused Anderson's request to stop the transmission of a defamatory recording through its system. *Id.* Anderson sued the telephone company for defamation and argued that the company had control of the equipment that disseminated the defamatory statement. *Id.* Ruling in favor of the telephone company, the New York Court of Appeals reasoned that the telephone company was not the publisher of the defamatory statement since it maintained only a passive role in the transmission. *Id.* The court concluded that the telephone company was neither the publisher nor communicator since it did not originate the message, but merely provided the means for its transmission. *See* Note, *Anderson*, at 318.

While both the telephone company in *Anderson* and the Petitioner Gordon created systems through which messages could be transmitted, Gordon's role was even more passive. In fact, it was virtually nonexistent. Unlike the telephone company, Gordon did not know about the defamatory statement and did not refuse to remove it from the computer system. (R. 3-4). The message was not even present on the system by the time Douglas could personally complain to Gordon. (R. 4). Such a minimal and insignificant role in regard to the computer message cannot elevate Gordon to the status of a "publisher" and subject him to liability.

Gordon must have had control of the defamatory statement at some time during its dissemination in order to incur liability as a publisher. *Lewis*, 83 F.R.D. at 463. Gordon's lack of control can be illustrated by comparing the computer system to a radio station. Generally, statements broadcast over a radio station subject the station management or owner to liability as publishers. *Windsor Lake, Inc. v. WROK*, 94 Ill. App. 2d 403, 404, 236 N.E.2d 913, 917 (1968). However, when the radio station leases its equipment to another party, it relinquishes control over the statements made through its facilities and is no longer considered the publisher. *See Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 190, 8 A.2d 302, 311 (1939); *Kelly v. Hoffman*, 137 N.J.L. 695, 701, 61 A.2d 143, 147 (1948). By charging a fee to gain access to "Gordotalk," Gordon in effect leased space on his equipment to provide a public service. (R. 3). The record demonstrates that Gordon did not even know the identities of the parties posting messages and had no control over their content. (R. 3). Thus Gordon cannot possibly be the publisher since he had relinquished control over the publication.

The requirement that a defendant in a defamation action have

control over the means of publication also applies when the computer system is compared to printed material. A print media defendant is not considered a publisher if he has no knowledge of or control over the defamatory statement before its release to the public. *See Lewis,* 83 F.R.D. at 464; *Walheimer v. Hardenbergh,* 217 N.Y.2d 64, 65, 111 N.E. 826, 827 (1916). The facts in *Folwell,* 145 F. 495 (2d Cir. 1906), provide an appropriate illustration. In *Folwell,* an editor and part owner of a newspaper was on vacation when a defamatory statement was published in his newspaper. *Id.* Granting judgment for the editor, the court determined that the editor could not possibly have endorsed a statement which he never saw and of which he had no knowledge. *Id.* Gordon in the present case is similar to the editor in *Folwell* since he was also on vacation when the mysterious computer message appeared on the computer bulletin board.

The Respondent, Douglas and EZ Construction Company, cannot contend that Gordon had control over the computer bulletin board simply because he could remove messages from the system. Courts have consistently held that mere disseminators of information have no duty to edit or control the messages which pass through their hands. *See, e.g., Maynard v. Port Publications, Inc.,* 98 Wis. 2d 555, 559, 297 N.W.2d 500, 506 (1980); *Bowerman v. Detroit Free Press,* 287 Mich. 443, 446, 283 N.W. 642, 645 (1939). While telegraph and telecommunication companies have been held liable in defamation actions when the operators actually read the messages before transmission, Gordon never had the opportunity to approve or disapprove the alleged defamatory statements. (R. 3); *see Western Union Telegraph Co. v. Lesesne,* 182 F.2d 135, 137 (4th Cir. 1950), *cert. denied,* 344 U.S. 896, 897 (1952); *Paton v. Great Northwestern Telegraph Company of Canada,* 141 Minn. 430, 431, 170 N.W. 511, 512 (1919).

To require Gordon to control the content of messages transmitted on his computer network would essentially place him in the role of a censor. Censorship would severely inhibit the free flow of information, and the cost of the services would naturally become more expensive. *See Maynard,* 297 N.W.2d at 506. Such increased costs would surely render non-profit community service projects such as "Gordotalk" economically infeasible. (R. 3).

The facts reveal that Gordon was not the originator of the defamatory statement and did not maintain any control over its transmission. (R. 3-4). Thus, under any legal definition, he cannot be held liable as a publisher for damages caused by the alleged defamation. *See Ginsburg,* 237 F.2d at 799. A finding by this Court that Gordon was not the publisher of the computer message requires a reversal of the Appellate Court and an affirmance of the Circuit Court's sum-

mary judgment.

II. THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER SINCE EZ CONSTRUCTION COMPANY DID NOT PROVE THAT GORDON ACTED WITH ACTUAL MALICE.

The Petitioner respectfully requests this Court to uphold first amendment protections and to require that the Respondent show actual malice in his defamation action. To hold Petitioner Gordon liable on the basis of strict liability ignores constitutional guidelines promulgated by the United States Supreme Court and impugns the integrity of the first amendment.[2]

The sanctity of the first amendment constitutional protection of speech assures an unhampered exchange of ideas leading to political and social changes necessary to a democracy. These protections are not limited to merely political issues, nor to comments on public affairs. *Time, Inc. v. Hill,* 385 U.S. 374, 388 (1967); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 105 S. Ct. 2939, 2955 (1985) (Brennan, J., dissenting). Rather, the scope of the first amendment protection extends to all matters of public concern. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978) (quoting *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940)).

Petitioner Gordon maintains that these same constitutional safeguards apply to the speech in the case at bar, regardless of who published the alleged defamatory statement. The United States Supreme Court has consistently held that constitutional protection is available for speech on all issues in which information is needed or appropriate to aid people in coping with the "exigencies of their period." *Thornhill v. Alabama,* 310 U.S. 88, 102 (1940); *Time, Inc. v. Hill,* 385 U.S. at 388.

Speech pertaining to public affairs is more than self-expression; it is the "essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). Speech claims the highest level atop the throne of first amendment values and, accordingly, receives special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982); *Carey v. Brown,* 447 U.S. 455, 467 (1980). A risk always exists that an abuse may occur, but since erroneous statements are inevitable in free discussion, they must also be protected if the right to speak is to have the breathing space which it needs to survive.

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2. Rights enumerated in the first amendment have been held to be protected against state action by the fourteenth amendment. *See, e.g., Gitlow v. New York,* 268 U.S. 652 (1925); *Fiske v. Kansas,* 274 U.S. 380 (1927). For the text of the first and fourteenth amendments, see Appendix B.

Dun & Bradstreet, 105 S. Ct. at 2955 (Brennan, J., dissenting); *New York Times Co. v. Sullivan,* 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button,* 371 U.S. 415, 433 (1963)).

This Court today should uphold the values which the citizens of the State of Marshall place upon this freedom of speech by recognizing that strict liability for defamation no longer exists and that actual malice must be shown in order to recover presumed damages when the defamatory statement is a matter of public concern, regardless of the status of the parties.

A. The United States Constitution Prohibits The Use Of Strict Liability In Defamation Cases.

The State of Marshall recognizes the strict liability standard in defamation actions. (R. 4). However, this liability standard has been the object of concern and criticism by courts throughout the land, including the United States Supreme Court. *See Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); *Time, Inc. v. Firestone,* 424 U.S. 459 (1976); *Schermerhorn v. Rosenberg,* 73 A.D. 2d 276, 426 N.Y.S. 2d 274 (1980). In reviewing the case at bar, the Petitioner urges this Court to look to the Constitution and United States Supreme Court precedents, and not to Marshall common law which advocates liability without fault in defamation actions.

Common law strict liability places a heavy burden on the publisher of defamatory material. Prosser and Keeton, Torts § 113 (5th ed. 1984). If a person publishes defamatory material which is false, he publishes it at his own peril. *See,* Restatement (Second) Torts § 580B (1977). Strict liability prohibits individuals from repeating statements they may have heard in fear of litigous retribution. *See* Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology,* 25 UCLA L. Rev. 915, 941 (1978).

1. *Gertz prohibits the use of strict liability in defamation actions.*

The United States Supreme Court recognized the smothering effect which strict liability for defamation would have upon free speech when it declared that the Constitution prohibits individual states from imposing liability without fault. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974). *Gertz* afforded the private plaintiff a cause of action against a publisher in a defamation suit by either showing some form of negligence or actual malice to recover. The *Gertz* court concluded that "so long as [the States] do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.; see also*

Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 128, 130, 341 N.E.2d 526, 528, 379 N.Y.S.2d 61, 64 (1975).

The common law rule of strict liability has been tempered not only by the United States Supreme Court, but also by lower courts which have followed the logic of *Gertz* and abandoned strict liability in defamation actions. *See, e.g., Fitzpatrick v. Milky Way Productions, Inc.*, 537 F. Supp. 165, 168-69 (E.D. Pa. 1982); *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371, 374-75 (6th Cir.), *cert. denied*, 454 U.S. 962 (1981); *Troman v. Wood*, 62 Ill. 2d 184, 194, 340 N.E.2d 292, 299 (1975); *Tuskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 442, 546 P.2d 81, 84 (1976). For example, the court in *Jacron Sales v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), evaluated *Gertz* for its sweeping alteration of defamation law. The *Jacron* court commented that *Gertz* insulates the defendant in a purely private defamation action from the antiquated strict liability rule. *Id.* at 692. *Gertz* balanced the importance of uninhibited debate and the state's interest in presenting and protecting the rights and reputations of private individuals when confronted by a defamatory message. *Id.* at 693. Thus, speech and publication of matters of public concern held hostage by strict liability does not abide by our constitutional provision of freedom of speech. *See generally*, Watkins and Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Non-Media Defendants, and Conditional Privileges*, 15 Tex. Tech. L. Rev. 823 (1984).

2. *Gertz applies regardless of the defendant's media/non-media status.*

The *Gertz* holding is applicable in defamation actions regardless of whether or not the defendant is a member of the media. At least six members of the United States Supreme Court (White, Brennan, Marshall, Blackmun, Stevens and Burger) assert there is no distinction between media and non-media defendants in first amendment cases. *Dun & Bradstreet*, 105 S. Ct. at 2959 (Brennan, J., dissenting). Any such distinction "is irreconcilable with the fundamental first amendment principle that 'the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its sources.' " *Dun & Bradstreet*, 105 S. Ct. at 2957 (Brennan, J., dissenting) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1973)). Defining media defendants would become a necessary question to which there is no real answer. *Dun & Bradstreet*, 105 S. Ct. at 2957-58 (Brennan, J., dissenting); *Bellotti*, 435 U.S. at 777.

The notion that *Gertz* is limited to media defendants misinterprets all of the United States Supreme Court's cases on the subject of defamation. Although the press has been protected to "ensure the

vitality of first amendment guarantees," this implies no holding or belief that non-media speakers deserve lesser first amendment protection. *Dun & Bradstreet,* 105 S. Ct. at 2958 (Brennan, J., dissenting).

> It would seem strange to hold that the press, composed of professionals and causing much greater damages because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

Restatement (Second) of Torts § 580B comment e (1977); *see also Jacron Sales,* 350 A.2d at 695; *Gazette, Inc. v. Harris,* 325 S.E.2d 713, 726-27, *cert denied,* 105 S. Ct. 3513 (1985).

Every citizen is guaranteed the right to speak under the first amendment. *Carey,* 447 U.S. at 467; *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972); *Cohen v. California,* 403 U.S. 15, 24 (1971); *Whitney v. California,* 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring). This also guarantees the rights of listeners to the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20 (1945). The first amendment is "plainly offended" when the suppression of speech gives one institution an advantage in expressing its views to the people. *Bellotti,* 435 U.S. at 785-86; *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

Further, the *New York Times* rules requiring a showing of actual malice has been applied in non-media cases. *See, e.g., Henry v. Collins,* 380 U.S. 356 (1965); *Garrison,* 379 U.S. at 64; *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966); *Letter Carriers v. Austin,* 418 U.S. 264 (1974). It is apparent that the United States Supreme Court has rejected the suggested media versus non-media distinction "at every turn," and that the first amendment gives equal protection to either type of defendant. *Dun & Bradstreet,* 105 S. Ct. at 2953 (White, J., concurring).

This Court is therefore bound by the first amendment to give at least the same amount of protection to free speech as does federal law. *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 325 (1816). Because of this, the Petitioner maintains that the State of Marshall cannot apply the doctrine of strict liability in this defamation action, and the Circuit Court's summary judgment should be affirmed.

B. EZ Construction Company Is Required To Show Actual Malice Under The First Amendment.

The Petitioner Gordon respectfully asks this Court to look to the United States Supreme Court's guidelines which obligate a party

seeking presumed damages involving a matter of public concern to show "actual malice." In order to better understand the requirements established by the United States Supreme Court, it is necessary to briefly survey the history of United States defamation law.

In 1964, the United States Supreme Court radically altered the direction of defamation law in *New York Times v. Sullivan*, 376 U.S. 254 (1964). The Court held that the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The United States Supreme Court noted that, even though such protection subjects public officials to caustic, vehement and sometimes unpleasant attacks, "debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270. Finally, the Court added a critical prerequisite that a public official must show with "convincing clarity" that the publisher acted with actual malice in order to recover damages in a libel action. *Id.* at 285-86.

Shortly after *New York Times*, the Court expanded the category of protected parties to include public figures.[3] *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967). Four years later, the United States Supreme Court extended *New York Times* even further in a plurality decision in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). The *Rosenbloom* court abandoned the concept that the plaintiff's status as a public or private figure should determine whether malice was required to recover damages for defamation. The Court held that a plaintiff's involvement in "an event of public or general interest" would trigger the malice requirement. *Id.* at 40-50.

In 1974, *Rosenbloom* was abandoned, although not expressly overruled, in the case *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The *Gertz* Court reinstated the plaintiff's status as the determining factor in whether malice was required to recover damages for defamation. *Id.; see also,* Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 Mich. L. Rev. 43, 46-51 (1976). The Petitioner relies on *Gertz* in support of the proposition that the Respondent who is seeking presumed damages much show actual malice when the defamatory statement is a matter of public concern.

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3. The Petitioner does not content that the Respondent is a public figure under *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

1. *Actual malice is required when presumed damages are sought and the defamatory statement is a matter of public concern.*

Gertz specifically establishes that a private plaintiff must show actual malice in order to recover presumed or punitive damages.[4] *Gertz*, 418 U.S. at 349; *see also* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975). The *Gertz* court reversed the trial court's judgment since the jury was permitted to award presumed damages without proof of injury.[5] *Gertz*, 418 U.S. at 352. States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth, when the defamation is a matter of public concern. *Id.* at 349.

A private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* actual malice test may recover only such damages as are sufficient to compensate him for actual injury. *Id.* at 350. This actual injury is not limited to out-of-pocket loss, but includes impairment of reputation, mental anguish, and suffering. *Id.* The rationale for this damage limitation is based on the government's legitimate interest in only compensating defamed individuals for actual injury. *Hogan v. Herald Co.*, 84 A.D.2d 470, 478, 446 N.Y.S.2d 836, 842 (1982). If juries had the discretion to award damages far in excess of actual damages, the judgment would serve merely as a penalty which might result in unwarranted censorship. *Id.*

The *Gertz* proposition requiring actual malice before an award of presumed damages was explained and modified in the recent case *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985). In *Dun & Bradstreet*, a construction contractor brought a defamation action against a credit reporting agency which distributed false credit reports to five subscribers. The Court acknowledged that *Gertz* recognizes that the first amendment prohibited recovery of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice." *Dun & Brad-*

4. Presumed damages are awarded in the absence of proof of injury, and compensate an injury which is presumed to be the normal result of a defamatory publication. Actual damages are those which are supported by evidence "which show[s] an actual and real loss or injury." *DeJong v. Stern*, 162 Ga. App. 529, 292 S.E.2d 115 (1982). Thus, actual damages require evidence of an actual loss, while presumed damages do not. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1975).

5. Upon retrial in district court, Gertz was awarded $100,000 compensatory damages and $300,000 punitive damages. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527 (1982), *cert. denied*, 459 U.S. 1226 (1983).

street, 105 S. Ct. at 2941. However, *Dun & Bradstreet* specifically limits *Gertz's* application to only those cases where the defamatory statement involves matters of public concern. *Id.* at 2946. Since the United States Supreme Court considered the distribution of credit reports to only five subscribers as a matter of private concern, the plaintiff construction company was not burdened with proving actual malice. *Dun & Bradstreet,* 105 S. Ct. at 2947.

The Petitioner Gordon proposes to this Court that the facts of *Dun & Bradstreet's* plurality holding are distinguishable from the facts in the present case, although the rule of law in *Dun & Bradstreet* is controlling. *Dun & Bradstreet* establishes that a private figure suing for a defamatory statement dealing with a matter of *private* concern, does not have to prove actual malice on the part of the defendant when seeking presumed damages. *Id.* at 2948. However, *Dun & Bradstreet* holds that, in cases involving matters of public concern, courts must still look to the *Gertz* decision for guidance and precedent. When seeking presumed damages, a private plaintiff such as Douglas has the burden to prove actual malice upon a finding by this Court that the computer message involves a matter of public concern.

2. *The computer message is a matter of public concern.*

No tangible definition exists as to what constitutes a public concern. *Dun & Bradstreet,* 105 S. Ct. at 2959. (Brennan, J., dissenting). However, this Court can look to the case of *Dun & Bradstreet* for guidance in developing a workable definition of public concern. Public concern can be considered synonymous with a public controversy or public issue. These terms have been used interchangeably in first amendment cases, most recently through *Dun & Bradstreet.* All of the *Dun & Bradstreet* opinions, including the majority, two concurrences, and the dissent, speak in terms of public concern as being equivalent to public affairs, public issues, public importance, and public controversy.

The *Dun & Bradstreet* Court held that the speech did not involve a matter of public concern since the issue was of interest solely to the individual speaker and a very limited business audience. This "particularized interest" does not warrant special protection when the speech is wholly false and damaging to the plaintiff's business reputation. *Id.* at 2947. However, the facts in the instant case are easily distinguishable from *Dun & Bradstreet.* While the erroneous credit reports in *Dun & Bradstreet* were only provided to five subscribers, the computer message in the present case was distributed throughout an entire computer network. Also, the computer message was not only in the interest of its author and the subscribers to the computer network, but was of interest to the entire public. Thus the

case at bar lacks the "particularized interest" that was identified in *Dun & Bradstreet.*

One practical definition of public concern suggests that it must be a real dispute, "the outcome of which affects the general public or some segment of it in an appreciable way." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir.), *cert. denied,* 449 U.S. 898 (1980). The ramifications of such dispute will be felt "by persons who are not direct participants." *Id.* Under whichever definition this Court wishes to adopt, substandard work which does not meet building code requirements can certainly be considered a matter of public concern.

Matters of public concern are not restricted to political issues, nor public affairs. *Time, Inc. v. Hill,* 385 U.S. at 388; *Roth v. United States,* 354 U.S. 476, 484 (1957). Courts have covered a broad spectrum of topics when finding that a matter was a public concern. *See, e.g., Littlefield v. Fort Dodge Messenger,* 614 F.2d 581 (8th Cir.), *cert. denied,* 445 U.S. 945 (1980) (attorney's guilty pleas in disciplinary action); *Logan v. District of Columbia,* 447 F. Supp. 1328 (D.D.C. 1978) (police "sting" operation); *Rosanova v. Playboy Enterprises,* 580 F.2d 859 (5th Cir. 1978) (relationship with organized crime); *Schultz v. Reader's Digest Association,* 468 F. Supp. 551 (E.D. Mich. 1979) (Jimmy Hoffa's disappearance); *Hanish v. Westinghouse Broadcasting Co.,* 487 F. Supp. 397 (E.D. Pa. 1980) (fraudulent scheme). This flexibility is required since the legitimacy of the public's concern may not be questioned by the court and since no arm of the government should be allowed to "set society's agenda." *See Waldbaum,* 627 F.2d at 1297.

In the case at bar, the facts are undisputed that Respondent Douglas and EZ Construction Company is a contractor. (R. 2). The Respondent contractor is in the business of performing work which must meet building code standards. Given such facts, the Petitioner asks this Court to examine the computer message's content, form, and context as revealed by the entire record and make a determination that the statement in question involves a matter of public concern. *See Connick v. Myers,* 461 U.S. 138, 145 (1983).

The public has always been concerned about defective housing; everyone has a basic need to provide adequate shelter for themselves and those under their roofs. *See* Note, *The Home Buyer's Protection Acts An Alternative to Building Codes for Single Family Homes,* 54 S. Cal. L. Rev. 529 (1981); Colling, Modern Building Inspection 12 (2d ed. 1951) [hereinafter cited as *"Modern Building Inspection"*]. Consequently, the public is legitimately concerned with a contractor's professional qualifications and his adherence to approved standards. Societies have continually experimented with different ways to ensure themselves safe, sound housing and buildings.

Modern Building Inspection at 12. Americans have relied primarily upon strict local governmental regulations which require that persons in the business of constructing or improving buildings be qualified and that work be done properly. *Id.*

The computer message specifically states that the contractor was not licensed. (R. 2). Whether Douglas is licensed is an issue directly related to his government regulated qualifications. As the government places requirements upon the Respondent, the public has the right to be concerned with his compliance. This is especially true in any area where noncompliance can produce tragic consequences for large segments of the populace. *See* Lawrence, *Homebuilder's Liability for Physical Defects After the Sale*, 7 Okla. City U.L. Rev. 49, 56-70 (1982). [hereinafter cited as "Lawrence, *Homebuilder's Liability*"].

Substandard work by builders often tragically affects the public without warning. An unsuspecting child was injured when a supermarket roof fell on her. *Fujioka v. Kam*, 55 Hawaii 7, 8, 514 P.2d 568, 569 (1973). Another innocent child was killed, and his brother severely injured, when a fireplace tumbled down upon them. *Saylor v. Hall*, 497 S.W.2d 218, 220 (Ky. 1973). On numerous occasions, empty substandard buildings have crumbled; if they had been occupied, thousands might have perished. *See, e.g.*, Pippeteau, *The Failures Exposed by the Hyatt Disaster*, Business Week, August 3, 1983 at 23 (the roof of a Connecticut coliseum collapsed during a snowstorm); D'Aulaire, *"There Wasn't Time to Scream," Anatomy of a Hotel Disaster*, Reader's Digest, July 1982 at 49, 56 (roofs of Illinois and Missouri sports complexes collapsed).

Another newsworthy example of substandard work was evidenced in July, 1981 at the Kansas City Hyatt Regency Hotel. Two of three skywalks which were suspended over the lobby tumbled, spilling tons of concrete, steel, and human bodies upon unwary hotel patrons below. Garmon, *Code Breach Blamed for Hotel Disaster*, Science News, March 6, 1982 at 149. One hundred and thirteen persons died amid the twisted steel and rubble, and another one hundred and eighty-six were injured. *Id.* The National Bureau of Standards researchers and investigators determined the cause of the accident to be breaches of building code standards. *Id.* It is undeniable that the public has a strong concern regarding the qualifications, goods, and services of contractors, whose work is often responsible for the deaths and injuries of members of an innocent and unsuspecting public. *See* Lawrence, *Homebuilders Liability*, at 71-75; Collins, *Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality*, 29 FIC Quarterly 41, 41-42 (1978).

By including the alleged defamatory computer message in the

scope of public concern, this Court would be recognizing the public's legitimate right to be apprised of the qualifications of those persons who provide one of our most essential needs. The Petitioner strongly advocates that any statement which involves the noncompliance with building codes is a matter of public concern. Therefore any finding by this Court that the computer message is a matter of public concern automatically requires that the Respondent prove actual malice since he is seeking presumed damages.

C. As A Matter of Marshall State Law, EZ Construction Company Should Be Required To Show Actual Malice When Seeking Presumed Damages.

Under the United States Supreme Court's holding in *Gertz*, any party seeking presumed damages was automatically required to prove actual malice. *Gertz*, 418 U.S. at 352. However, the recent Court in *Dun & Bradstreet* only required actual malice when a party was seeking presumed damages *and* the defamatory statement was a matter of public concern. *Dun & Bradstreet*, 105 S. Ct. at 2948. This *Dun & Bradstreet* holding significantly retreats from the United States Supreme Court's position in *Gertz* and necessitates more stringent requirements before the actual malice standard is "triggered." In the event that this Court should find that the alleged defamatory statement is not a matter of public concern, this Court can still require a showing of actual malice as a matter of Marshall state law. This Court does not have to adopt the restrictive *Dun & Bradstreet* position, but can follow *Gertz* and require actual malice *anytime* presumed damages are being sought in a defamation action.

The United States Supreme Court has long recognized the inherent power of the states to grant their residents greater protection than offered by the United States Constitution. *Oregon v. Haas*, 420 U.S. 714, 719 (1975); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 325 (1816). It is only when a state restricts rights afforded by the United States Constitution that independent state grounds will be struck down. *Id.* Where a decision rests wholly upon adequate and independent state grounds, federal courts have no jurisdiction to review the case, despite the presence of constitutional issues. *Fox Film Corp. v. Muller*, 296 U.S. 207, 209 (1935). A state court is then insulated from review by any federal court. *See Michigan v. Long*, 463 U.S. 1032, 1035 (1983); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed* and *cert. denied*, 423 U.S. 808 (1975).

Numerous states have offered their residents more extensive rights than does the federal Constitution, and in fact, many states

have written recognized protections into their own constitutions.[6] Thus, independent state grounds can offer more protection of free speech than is afforded by a fragmented United States Supreme Court. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977).

Petitioner Gordon is asking this Court today to recognize the dangers inherent in allowing any defamation plaintiff to recover presumed damages without a showing of actual malice, even in matters of private concern. Courts in other jurisdictions have held that as a matter of state law these damages require proof of actual malice. *See, e.g., Gobin v. Globe Publishing Co.,* 216 Kan. 223, 229, 531 P.2d 76, 82 (1975); *Beneficial Management Corporation of America v. Evans,* 421 So. 2d 92 (Ala. 1982); *Yerkie v. Post-Newsweek Stations, Michigan, Inc.,* 470 F. Supp. 91, 93 (D. Md. 1979). Other states have gone even further in protecting freedom of speech by surpassing the *Gertz* standard and mandating that "the plaintiff [be] required to prove actual damages in all defamation cases." *Handley v. May,* 588 S.W.2d 772, 776 (Tenn. App. 1979) (quoting *Memphis Publishing Co. v. Nichols,* 569 S.W.2d 412, 419 (Tenn. 1978)).

These courts recognize the wisdom in *Gertz*'s policy requiring actual malice when presumed damages are sought. This policy allows states to determine for themselves the standard of liability for defamation, so long as they do not apply strict liability. *Gertz,* 418 U.S. at 348. The legitimate state interest in a defamation action is to permit the compensation of private individuals for injuries. This interest extends no further than compensation for actual injury. *Id.* at 349-50; *see also Hogan v. Herald Co.,* 84 A.D.2d 470, 466 N.Y.S.2d 836 (1982).

Where damages are presumed in defamation cases, juries are free to award substantial sums in compensation for injuries to reputation, whether or not such damage exists. *Gertz,* 418 U.S. at 350. Juries are in effect awarding punitive damages "in wholly unpredict-

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6. Many states have gone beyond the United States Supreme Court protections by preserving citizens' rights under independent state grounds. *People v. Gokey,* 60 N.Y.2d 309, 457 N.E.2d 723, 469 N.Y.S.2d 618 (1983) (rights of the accused); *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 584 (1979), *aff'd,* 447 U.S. 74 (1980) (access to private shopping center); *Peper v. Princeton University Board of Trustees,* 77 N.J. 55, 389 A.2d 465 (1978) (sex and employment discrimination); *Dupree v. Alma School District,* 279 Ark. 340, 651 S.W.2d 90 (1983) (school financing); *Cox v. Cox,* 532 P.2d 994 (Utah 1975) (state ERA and child custody); *Cooper v. Gwinn,* 298 S.E.2d 781 (W. Va. 1981) (prisoner rights); *State v. Santiago,* 53 Hawaii 254, 492 P.2d 657 (1971) (prior convictions to impeach testimony of criminal defendant); *Blue v. State,* 558 P.2d 636 (Alaska 1977) (right to counsel and confrontation); *Pool v. Superior Court,* 139 Ariz. 98, 677 P.2d 261 (1984) (double jeopardy); *State v. Spencer,* 289 Or. 225, 611 P.2d 1147 (1980) (vagueness and overbreadth); *State v. Beno,* 116 Wis. 2d 122, 341 N.W.2d 668 (1984) (legislative immunity).

able amounts bearing no necessary relation to the actual harm caused," simply to punish unpopular opinions. *Id.* States have no substantial interest in helping plaintiffs exploit defendants for damages beyond actual harm. *Id.* When juries have discretion to arbitrarily award damages which surpass the injury, the judgment acts a penalty which unduly inhibits free speech. *Id.* at 351; *see also Hogan v. Herald Co.*, 446 N.Y.S.2d at 843. These basic policy considerations apply whether the subject matter is of public or of private concern. *Dun & Bradstreet,* 105 S.Ct. at 2956 (Brennan, J., dissenting).

Because the states are not restricted to the limited rights announced in *Dun & Bradstreet,* this Court today can require all defamation plaintiffs in the State of Marshall to show actual malice in order to recover presumed damages. This would protect the revered right of free speech from being eroded by a flood of libel actions generated in the hopes of obtaining excessive award for minimal or nonexistent damages. The residents of Marshall need not be limited to the lesser protection of free speech which has been offered by the United States Supreme Court in *Dun & Bradstreet.* Consequently, this Court can restore the first amendment to its proper protected place by agreeing with the analysis in *Gertz* and with other states that actual malice must be shown before there can be an arbitrary award of presumed damages in any defamation action.

D. EZ Construction Company Cannot Show That Gordon Acted With Actual Malice.

The Petitioner advocates that the Respondent seeking presumed damages must show "actual malice" when the defamatory statement is a matter of public concern. The Petitioner also asserts, in the alternative, that the Respondent seeking presumed damages must show "actual malice" as a matter of Marshall state law, whether or not the issue is one of public concern. By adopting either contention, this Court must require proof of actual malice as an element of the Respondent's prima facie case. The Petitioner respectfully requests this Court to uphold the Circuit Court's summary judgment upon a finding that Respondent failed to allege and prove the requisite element of actual malice required by either the Constitution or Marshall state law.

A defendant moving for summary judgment has the burden of proving as a matter of law that no genuine issue of material fact exists as to an element of the plaintiff's cause of action. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (under traditional summary judgment doctrine, burden of proof is on the movant); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516

F.2d 33, 36 (10th Cir. 1975); *Citizens First National Bank of Tyler v. Cinco Exploration Co.*, 540 S.W.2d 292, 294 (Tex 1976). When at least one of the elements of the plaintiff's cause of action has been established conclusively against him, the summary judgment should be granted. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 829 (Tex. 1970); *see* FED. R. CIV. P. 56.

In these defamation cases, the summary judgment has become a "favored remedy" which the trial court must grant upon an insufficient showing of actual malice. *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *Reader's Digest Association v. Superior Court*, 37 Cal. 3d 244, 245, 690 P.2d 610, 613, 208 Cal. Rptr. 137, 138, (1984). Summary judgments are the rule, not the exception, in defamation cases. *Guitar v. Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 309 (2d Cir. 1976); Note, *Summary Judgment in Defamation Actions; A Threat to the Substantive Rights of Public Figure Plaintiffs*, 3 Cardoza L. Rev. 105, 105, (1981).

Petitioner Gordon contends that the same analysis applies in all cases when determining if a summary judgment is proper. However, a jury finding of actual malice in a defamation action must be supported by clear and convincing evidence. *New York Times*, 376 U.S. at 285-86; Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. Cal. L. Rev. 707, 707-08 (1984). Without such a finding, when the record is viewed in the light most favorable to the nonmovant, a summary judgment must be granted. *Reader's Digest Association v. Superior Court*, 37 Cal. 3d 244, 690 P.2d 614, 208 Cal. Rptr. 137 (1984); *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

To prove knowing falsity or reckless disregard for whether a statement is true, EZ Construction Company must show more than just negligence or that a reasonably prudent person would have investigated the facts before making a defamatory statement. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Actual malice must be shown by clear and convincing evidence that there is a "high degree of awareness of probable falsity." *Garrison*, 379 U.S. at 74. This means that EZ Construction Company must set forth "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. at 731. Although a defendant could have verified the facts, failure to investigate does not constitute actual malice. *Id.* at 733.

The record in the case at bar shows that Gordon did not see the alleged defamatory statement before he left town and went on vaca-

tion on March 17, 1984. (R. 3). There is no allegation that Gordon even knew the statement had been made or entered into the computer bulletin board before he was contacted by EZ Construction Company. Without showing that Gordon knew of the statement's existence, EZ Construction Company cannot, as a matter of law, contend that Gordon had any serious doubts regarding its truthfulness.

It is apparent on the face of the record that Douglas failed to allege that Gordon acted with actual malice. Since actual malice, an element of Respondent's case, was not alleged, the Respondent has failed as a matter of law to state a cause of action. Thus the Petitioner Gordon asks this Court today to reverse the Appellate Court and affirm the Circuit Court's summary judgment.

III. THE TRIAL COURT'S SUMMARY JUDGMENT WAS PROPER SINCE EZ CONSTRUCTION COMPANY DID NOT PLEAD SPECIAL DAMAGES REQUIRED FOR PRODUCT DISPARAGEMENT ACTIONS.

The Marshall Appellate Court incorrectly reversed the Circuit Court's summary judgment by considering the Respondent's pleadings and allegations as a personal defamation action, when this is actually an action for product disparagement. Defamatory statements which merely disparage an individual's products and services are not governed by the same rules and requirements as personal defamation actions. *See* Comment, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 Yale L.J. 65 (1953). Product disparagement is best described as false communications which actually or potentially damage the reputation as to the quality of goods and services. *See* Prosser and Keeton, Torts § 128 (5th ed. 1984); Annot., 74 A.L.R.3d 298 (1976). Product disparagement may cause financial injury to the plaintiff, but casts no reflection upon either his personal reputation or his property. *See Horning v. Hardy*, 36 Md. App. 419, 373 A.2d 1273 (1977); Prosser, *Injurious Falsehood: The Basis of Liability*, 59 Colum. L. Rev. 425 (1959). The Petitioner Gordon asks this Court to review this case as an action for product disparagement, and not personal defamation.

The interests given consideration in product disparagement cases are significantly different than those in defamation actions. According to Justice Stewart, the protection of an individual's reputation "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). On the other side of the spec-

trum lies the product disparagement action which only emphasizes the reputation of one's goods and services. The value of free speech greatly outweighs the purely pecuniary value to a company of maintaining a good reputation for itself and its products. Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 Colum. L. Rev. 963, 992 (1975).

A. EZ Construction Company, At Most, Has A Cause Of Action For Product Disparagement, Not Personal Defamation.

EZ Construction Company does not have a cause of action for defamation when its products or services are criticized by one merely expressing his displeasure or dissatisfaction. *See, e.g., Marlin Firearms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163 (1902) (magazine criticized manufacturer's rifles); *Tex Smith, the Harmonica Man, Inc. v. Godfrey*, 198 Misc. 1006, 102 N.Y.S.2d 251 (1951) (television performer criticized manufacturer's ukeleles). A statement is only product disparagement, and not personal defamation, when the objectionable language does not "impute dishonesty, fraud, lack of integrity, or reprehensible conduct to such owner or manufacturer in connection with the property, goods, or product." Hibschman, *Defamation or Disparagement?*, 24 Minn. L. Rev. 625, 631 (1940); *see also, National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 771 (8th Cir. 1927). A publication which merely disparages goods or property by making accusations against the quality, purity, or value is not actionable per se. *Victor Safe & Lock Co. v. Deright*, 147 F. 211, 212-13 (8th Cir. 1906).

Having sought commercial acceptance of its products and services, EZ Construction Company cannot reasonably expect legal protection against occasional disparagement or dissatisfaction. *See Boynton v. Shaw Stocking Co.*, 146 Mass. 219, 15 N.E. 507 (1888). The consumer and the public have a right to receive information about the quality and characteristics of consumer products. *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1270 (D. Mass. 1981), *aff'd*, 466 U.S. 485 (1984). The society would be greatly affected "if the threat of product disparagement actions stifled the free flow of such information." *Id.* at 1271.

The computer message does not import any personal reflection upon the Respondent in the conduct of his business, but simply disparages the services which he provides. *See Dooling v. Budget Publishing Co.*, 144 Mass. 258, 10 N.E. 809, (1887). The alleged defamatory message in this case stated that Douglas is not licensed and that his work does not meet building code requirements. (R. 2). Such a statement only proposes that the construction company's fi-

nal work product is not satisfactory. At most, the statement merely affected the owner's ability to sell its goods and services, rather than impinging on the company's reputation. This Court should decide that the case before it today is product disparagement and not personal defamation.

B. Special Damages Must Be Pled In Product Disparagement Actions.

While disparagement may resemble defamation, it differs materially in the greater burden of proof which rests upon the Respondent. *See Beane v. McMullen,* 265 Md. 585, 291 A.2d 37 (1972); Smith, *Disparagement of Property,* 13 Colum. L. Rev. 121 (1913). A common law action for disparagement of business or property mandates a showing of special damages. 50 Am. Jur. 2d *Libel and Slander* § 546 (1970). The tort exists to provide redress only for tangible and direct pecuniary loss—a purely economic injury to which society accords a lesser value than an interest in person's reputation. *Bose Corp. v. Consumers Union of United States, Inc.,* 529 F. Supp. 361 (D. Mass. 1981), *aff'd,* 466 U.S. 485 (1984). Without an allegation of special damages, the Respondent's complaint does not state facts sufficient to constitute a valid cause of action.

Courts have uniformly held that disparagement of products and services are not actionable unless the owner alleges and proves that he has sustained pecuniary loss as a necessary and natural consequence of the publication. *See Bosi v. Herald Co.,* 33 Misc. 622, 68 N.Y.S. 898 (1901). Statements merely disparaging

> the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damages. For example, the condemnation of books, paintings, and other works of art, music, architecture, and, generally, of the product of one's labor, skill or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further, and attacks the individual.

Dooling, 144 Mass. at 258, 10 N.E. at 809. Thus the Respondent has the burden to specifically plead and prove special damages which proximately flow from the disparaging computer message. *See Erlich v. Etner,* 244 Cal. App. 2d 69, 82, 36 Cal. Rptr. 256, 260 (1964); *Le Massena v. Storm,* 62 A.D. 150, 158, 70 N.Y.S. 882, 886 (1901).

The Record indicates that the Respondent brought suit seeking only presumed damages of $400,000. (R. 1). However, general damages are not presumed to result from the disparagement of products, and the plaintiff cannot recover if specific resultant injury is not shown. *See* 50 Am. Jur. 2d *Libel and Slander,* § 546 (1970). The Respondent has the burden to identify the particular customers who

have refrained from dealing with him and to specify the transactions of which he claims to have been deprived. *Drug Research Corp. v. Curtis Publishing Co.*, 7 N.Y.2d 435, 166 N.E.2d 319, 199 N.Y.S.2d 33 (1960); *Wilson v. Dubois*, 35 Minn. 471, 472, 29 N.W. 68, 69 (1886); *Barquin v. Hall Oil Co.*, 28 Wyo. 164, 166 201 P. 352, 354 (1921). Even a general statement alleging a loss of sales or a decline in business is not sufficient to enable EZ Construction Company to show particular injury. *See Tobias v. Harland*, 4 Wend. 537 (1830); *Shaw Cleaners & Dyers, Inc. v. Des Moines Dress Club*, 215 Iowa 1130, 245 N.W. 231 (1932); *Gonzalez v. Hearst Consolidated Publications, Inc.*, 115 F. Supp. 721, 722 (S.D.N.Y. 1953).

In the case of bar, Gordon's summary judgment was properly granted since Respondent failed to satisfactorily plead a valid cause of action for product disparagement. A finding of this Court that the case at bar is actually a product disparagement case mandates that special damages be pled and proved. In the absence of such allegations, the Circuit Court's summary judgment must be affirmed.

CONCLUSION

WHEREFORE, all premises considered, Petitioner respectfully prays that this Court reverse the decision of the Appellate Court of the State of Marshall and affirm the summary judgment of the Circuit Court of Plymouth County, State of Marshall.

Respectfully submitted,

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APPENDIX

IN THE APPELLATE COURT
OF THE
STATE OF MARSHALL
No. 85-070

RICHARD DOUGLAS, d/b/a/ EZ CONSTRUCTION COMPANY	§	On appeal from the Circuit Court of Plymouth County, State of Marshall
Plaintiff-Appellant,	§	
vs.	§	
DAVID GORDON,	§	
Defendant-Appellee.	§	

OPINION

Decided: April 10, 1985
Before: Mason, Caldwell and Marlowe, JJ.

Mason, C.J., delivered the opinion of the Court:

This is an appeal from an order of the Circuit Court of Plymouth County, granting defendant-appellee's motion for summary judgment. The plaintiff-appellant, Richard Douglas, is the owner of EZ Construction Co. of Plymouth, Marshall. He filed suit for defamation, seeking presumed damages of $400,000. The complaint alleged the following:

The defendant-appellee, David Gordon, owns and operates a personal home computer. Gordon has programmed his computer to serve as a host for an electronic bulletin board network. Gordon's computer stores messages for the board in its memory. Anyone who has a computer equipped with a "modem"—a device that allows a computer to be connected with standard telephone lines—can call Gordon's computer; the caller can read on his own monitor screen the messages "posted" by Gordon's board.

Sometime during the morning of Saturday, March 17, 1984, the following message appeared on Gordon's bulletin board:

> "Attention readers: Avoid doing any business with EZ Construction Co. of Plymouth City. The owner is not a licensed contractor and his work frequently does not meet building code requirements."

About noon on March 17, 1984, a friend called Douglas to tell him about the defamatory message. Douglas promptly tried to each Gordon but was unable to do so until Monday, March 26, by which

time the message had disappeared from the board.

Douglas further alleged that he is a properly licensed contractor and that the accusation of substandard work is false.

Gordon's answer admitted the facts alleged in the complaint, and alleged further as follows:

Gordon advertises his bulletin board, which he calls "Gordotalk," in a variety of trade magazines, inviting those who are interested in home repairs and do-it-yourself carpentry work to communicate with one another through his system. Anyone who calls "Gordotalk" can read messages, but to post a message one must register as a user to receive a unique password that permits messages to be entered into the system. Gordon charges an annual registration fee of $20, which covers the cost of operating "Gordotalk" but provides no profit; the system is operated as hobby and not for economic gain. Because the memory for "Gordotalk" is limited, Gordon registers only 200 passwords. If the annual fee is not paid, Gordon cancels the particular password. In most instances Gordon doesn't know a user's identity because it is common practice to employ a "moniker" or nickname. A user identifying himself only by a "moniker" or nickname might send a money order for annual dues and call Gordon personally to receive his password, or enclose a stamped self-addressed envelope so the password can be mailed back. Often the addresses are blind box numbers, which makes it infeasible for Gordon to keep records of the addresses of users.

Gordon does not screen messages before they are posted on the board. Though "Gordotalk" could be programmed to permit screening, there is too much traffic for Gordon to screen messages and still operate the system as a hobby. The system does not record what password is utilized to leave any particular message; therefore, a user can leave a message anonymously if an identifier is not posted with the message. The system only keeps track of the order in which messages are received, and as the computer memory is filled the oldest messages are automatically deleted to make room for new ones. While users cannot remove messages from "Gordotalk," Gordon, as the system operator, can perform that function.

Gordon left town on vacation with his family early on March 17, 1984, and did not see the defamatory message before he departed. The bulletin board system was left to operate during Gordon's absence. Gordon did not return until the late evening of Sunday, March 25, 1984. By the time that Douglas reached Gordon on Monday, March 26, 1984, the message had been replaced on "Gordotalk."

Plaintiff's reply admitted the additional allegations in the answer. Gordon filed a motion for judgment on the pleadings, asserting

that the pleading showed: (1) that defendant was not the publisher of the defamatory statement, and (2) even if defendant was the publisher, presumed damages were inappropriate because the plaintiff had neither alleged that Gordon knew the defamatory statement was false nor exhibited reckless disregard as to its falsity. The parties did not disagree about the facts recited above and the trial court granted defendant's motion. Plaintiff appeals.

The trial court should not have granted appellee's motion on either ground. Gordon has control of the bulletin board in that he authorizes users to post messages and he can remove messages if he so chooses. Under such circumstances, Gordon is a publisher of the material that appears on "Gordotalk."

Further, Douglas is not required to prove actual malice as defined in *New York Times v. Sullivan*, 376 U.S. 254 (1964), because plaintiff is not a public figure or public official and the subject matter of the defamatory statement is not a matter of public concern. Accordingly, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974), does not apply to this case. The common law of the State of Marshall is applicable and permits strict liability for the publication of a defamatory statement. Therefore, the trial court erroneously granted appellee's motion for summary judgment.

Reversed and remanded.

IN THE SUPREME COURT
OF THE
STATE OF MARSHALL
NO. 85-211

DAVID GORDON,

Petitioner,

vs.

RICHARD DOUGLAS, d/b/a
EZ CONSTRUCTION COMPANY

Respondent.

ORDER GRANTING PETITION
FOR LEAVE TO APPEAL

The Supreme Court of the State of Marshall hereby grants petitioner, David Gordon, leave to appeal and instructs the parties to address all issues raised in the Appellate Court opinion.

David J. Bosworth,
Chief Justice

Dated: July 15, 1985

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, amendment XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.