Libel Litigation in Texas: The Plaintiff's Perspective.

Mary A. Sprague Langston

LIBEL LITIGATION IN TEXAS: THE PLAINTIFF'S PERSPECTIVE

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I. INTRODUCTION

A final judgment for the plaintiff in libel cases is rare in Texas courts.[1] Plaintiff's attorneys must overcome both constitutional protections and

1. Of the 69 final libel appeals in the Texas courts since 1964, only four plaintiffs have succeeded in recovering damages. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881 (Tex. 1970); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); British Overseas Airways Corp. v. Tours & Travels of Houston, Inc., 568 S.W.2d 888 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.), *appeal dism'd*, 434 U.S. 962 (1977).

demanding standards of proof to be successful in the suit.[2] Media defendants are the most common adversaries of the plaintiff's attorney in libel litigation.[3] They frequently employ a firm no-settlement policy in libel actions and can be expected to pursue the litigation through the appellate process.[4] Their tenacious defense serves to discourage potential plaintiffs from undertaking what could prove to be a lengthy and costly suit.[5] More importantly, media libel cases involve constitutional issues that bear upon the normal functioning of the media; therefore, media defendants, will rarely accept a loss.[6]

The plaintiff in a libel suit often lacks the necessary finances to persist in lengthy litigation against the media.[7] By bringing suit, the plaintiff also places his reputation in issue, and the defendant is free to expose any existent injury to the plaintiff's reputation.[8] The remedy the plaintiff can expect is "at best problematical and at worst will serve but to underscore and republish precisely that which he wishes to expunge."[9]

The purpose of this comment is to aid a plaintiff's attorney in identify-

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2. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION, Summer 1980, at 12, 16. New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964) mandated first amendment protection for even false statements in certain instances. *See id.* at 278-80. After *Times*, summary judgments in libel cases were the rule, the purpose being to weed out those cases that were unable to sufficiently demonstrate the "actual malice" standard used against media defendants by a public official or figure. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION, Summer 1980, at 12, 16.

3. *See* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 457, 464-465 (31% of all libel appeals between Jan. 1976 and June 1979 were media appeals). In Texas, 45.9% of all libel appeals are brought by media defendants. *See* Table B at page 1005 *infra*.

4. *See, e.g.*, Darrow, *Pre-Complaint Phase: Deterring and Handling Claims, in* Winfield, *Libel Litigation*, 1979 N.Y. PRAC. L. INST. 11, 30 (no settlement policy refers to monetary settlements); Franklin, 1980 *Winners and Losers and Why: A Study of Defamation Litigation*, AM. B. FOUND. RESEARCH J. 457, 461 n.16 (unusual for media defendant to make payment without an appellate decision); *Gannett Sets Policy on Libel Cases*, EDITOR & PUBLISHER, July 28, 1979, at 1, 4 (out-of-court settlements in libel cases are discouraged).

5. *See* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 457, 461 n. 16 (no settlement policy is costly, but persuasive means to discourage a plaintiff with limited resources).

6. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION SUMMER 1980, at 12, 12.

7. *See* Associated Press v. Walker, 393 S.W.2d 671, 683 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.), *rev'd sub. nom.* Curtis Publishing Co. v. Butts, 388 U.S. 130, 142 (1966) (plurality opinion). An idea of the time and expense involved in libel litigation is that the statement of facts in *Walker* composed eleven volumes and consisted of 2126 pages. *Id.* at 683; *see also* Alioto v. Cowles Communication, Inc., 430 F. Supp. 1363, 1372 n.5 (N.D. Cal. 1977) (affidavit stating that defendant had spent over $600,000.00 on attorney's fees and costs).

8. *See* Brosnahan, *First Amendment Jury Trials*, LITIGATION, Summer 1980, at 28, 28.

9. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS xxv (1980).

ing problem areas in the complex area of libel litigation, thus allowing for a determination of the client's chances of success at trial. At the core of this comment is a survey and analysis of all libel cases in Texas since the landmark *New York Times Co. v. Sullivan*[10] ruling. By comparing certain aspects of his client's case with those of the cases surveyed, the plaintiff's attorney can come to a better judgment concerning the proper course of action.

II. BACKGROUND

American defamation law was adopted from the English common law, which required the plaintiff to prove the defendant published material which adversely affected the plaintiff's reputation.[11] The plaintiff, however, was not required to prove fault, damage, or falsity.[12] The defendant could escape liability by proving the statements were true, privileged, or non-defamatory.[13]

The United States Supreme Court extended first amendment protection to defamatory statements for the first time in *New York Times Co. v. Sullivan*.[14] The *Times* Court mandated first amendment[15] protection even when the statements in issue were false, if the statements were made in reference to a public official, absent "clear and convincing evidence" that the statements were published with "actual malice."[16] In 1967, the Supreme Court expanded the *Times* classification to include public

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

11. *See* Zillman, *The American Approach to Defamation*, 9 ANGLO-AM. L. REV. 316, 317 (1980).

12. *Id.* at 317.

13. *See id.* at 318. Absolute privileges are true statements, statements made as part of the work of the court or legislature, witness' statements and parts of legal pleadings. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113, at 773 (1971). Conditional privileges extend to statements made in the interest of the defendant, in the course of commercial activity, between family members, in reports of official and judicial proceedings and the fair comment privilege, allowing newspapers to comment fairly on any matter of public interest and concern. *See* 1 A. HANSON, LIBEL AND RELATED TORTS 97-102 (1969).

14. 376 U.S. 254, 269 (1964). The Court stated, "It [libel] must be measured by standards that satisfy the First Amendment." *Id.* at 269. Before this, the Supreme Court did not protect libelous statements by the constitutional guarantees of freedom of speech and the press. *See* Roth v. United States, 354 U.S. 476, 483 (1957) (dictum).

15. U.S. CONST. amend. I. The first amendment provides, "Congress shall make no law abridging freedom of speech or of the press." *Id.*

16. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Actual malice was defined as knowledge that the statement was false or with reckless disregard of whether or not it was false. *Id.* at 279-80. Convincing clarity has been defined as "something more than 'a preponderance of the evidence' and less than 'beyond a reasonable doubt' ". *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 225 (1980).

figures as well as public officials.[17] The movement to shield publishers from libel judgments, however, was short lived, as the Burger Court retreated from the Warren Court's expansive definition of a public person.[18] Presently, public figure status is given sparingly and is limited to those who take conscious steps to enter the public arena, not those who inadvertently are associated with a noteworthy issue.[19] The Court in *Gertz v. Robert Welch, Inc.*[20] permitted the states to decide the applicable standard of liability in cases of private figures in defamation actions against publishers.[21] Texas adopted a simple negligence standard whereby a plaintiff must simply prove a publisher acted without reasonable care in the publication.[22]

In 1979, the Supreme Court provided further support for defamed individuals in the case of *Herbert v. Lando*,[23] requiring journalists to testify at deposition about the editorial process, including the journalist's own thought processes used in the preparation of the article.[24] *Herbert* allows the public plaintiff to force the journalist to disclose in minute detail his beliefs and motives in writing the article, thus affording the plaintiff an opportunity to torment his tormentor.[25]

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17. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-165 (1967) (Warren, C.J., concurring in result). The rationale for the rule was the need for public debate on public issues. Justice Harlan went so far as to say that it is the right of individuals to give opinions on matters of public interest. *Id.* at 149 (Harlan, J., concurring).

18. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The Court held that a person of "pervasive fame and notoriety" was a public person for all purposes. Those that were public figures because of their involvement in certain issues were public figures only for that issue. *Id.* at 345.

19. *See* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 165-167 (1979) (unwilling participant in even a newsworthy controversy not a public figure); Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979) (winner of Golden Fleece award known only to small group of professionals and had only limited access to media, not a public figure).

20. 418 U.S. 323 (1974).

21. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (individual states may define the standard of liability applicable "so long as do not impose liability without fault").

22. *See* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). The negligence standard mandates a private individual may recover for actual damages caused by the publication of a defamatory statement if he can prove the publisher "knew or should have known that the defamatory statement was false." *Id.* at 819-20.

23. 441 U.S. 153 (1979).

24. *Id.* at 160. The *Herbert* Court reasoned that the *Times* decision made it essential to focus on the defendant's state of mind to prove the element of actual malice in his cause of action, therefore, the thoughts and editorial processes of the defamer must be left open to examination. *Id.* at 160.

25. *See* Zillman, *The American Approach to Defamation*, 9 ANGLO-AM. L. REV. 316, 325 (1980). The transcript of Lando's examination of Herbert consisted of 2903 pages and 240 exhibits, and lasted for over one year. *See* Anderson, *Libel Law Today*, TRIAL, May

The plaintiff is still protected from defamation since the *Times* decision has not turned out to be a complete media victory. While the *Times* decision has not been repudiated, it has been diluted by the Supreme Court's refusal to intervene in state court decisions allowing public officials and public figures a recovery.[26] Additionally, the Court has allowed private plaintiffs to recover on a showing of mere negligence by the publisher instead of by the rigorous "reckless disregard" standard imposed by *Times*.[27]

III. Identifying the Plaintiff's Motive in the Suit

The plaintiff's motive in seeking recovery in a defamation action is an important consideration in determining what course of action the plaintiff's attorney should pursue. If the plaintiff is motivated by a desire for personal publicity, he may wish only to file a complaint.[28] Politicians and celebrities, if seeking publicity and an opportunity to express indignation regarding an unfavorable publication, may have no intention of seeing their case through to its conclusion.[29] If the plaintiff's motive in bringing suit, however, is to seek revenge or punishment he may be be expected to pursue the action to its completion.[30] Other plaintiffs may wish only to demonstrate to themselves and their friends that the publication was in error.[31] These plaintiffs are not likely to be satisfied by an award of mon-

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1978, at 19, 20.

26. *See, e.g.*, Phoenix Newspapers, Inc. v. Church, 537 P.2d 1345, 1348 (Ariz. Ct. App. 1975) ($485,000 judgment for former attorney general of state), *appeal dismissed and cert. denied*, 425 U.S. 908 (1976) (Chief Justice Burger and Justice Blackmun would have granted certiorari); Montandon v. Triangle Publications, Inc., 120 Cal. Rptr. 186, 188 (Cal. App. 1975), *cert. denied*, 423 U.S. 893 (1975) ($150,000 judgment for television personality); Sprouse v. Clay Communication, Inc., 211 S.E.2d 674, 692 (W.Va. 1975) ($250,000 judgment for a West Virginia gubanatorial candidate), *cert. denied*, 423 U.S. 882 (1975) (Justices Brennan and Douglas would have granted certiorari).

27. *See* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). Texas has adopted the negligence standard. *Id.* at 819; *cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1973) (states may decide appropriate standard).

28. *See* Warren, *Libel—Some Thoughts for the Defense*, Litigation, Summer 1980, at 12, 13. Warren believes the defendant should allow the plaintiff to obtain the publicity desired and later dismiss the action for lack of prosecution. *Id.* at 13.

29. *See id.* at 12. *But see* Brown v. Wilson, 554 S.W.2d 817, 818 (Tex. Civ. App.—Tyler 1977, no writ) (former judge defamed before election pursues suit through appellate process).

30. *See* Warren, *Libel—Some Thoughts for the Defense*, Litigation, Summer 1980, at 12, 12; *see also* Trexler v. El Paso Times, 439 S.W.2d 883 (Tex. Civ. App.—El Paso 1969, *rev'd*, 447 S.W.2d 403, 404 (Tex. 1969) (publication of letter to editor stating university professor was traitor for leading anti-war demonstrations).

31. *See* R. Sack, Libel, Slander, And Related Problems 482 (1980). In this instance,

etary damages—their satisfaction lies in either a retraction or reconciliation.[32]

IV. Retraction

Texas has codified the common law rule that evidence of retraction or correction of defamatory statements is not a total defense but is employed merely to mitigate damages.[33] The defendant, however, must specifically plead retraction to mitigate damages.[34] The plaintiff need not give the defendant written notice that retraction is desired since the Texas statute is not a retraction statute *per se*.[35] A prompt retraction by the defendant may also be used to indicate that a statement was published in good faith and, therefore, defeat the plaintiff's allegation of actual malice.[36] Nevertheless, clarification of a statement in a subsequent article has lent support to the contention that a material fact existed which precluded summary judgment, since the former article was so poorly worded that it could be misconstrued.[37]

V. Identifying the Plaintiff

The plaintiff's identity is determinative of the requisite standard of proof. If the plaintiff is a public official or public figure, the *Times* standard of "actual malice" must be proven.[38] Due to its importance in the

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the plaintiff will probably do no more than file a complaint, and then allow the suit to die of neglect. *Id.* at 482.

32. *See* Warren, *Libel—Some Thoughts for the Defense*, Litigation, Summer 1980, at 12, 13. The plaintiff may be satisfied with an apology by the publisher, or the chance to set the record straight by a letter to the editor, a retraction, or a corrective article. *Id.* at 13.

33. *See* Tex. Rev. Civ. Stat. Ann. art. 5431 (Vernon 1958). The statute is entitled "Mitigation of Damages" and provides that the defendant may specially plead and prove "any public apology, correction, or retraction made and published by him" in mitigation of exemplary and punitive damages and to determine the extent of actual damages. *Id.* The common law rule was that retraction could mitigate damages. *See* R. Sack, Libel, Slander, And Related Problems 371 (1980).

34. *See* Tex. Rev. Civ. Stat. Ann. art. 5431 (Vernon 1958). The statute provides for retraction as mitigation of damages in "any action for libel." *Id.*

35. *See* R. Sack, Libel, Slander, And Related Problems 373 n.7 (1980); *see also*, Express Publishing Co. v. Gonzalez, 350 S.W.2d 589, 592 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e.).

36. *See* Logan v. District of Columbia, 447 F. Supp. 1328, 1332 (D.D.C. 1978) (quoting Hoffman v. Washington Post Co., 433 F. Supp. 600, 605 (D.D.C. 1977)).

37. *See* Rose v. Enterprise Co., 617 S.W.2d 737, 741 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.).

38. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-165 (1967) (Warren, J., concurring in result) (*Times* standard applies to public figures); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (public official).

strategy of the case, public official or figure status must be rapidly determined by the trial court.[39] The category of public official includes all elected officials and government employees that "have or appear to have substantial responsibility for or control over the conduct of governmental affairs."[40] Whether appointed officials are public figures and consequently held to the actual malice standard depends on their control or appearance of control over governmental affairs.[41] Law enforcement officials are generally considered to be public officials,[42] a position that the Texas courts seem to follow.[43]

There are two types of public figures, pervasive and vortex.[44] The category of pervasive public figure includes those who occupy positions of power and influence[45] to such a degree as to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood."[46] Plaintiffs in this category are thought to have a greater access to the media to rebut false charges.[47] All candidates for public office are considered

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39. *See* Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) (trial judge to make determination whether plaintiff is public official); Miller v. Transamerican Press, Inc., 621 F.2d 721, 723-24 (5th Cir. 1980) (public figure status is of primary importance in defamation case and therefore answered quickly).

40. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966); *see* St. Amant v. Thompson, 390 U.S. 727, 730 n.2 (1968) (public official who is government employee must appear to have substantial responsibility for governmental affairs); *see also* Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 534 (Tex. Civ. App.—Beaumont 1979, no writ) (mayor of Dallas is public official).

41. *See* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

42. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 191 (1980). The reasoning is that the public has a special interest in the performance of law enforcement agents because their decisions to arrest and search directly affect individual freedomes. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (deputy chief of detectives is a public official); St. Amant v. Thompson, 390 U.S. 727, 730 n.2 (1968) (deputy sheriff is a public official); Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir. 1977).

43. *See* Foster v. Upchurch, 613 S.W.2d 22, 23 (Tex. Civ. App.—El Paso) (sheriff found to be a public official), *rev'd on other grounds*, 624 S.W.2d 564 (Tex. 1981). For a holding of those held not to be public officials in Texas, see Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 813 (Tex. 1976) (a government related part-time civil engineer), *cert. denied*, 429 U.S. 1123 (1977); Poe v. San Antonio Express News, Inc., 590 S.W.2d 537, 540 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (school teacher not a public official).

44. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 196 (1980).

45. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). Texas has defined a pervasive public fiture as one who has sought the publicity of the news media or has engaged public opinion to influence the outcome of a controversy. *See* A. H. Belo Corp. v. Rayzor, 620 S.W.2d 756, 759 (Tex. Civ. App.—Fort Worth 1981, no writ).

46. Gertz v. Robert Welch, inc., 418 U.S. 323, 344-45 (1974).

47. *Id.* at 344. The Court has in effect admitted that the access to media argument for differentiating public and private plaintiffs is not a particularly strong one. *See id.* at 344 n.9. A better argument would be that those who seek public status assume the risk of "closer public scrutiny." *Id.* at 344.

to be pervasive public figures.[48] Vortex public figures,[49] on the other hand, are those who have placed themselves in the forefront of a particular public controversy,[50] thereby becoming public figures only with respect to the controversy with which they are connected.[51] Those adjudicated public figures in Texas include: a university professor,[52] a narcotics officer,[53] a high-ranking union official,[54] and a private citizen of political prominence.[55]

Texas employs a negative definition of private persons by defining private plaintiffs as those who are not public officials or public figures.[56] In actions brought by private individuals against publishers and broadcasters, the negligence standard is applicable.[57] In the case of defamation of a private plaintiff by a non-media defendant, the common law principle of strict liability is generally applied.[58]

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48. Garrison v. Louisiana, 379 U.S. 64, 77 (1964). The scope of protected comment about a candidate for public office includes anything that may touch on their fitness for office, including personal attributes of dishonesty, malfeasance, or improper motivation, even though these characteristics also affect the candidate's private character. *Id.* at 77; *see* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 197 (1980). Even a remote charge of criminal conduct is never irrelevant to a candidate's fitness for office. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971).

49. The term vortex was first used by Justice Brennan in Rosenblatt v. Baer, 383 U.S. 75, 86 n.12 (1966).

50. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (Court stated that they invited attention and comment by assuming special prominance in public issues).

51. *See* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 198 (1980).

52. *See* El Paso Times, Inc. v. Trexler, 447 S.W.2d 403, 404 (Tex. 1969) (university professor called traitor in letter to editor for leading anti-war demonstration).

53. *See* Times Herald Printing Co. v. Bessent, 601 S.W.2d 487, 489 (Tex. Civ. App.—Beaumont 1980, writ dism'd) (policeman in charge of narcotis squad a public figure).

54. *See* Miller v. Transamerican Press, Inc., 621 F.2d 721, 723-24 (5th Cir. 1980). The plaintiff was a high-ranking official of a major trade union and his actions related to his official duties, therefore he was held to be a public figure. *Id.* at 723-24.

55. *See* Associated Press, Inc. v. Walker, 393 S.W.2d 671 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.), *rev'd sub. nom.*, Curtis Publishing Co. v. Butts, 388 U.S. 130, 140-142 (1966) (plurality opinion).

56. *See* Roegelin Provision Co. v. Mayen, 566 S.W.2d 1, 9-10 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (former employees are private persons).

57. *See* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819-20 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977). The court held that a private individual could recover damages from a publisher or broadcaster for actual injury sustained by the defamatory falsehood if he could show the publisher or broadcaster knew or should have known that the statement was false. *Id.* at 819.

58. *See* Comment, *Negligence as a Standard of Recovery in Libel Actions in Texas*, 8 ST. MARY'S L.J. 529, 534 (1976). For a discussion of the standard of fault in purely private defamation actions, see Roegelein Provision Co. v. Mayen, 566 S.W.2d 1 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.), in which the court stated that the majority of cases have been decided on the basis of common law rules instead of the standards enunci-

VI. WHO MAY BE LIBELED

Generally, any living person or entity capable of having a reputation may bring an action for libel including corporations and partnerships.[59] The general rule is that libel of a business is not actionable.[60] Rather, the libel must refer to an ascertainable person and that person must be the plaintiff.[61] While it is not necessary that the plaintiff be specifically named, it is necessary that those who were acquainted with the plaintiff know that the defamatory statement referred to the plaintiff,[62] or that the plaintiff's name is so closely associated with the name of the business that the reference to the business is necessarily a reference to the plaintiff.[63] When a large group is involved, libelous statements are usually not actionable because the statements do not refer to or concern the individual plaintiff;[64] however, the statements are actionable if the defamation singles out the plaintiff as the person involved.[65] There is no cause of action in Texas for defamation of the dead,[66] even though the statutory definition of libel includes "drawings tending to blacken the memory of the dead."[67] Texas adopts the position that if the libel of the deceased does

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ated in *Gertz* and *Firestone*, but the court then refused to determine the proper standard to be used. *Id.* at 11.

59. *See, e.g.*, General Motors Acceptance Corp. v. Howard, 487 S.W.2d 708, 710 (Tex. 1972) (motor credit company alleges defamation by false reports of default on debt); Newspapers, Inc. v. Matthews, 161 Tex. 284, 287, 339 S.W.2d 890, 893 (1960) (libel of partnership or corporation is libel of owner of business, not business itself); Bell Publishing Co. v. Garrett Eng'n Co., 141 Tex. 51, 59, 170 S.W.2d 197, 202 (1943) (corporation may be libeled).

60. *See* Newspapers, Inc. v. Matthews, 161 Tex. 284, 287, 339 S.W.2d 890, 893 (1960); Miller v. Reinhert, 534 S.W.2d 161, 163 (Tex. Civ. App.—Waco 1976, writ dism'd).

61. *See* Goldstein v. KDFW, 541 S.W.2d 862, 864-865 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.).

62. *See id.* at 864-65 (subject of libel was Honest Joe's Pawn Shop; Honest Joe was plaintiff's husband therefore defamation did not refer to plaintiff).

63. *See* Miller v. Reinert, 534 S.W.2d 161, 163 (Tex. Civ. App.—Waco 1976, writ dism'd) (article mentioned only Lemon Twist Lounge and not plaintiff owner).

64. *See* RESTATEMENT (SECOND) OF TORTS § 564A comment b (1977) (large group is generally over 25 persons).

65. *See* Neiman-Marcus v. Lait, 13 F.R.D. 311, 313 (S.D.N.Y. 1952) (book referred to "all" 382 saleswomen at Dallas department store as "call girls"; action dismissed because of size of the class). Webb v. Sessions, 531 S.W.2d 211, 213 (Tex. Civ. App.—Eastland 1975, no writ) (matter of law that individual may not recover damages for defamation of group of 740 persons in Dallas sheriff's office unless defamation singles out plaintiff).

66. *See* Gonzales v. Times Herald Printing Co., 513 S.W.2d 124, 125 (Tex. Civ. App.—Dallas 1974, no writ) (no cause of action for defamation referring to plaintiff's deceased husband).

67. TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958). The statute provides in pertinent part, "A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive . . . . " *Id.*; *see* Renfro Drug Co. v. Lawson, 138 Tex. 434, 439, 160

not directly cast personal reflection on his relatives, the relatives have no cause of action even if they have suffered mental anguish or diminished reputation.[68]

VII. STANDARD OF CONDUCT

The term "malice" has two distinct meanings.[69] Actual malice in the *Times* sense refers to whether the defendant published without believing in the truth of the publication and applies in public figure and public official cases.[70] Proof of common law malice, spite, or ill-will toward the plaintiff is employed in determing whether sufficient evidence has been demonstrated to defeat a conditional privilege.[71] The *Times* actual malice requirement refers to the actual state of defendant's knowledge at the time of the publication[72] and has been a very difficult standard for plaintiffs to establish.[73] In Texas, actual malice is a part of the common law definition of malice for purposes of determining whether a conditional privilege has been lost,[74] and consists of knowing or reckless falsehood or wrongful motivation.[75]

Actual malice is not presumed; however, its existence does not necessarily have to be shown by direct or extrinsic evidence. It is sufficient to

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S.W.2d 246, 250 (1942); Keys v. Interstate Circuit, Inc., 468 S.W.2d 485, 487 (Tex. Civ. App.—Tyler 1971, writ dism'd). Indeed, one commentator goes so far as to say that all authorities hold that defamation of the dead is not actionable. *See* M. NEWELL, THE LAW OF SLANDER AND LIBEL § 332, at 368 (1924).

68. *See* Gonzales v. Times Herald Printing Co., 513 S.W.2d 124, 126 (Tex. Civ. App.—Dallas 1974, no writ) (wife of libeled deceased can not recover for newspaper inference husband engaged in sale of narcotics); *cf.* Keys v. Interstate Circuit, Inc., 468 S.W.2d 485, 486 (Tex. Civ. App.—Tyler 1971, writ dism'd) (movie "Bonnie and Clyde" never directly or indirectly named, referred to or identified relatives of deceased Clyde Barrow).

69. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 43 (1980).

70. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 162-165 (1967) (Warren, J., concurring) (actual malice applicable to public figures); New York Times, Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (actual malice is knowing or reckless falsity and is applicable to public officials).

71. *See* International & G.N.R. Co. v. Edmundson, 222 S.W. 181, 183-84 (Tex. Comm'n App. 1920, holding approved). Malice sufficient to defeat a conditional privilege exists when the defendant imputes a knowing falsehood, or if a statement is activated by a sinister or corrupt motive, personal spite, ill-will, or with gross indifference. *Id.* at 183-84; *see also* Sterns v. McManis, 543 S.W.2d 659, 664 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (conditional privilege lost if defendant was in any degree activated by malice).

72. *See* Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.] writ ref'd n.r.e.), *appeal dismissed*, 434 U.S. 962 (1977); R. SACK, LIBEL, SLANDER AND RELATED PROBLEM 21 (1980).

73. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 213 (1980).

74. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 9-12 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.).

75. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 332 (1980).

show evidence of facts and circumstances from which malice may be reasonably inferred.[76] Evidence from which the jury may infer malice must have existed at the time of the publication and must have motivated publication.[77] The United States Supreme Court has held evidence of a fabricated publication based wholly on an unverified anonymous telephone call, or evidence of such improbable allegations that only a reckless person would publish them, is sufficient to establish actual malice.[78] In Texas, actual malice may be proven by evidence the publisher knew the statement was false at the time of the publication, had bad motives in giving the publication more publicity than was necessary, or bore ill-will towards the plaintiff.[79]

Common law malice, or ill-will toward the plaintiff, is not implied merely from the fact of publication nor solely from the vehemence of the language used.[80] Further, the failure to investigate the truth of a privileged statement will not constitute malice sufficient to defeat the conditional privilege.[81] Similarly, the making of a conditionally privileged statement cannot be used as evidence of malice.[82] Common law malice is not inferred from merely negligent behavior[83] but may be inferred from the relation of the parties, circumstances attending the publication, language used, or from words or acts of the defendant before, at, or after the time of the communication.[84]

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76. *See* Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.), *appeal dism'd*, 434 U.S. 962 (1977); Gulf Coast Construction Co. v. Mott, 442 S.W.2d 778, 784 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ).

77. *See* Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.), *appeal dism'd*, 434 U.S 962 (1977).

78. *See* St. Amant v. Thompson, 390 U.S. 727, 732 (1968).

79. *See* Gulf Coast Constr. Co. v. Mott, 442 S.W.2d 778, 784 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). For instances where actual malice has been proven, see British Overseas Airways v. Tours & Travels of Houston, Inc., 568 S.W.2d 888, 892-93 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (defendant placed plaintiff in default on disputed debit memos to ruin plaintiff's business); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.) (plaintiff accused drug addict and defendant failed to present a pathologist's report that plaintiff did not have methadone in his system), *appeal dism'd*, 434 U.S. 962 (1977).

80. *See* Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.), *appeal dism'd*, 434 U.S. 962 (1977).

81. *See* Cheatwood v. Jackson, 460 S.W.2d 528, 530 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.).

82. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 13 (Tex. Civ. App.—San Antonio, 1978, writ ref'd n.r.e.) (evidence that employer called district attorney and sought opinion on possibility of indictment is conditionally privileged report of suspected crime).

83. *See* El Paso Times, Inc. v. Trexler, 447 S.W.2d 403, 406 (Tex. 1969).

84. *See* Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.), *appeal dism'd*, 434 U.S. 962 (1977).

In Texas, ordinary negligence is the standard of conduct employed in actions involving private plaintiffs against media defendants.[85] Recovery is permitted by showing the defendant published the defamatory falsehood knowing or having reason to know of the statements' defamatory potential.[86] Consequently, the pertinent question is whether the defendant had reasonable grounds to believe the defamation was true.[87] When the statement is of a nature that it is apparent injury to reputation will occur, it is unreasonable not to inquire into the facts to determine the statement's truth.[88] In situations where neither the character of the language used nor the defendant's knowledge would put a reasonable person under similar circumstances on notice to inquire, no liability should be imposed under the negligence standard.[89]

VIII. The Cause of Action

In order to state a cause of action, the plaintiff must plead the following elements of libel: (1) a false and defamatory statement about another, (2) an unprivileged publication to a third party, (3) some degree of fault on the part of the publisher, (4) actionability for the statement with or without harm caused by the publication,[90] and (5) the relief sought.[91] In public plaintiff cases, the plaintiff has the burden of proving falsity.[92] In a purely private case, it is not clear whether the plaintiff must prove falsity or the defendant prove truth.[93] The *Gertz* ruling implied that only a

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85. *See* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819-20 (Tex. 1976) (court specifically refused to adopt a gross negligence standard), *cert. denied*, 429 U.S. 1123 (1977).

86. *See id.* at 819.

87. *See* Restatement (Second) of Torts § 580B comment g (1977).

88. *See* Anderson, *Libel and Press Self-Censorship*, 53 Texas L. Rev. 422, 461 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Texas L. Rev. 199, 244-45 (1976).

89. *See* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L.J. 471, 505-06 (1975).

90. Restatement (Second) of Torts § 558 (1977).

91. *See* 1 A. Hanson, Libel and Related Torts ¶ 218, at 184 (1969).

92. *See* New York Times, Inc. v. Sullivan, 376 U.S. 254, 279-80 (1964); Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 8 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). At common law, the defendant had the burden of proving falsity. The adoption of the negligence standard in Texas requires the plaintiff to prove that the defendant either knew or should have known that a statement was false; the plaintiff, therefore, will necessarily have to prove falsity. *See* Keeton, *Defamation and Freedom of the Press*, 54 Texas L. Rev. 1221, 1235-37 (1976).

93. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 11 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). The court discussed whether in purely private defamation the common law rules or the standard applied by the *Times* case. The court refused to determine the proper standard, but did point out that a majority of cases have been decided on the basis of common law rules. *See id.* at 11; *see also* Ryder Truck Rentals v. Latham,

falsehood can be defamatory, and since opinions can never be false, they are never actionable even if defamatory.[94] The plaintiff has the burden to demonstrate that a statement is one of fact and not opinion.[95]

The presence of publication is essential in a libel action.[96] The plaintiff must show that there was an unconsented communication to a third party on a matter injurious to his reputation.[97] Publication may be achieved through writings or by illustrations.[98] In Texas, publication results from an intentional communication to a third party.[99] Interception of a defamatory statement without the requisite intent does not amount to publication.[100]

A statement may be actionable with or without resulting harm caused by the publication.[101] Private plaintiffs proving less than the actual malice standard of fault may recover for only actual injury.[102] Where actual malice is proven, however, damages need not be limited to actual damages.[103]

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593 S.W.2d 334, 338 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e); Southwestern Bell Tele. v. Dixon, 575 S.W.2d 596, 600 (Tex. Civ. App.—San Antonio 1978), *writ dism'd*, 607 S.W.2d 240 (1980). At common law falsity was presumed.

94. *See* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 154 (1980); *cf.* Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.) (assertion is not libelous if not false), *cert. denied*, 434 U.S. 834 (1977).

95. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 154 (1980).

96. *See* Lyle v. Waddle, 144 Tex. 90, 92, 188 S.W.2d 770, 771 (1945) (gist of libel action is injury to reputation, without publication there can be no injury); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 751 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.) (safety report sent to seven persons and read during investigation is evidence of publication), *appeal dism'd*, 434 U.S. 962 (1977).

97. *See* Glenn v. Gidel, 496 S.W.2d 692, 697 (Tex. Civ. App.—Amarillo 1973, no writ) (communication to third person must be understood as defamatory to be actionable).

98. *See* TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958). The statute provides in pertinent part that "libel is a defamation expressed in printing or writing, or by signs and pictures . . . . " *Id.*

99. *See* Lyle v. Waddle, 144 Tex. 90, 94, 188 S.W.2d 770, 772 (1945); Renfro Drug Co. v. Lawson, 138 Tex. 434, 443, 160 S.W.2d 246, 251 (1942); Patterson & Wallace v. Frazer, 79 S.W. 1077, 1082 (Tex. Civ. App. 1904, no writ).

100. *See* Barnes v. Clayton House Motel, 435 S.W.2d 616, 617 (Tex. Civ. App.—Waco 1968, no writ) (no publication when defendant sent certified letter where facts showed it was merely possible someone might intercept and read it, and defendant did not know this would occur).

101. *See* RESTATEMENT (SECOND) OF TORTS § 558 (1977).

102. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (private defamation plaintiff not utilizing *Times* standard of fault may recover only damages that will compensate him for actual injury); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 752 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.) (Texas adopts the negligent standard of liability plus actual injury requirement to defamation suits against media defendants), *appeal dism'd*, 434 U.S. 962 (1977).

103. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

In order to be libelous, a publication must do more than merely embarrass or annoy a plaintiff. The statement may be false, abusive, unpleasant, and objectionable to the plaintiff without being defamatory.[104] In Texas, to be libelous, a publication must expose plaintiff to "public hatred, contempt, or ridicule, or financial injury . . . or publish the natural defects of anyone."[105] An example of the libelous publication of natural defects includes an allegation of mental imbalance,[106] but not a mere unflattering anatomical description.[107] Additionally, a statement linking plaintiff to crime would expose him to public hatred and, therefore, be actionable.[108] A false report of bankruptcy would expose a merchant to financial injury;[109] however, a publication that merely costs a candidate votes is not libelous.[110]

A. *The Complaint*

The most difficult part of the plaintiff's case may be the pleading of actionable defamation. All unpleasant publications are not defamatory. Unless the publication's language is reasonably susceptible of a defama-

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104. *See* Rawlins v. McKee, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

105. *See* TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958).

> A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injury the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of anyone and thereby expose such person to public hatred, ridicule, or financial injury.

Id..

106. *See* Hibdon v. Moyer, 197 S.W. 1117, 1118 (Tex. Civ. App.—El Paso 1917, writ dism'd) (accusing plaintiff of having "brainstorms" implies mental imbalance and is actionable).

107. *See* Raymer v. Doubleday & Co., 615 F.2d 241, 243 (5th Cir. 1980) (no libelous publication of natural defect to liken plaintiff's head to a hard-boiled egg).

108. *See* Houston Chronicle Publishing Co. v. Flowers, 413 S.W.2d 435, 438 (Tex. Civ. App.—Beaumont 1967, no writ) (innuendo that plaintiff was "Mr. Big" and therefore connected with gambling and prostitution is libelous).

109. *See* Thorn v. Theo. H. Blue Drilling, Inc., 472 S.W.2d 535, 536 (Tex. Civ. App.—El Paso 1971, no writ) (statement that plaintiff was "preparing to auction" is tantamount to saying plaintiff is bankrupt and therefore statement is actionable). *But see* Dun & Bradstreet Inc. v. O'Neil, 456 S.W.2d 896, 899 (Tex. 1970) (false report that plaintiff filed bankruptcy is conditionally privileged and not actionable if done in "strict confidence" only to subscribers requesting information).

110. *See* Brown v. Wilson, 554 S.W.2d 817, 820 (Tex. Civ. App.—Tyler 1977, no writ) (advertisement published one day before primary election of judge not libelous); Dunn v. Newspapers, Inc., 446 S.W.2d 101, 102 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.) (not libelous to delete plaintiff's name from sample ballot; defendant was under no duty to print), *cert. denied*, 400 U.S. 830 (1970).

tory meaning, it can not form the basis of a libel action.[111] To defeat the defendant's inevitable motion for summary judgment, the plaintiff must show: (1) the publication was defamatory; (2) it injured or impeached the reputation of the alleged libellee;[112] and (3) the statement was not protected speech or a legitimate expression of opinion.[113]

The libelous communication must be attached to or set forth in the complaint and may set forth only selective quotes so long as the context demonstrates actionable defamation.[114] It is best to set forth the defamatory statement in full, however, to avoid the appearance of taking statements out of context to force a libelous meaning.[115] The complaint should contain a communication that identifies the plaintiff by name so that no identification problems develop at trial.[116] There is, however, no requirement that the communication identify the plaintiff specifically if it can be proven that those who knew and were acquainted with the plaintiff understood that the publication referred to the plaintiff.[117] The reference to the plaintiff may then be raised by extrinsic facts.[118] Libelous out of court writings are not hearsay and, therefore, may be used by one with personal

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111. *See* Taylor v. Houston Chronicle Publishing Co., 473 S.W.2d 550, 553 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (false statement that coach would not work unless certain team member did not play is not defamatory).

112. *Id.* at 553 (quoting Snider v. Leatherwood, 49 S.W.2d 1107 (Tex. Civ. App.— Eastland 1932, writ dism'd)).

113. *See* RESTATEMENT (SECOND) OF TORTS § 566 (1977) (a legitimate expression of opinion on a matter permitting commentary cannot reasonably be construed as defamatory).

114. *See* Warren, *Libel—Some Thoughts for the Defense* LITIGATION, Summer 1980, at 12, 14-15.

115. *See* Raymer v. Doubleday & Co., 615 F.2d 241, 245 (1980) (summary judgment affirmed because statements could not be made defamatory by taking them out of context); Taylor v. Houston Chronicl Publishing Co., 473 S.W.2d 550, 554 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.) (words not capable of defamatory meaning).

116. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION, Summer 1980, at 12, 15.

117. *See* Poe v. San Antonio Express-News Corp., 590 S.W.2d 537, 542 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (newspaper accused unnamed teacher of fondling student).

118. *See* General Motors Acceptance Corp. v. Howard, 487 S.W.2d 708, 710 (Tex. 1972). In *Howard*, plaintiff's president was not identified in a libelous letter as owning any stock. The evidence, however, showed that a bank president who received the letter knew the corporate president owned stock and was responsible for the corporation's actions. Consequently, the bank refused to make further loans to the corporation's president. This was sufficient to identify the president with the corporation, enabling the plaintiff corporation to have a cause of action. *Id.* at 710; *cf.* Goldstein v. KDFW, 541 S.W.2d 862, 864-65 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (defendant used evidence that plaintiff's name was Goldstein and she was not a pawnbroker, therefore could not be subject of libel directed to Honest Joe's Pawn Shop).

knowledge of the statement as evidence of the libelous writing.[119]

B. *Discovery: The Reporter's Privilege*

Texas does not provide a "shield" statute to protect a reporter's confidential sources.[120] The common law provided for the existence of a qualified privilege, allowing the defendant to refuse to disclose the name of a source of information in a libel suit.[121]

Texas has limited a reporter's privilege of non-disclosure of confidential sources to the requirements of the first amendment.[122] The court generally weighs the competing interests of the parties, balancing the first amendment interest of the media against the necessity for the plaintiff to have facts to prove his case.[123] The United States Supreme Court has indicated that the balance should weigh heavily in favor of disclosure.[124] In public plaintiff cases the first amendment interest in granting a privilege is particularly strong,[125] since the first amendment policy is of free investigation of public plaintiffs because their activities are of public concern.[126] Because the public plaintiff is required to prove malice, the publisher's state of mind as to the truth or falsity of the statement is relevant.[127] In order to balance the competing interests of the parties, a three part test is utilized: (1) whether the information is relevant; (2) whether another source for the information exists; and (3) whether the informa-

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119. *See* 1A R. RAY, TEXAS LAW OF EVIDENCE § 795, at 41-42 (Texas Practice 3d ed. 1980).

120. *See, e.g.*, Miller v. Transamerican Press, Inc., 621 F.2d 721, 724 (5th Cir. 1980); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 494, 621-648 (1980). *But cf.* Adams v. Associated Press, 46 F.R.D. 439, 440 (N.D. Tex. 1969) (37 states do not statutorily protect reporter's source).

121. *See* Sherbow & Craig, *Confidential Sources and Defamation Litigation*, LITIGATION, Summer 1980, at 25, 25.

122. *See, e.g.*, Adams v. Associated Press, 46 F.R.D. 439, 441 (S.D. Tex. 1969) (plaintiff's interest in determining whether source was reliable outweights freedom of press); Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70, 77 (Tex. Civ. App.—Dallas 1976, no writ) (no disclosure required unless interest is greater than that of freedom of speech and press); *see also* Garland v. Torre, 259 F.2d 545, 548 (2d Cir.) (first amendment protects freedom of press, but that freedom not absolute), *cert. denied*, 358 U.S. 910 (1958).

123. *See* Dallas Oil & Gas, Inc. v. Mouer, 533 S.W.2d 70, 77 (Tex. Civ. App.—Dallas 1976, no writ) (court weights plaintiff's interest and public interest in free disclosure, testimony must be relevant and admissible before disclosure required).

124. *See* Branzburg v. Hayes, 408 U.S. 665, 681-88 (1972) (dictum).

125. *See* Miller v. Transamerican Press, Inc., 621 F.2d 721, 725-26 (5th Cir. 1980).

126. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) (public plaintiffs are involved in resolutions of important public questions and shape events in areas of public concern).

127. *See* Hunter, *Editorial Privilege and the Scope of Discovery in Sullivan-Rule Libel Actions*, 67 KY. L.J. 789, 807 (1978).

tion is vital.[128] If an alternative source for the information is suggested by the defendant, the plaintiff must exhaust the suggested source before compelling disclosure.[129] A compelling interest is found where no other proof is available except through disclosure.[130] Generally, if all three factors are proven and the court rules that the source should still be protected, then the defendants are denied the opportunity to produce any testimony gained from the confidential source.[131]

If the court compels disclosure of the confidential source, the court should also protect the source by restricting knowledge of the informant's identity to counsel and require the knowledge be used only for the litigation.[132]

C. *Venue*

Venue is a crucial strategic consideration in every libel case. The defendant will not want to defend his case in a foreign jurisdiction, especially if the plaintiff is well-known and popular in the county of his residence. Under subdivision 29 of article 1995[133] the plaintiff must prove a cause of action for libel accrued in his favor, the date of accrual, and his own residence in the county where the suit was filed on the date of accrual in order to establish venue in libel suit in the county of the plaintiff's residence.[134] Where the plaintiff is a public figure or official, actual malice must be proven at the venue hearing, or the plaintiff will have failed to prove the existence of a cause of action in the county of his residence.[135]

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128. *See, e.g.*, Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980); R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 490 (1980); Sherbow & Craig, *Confidential Sources and Defamation Litigation*, LITIGATION, Summer 1980, at 25, 26.

129. *See* Sherbow & Craig, *Confidential Sources and Defamation Litigation*, LITIGATION, Summer 1980, at 25, 51.

130. *See* Carey v. Hume, 492 F.2d 631, 639 (D.C. Cir.) (only evidence plaintiff had to disprove story was his own testimony), *cert. dism'd*, 417 U.S. 938 (1974); Garland v. Torre, 259 F.2d 545, 551 (2d Cir.) (no other proof available), *cert. denied*, 358 U.S. 910 (1958).

131. *See* Greenberg v. CBS, 69 A.D.2d 693, 708, 419 N.Y.S.2d 988, 997 (N.Y. App. Div. 2d 1979).

132. *See* Miller v. Transamerican Press, Inc., 621 F.2d 721, 727 (5th Cir. 1980).

133. *See* TEX. REV. CIV. STAT. ANN. art. 1995, § 29 (Vernon 1955).

> A suit for damages for libel or slander shall be brought, and can only be maintained, in the county in which the plaintiff resided at the time of the accrual of the cause of action, or in the county where the defendant resided at the time of filing suit, or in the county of the residence of defendants, or any of them, or the domicile of any corporate defendant, at the election of the plaintiffs.

Id.

134. *See* Foster v. Upchurch, 624 S.W.2d 564, 565 (Tex. 1981); General Motors Acceptance Corp. v. Howard, 487 S.W.2d 708, 710 (Tex. 1972); A.H. Belo Corp. v. Blanton, 133 Tex. 391, 396, 129 S.W.2d 619, 622 (1939).

135. *See* Foster v. Upchurch, 624 S.W.2d 564, 566 (Tex. 1981); Times Herald Printing

Actual malice may be demonstrated by evidence of the publisher's state of mind or the editorial process that went into the publication.[136] Where plaintiff is a private individual no malice need be shown to assert a cause of action since the defendant may not assert a privilege to defeat venue.[137] To maintain suit against a non-resident defendant where he is joined with a resident defendant, the plaintiff must prove a good cause of action against both defendants.[138]

D. *Summary Judgment*

In defamation cases, summary judgments seem to be the normal outcome.[139] This is due in part to the difficulty plaintiff faces in overcoming constitutional protections and demanding standards of proof required to be successful in the suit.[140] Summary judgments are not utilized to deny the plaintiff his right to jury trial, but instead seek to dispose of unmeritorious claims.[141]

The plaintiff generally has the burden to prove actual malice when the plaintiff is a public figure or official, and to prove common law malice to

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Co. v. Bessent, 601 S.W.2d 487, 489 (Tex. Civ. App.—Beaumont 1980, writ dism'd).

136. *See* Foster v. Upchurch, 624 S.W.2d 564, 566 (Tex. 1981) (no evidence presented of actual malice, may not simply rely on internal inconsistencies in publication itself).

137. *See* Thorn v. Theo. H. Blue Drilling, Inc., 472 S.W.2d 535, 537 (Tex. Civ. App.—El Paso 1971, no writ). McDonald states: "If the controverting affidavit brings the cause within a venue exception, the court will not . . . consider matters in abatement, the in sufficiency of the petition to state an enforceable claim, or affirmative defenses." 1 R. McDONALD, TEXAS CIVIL PRACTICE § 4.55, at 614 (1965).

138. *See* A. H. Belo Corp. v. Rayzor, 620 S.W.2d 756, 761 (Tex. Civ. App.—Fort Worth 1981, no writ).

139. *See* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 457, 467 (35% of federal appeals in defamation actions involved motions for summary judgment). In Texas, 43.4% of libel appeals are the result of summary judgments, with 13% of all libel appeals being finally decided by summary judgment. One survey demonstrated that between 1971 and 1977, less than 2% of all civil cases in Texas were disposed of by summary judgment. *See* Pittsford & Russell, *Summary Judgment in Texas: A Selective Survey*, 14 HOUS. L. REV. 854, 854 (1977). Another survey indicated that 70% of all summary judgment cases decided between 1968 and 1976 were reversed and remanded for trial by the appellate court. *See* Sheehan, *Summary Judgment: Let the Movan Beware*, 8 ST. MARY'S L.J. 253, 254 (1976).

140. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION, Summer 1980, at 12, 16. New York Times, Co. v. Sullivan, 376 U.S. 254 (1964) mandated first amendment protection for even false statements in certain instances. *Id.* at 278-80. After *Times*, summary judgments in libel cases were the rule, the purpose being to weed out those cases that were unable to sufficiently demonstrate the "actual malice" standard used against media defendants by a public official or figure. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION, Summer 1980, at 12, 16.

141. *See* City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 n.5 (Tex. 1979); Gulbenkian v. Penn, 151 Tex. 412, 416 252 S.W.2d 929, 931 (1952).

overcome a conditional privilege.[142] The defendant must prove an absence of malice when he has instigated the motion for summary judgment.[143] Texas has adopted the position that actual malice deals with the state of mind of the defendant, which should not be determined without a jury trial, and summary judgments should be a disfavored remedy in these instances.[144] Summary judgments will only be granted where the "proof establishes as a matter of law that there is no genuine issue of fact."[145] If there is any doubt as to whether a material fact exists, then it is resolved against the movant and summary judgment will be denied.[146] Additionally, a party's pleadings are never considered as proof in summary judgment proceedings.[147] If the defendant makes a written request for summary judgment, the plaintiff must make a written answer to the motion and expressly present to the trial court all issues that would defeat the motion.[148] Issues not presented to the trial court cannot be considered on appeal as grounds for reversal.[149]

Before 1978, libel defendants could not use the affidavit of an interested witness to establish a publication's truth, and thus, disprove actual malice because use of the affidavit permitted a unilateral subjective determination of the facts.[150] A summary judgment may now be based on the

142. *Accord* Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 535-36 (Tex. Civ. App.—Beaumont 1979, no writ). The court in *Wise* asserted that the 1978 amendment to Rule 166-A did not change the rule that the movant has the burden to prove all essential elements of his cause as a matter of law in order to be entitled to summary judgment. *Id.* at 535-36; *see* Houston v. Grocers Supply Co., 625 S.W.2d 798, 801 (Tex. Civ. App.—Houston [14th Dist.], 1981, no writ) (general rule is plaintiff has burden to prove malice where there is conditional privilege).

143. *See* Houston v. Grocers Supply Co., 625 S.W.2d 798, 801 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

144. *See* Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 536 (Tex. Civ. App.—Beaumont 1979, no writ). The court noted the difficulty of proving actual malice and indicated that plaintiff should at lease be entitled to a jury trial for the determination of actual malice. *Id.* at 536.

145. Gibbs v. General Motor Corp., 450 S.W.2d 827, 828 (Tex. 1970).

146. *See* Rose v. Enterprise Co., 617 S.W.2d 737, 740 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.).

147. *See, e.g.*, City of Houston v. Clear Creek Basis Auth., 589 S.W.2d 671, 678 (Tex. 1979); Hidalgo v. Surety Savings & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971); 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.26, at 1389 (1965).

148. *See* City of Houston v. Clear Creek Basis Auth., 589 S.W.2d 671, 677 (Tex. 1979).

149. *See* TEX. R. CIV. P. 166-A(c). The rule provides in pertinent part that "issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." *Id.* The new addition was to encourage the trial court to utilize summary judgments when appropriate. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 676 (Tex. 1979).

150. *See* Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 536 (Tex. Civ. App.—Beaumont 1979, no writ); Kennedy v. Texona Broadcasters, Inc., 507 S.W.2d 864, 867

testimonial evidence of an interested or expert witness, if uncontroverted and if the evidence is clear, positive, direct . . . and could have been readily controverted."[151] Thus, summary judgments may be more readily granted for the defendant if the plaintiff fails to adequately controvert the motion in writing in the trial court. Summary judgments in cases utilizing the negligence standard are unusual because negligence involves what a reasonable man would do, which involves a question of fact for the jury's determination.[152] In cases where a private plaintiff is involved, the plaintiff must insure that the defendant has no claim or privilege or an adequate defense, or summary judgment will be granted.[153]

E. *Jury Selection*

Because the jury decides whether the plaintiff has proven actual malice[154] or whether the words published are actionable,[155] the jury selected must have the best collective attitude toward the plaintiff. The plaintiff's attorney should determine what type of juror is most likely to sympathize with the plaintiff and his injury. Factors which tend to indicate a favorable attitude toward the plaintiff include an uneducated juror; one who does not enjoy reading,[156] or a political conservative that supports the right to censorship rather than the right to publish.[157] In a case involving a media defendant, the juror should be one that associates with the common man, as opposed to one that favors big business. Alternatively, the juror may be a member of a group that has been maligned by the press.[158]

(Tex. Civ. App.—Dallas 1974, no writ) (station manager's deposition that he had no reason to doubt truth of statements by political candidate did not establish absence of malice).

151. City of Houston v. Clear Creek Basis Auth., 589 S.W.2d 671, 676 (Tex. 1979). *But see* Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 536 (Tex. Civ. App.—Beaumont 1979, no writ) (court states they are unwilling to adopt a rule where a self-serving affidavit by an interested witness is accepted).

152. *See* R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 552 (1980).

153. *See* O'Neil v. Dun & Bradstreet, Inc., 448 S.W.2d 153, 155 (Tex. Civ. App.—El Paso 1969) (if language is unambiguous and facts are undisputed, question of privilege is one of law for courts), *reversed on other grounds*, 456 S.W.2d 896 (Tex. 1970).

154. *See* Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 536 (Tex. Civ. App.—Beaumont 1979, no writ).

155. *See* TEX. CONST. art. I, § 8. The constitution provides that "In all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." *Id.*

156. *See* Brosnahan, *First Amendment Jury Trials*, LITIGATION, Summer 1980, at 28, 29 (high school graduate less likely to understand or sympathize with constitutional issues, ideally juror should sympathize with injury instead).

157. *See id.* at 29 (membership in religious group that support types of censorship).

158. *See id.* at 29 (anti-establishment or one who sympathizes with those attacked by media).

F. *Damages*

The most prevalent remedy requested in a defamation action is pecuniary damages to compensate plaintiff for the loss of reputation.[159] The landmark case in the area of damages for defamation is *Gertz v. Robert Welch, Inc.*[160] *Gertz* provides that private plaintiffs who fail to establish actual malice are limited to actual damages.[161] *Gertz* has no effect on cases in which the *Times* actual malice standard is proven,[162] and punitive damages may still be awarded in these instances.[163] Texas courts have noted that legal commentators are in disagreement as to whether *Gertz* applies solely to media defendants or if it also applies to cases of purely private litigation.[164] Nevertheless, a majority of private defamation cases have been decided on common law rules rather than the *Gertz* standard, although the courts have never specifically enunciated the standard for private defamation actions.[165]

Damages in a libel action are left to the jury's discretion[166] and cannot

159. *See* 1 A. HANSON, LIBEL AND RELATED TORTS 129 (1969). Other remedies are available, such as retraction, correction, right of reply and injunctive relief. *Id.* at §§ 168-70, at 138-40.

160. 418 U.S. 323 (1974). It is ironic that the most important case affecting recoverable damages had nothing to do with damages in the case itself. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 341 (1980).

161. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). The Court goes on to state that actual injury is not limited to out of pocket loss, it may also include impairment of reputation and standing in the community, personal humiliation, mental anguish, and suffering. *Id.* at 350.

162. *See* British Overseas Airways Corp. v. Tours & Travel of Houston, Inc., 568 S.W.2d 888, 892-93 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (jury awarded $25,000 actual damages and $7,500 exemplary damages on a showing of malice); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (jury awarded $150,000 actual damages and $300,000 punitive damages upon a showing of malice), *appeal dism'd*, 434 U.S. 962 (1978).

163. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

164. *See, e.g.*, Ryder Truck Rentals v. Latham, 593 S.W.2d 334, 338 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.); Southwestern Bell Tele. Co. v. Dixon, 575 S.W.2d 596, 600 (Tex. Civ. App.—San Antonio 1978), *writ dism'd*, 607 S.W.2d 240 (1980); Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 11 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). *Compare* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 792-93 (1975) *and* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 215-20 (1976) *with* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1221-27 (1976).

165. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 11 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.).

166. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); Winkel v. Hankins, 585 S.W.2d 889, 894 (Tex. Civ. App.—Eastland 1979, writ dism'd).

be measured by any fixed rule or standard since they are purely personal.[167] No fixed ratio between exemplary and actual damages has been established by the courts or the legislature; the courts only require that they must be reasonably apportioned.[168] Since 1964, the Texas courts have only upheld four cases where a jury award of damages was granted, and the court has specifically stated that awards of up to $450,000 are not excessive.[169]

In cases of libel per se, the law presumes some actual damages,[170] but if libel per se is not proven, the plaintiff must establish proof of actual damages to support the action.[171] Therefore, in libel per se actions, the plaintiff may recover for general damages without any specific proof that they were incurred regardless of whether there was any other injury.[172] General damages include mental suffering, injury to feelings, and humiliation if they are the direct and proximate result of defamation.[173] Since *Gertz*, presumed damages are unconstitutional without a showing of actual malice, but an award of general damages for actual injury is sanctioned even without a showing of malice.[174]

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167. *See* Bayoud v. Siegler, 555 S.W.2d 913, 916 (Tex. Civ. App.—Beaumont 1977, writ dism'd); Whalen v. Weaver, 464 S.W.2d 176, 182 (Tex. Civ. App.—Houston [1st Dist.] 1970, writ ref'd n.r.e.).

168. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). The court stated that Florida in Air Line Employees Assoc. Int'l v. Turner, 291 So. 2d 670 (Fla. App. 1974), has implicitly approved a 10 to 1 ratio of punitive damages to actual damages. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 703-04 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

169. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 882 (Tex. 1971) (jury gave $10,000 award); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 703 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) ($450,000 total recovery not excessive); British Overseas Airways Corp. v. Tours & Travel of Houston, Inc., 568 S.W.2d 888, 891 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (jury awarded $32,500 in damages); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 746 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.) (jury awarded $200,000 damages), *appeal dism'd*, 434 U.S. 962 (1977).

170. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); Bayoud v. Siegler, 555 S.W.2d 913, 915 (Tex. Civ. App.—Beaumont 1977, writ dism'd).

171. *See* Fields v. Worsham, 476 S.W.2d 421, 427 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). Libel per se means that a statement is defamatory on its face. *See* Thorn v. Theo. H. Blue Drilling, Inc., 472 S.W.2d 535, 536 (Tex. Civ. App.—El Paso 1971, no writ).

172. *See* Associated Press v. Walker, 393 S.W.2d 671, 682 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.), *rev'd sub. nom.* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

173. *Id.* at 682.

174. *See* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 348-49 (1980) (injury to reputation closely related to presumed damages, but courts allow it).

IX. DEFENSES

A. *Absolute Privileges*

Several possible defenses exist in a defamation action, including failure to establish one of the elements of defamation,[175] absolute and qualified privileges, truth, and the running of the statute of limitations. An absolute privilege is a complete defense in libel actions[176] and exists where no remedy is provided, even though the statement is false or maliciously made.[177] The justification for absolute privilege is based on the premise that the defendant is furthering a socially important interest in making the statement.[178] Public policy also dictates that a citizen should feel free to appeal to government agencies for redress of grievances without fear of being subjected to a libel action.[179] The absolute privilege is limited to statements made in judicial, legislative, executive and quasi-judicial proceedings;[180] communications between spouses;[181] and to any preliminary

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175. *See* 1 A. HANSON, LIBEL AND RELATED TORTS 79-80 (1969). This can be done by demonstrating: (1) there was a lack of publication to a third party; (2) that the words were not directed toward an identifiable plaintiff; (3) the words were not defamatory; (4) plaintiff consented to the publication; (5) the words were libel per quod and no or insufficient special damages were pled; (6) no actual malice was proven in a *Times* case. *Id.* at 79-80.

176. *See* Zarate v. Cortinas, 553 S.W.2d 652, 654 (Tex. Civ. App.—Corpus Christi 1977, no writ).

177. *See* Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 110-11, 166 S.W.2d 909, 912 (1942); Zarate v. Cortinas, 553 S.W.2d 652, 654 (Tex. Civ. App.—Corpus Christi 1977, no writ).

178. *See* Zarate v. Cortinas, 553 S.W.2d 652, 654-55 (Tex. Civ. App.—Corpus Christi 1977, no writ).

179. *See* Runge v. Franklin, 72 Tex. 585, 590, 10 S.W. 721, 724 (1889); Moore & Associates v. Metropolitan Life Ins., 604 S.W.2d 487, 489 (Tex. Civ. App.—Dallas 1980, no writ). The power of the court to strike matters from the record and punish for contempt is considered an adequate safeguard against abuse. *See* Runge v. Franklin, 72 Tex. 585, 590, 10 S.W. 721, 724 (1889).

180. *See* Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 111, 166 S.W.2d 909, 912 (Tex. 1942); McAfee v. Feller, 452 S.W.2d 57, 60 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); *see also* Putter v. Anderson, 601 S.W.2d 73, 76 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). For examples of quasi-judicial agencies before whom communications are absolutely privileged, see Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 109, 166 S.W.2d 909, 913 (1942) (Board of Ins. Commissioners to investigate applicant for license to sell insurance); Hott v. Yarbrough, 112 Tex. 179, 183-87, 245 S.W. 676, 678 (Tex. 1922) (letter to grand jury foreman absolutely privileged); Aransas Harbor Terminal Ry. v. Taber, 235 S.W. 841, 842 (Tex. Comm. App. 1921, judgmt adopted) (Railroad Commission before which accusatory letter published); Bloom v. A.H. Robins Co., 479 S.W.2d 780, 782 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (Pharmacy Board in front of which drug manufacturer's letter was published), *cert. denied*, 410 U.S. 983 (1973); McAfee v. Feller, 452 S.W.2d 56, 58 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ) (state bar grievance committee); Connellee v. Blanton, 163 S.W. 404, 406 (Tex. Civ. App.—Fort Worth 1913, writ ref'd) (pardon

communication by an attorney in a proposed judicial proceeding.[182]

B. *Conditional Privileges*

A conditional or qualified privilege exists when the interest of the participants or society dictate that the communication should not be hampered by fear of lawsuit.[183] Public policy, however, is not so important that an inquiry into the motives and reasonableness of the statement is forbidden.[184] The Texas courts dictate that a qualified privilege exists when either the author or the public has an interest in a communication, or where the publisher has a duty to perform to another who owes a corresponding duty.[185] The media possesses a statutory qualified privilege to report on judicial, legislative, executive proceedings, and public meetings or to make fair comment or criticism of official acts of public officials.[186] For the statutory privilege to exist, the publication must be a fair, true and impartial account of the proceedings.[187] A qualified privilege may be lost if there is evidence showing the communication was made in bad faith, with malice,[188] or in an unlawful manner for an unlawful purpose.[189]

A privilege is defined as an affirmative defense that confesses yet seeks to avoid liability.[190] The defendant has the burden to demonstrate that a publication is privileged except when plaintiff's petition on its face demonstrates a privilege exists.[191] Once a privilege is shown to exist, the bur-

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procedure before Governor).

181. *See* Zarate v. Cortinas, 553 S.W.2d 652, 654 (Tex. Civ. App.—Corpus Christi 1977, no writ); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 114, at 777-85 (1971); *cf.* Moore & Assoc. v. Metropolitan Life Ins., 604 S.W.2d 487, 490 (Tex. Civ. App.—Dallas 1980, no writ) (absolute privilege not necessarily available to private persons making communication mandated by law).

182. *See* Royal Russell & Gulf States Energy Corp. v. Clark, No. 20709 (Tex. Civ. App.—Dallas, Aug. 7, 1981). Since this is an unpublished opinion, its precedential value is uncertain.

183. *See* 1 A. HANSON, LIBEL AND RELATED TORTS 95 (1969).

184. *See* Zarate v. Cortinas, 553 S.W.2d 652, 654 (Tex. Civ. App.—Corpus Christi 1977, no writ).

185. *See* British Overseas Airways v. Tours & Travels of Houston, Inc., 568 S.W.2d 888, 892-93 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

186. *See* TEX. REV. CIV. STAT. ANN. art. 5432 (Vernon 1958).

187. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 884 (Tex. 1970).

188. *See* McDonald v. Glitsch, Inc., 589 S.W.2d 554, 556 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (burden on plaintiff to prove malice); Buck v. Savage, 323 S.W.2d 363, 372-73) (Tex. Civ. App.—Houston [1st Dist.] 1959, writ ref'd n.r.e.) (malice is defined as want of good faith).

189. *See* British Overseas Airways v. Tours & Travels, Inc., 568 S.W.2d 888, 892-93 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

190. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 884 (Tex. 1970).

191. *See id.* at 884; O'Neil v. Dun & Bradstreet, Inc., 448 S.W.2d 153, 155 (Tex. Civ.

den is on plaintiff to show the privilege has been lost.[192] Generally, if the facts are undisputed and the language used is unambiguous, the jury determines how an ordinary reader would interpret the publication.[193] A conditional privilege can only be overcome by evidence of actual malice,[194] with the communication carrying a presumption of good faith.[195] The defendant's belief in the truth of a conditionally privileged statement is essential in a determination of malice.[196] The privilege is not lost if one made the statement believing it to be true, even if there is no reasonable grounds for the belief.[197] A statement need not be literally true to be privileged; substantial truth is sufficient.[198] A statement cannot be literally or substantially true, however, if it implies a false impression by omitting facts that would refute the false impression.[199]

C. *Truth*

The truth of a statement is a complete defense in libel actions.[200] Truth acts as a defense even when the plaintiff's proven misconduct is substantially different in kind from the misconduct charged.[201] To negate the de-

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App.—El Paso 1969), *rev'd on other grounds*, 456 S.W.2d 896 (Tex. 1970).

192. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 884 (Tex. 1971); O'Neil v. Dun & Bradstreet, Inc., 448 S.W.2d 153, 155 (Tex. Civ. App.—El Paso 1969), *rev'd on other grounds*, 456 S.W.2d 896 (Tex. 1970).

193. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 884 (Tex. 1970).

194. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 11-12 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (malice is a knowledge of falsity or reckless disregard for truth).

195. *See* British Overseas Airways v. Tours & Travels of Houston, Inc., 568 S.W.2d 888, 893 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (good faith presumed); Cooksey v. McGuire, 146 S.W.2d 480, 483 (Tex. Civ. App.—Eastland 1940, no writ) (malice not presumed in defense of privilege).

196. *See* Mayfield v. Gleichert, 484 S.W.2d 619, 627 (Tex. Civ. App.—Tyler 1972, no writ) (privilege not lost if one believes in its truth).

197. *See id.* at 627.

198. *See* Walker v. Globe-News Publishing Co., 395 S.W.2d 686, 689 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.) (article reporting stolen property recovered from co-accused rather than from accused is substantially true).

199. *See* Express Publishing Co. v. Gonzalez, 350 S.W.2d 589, 592 (Tex. Civ. App.—Eastland 1961, writ ref'd n.r.e) (article stating defendant was guilty failed to mention judgment was solely on appeal bond for costs).

200. *See* Bell v. Gayle, 384 F. Supp. 1022, 1027 (N.D. Tex. 1974) (newspaper article stating true reasons for policeman's discharge not actionable); Zarate v. Cortinas, 553 S.W.2d 652, 654 (Tex. Civ. App.—Corpus Christi 1977, no writ) (true statement not actionable); *see also* TEX. REV. CIV. STAT. ANN. art. 5431 (Vernon 1958) (truth of statement is defense).

201. *See* Shihab v. Express-News Corp., 604 S.W.2d 204, 208 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (court reasoned proof defendant murdered B would justify accusation defendant murdered A, as act is equally reprehensible in mind of average

fense, the plaintiff must demonstrate that the defamation published would affect the mind of a reader in a different way than the misconduct proved. If this is not done, any variance between the misconduct charged and that proved is disregarded.[202]

D. *The Statute of Limitations*

The statute of limitations also acts as a bar to a defamation action. In Texas, article 5524 defines the applicable limitations period for libel actions.[203] The adoption of the discovery rule in libel actions stipulates that the one year limitations period runs from the time when the plaintiff learned or, in the exercise of reasonable diligence, should have learned of the libelous statement.[204] A cause of action for libel accrues at the time of the defamation, with limitations running from the date of the communication, or its discovery, and not from the date of its consequences.[205] Additionally, under article 5524, the mere filing of a suit will not toll the limitations period; it is further required that the plaintiff use due diligence to procure issuance and service of citation.[206] When a cause of action accrues while a defendant is out of state the plaintiff has recourse in article 5537,[207] a suspension statute that acts to toll the limitations period for the time a defendant is out of state.[208] The burden of pleading and

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person).

202. *See id.* at 208.

203. *See* TEX. REV. CIV. STAT. ANN. art. 5524 (Vernon 1958). The statute provides that actions for libel shall be commenced and prosecuted within one year of accrual of the action. *Id.*

204. *See, e.g.*, Kelly v. Rinkle, 532 S.W.2d 947, 949 (Tex. 1976) (petitioner neither knew or should have known of credit report within one year of case's filing); Citizens State Bank of Dickinson v. Shapiro, 575 S.W.2d 375, 388 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (petitioner knew of defamatory communication two years before suit filed, therefore statute of limitations bars action); Armstrong v. Morgan, 545 S.W.2d 45, 47 (Tex. Civ. App.—Texarkana 1976, no writ) (discovery rule applied to medical report).

205. *See* Moore & Assoc. v. Metropolitan Life Ins. Co., 604 S.W.2d 487, 491 (Tex. Civ. App.—Dallas 1980, no writ) (limitations runs from time libelous letters are sent).

206. *See* TEX. REV. CIV. STAT. ANN. arts. 5524-5529 (Vernon 1958). Statutes require that the action be "commensed and prosecuted" within the limitations period. *Id.* This has been interpreted to mean more than the mere filing of petition. *See* Rigo Mfg. Co. v. Thomas, 458 S.W.2d 180, 182 (Tex. 1970); Walker v. Hanes, 570 S.W.2d 534, 539 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

207. TEX. REV. CIV. STAT. ANN. art. 5537 (Vernon 1958). The statute provides that the limitations period is tolled when the defendant is outside the state limits at the time the cause of action accrued or is maintained. *Id.*

208. *See* Wise v. Anderson, 163 Tex. 608, 611-12, 359 S.W.2d 876, 879 (1962). The statute also applies to nonresidents present in the state when the cause of action accrued, but later leave the state. *Id.* at 611, 359 S.W.2d at 879.

proving the defendant's absence is on the plaintiff.[209]

X. Profile of the Successful Plaintiff: Charting the Outcome of Texas Cases Since *Times*

The following tables were designed to aid the plaintiff's counsel in the determination of whether to pursue a libel action. All Texas civil libel appeals from January 1965[210] to December of 1981 are examined. Only appellate cases are examined, and only the latest appeal of all related cases are summarized. Because the *Times* decision has given constitutional aspects to media cases, defendants are classified as media and non-media.[211] Not all appellate decisions are published, hence the tables do not reflect all cases appealed. Media cases, however, involve constitutional issues and are, therefore, more likely to be reported.[212] Media defendants also tend to appeal all losses;[213] consequently, the tables probably are an accurate reflection of defendant media appeals. Generally, libel appeals involve only little additional expense; therefore, non-media cases are also likely to be appealed.[214]

Table A merely illustrates that media defendants constitute the largest single category of defendants in libel actions in Texas.[215] Of the 69 final appeals examined, 44.8% involved media defendants.

TABLE A
DISTRIBUTION OF CASES

Court	Media		Nonmedia		Total	
	#	%	#	%	#	%
Supreme Court	4	5.8	4	5.8	8	11.5
Civil Appeal	27	39.0	34	53.6	61	88.4
Total	31	44.8	38	59.4	69	

209. *See* Harris v. CBS, 405 S.W.2d 613, 617 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.) (purpose of article 5537 was to protect domestic creditors).

210. 1965 was chosen as the starting point to allow the Texas courts to assimilate the New York Times Co. v. Sullivan, 376 U.S. 254 (1964) decision.

211. For the purposes of this survey, media defendants are defined as all newspaper, broadcasting, publishing or magazine defendants.

212. *See* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Research J. 457, 461.

213. *See* Warren, *Libel—Some Thoughts for the Defense*, Litigation, Summer 1980, at 12 (media cases involve important points of principle that are defended at all costs).

214. *See* Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Am. B. Found. Research J. 457, 462.

215. *See, e.g.*, Denton Publishing Co. v. Boyd, 460 S.W.2d 881 (Tex. 1970); Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533 (Tex. Civ. App.—Beaumont 1979, no writ); Harris v. CBS, 405 S.W.2d 613 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

The purpose of Table B is to illustrate at what stage of litigation the decision being appealed occurred. Of the 69 final appeals examined, 43.4% involved a motion for summary judgment,[216] indicating that a substantial number of libel actions are disposed of before trial. A significantly greater proportion of plaintiffs in nonmedia appeals went to trial,[217] probably because summary judgments had already eliminated media cases where constitutional issues and media privileges could not be overcome by the plaintiff.

TABLE B
DISPOSITION OF CASES

Stage of Litigation	Media		Nonmedia	
	#	%	#	%
No Cause of Action	1	1.4	1	1.4
Venue	6	8.7	6	8.7
Summary Judgment	15	21.7	15	21.7
Post-trial Motion	9	13.0	16	23.2
Total	31	44.8	38	55.0

Table C seeks to illustrate who brings appeals,[218] indicating that plaintiffs have a very low rate of success in the trial courts at hearings on all motions. Since media defendants will only rarely accept a loss,[219] the 8.9% figure, reflected in Table C, of media defendants bringing appeals[220] is probably a reasonably accurate representation of all motions won by the plaintiffs in the trial court against media defendants.

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216. *See, e.g.*, Downer v. Amalgamated Meatcutters & Butcher Workmen of North America, 550 S.W.2d 744, 744 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); McAfee v. Feller, 452 S.W.2d 56, 56 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ); Brazile v. Tamorello, 442 S.W.2d 923, 923 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.).

217. *See, e.g.*, Putter v. Anderson, 601 S.W.2d 73 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); Roegelein Provision Co. v. Mayen, 566 S.W.2d 1 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Fields v. Worsham, 476 S.W.2d 421 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

218. *See, e.g.*, Rose v. Enterprise Co., 617 S.W.2d 737 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.); Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533 (Tex. Civ. App.—Beaumont 1979, no writ); Poe v. San Antonio Express-News Corp., 590 S.W.2d 537 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).

219. *See* Warren, *Libel—Some Thoughts for the Defense*, LITIGATION, Summer 1980, at 12.

220. *See, e.g.*, A.H. Belo Corp. v. Rayzor, 620 S.W.2d 756, 756 (Tex. Civ. App.—Fort Worth 1981, no writ); Houston Chronicle Publishing Co. v. Flowers, 413 S.W.2d 435, 435 (Tex. Civ. App.—Beaumont 1967, no writ); Associated Press v. Walker, 393 S.W.2d 671, 671 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.), *rev'd sub. nom.* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966).

TABLE C
WHO BRINGS APPEAL

Party Appealing	Media		Nonmedia		Total	
	#	%	#	%	#	%
Plaintiff	24	35.8	28	41.8	52	77.6
Defendant	6	8.9	9	13.4	15	22.3

Table D shows that while a highter percentage of summary judgments are granted for media defendants, a slightly greater number of nonmedia cases were affirmed on appeal. Of the seven media cases affirmed, three were affirmed because the plaintiff was never specifically identified,[221] one because the libelous statement was of the dead,[222] and three involved newspapers publising privileged matters.[223] Of the seven reversed and remanded, most were remanded because a material fact issue surfaced.[224] The 1978 addition to Rule 166-A mandated that issues not presented to the trial court cannot be raised for the first time on appeal,[225] and was designed to encourage the trial court to utilize summary judgments to finally dispose of cases.[226] Of the eight summary judgments handed down by the trial court since the addition of the rule, five have been reversed and remanded.[227] Only one was affirmed with specific reference to Rule

221. *See, e.g.*, Goldstein v. KDFW, 541 S.W.2d 862, 864-65 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.); Webb v. Sessions, 531 S.W.2d 211, 213 (Tex. Civ. App.—Eastland 1975, no writ); Keys v. Interstate Circuit, Inc., 468 S.W.2d 485, 486 (Tex. Civ. App.—Tyler 1971, writ dism'd).

222. *See* Gonzales v. Times Herald Printing Co., 513 S.W.2d 124, 125-26 (Tex. Civ. App.—Dallas 1974, no writ).

223. *See, e.g.*, Dudley v. Farmers Branch Dailey Times, 550 S.W.2d 99, 100 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.); Dunn v. Newspapers, Inc., 446 S.W.2d 101, 102 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.), *cert. denied*, 400 U.S. 830 (1970); Walker v. Globe News Publishing Co., 395 S.W.2d 686, 689 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e).

224. *See, e.g.*, Poe v. San Antonio Express-News Corp., 590 S.W.2d 537, 542 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.) (defendant's failure to establish an absence of malice was one reason for reversal). *See also* Kennedy v. Texoma Broadcasters, Inc., 507 S.W.2d 864, 868 (Tex. Civ. App.—Dallas 1974, no writ) (defendant failed to negate malice); Autobuses Inter. v. El Continental Publishing Co., 483 S.W.2d 506, 509 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.) (defendant failed to negate malice).

225. *See* TEX. R. CIV. P. 166-A(c). The rule provides in pertinent part that "issues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal." *Id.*

226. *See* City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 676 (Tex. 1979).

227. *See, e.g.*, Rose v. Enterprise Co., 617 S.W.2d 737, 737 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.); Moore & Assoc. v. Metropolitan Life Ins. Co., 604 S.W.2d 487, 487 (Tex. Civ. App.—Dallas 1980, no writ); Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 533 (Tex. Civ. App.—Beaumont 1979, no writ).

166-A(c).[228] While it is still early, the figures seem to indicate that in libel cases, summary judgments still retain a high reversal rate.

TABLE D
ANALYSES OF SUMMARY JUDGMENT

Final Disposition on Appeal	Ruling by Trial Court			
	Granted for Defendant		Plaintiff Take Nothing	
	#	%	#	%
Media Defendant				
Affirmed	7	23.3	1	3.3
Reversed and Remanded	7	23.3		
Nonmedia Defendant				
Affirmed	7	23.3	1	3.3
Reversed and Remanded	5	16.7	2	6.6

Table E illustrates that while the plaintiffs brought 77.6% of all appeals,[229] the appellate courts affirmed rulings that favored defendants much more frequently[230] than they affirmed favorable rulings for the plaintiffs. In fact, the plaintiffs only acquired four outright wins,[231] the remainder of plaintiff's "wins" consisted of reversals of earlier trial court rulings favorable to the defendant.[232]

228. *See* Bailey v. Gulfway Nat'l Bank, 626 S.W.2d 70, 72 (Tex. Civ. App.—Corpus Christi 1981, no writ).

229. *See* Table C at page 1006 *supra*.

230. *See, e.g.*, Shihab v. Express-News Corp., 604 S.W.2d 204, 211 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.); Duncantell v. Universal Life Ins. Co., 446 S.W.2d 934, 937 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); Stewart v. Enterprise Co., 439 S.W.2d 674, 678 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

231. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 882 (Tex. 1970) ($10,000 damages); First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 703 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) ($450,000 recovery); British Overseas Airways Corp. v. Tours & Travel of Houston, Inc., 568 S.W.2d 888, 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) ($32,500 award); Houston Belt & Terminal Ry. Co. v. Wherry, 548 S.W.2d 743, 746 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) ($200,000 damages awarded), *appeal dism'd*, 434 U.S. 962 (1977).

232. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1, 13 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); Stewart v. Enterprise Co., 393 S.W.2d 372, 373-74 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.).

TABLE E
PARTIES REACHING TRIAL

Final Disposition on Appeal	Trial Court	
	Judgment for Plaintiff	Judgment for Defendant
Media Defendant	2	8
Affirmed	1	6
Reversed and remanded	—	2
Reversed and rendered	1	—
Nonmedia Defendant	6	10
Affirmed	3	8
Reversed and remanded	2	1
Reversed and rendered	1	1

Table F demonstrates that of the media defendant's that won by summary judgment, eight summary judgments for defendants were reversed and remanded to the trial court,[233] and one plaintiff had a take nothing judgment affirmed.[234] Of the post-trial wins by plaintiff against a media defendant, one judgment for defendant was remanded,[235] and one was a win by the plaintiff.[236] The four post-trial wins by plaintiff against a nonmedia defendant consisted of three outright wins granting damage awards[237] to the plaintiff, and one was a win on remand.[238] The overall success rate on all motions by plaintiff against media defendants is higher, however a great majority of plaintiff's wins were on remand of summary judgments.[239] Additionally, of the summary judgments remanded for trial action, none appeared again as an appeal, causing one to speculate that plaintiffs lost on the merits in the trial courts.

233. *See, e.g.*, Rose v. Enterprise Co., 617 S.W.2d 737, 737 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.); Wise v. Dallas Southwest Media Corp., 596 S.W.2d 533, 533 (Tex. Civ. App.—Beaumont 1979, no writ); Poe v. San Antonio Express-News Corp., 590 S.W.2d 537, 537 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).

234. *See* Dunn v. Newspapers, Inc., 446 S.W.2d 101 (Tex. Civ. App.—Waco 1969, writ ref'd n.r.e.), *cert. denied*, 400 U.S. 830 (1970).

235. *See* Stewart v. Enterprise Co., 393 S.W.2d 372 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

236. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 885 (Tex. 1971).

237. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 703 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); British Overseas Airways Corp. v. Tours & Travels of Houston, Inc., 568 S.W.2d 888, 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 746 (Tex. Civ. App.—Houston [1st Dist.], writ ref'd n.r.e.), *appeal dism'd*, 434 U.S. 962 (1977).

238. *See* Roegelein Provision Co. v. Mayen, 566 S.W.2d 1 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (affirmed in part, reversed and rendered in part).

239. See note 1 *supra*.

TABLE F
PERCENTAGE OF PLAINTIFF'S SUCCESS ON FINAL APPEAL

Proceeding	Media Defendants Total	Plaintiff wins	%	Nonmedia Defendants Total	Plaintiff wins	%
Venue	6	2	33.0	6	2	33.0
Summary Judgment	15	8	53.3	15	6	40.0
Post-trial	9	2	22.0	16	4	25.0
Total			40.0			32.4

Table G illustrates what defamatory conduct was charged to the plaintiffs experiencing successes in the appellate courts. For the purposes of Table G, a judgment that was reversed and remanded was termed a win, although in actuality it is not. The win for the plaintiff in the media bankruptcy category was by default, since the defendant had waived an available defense of privilege by failing to submit it to the trial court.[240] Also, the win for the plaintiff in the media business crime area is actually a case on remand because of a fact issue as to privilege.[241] Therefore, the one outright win for a plaintiff against a media defendant occurred only because the defendant had failed to assert an available privilege.

The "win" for nonmedia business crime was another case on remand, here the appellate court held that the plaintiff had defeated defendant's absolute privilege claim, and the case was remanded.[242] Plaintiff had three other "wins," in two the plaintiff succeeded in proving malice sufficient to overcome a conditional privilege,[243] and in the other, a libelous statement was found to be false.[244]

240. *See* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 883 (Tex. 1970) (in absence of privilege, statement that merchant is bankrupt is libel per se).

241. *See* Stewart v. Enterprise Co., 393 S.W.2d 373, 374 (Tex. Civ. App.—Beaumont 1965, writ ref'd n.r.e.), *on remand*, 439 S.W.2d 674 (Tex. Civ. App.—Beaumont 1969, writ ref'd n.r.e.).

242. *See* Manchester v. International Ass'n of Machinists and Aerospace Workers, 567 S.W.2d 623, 626 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.) (union official charged with theft of union funds), *cert. denied*, 440 U.S. 960 (1979).

243. *See* British Overseas Airways Corp. v. Tours & Travels of Houston, Inc., 568 S.W.2d 888, 893 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (malice sufficient to defeat conditional privilege demonstrated by false default notice sent to coerce plaintiff to pay disputed claim); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 754 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (malice shown by failure to present pathologist's report that refuted presence of methadone in accused drug user's system), *appeal dism'd*, 434 U.S. 962 (1977).

244. *See* First State Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 703 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (false report on fidelity bond crippled plaintiff's chances for future employment in banking).

TABLE G
SUCCESS BY CONTENT

Nature of Conduct Alleged	MEDIA P wins	MEDIA D wins	NONMEDIA P wins	NONMEDIA D wins
Crime:				
Nonbusiness	—	—	1	1
Business	1	4	1	2
Moral Failing:				
Nonbusiness	—	1	—	1
Business	—	—	1	—
Professional Incompetence	—	1	—	2
Business Bankruptcy	1	—	—	1
Failure to Pay Debts:				
Nonbusiness	—	—	—	4
Business	—	—	1	—

Defendants prevailed in the majority of all appeals, winning 60.0% of the media appeals and 67.6% of the nonmedia appeals.[245] The following Table of successful defenses illustrates that most defendants prevailed by the defenses of truth or privilege;[246] demonstrating that defendants won on common law or state statutory grounds, and not because of the standards imposed by *Gertz* or *Times*.

TABLE H
SUCCESSFUL DEFENSES

Grounds	Media	Nonmedia
Plaintiff not referred to	2	—
Words not actionable	3	2
Publication not shown	—	1
No showing of actual damages	—	1
Statute of Limitations	1	1
Truth	5	3
Qualified Privilege	2	5
Absolute Privilege	—	4
Malice not shown	2	—

XI. CONCLUSION

This comment attempted to identify difficulties the plaintiff's counsel may face in the determination of whether to pursue a libel action. Additionally, the writer sought to enable counsel to accurately predict his

245. See Table F at page 1009 *supra*.

246. *See, e.g.*, Barnett v. Tarrant County Humane Society, 608 S.W.2d 823, 825 (Tex. Civ. App.—Waco 1980, no writ) (truth); Shihab v. Express-News Corp., 604 S.W.2d 204, 211 (Tex. Civ. App.—San Antonio 1980, writ ref'd n.r.e.) (truth); Putter v. Anderson, 601 S.W.2d 73, 77 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (absolute privilege).

chances of success and the factors relevant to success in civil libel actions. Of the cases researched, plaintiffs brought 77.6% of all appeals, however, the defendants prevailed in the majority of appeals. In the 69 final appeals analyzed, defendants won an average of 62.2% of all appeals with only four cases resulting in damages being awarded to the plaintiff. The largest single group of defendants consisted of media defendants, comprising 44.8% of all appeals. The plaintiff enjoyed 11% more "wins" against media defendants, however, a majority of all the "wins" reported were reversals of summary judgments. As evidenced by the enactment of the 1978 amendment to Rule 166-A,[247] the intent of the supreme court was to encourage final summary judgments by making it more difficult for plaintiff to reverse the trial court decision.[248] Whether this goal is realized remains to be seen.

Defendants were generally victorious at all stages of litigation, demonstrating that a plaintiff's chances of successfully litigating a libel action through to completion are only marginal. As demonstrated, monetary damages are rarely awarded in libel actions. Nevertheless, pecuniary awards offer little satisfaction to the plaintiff, since the suit involves extensive and time consuming litigation. While plaintiffs have only a minimal chance of recovering monetary damages, especially where defendant is protected by a statutory or common law privilege, the plaintiff may gain a moral victory through nontrial devices such as retraction and correction. In short, a nontrial remedy may be the best advice that a plaintiff's attorney may offer his client in any libel action. Such a course would provide the client an opportunity to gain some measure of success, even if it is only moral and noncompensatory.

247. TEX. R. CIV. P. 166-A(c). The rule provides, in pertinent part, that "[i]ssues not expressly presented to the trial court by written motion, answer, or other response shall not be considered on appeal as grounds for reversal." *Id.*

248. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 676 (Tex. 1979) (summary judgment may be based on uncontroverted testimonial evidence, if plaintiff fails to adequately controvert the motion, it may not be raised on appeal).