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MASS COMMUNICATION LAW IN OKLAHOMA

By Joey Senat

Tenth Edition

MASS COMMUNICATION LAW IN OKLAHOMA

By Joey Senat, Ph.D.

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Contents

Acknowledgments ix

Preface xi

Freedoms of Speech and Press.....1
Oklahoma's Campus Free Speech Statute 7

Libel 13
Publication 18
Identification.....19
Group Libel 23
Defamatory Content.....26
Defamatory Per Se 30
Defamatory Per Quod.....35
Fault 37
Public Official 38
Public Figure 42
Private Figure 45
Actual Malice 46
Negligence.....55
Damages 57
Defenses.....59
Truth.....59
Qualified Privilege 60
Fair Comment & Criticism.....73
Opinion.....79
Anti-SLAPP Statute 83
Political Speech 100
Neutral Reportage 101
The Communications Decency Act.....103
Retraction Statutes 106
Print Retraction Statute 106
Broadcast Retraction Statute 107
Broadcast Station Liability 108
Preserving Political Utterances.....109

Disparagement of Agricultural Food Products 110
Criminal Libel.....112

False Light 121
Falsity Required / Truth is a Defense 123
Highly Offensive to a Reasonable Person 129
Actual Malice Required.....133
Publicity Required 140
Qualified Privilege.....141
Anti-SLAPP Statute 145
Statute of Limitations.....154

Infliction of Emotional Distress.....155
Intentional Infliction 156
Extreme & Outrageous Conduct 159
Severe Emotional Distress 166
Qualified Privilege 168
Anti-SLAPP Statute 169
Negligent Infliction.....177

Intrusion.....181
Reasonable Expectation of Privacy 184
Hidden Cameras.....187
Recording Electronic Conversations 188
Trespass 192

Publishing Private Facts.....197
Private Facts.....198
Public Records Provide a Defense.....200
Legitimate Public Concern 201
Public Person Over Time.....206
Publicity Required 207
Statute of Limitations.....208

Open Records Act.....209
Public Body Defined.....215
Nonprofit Corporations.....221
Public Official Defined.....222

Legislators.....223
Governor.....224
Public Records Defined.....228
Electronic Communications.....231
Court Records.....233
Sealing Records.....237
Jury Lists.....246
Pretrial Depositions.....247
Quasi-Judicial Bodies.....248
Exemptions.....251
Autopsy Records.....258
Bankrupt Business Records.....261
Business Plans, Feasibility Studies, Trade Secrets.....261
Confidential Personal Communications
Exercising Constitutional Rights.....262
Execution Procedure Records.....263
Juvenile Records.....264
Law Enforcement Records.....266
Investigatory and Litigation Records.....280
Library, Archive or Museum Materials.....280
Other Statutes.....281
Personal Information of Elected County Officials
and Law Enforcement Officers.....282
Personnel Records.....283
Public Utility Company Records.....295
Research Information.....297
Social Security Numbers.....299
Student Records.....300
Terrorism-related Records.....302
University Foundation/Donor Records.....305
Voter Registration Records.....307
Public Access.....307
Prompt, Reasonable Access.....313
Electronic Format.....318
Copy & Search Fees.....319
Electronic Format.....322
Search Fees.....324
Records Retention.....330

Electronic Records 332
Local Records.....333
Expungement 335
Attorney Fees and Court Costs 340
Criminal Penalties for Violations 344

Open Meeting Act.....349
Public Body Defined.....353
Advisory Committees.....354
Private Organizations 361
Meeting Defined 368
Types of Meetings.....371
Videoconference.....373
Email and Other Electronic Communications.....376
Social Gatherings and Informal Discussions.....377
Serial Meetings.....379
Advance Notice.....383
Agendas 386
Wording of Agendas 388
New Business 393
Executive Sessions.....395
Executive Session Topics.....400
Who May Attend Executive Sessions 408
Other Statutes Authorizing Executive Sessions 410
Deliberative Process Privilege 414
Voting in Public 415
Minutes 419
Filing Civil Suits 425
Criminal Penalties for Violations 431
Declaring Action Invalid 438

Journalist's Privilege.....443
Protection Under the First Amendment 443
Oklahoma's Shield Law.....445
Who Is Eligible For Protection?.....446
How Much Protection Is Offered? 447

Free Press – Fair Trial.....451

Prejudicial Publicity....452
Change of Venue and Voir Dire....452
Gag Orders....462
Closed Courtrooms....464
Sealed Documents....471
Oklahoma Open Records Act....476
First Amendment Right of Access....485
Jury Lists....491
Personal Identifying Information....492
Pretrial Depositions....492
Cameras in State Courtrooms....493

Obscenity....509
Child Pornography....513
Action Required of Film Developers & Computer Technicians....516

Appropriation....519
Identification Required....521
Commercial or Advertising Purpose Required....526
College Athletes' Name, Likeness, Image....530
Parody Protected....531
Property Right Survives Death....534
Statute of Limitations....535
Damages....535
Catfishing....536

Commercial Speech....539
Central Hudson Test....543
Deceptive Advertising....548
Email....552
Outdoor Advertising....555
Alcoholic Beverages....556

About the Author....563

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Preface

This book is designed as a primer on Oklahoma's mass communication law and as a supplement to the many textbooks that approach media law from a national perspective. It is intended for journalists, attorneys, teachers and students. For many in that audience, an initial explanation of the primary sources of laws examined by this book – Oklahoma's Constitution, statutes, common law and attorney general opinions – is helpful.

For example, while the First Amendment to the U.S. Constitution most notably offers protection for speech and the press, the Oklahoma Constitution states, "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[1] Oklahoma's Supreme Court has concluded that the state constitutional provision provides more protection than that afforded by the First Amendment.[2]

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[1] OKLA. CONST. art. II, § 22.

[2] *In re* Initiative Petition No. 366, State Question No. 689, 2002 OK 21, ¶ 7 ("[T]he Oklahoma Constitution is more protective of speech than is the United States Constitution."). *See also* Peterson v. Grisham, CIV-07-317-RAW, 2008 U.S. Dist. LEXIS 70206, at *12 (E.D. Okla. 2008) ("Oklahoma's protection of free speech is worded far more broadly than the First Amendment's restriction on governmental interference with speech.") (citing Gaylord Entertainment Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 139); Collier v. Reese, 2009 OK 86, ¶ 18, n.20, 222 P.3d 966 ("The Oklahoma Constitution's protections of free speech have been recognized as far more broadly worded than the First Amendment's restrictions.") (citing Gaylord Entertainment Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 139); Clinton v. State *ex rel.* Logan County Election Bd., 2001 OK 52, ¶ 9, 29 P.3d 543, 549 (Kauger, J., concurring) ("[T]he generous protection of free speech afforded by this State's own fundamental law. The States are entirely free to protect the right of expression with greater solicitude and within a wider dimensional range of immunity than the shield available under the U.S. Constitution."); Gaylord Entertainment Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 139 ("The Oklahoma Constitution's protection of free speech is far more broadly worded than the First Amendment's restriction on governmental interference with speech. The latter states in pertinent part that 'Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'").

Oklahoma courts are frequently called upon to clarify rights granted by the state Constitution and to interpret statutes created by legislative bodies. "If the question presented is one purely of state law, the Oklahoma Supreme Court is the final arbiter. An opinion of the Oklahoma Supreme Court, based on the Oklahoma Constitution, affording greater rights than those preserved by the United States Constitution may not be overturned by the United States Supreme Court."[3]

State courts have three main approaches to interpreting the scope of individual rights guaranteed under state constitutional provisions that parallel those in the U.S. Constitution. Under the "primacy approach," the state court looks first to its own state constitution and refers "to the federal constitution only when the right is not protected under state law."[4] "Advocates of the primacy model argue that it is logical to refer to state constitutions first because these came first and in fact served as the model for our federal Constitution."[5] Under this approach, "state constitutions are the 'primary source of protection for individual rights.'"[6]

The "interstitial" method of interpretation prescribes analyzing the U.S. Constitution first and turning "to the state constitution only when the federal constitution does not protect the right."[7] Under this

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[3] OKLAHOMA SUPREME COURT NETWORK, THE OKLAHOMA APPELLATE COURTS, *at* http://www.oscn.net/oscn/schome/appellate.htm (last visited Aug. 13, 2018).

[4] Shirley S. Abrahamson and Charles G. Curtis, Jr., *State Constitutions and Individual Rights*, *at* http://www.answers.com/topic/state-constitutions-and-individual-rights (last visited June 4, 2010) (Abrahamson is Chief Justice of the Wisconsin Supreme Court, and Curtis is a noted lawyer and adjunct professor at Marquette University Law School.). *See also* Sinead McLoughlin, *Choosing a "Primacy" Approach: Chief Justice Christine M. Durham Advocating States Rights in Our Federalist System*, 65 ALB. L. REV. 1161, 1167-69 (2002).

[5] McLoughlin, *supra* note 4, at 1167-68.

[6] *Id.* at 1167 (quoting Milo Steven Marsden, *The Utah Supreme Court and the Utah State Constitution*, 1986 UTAH L. REV. 319, 326 (1986)).

[7] Abrahamson and Curtis, *supra* note 4. *See also* McLoughlin, *supra* note 4, at 1168 ("The interstitial approach essentially prescribes deferring to federal constitutional law, and turning to comparable or similar state provisions only when the federal provision does not adequately address a 'claimed right.'"). "Proponents of the interstitial model claim that relying on federal law is beneficial to state courts because it heightens the validity and persuasive force of their decisions. Supporters of the primacy model, though, oppose the interstitial approach because it results in a

approach, "the state constitution serves as an additional or supplemental protection for individual rights."[8] "[I]f a right is protected under the federal Constitution, the state court will not consider its own constitution."[9]

Under the third approach, the state court moves "lock step" with the U.S. Supreme Court's interpretation of the relevant federal Constitutional provision, provided it is similar to the state provision at issue.[10] "Independent interpretation of a state constitution is not favored under the lockstep approach; hence, under this approach, interpretative authority of state constitutions is ultimately surrendered to the United States Supreme Court."[11]

When determining the constitutionality of statutes, the Oklahoma Supreme Court is guided by "well established principles." "A heavy burden is cast on those challenging a legislative enactment to show its unconstitutionality and every presumption is to be indulged in favor of the constitutionality of a statute," the court said in 1999. "If two possible interpretations of a statute are possible, only one of which would render it unconstitutional, a court is bound to give the statute an interpretation that will render it constitutional, unless constitutional infirmity is shown beyond a reasonable doubt. A court is bound to

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'piecemeal use of state constitutions,' which can 'denigrate[]' the force of state constitutions in the federal system. Proponents of the primacy approach have disavowed the interstitial approach also due to its propensity to be 'unprincipled' and 'result-oriented,'" *id*. at 1168-69; Rachel E. Fugate, *The Florida Constitution: Still Champion of Citizens' Rights?* 25 FLA. ST. U.L. REV. 87, 101-02 (1997) ("State courts using an interstitial method of analysis can diverge from federal precedent because of flawed federal analysis, structural differences between state and federal constitutional provisions, or distinctive state characteristics.").

[8] Abrahamson and Curtis, *supra* note 4.

[9] Fugate, *supra* note 7, at 101.

[10] *See* Abrahamson and Curtis, *supra* note 4 ("State courts frequently adopt the Supreme Court's analysis and interpretation of the federal Constitution as a guide to interpreting their own parallel state constitutional guarantees; these state courts move in 'lock step' with the Supreme Court."); McLoughlin, *supra* note 4, at 1169 ("The lockstep model suggests that state courts analyzing state constitutional issues should simply follow the federal courts' interpretation of the corresponding federal provision, assuming of course it is identical or similar to the state provision in question.").

[11] McLoughlin, *supra* note 4, at 1169.

accept an interpretation that avoids constitutional doubt as to the legality of a legislative enactment."[12]

However, the opposite is true if the statute infringes on freedoms protected by the federal First Amendment or Article II, Section 22,[13] of the Oklahoma Constitution. "[T]he usual presumption favoring the constitutional validity of legislation generally is not operative against statutory restriction of the preeminent freedoms secured by the first amendment," the Oklahoma Supreme Court noted in 1979.[14] "That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. It has been stated by the Federal Supreme Court therefore that any system of prior restraints of expression comes to the bar for judicial review bearing a heavy presumption against its Constitutional validity."

When interpreting the meaning of statutes, courts and the Oklahoma Attorney General should rule consistent with the legislative intent,[15] or what legislators meant as they passed the law, rather than

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[12] Fent v. Oklahoma Capitol Improvement Auth., 1999 OK 64, ¶ 3, 984 P.2d 200 (citing Application of Oklahoma Capitol Improvement Authority, 1998 OK 25, 958 P.2d 759, 763, *cert. denied* 119 S. Ct. 174, 142 L. Ed. 2d 142 (1998); Gilbert Central Corp. v. State, 1986 OK 6, 716 P.2d 654, 658). *See also* Edmondson v. Pearce, 2004 OK 23, ¶ 17, 91 P.3d 605 ("The general rules concerning the standard of review applicable when a statutory enactment is attacked on constitutional grounds were spelled out in *Fent v. Oklahoma Capitol Improvement Authority.")*.

[13] OKLA. CONST. art. II, § 22 ("Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.").

[14] State *ex rel.* Dept. of Transport. v. Pile, 1979 OK 152, ¶ 9, 603 P.2d 337, *cert. denied*, 453 U.S. 922, 100 S. Ct. 2960, 64 L. Ed. 2d 837 (1981).

[15] Okla. Ass'n for Equitable Taxation v. City of Okla. City, 1995 OK 62, ¶ 5, 901 P.2d 800 ("The determination of legislative intent controls statutory interpretation."). *See also* State v. Silas, 2020 OK CR 10, ¶ 6, 470 P.3d 339 ("A fundamental principle of statutory construction is to ascertain and give effect to the intention of the Legislature."); Okla. Ass'n of Broad. v. City of Norman, 2016 OK 119, ¶ 15, 390 P.3d 689 (citing Heldermon v. Wright, 2006 OK 86, ¶ 12, 152 P.3d 855, 859) ("In construing a statute, our goal is to determine the Oklahoma Legislature's intent."); Duncan v. Okla. Dept. of Corrections, 2004 OK 58, ¶ 5, 95 P.3d 1076 ("We also keep in mind when reviewing this matter, the primary goal of statutory interpretation is to ascertain and follow the Legislature's intention."); City of Durant v. Cicio, 2002 OK 52, ¶ 13, 50 P.3d 218 ("The fundamental rule of statutory construction is to ascertain and give effect to the legislative intent … ."); Johnson v. City of Woodward, 2001 OK 85, ¶ 6, 38 P.3d 219, 222 ("The intent of the legislature controls when interpreting statutes."); 2012 OK AG 1, ¶ 6 ("The object of statutory interpretation is to discern

what the judges want the law to mean.[16] "The intent is ascertained from the whole act based on its general purpose and objective," the Oklahoma Supreme Court said. "In construing statutes, relevant provisions must be considered together whenever possible to give full force and effect to each."[17]

To ascertain intent, courts and the state Attorney General look to the language of the statute.[18] "We presume that the Legislature intends what it expresses," the Oklahoma Supreme Court said.[19] Common words in the statute are given their "plain and ordinary

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legislative intent."); 2009 OK AG 27, ¶ 12 ("Our goal is to determine the intent of the Legislature.").

[16] Duncan v. Okla. Dept. of Corrections, 2004 OK 58, ¶ 5, 95 P.3d 1076 ("A court is duty-bound to give effect to legislative acts, not amend, repeal or circumvent them. ... When a court is called on to interpret a statute, the court has no authority to rewrite the enactment merely because it does not comport with the court's view of prudent public policy.") (citing City of Tulsa v. Pub. Employees Relations Bd., 1998 OK 92, ¶ 18, 967 P.2d 1214, 1221).

[17] *Okla. Ass'n for Equitable Taxation*, 1995 OK 62, ¶ 5. *See also Okla. Ass'n of Broad.*, 2016 OK 119, ¶ 16, 390 P.3d 689 (quoting Blevins v. W.A. Graham Co., 1919 OK 147, ¶ 8, 182 P. 247, 248) ("In ascertaining the Legislature's intent, a court looks 'to each part of an act, to other statutes upon the same or relative subjects, to the evils and mischiefs to be remedied, and to the natural and absurd consequences of any particular interpretation.'")

[18] *Cicio*, 2002 OK 52, ¶ 13 ("[A]nd that intent is first sought in the language of a statute."); *Okla. Ass'n for Equitable Taxation*, 1995 OK 62, ¶ 5 ("To ascertain intent, we look to the language of the pertinent statute.); Wagner v. Off. of the Sheriff of Custer Cnty, 2021 OK CIV APP 20, ¶ 17 ("Although the fundamental goal of statutory construction is to divine the intent of the legislature, we must search for that intent in the language of the statute.") (citing YDF, Inc. v. Schlumar, Inc., 2006 OK 32, ¶6, 136 P.3d 656, 658). *See also* State v. Silas, 2020 OK CR 10, ¶ 6, 470 P.3d 339 ("Legislative intent is first determined by the plain and ordinary language of the statute."); Gerhart v. State, 2015 OK CR 12, ¶ 14, 360 P.3d 1194 (Rules of statutory construction "include construing the statute according to the plain and ordinary meaning of its language with the fundamental principle being to ascertain and give effect to the intention of the Legislature as expressed in the statute.").

[19] *Okla. Ass'n for Equitable Taxation*, 1995 OK 62, ¶ 5. *See also* Johnson v. City of Woodward, 2001 OK 85, ¶ 6, 38 P.3d 219, 222 ("It is presumed that the law-making body has expressed its intent in a statute and that it intended what it so expressed. Rules of statutory construction are employed only when legislative intent cannot be ascertained from the language of a statute, as in cases of ambiguity or conflict with other statutes.") (citations omitted).

meaning" unless "a contrary intention plainly appears."[20] "The Legislature will not be presumed to have intended an absurd result, and a statute should be given a sensible construction, bearing in mind the evils intended to be avoided or the remedy afforded," the court said in 1976.[21]

When seemingly conflicting laws are being construed, a "specific statute controls over one of more general applicability and the most recent enactment controls over an earlier one."[22] "[H]armony, not

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[20] 25 O.S. § 1 (OSCN 2021) ("Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained."). *See also Okla. Ass'n of Broad.*, 2016 OK 119, ¶ 16, 390 P.3d 689 ("Words will be given their common meaning unless a contrary legislative intent plainly appears."); *Cicio*, 2002 OK 52, ¶ 13 ("Courts will give the words of a statute a plain and ordinary meaning, unless a contrary intention plainly appears. When the language of a statute is plain and unambiguous, no occasion exists for application of rules of construction, and the statute will be accorded meaning as expressed by the language employed."); Samman v. Multiple Injury Trust Fund, 2001 OK 71, ¶ 13, 33 P.3d 302, 307 ("[T]he plain meaning of a statute's language is conclusive except in the rare case when literal construction produces a result demonstrably at odds with legislative intent."); *Okla. Ass'n for Equitable Taxation*, 1995 OK 62, ¶ 5 ("Except when a contrary intention plainly appears, terms are given their plain and ordinary meaning."); and 2007 OK AG 11, ¶ 3 ("[N]either the provisions of the acts, the Oklahoma Constitution, other Oklahoma statutes nor published cases provide a definition of that term. In the absence of an express definition of the common words used in a statute, the words must be given their plain and ordinary meaning.").

[21] AMF Tubescope Co. v. Hatchel, 1976 OK 14, ¶ 21. *See also* 1999 OK AG 74, ¶ 13 (Courts should give the statute "a sensible construction bearing in mind the evils intended to be avoided.").

[22] *Duncan*, 2004 OK 58, ¶ 5 (citing Milton v. Hayes, 1989 OK 12, 770 P.2d 14). *See also* Sw. Bell Tel. Co. v. Okla. Cnty. Excise Bd., 1980 OK 97, ¶ 12, 618 P.2d 915, 919 (Okla. 1980) ("[F]or it is a long-standing rule of construction in this jurisdiction that where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in a general statute, the special statute and not the general statute applies."); Earnest Inc. v. LeGrand, 1980 OK 180, ¶ 6, 621 P.2d 1148, 1151 ("[I]f it be considered that there is a conflict between one provision of a section of statute and another, one matter to consider is that the last in order or position and arrangement possibly should prevail."); and 2009 OK AG 27, ¶ 5 ("When there are conflicting provisions of two statutes that cannot be harmonized, the one enacted later in time will prevail.") "Generally, a specific statute controls over a general statute. An amendment to a statute enacted later in time controls over an earlier conflicting statute," *id.* ¶ 9 (internal citations omitted).

confusion, is to be sought and when parts of an act are reasonably susceptible of a construction which will give effect to both and to the words of each, without violence to either, such construction should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict," the court said in 1980.[23]

It can be determined that the legislative body meant to repeal an earlier or more general provision "only when two statutory provisions irreconcilably conflict," the court said. "The more recent and specific statute will be determined to modify or supercede [sic] an earlier, more general statute only to the extent necessary to avoid the irreconcilable conflict or inconsistency."[24]

In addition to interpreting statutes, courts create a body of law known as the common law in which judges seek solutions based upon the traditions and customs of a people.[25] In Oklahoma, the state Supreme Court noted in 1994, the common law "remains in full force unless a statute explicitly provides to the contrary. The common law's legislative abrogation may not be effected by mere implication. It must be clearly and plainly expressed. A presumption favors the preservation of common-law rights. In this State's legal system the common law forms 'a dynamic and growing' body of rules that

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[23] Indep. Sch. Dist. No. 89 of Okla. Cnty. v. Okla. City Fed'n of Teachers, 1980 OK 89, ¶ 12 (citing Rogers v. Okla. Tax Comm'n, 1952 OK 388). *See also* AMF Tubescope Co. v. Hatchel, 1976 OK 14, ¶ 22 ("When two acts, or parts of acts, are susceptible of construction which will give effect to both without doing violence to either, this construction should be adopted in preference to one which leads to a conclusion that there is a conflict.").

[24] *Indep. Sch. Dist. No. 89*, 1980 OK 89, ¶ 12 (citing City of Sand Springs v. Dept. of Pub. Welfare, 1980 OK 36).

[25] BLACK'S LAW DICTIONARY 221 (7th ed. 2000) ("The body of law derived from judicial decisions, rather than from statutes or constitutions."). *See also* Tibbetts v. Sight 'n Sound Appliance Centers Inc., 2003 OK 72, ¶ 21, 77 P.3d 1042 ("Lawmaking is not the monopoly of the Legislature. A judge engages in lawmaking through adjudication when interstitially filling a gap in the law by formulating a common-law rule, construing a statute or agency rule, or by framing a constitutional norm. Both the process of developing the common law and that of concretizing the textual meaning of statutory and constitutional law is known as interstitial lawmaking by adjudication."); "Judges have a legislative license to continue crafting the norms of Oklahoma's common law. It stands conferred upon the judicial service by the provisions of 12 O.S.2001 § 2," *id.* ¶ 21 n.39.

changes with the conditions of society."[26]

Federal courts can be called upon to resolve disputes involving Oklahoma's mass communication laws when the parties in a lawsuit are citizens of Oklahoma and of another state and the amount in controversy exceeds $75,000. In such a diversity of citizenship[27] case heard in Oklahoma, the federal court applies Oklahoma law.[28] If the plaintiff filed the case in an Oklahoma district court, the plaintiff may have it removed it to the appropriate federal district court in the state.[29]

The state Attorney General also is often called upon to answer questions regarding the state's mass communication laws, most notably the state's Open Records and Open Meeting statutes. Unlike in many other states, attorney general opinions in Oklahoma are binding unless overturned by a court or the Legislature.[30] Opinions can be requested

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[26] Wright v. Grove Sun Newspaper Co. Inc., 1994 OK 37, ¶ 5, 873 P.2d 983, 987, 22 Media L. Rep. (BNA) 1801 (quoting OKLA. STAT. tit. 12, § 2 (OSCN 2001): "The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma.").

[27] *Diversity of Citizenship*. (n.d.) West's Encyclopedia of American Law, edition 2. (2008). Retrieved August 2, 2021, from https://legal-dictionary.thefree dictionary.com/Diversity+of+Citizenship. ("When opposing parties in a lawsuit are citizens of different states (including corporations incorporated or doing business in different states) or a citizen of a foreign country, which places the case under federal court jurisdiction, pursuant to Article 2, section 3 of the U.S. Constitution , and the federal Judicial Code, if the amount in controversy exceeds $75,000.").

[28] *See* Talley v. Time, Inc., 923 F.3d 878, 883 n.2 (10th Cir. 2019) ("Because federal court jurisdiction in this case is based on the diversity of citizenship between the parties, 28 U.S.C. § 1332, we apply the substantive law of the forum state — Oklahoma.") (citing Haberman v. Hartford Ins. Grp., 443 F.3d 1257, 1264 (10th Cir. 2006) ("In diversity cases, the substantive law of the forum state governs the analysis of the underlying claims ....").

[29] 28 U.S.C. § 1332. *See, e.g., Talley*, 923 F.3d at 882 (plaintiff filed in state district court, but defendants invoking 28 U.S. § 1332, removed the case to the U.S. District Court for the Western District of Oklahoma.").

[30] Rasure Co. Supt. v. Sparks, 1919 OK 231, ¶ 7, 75 Okla. 181, 183 P. 495 ("It is the duty of public officers, such as county superintendents, when in doubt as to the construction of an act of the Legislature, to follow, and not disregard, the advice of the Attorney General ... ."). *See also* Branch Trucking Co. v. Okla. Tax Comm'n, 1990 OK 41, ¶ 10, 801 P.2d 686 (citing *Rasure*) ("Since 1919, the Attorney General's opinions have been binding on state officials unless the opinion is inconsistent with a final determination of a court of competent jurisdiction."); State *ex rel.* York v. Turpen, 1984 OK 26, ¶ 5, 681 P.2d 763 (citing *Rasure*) ("While in many states such an Attorney General's opinion is merely advisory, in this state it has been held such an opinion is

only by state legislators, local district attorneys and "any other state official, board, commission or department, and … only upon matters in which they are officially interested."[31]

Another important interpreter of mass communication law is the *Restatement (Second) of Torts*, an influential treatise published by the American Law Institute that describes the law in a given area. The *Restatement (Second) of Torts* is frequently cited in judicial opinions, but it is not binding upon courts.

Understanding the structure of Oklahoma's judicial system also is helpful while reading this book. "In Oklahoma, all litigants are entitled to one appeal as a matter of right."[32] However, Oklahoma, unlike most states, has two courts of last resort.[33] The state Supreme Court, which consists of nine justices, hears appeals of only civil cases.[34] Appeals in criminal cases are heard by the Court of Criminal Appeals, which consists of five judges.[35] In a conflict over jurisdiction

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binding upon the state official affected by it and it is their duty to follow and not disregard those opinions. This duty continues until a judgment of a court of competent jurisdiction relieves the public official of the burden of compliance."); 2006 OK AG 35, ¶ 29 (citing State *ex rel.* Fent v. State *ex rel.* Okla. Water Res. Bd., 2003 OK 29, ¶ 16, 66 P.3d 432, 441) ("The effect of an Attorney General's Opinion in Oklahoma is different than it would be in many other states. In most jurisdictions, opinions or advice of the attorney general is advisory only, i.e., non-binding on the officials to whom it is addressed. In such jurisdictions attorney general opinions have in no sense the effect of judicial utterances. This is in sharp contrast to the role of the Attorney General in Oklahoma, where the Attorney General's opinion is binding on state officials to whom it applies, except only to the matter of constitutionality of statutes.").

[31] 74 O.S. § 18b(A)(5) (OSCN 2021).

[32] OKLAHOMA SUPREME COURT NETWORK, BRINGING A CASE BEFORE THE APPELLATE COURTS, *at* http://www.oscn.net/oscn/schome/appelcase.htm (last visited July 19, 2021).

[33] OKLAHOMA SUPREME COURT NETWORK, THE OKLAHOMA APPELLATE COURTS, *at* http://www.oscn.net/oscn/schome/appellate.htm (last visited July 19, 2021).

[34] *Id*.

[35] Originally established as the Criminal Court of Appeals by the state's first Legislature (1907-08), the name of the court was changed in 1958. *See* OKLAHOMA COURT OF CRIMINAL APPEALS, HISTORY OF THE COURT, *at* http://www.okcca.net/history-of-the-court/ (last visited July 19, 2021).

The state's 77 district courts, or trial courts,[36] hear civil and criminal cases.[37] Appeals in criminal cases go directly to the Court of Criminal Appeals.[38] But unlike in most other states, appeals in civil cases are not automatically made first to an intermediate appellate court. In Oklahoma, the state Supreme Court initially handles the appeal, deciding whether to hear the case then or assign it to the Oklahoma Court of Civil Appeals. The Supreme Court may retain the case when "new first impression issues, or important issues of law, or matters of great public interest are at stake."[39]

The majority of appellate decisions in civil cases are made by the Court of Civil Appeals.[40] It consists of four divisions, each with three judges. Two divisions are in Tulsa and Oklahoma City each. Court of Civil Appeals opinions may be released for publication either by that court or by the state Supreme Court. Opinions ordered released by the Oklahoma Supreme Court have precedential value.[41]

Court of Civil Appeals decisions can be appealed to the state Supreme Court.[42] For a writ of certiorari to be issued, a majority of the nine Supreme Court justices must agree to do so. Certiorari may be granted when the Court of Civil Appeals has decided a question of substance not previously determined by the state Supreme Court; its decision does not conform with a decision by the state or U.S. supreme courts; the Court of Civil Appeals divisions have issued conflicting

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[36] OKLAHOMA SUPREME COURT NETWORK, THE OKLAHOMA COURT SYSTEM, http://www.oscn.net/sites/judicialnominatingcommission/documents/District-Court-Judicial-Districts.pdf (last visited July 19, 2021). A district court is located in each county seat. The counties are organized into 26 judicial districts.

[37] OKLAHOMA SUPREME COURT NETWORK, JUDGES OF THE DISTRICT COURTS, *at* http://www.oscn.net/oscn/schome/judges.htm (last visited July 19, 2021).

[38] BRINGING A CASE BEFORE THE APPELLATE COURTS, *supra* note 15.

[39] *Id.*

[40] THE OKLAHOMA APPELLATE COURTS, *supra* note 19. The court was established in 1968 as the Court of Appeals.

[41] *Id. See also In re* Official Publ'n of Decisions, 2013 OK 109, ¶ 2 ("Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked shall not be considered as precedent by any court or cited in any brief or other material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case. Opinions marked Not For Official Publication shall not be published on the Oklahoma State Courts Network, nor in the Oklahoma Bar Journal.").

[42] BRINGING A CASE BEFORE THE APPELLATE COURTS, *supra* note 15.

opinions; or the "decision is a substantial departure from the usual course of judicial proceedings."[43]

District judges are chosen in nonpartisan elections to four-year terms. Members of Oklahoma's appellate courts are appointed by the governor from a list of three names submitted by the Oklahoma Judicial Nominating Commission.[44] Five of the nine Supreme Court justices are chosen one each from the state's five Congressional Districts. The other four are chosen at large.[45] The five judges on the Court of Criminal Appeals are chosen one each from the state's five Congressional Districts.[46] Those appellate justices and judges stand for retention by Oklahoma voters on a six-year rotating schedule.[47] No justice or judge has been rejected by voters since the retention ballot system began in 1967.[48]

The opinions written by Oklahoma's appellate courts, along with the state's Constitution, statutes and Attorney General opinions, can be found online at the Oklahoma State Courts Network, www.oscn.net.

Joey Senat, Ph.D.
July 2021

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[43] *Id*.

[44] OKLAHOMA SUPREME COURT NETWORK, JUDICIAL NOMINATING COMMISSION, *at* https://www.oscn.net/jnc/about (last visited July 19, 2021).

[45] 20 O.S. § 2 (OSCN 2021) (amended by Laws 2019, HB 2366, c. 154, § 2, eff. January 1, 2020).

[46] 20 O.S. § 33 (OSCN 21) (amended by Laws 2019, HB 2366, c. 154, § 3, eff. January 1, 2020).

[47] OKLAHOMA SUPREME COURT NETWORK, THE SUPREME COURT OF THE STATE OF OKLAHOMA, *at* http://www.oscn.net/oscn/schome/justices.htm (last visited July 19, 2021) ("The retention ballot appears on general election ballots and is a non-partisan, non-competitive election process. If a Justice resigns or dies during a term, vacancies are filled by gubernatorial appointment from the appropriate Supreme Court judicial district. Newly appointed Justices who serve more than one year must stand for retention at the next regular general election.").

[48] Michael McNutt, *Survey shows support for electing Oklahoma's appellate judges, justices*, THE OKLAHOMAN, Aug. 27, 2013, *available at* http://newsok.com/survey-shows-support-for-electing-oklahomas-appellate-judges-justices/article/3876693.

Freedoms of Speech and Press

> Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.
>
> – *Article II, Section 22, Oklahoma Constitution*[1]

The language of Oklahoma's constitutional guarantee of free speech and press "is clear and unambiguous," the Oklahoma Supreme Court observed in 1964. "The fundamental idea it conveys is that every person possesses the right to freely speak, write, and publish his sentiments on all subjects, but that he is responsible at the hands of the law for an abuse of such right," the court explained. "The constitutional provision forbids the making of any law abridging or restraining liberty of speech or of the press. Neither the Legislature nor the courts may do so."[2]

Government may not censor speech simply because officials do not like its message, the Oklahoma Supreme Court said in 1976.[3] "Free expression must not, in the guise of a regulation, be abridged or denied. Board as instrumentality of state may not restrict speech simply because it finds views expressed by any group abhorrent," the court said.[4]

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[1] *See also* OKLA. CONST. art. II, § 3 ("Right of assembly and petition. The people have the right peaceably to assemble for their own good, and to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance.").

[2] Schmoldt v. Oakley, 1964 OK 61, ¶ 21, 390 P.2d 882.

[3] Hennessey v. Indep. Sch. Dist. No. 4, Lincoln County, 1976 OK 101, ¶ 11, 552 P.2d 1141 ("A governmental body may not restrict expressive activity because of its message.") (declared a school board's attempt to restrict access to school facility because of group's message to be a violation of Article II, Section 22).

[4] *Id.*

The wording of Oklahoma's free speech and press provision is similar to that found in other state constitutions[5] and dates back to the early 1800s.[6] Oklahoma's Supreme Court has adopted a Meiklejohnian[7] interpretation of the provision, saying it is intended to protect the public by protecting the vigorous discussion of issues needed for a democracy.[8] The court explained:

> There is a recognized need in a free, self-governing society for dissemination of information of fundamental importance to the people. Without accurate media coverage and discussion of issues that are of governmental interest, it is doubtful that the general public would be able to make informed decisions and participate intelligently in their governance; nor would representatives of government be able to perform their assigned tasks effectively. The protection of this activity is essential for an effective democracy. The fundamental law's free-speech-and-press

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[5] *See, e.g.,* ALA. CONST. ANN. art. 1, § 4 ("That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."); WYO. CONST. art. 1, § 20 ("Every person may speak, write and publish on all subjects, being responsible for the abuse of that right.").

[6] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES ¶ 2.597-98 (1833) ("[E]very man shall have the right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person[,] … disturb the public peace, or attempt to subvert the government."); JAMES KENT, COMMENTARIES ON AMERICAN LAW ¶ 2.17 (5th ed. 1844) ("[E]very citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right.").

[7] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (First Amendment is intended to safeguard and protect individual self-governance in a free and democratic society. Political discussion assures that the citizens will have the necessary information to make the informed judgments (voting) on which a self-governing society is dependent.).

[8] Gaylord Entm't Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 138 ("The State's free-speech-and-press guarantee protects the public by allowing issues to be freely and vigorously discussed."). *See also* Collier v. Reese, 2009 OK 86, ¶ 18, 222 P.3d 966 ("[T]he free-speech guarantee gives each citizen an equal right to self-expression and to participation in self-government, … ."); House of Sight & Sound, Inc. v. Faulkner, 1995 OK CIV APP 112, ¶ 13, 912 P.2d 357 ("The people's guarantee of free speech is a 'public policy concern' by virtue of this Constitutional provision.").

> components are intended to facilitate the functioning of a democratic government by protecting speech that relates to the self-governing process.[9]

But the provision grants freedom to more than just newspaper publishers and other members of the news media. Freedom of speech and press "belongs to every person," the Oklahoma Court of Criminal Appeals has said.[10] That includes non-English speakers, the state Supreme Court emphasized in 2002.[11]

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[9] *Gaylord,* 1998 OK 30, ¶ 13. "The phrase 'free speech' is often equated with 'political speech.' The term 'political' pertains 'to the policy or the administration of government' or to 'the influence by which individuals of a state seek to determine or control its public policy.' Political speech is hence any expression concerning the ideas and art of governing. Protected political speech is vital to self-government. It must be available without any governmental hindrance. There should be 'no potential interference' with a meaningful dialogue of ideas concerning self-government; nor should there be a threat of liability that causes 'self-censorship,'" *id*. at ¶ 14 (citations omitted). *See also In re* Initiative Petition No. 366, State Question No. 689, 2002 OK 21, ¶ 10, 46 P.3d 123, 127 (striking down a proposed English-only statute as a violation of Article II, Section 22, because it would "prevent citizens of limited English proficiency from effectively communicating with government officials and from receiving, when available, vital information about government"). "It is difficult to envision a situation where these protections are more necessary than in communications between government officials, whether electees or employees, and citizens. ... Even with the exceptions for constitutional conflicts, Petition No. 366 would disenfranchise segments of Oklahoma citizens by interfering with their ability to access vital information necessary for a self-governing society and cause self-censorship by inhibiting communications with government officials," *id*. at ¶ 12.

[10] Lyles v. State, 1958 OK CR 79, ¶ 6, 330 P.2d 734, 739. "How can the right of all to gather and disseminate legitimate matter to the public be denied to one without doing violence to the right of all? A right that belongs to all cannot be denied to the few without risk of destruction of the right. No one will deny the long established right of the press in the United States to gather and disseminate news and information concerning every phase of human activity, together with the incidents appertaining thereto. This right makes the press the most potent servant of the people in protecting all rights against acts of tyranny, fraud, and corruption, as well as a most prolific medium of information and education. Freedom of the press is the fulcrum by which the standards of the world have been lifted to a higher level. Hence, we can understand why it has been many times held that these provisions of free press extend to broadcasting and television. … We are further of the opinion that to deny television the same privileges as are granted to the press would constitute unwarranted discrimination," *id.* (broadcasters entitled to use cameras in the courtroom to cover trials).

[11] *In re* Initiative Petition No. 366, State Question No. 689, 2002 OK 21, ¶

Freedom of the press under the state constitution "is not confined to newspapers and periodicals, but necessarily embraces pamphlets and leaflets."[12] For example, the provision applied to religious literature distributed without a city permit in Guymon by a Jehovah's Witness, the Court of Criminal Appeals said in reversing his conviction in 1942.[13]

Oklahoma's constitutional guarantee "contemplates not only the right to print, but also the right to distribute," the court said. "The power of municipalities to enact regulations in the interest of the public safety, health and welfare or convenience, may not be so employed as to abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion."[14]

The U.S. Supreme Court acknowledges that state courts could interpret their constitutions as providing broader protection for speech and press rights than the First Amendment.[15] Oklahoma's Supreme Court, in turn, has compared "Every person may freely speak, write, or publish his sentiments on all subjects" to "Congress shall make no law ... abridging the freedom of speech …" and concluded that Oklahoma's language provides more protection than that of the First Amendment.[16]

11, 46 P.3d 123, 127 ("These rights apply equally to those proficient in the English language and those who are not.") (citing Meyer v. State of Nebraska, 262 U.S. 390 (1923)).

[12] Emch v. Guymon, 127 P.2d 855, 857 (Okla. Crim. App. 1942) (quoting *Ex parte Walrod*, 120 P.2d 783, 785 (Okla. Crim. App. 1941), and *Ex parte Winnett*, 121 P.2d 312 (Okla. Crim. App. 1942)).

[13] *Id*.

[14] *Id*. at 857-58.

[15] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (noting its precedents did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"). "I applaud the court's decision, which is a part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution," *id*. at 91 (Marshall, J., concurring).

[16] 2002 OK 21, ¶ 7 ("[T]he Oklahoma Constitution is more protective of speech than is the United States Constitution."). *See also* Peterson v. Grisham, CIV-07-317-RAW, 2008 U.S. Dist. LEXIS 70206, at *12 (E.D. Okla. 2008) ("Oklahoma's protection of free speech is worded far more broadly than the First Amendment's restriction on governmental interference with speech.") (citing Gaylord Entm't Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 139); Collier v. Reese, 2009 OK 86, ¶ 18, n.20, 222 P.3d 966 ("The Oklahoma Constitution's protections of free speech have

Constitutional language such as Oklahoma's specifically secures an "affirmative" right to speak, write and publish while the "negative rights" found in the First Amendment simply require that Congress not abridge those freedoms.[17] "The distinction is more than semantic," explained legal scholar Michael A. Giudicessi in reference to the Iowa Constitution's free speech and press clause, which contains "affirmative" language nearly identical to Oklahoma's provision.[18] Giudicessi explained:

> Under independent state review, the affirmative rights found only in the Iowa Bill of Rights and not in its federal

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been recognized as far more broadly worded than the First Amendment's restrictions.") (citing Gaylord Entm't Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 139); Clinton v. State *ex rel.* Logan County Election Bd., 2001 OK 52, ¶ 9, 29 P.3d 543, 549 (Kauger, J., concurring) ("[T]he generous protection of free speech afforded by this State's own fundamental law. The States are entirely free to protect the right of expression with greater solicitude and within a wider dimensional range of immunity than the shield available under the U.S. Constitution."); Gaylord Entm't Co. v. Thompson, 1998 OK 30, ¶ 13, 958 P.2d 128, 139 ("The Oklahoma Constitution's protection of free speech is far more broadly worded than the First Amendment's restriction on governmental interference with speech. The latter states in pertinent part that 'Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'").

[17] *See* DEPARTMENT OF STATE'S BUREAU OF INTERNATIONAL INFORMATION PROGRAMS, PRINCIPLES OF DEMOCRACY: CONSTITUTIONALISM, at http://usinfo.org/zhtw/DOCS/prinDemocracy/constitution_dem.html (last visited June 4, 2010) ("Constitutions generally contain two different types of rights – negative and affirmative rights. ° Negative rights tell the government what it cannot do. These rights limit government and prevent it from affecting certain behaviors of its citizens. For example, the government must refrain from limiting free speech and the ability of citizens to peacefully assemble, and from illegal imprisonment. ° Affirmative rights tell the government what it must do and citizens what they are entitled to. Such 'entitlements' may include social, economic, and cultural rights in the form of government guarantees of various social indicators. There may be guarantees of primary and secondary education for all boys and girls, guaranteed 'well being' after retirement, or jobs and health care for all citizens.").

[18] Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and the Press: Article 1, Section 7 of the Iowa Constitution*, 38 DRAKE L. REV. 9, 16 (1989) (referring to IOWA CONST. art. 1, § 7, which states: "Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press.").

> counterpart make it possible for the Iowa Supreme Court to expand speech and press protection in two ways. First, ... even where state and federal provisions are identical, the interpretation on state grounds need not be the same as that of the federal provisions as long as it does not reduce the protection afforded by the federal law. Second, the distinct language gives the state court a clear, independent mandate for extending protection.[19]

But freedom of speech and press under the Oklahoma Constitution "is not absolute."[20] Unlike the wording of the First Amendment, the state Supreme Court has noted, Oklahoma's constitutional guarantee of free speech and press carries with it an explicit "responsibility for an abuse of that right."[21]

"Freedom of the press does not impart an absolute right to publish without responsibility whatever one may choose, or an unrestricted and unbridled license that affords immunity for every possible use of language," the court said. "Recovery should be allowed for the abuse of such freedom. Libel is one such abuse. Invasion of privacy is another."[22]

The constitutional provision imposes "both criminal and civil responsibility" upon the abuser, the court noted in 1964. "However, he

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[19] *Id*.

[20] McCormack v. Oklahoma Publ'g Co., 1980 OK 98, ¶ 12, 613 P.2d 737, 741, 6 Media L. Rep. (BNA) 1618. *See also* Collier v. Reese, 2009 OK 86, ¶ 18 ("While the free-speech guarantee gives each citizen an equal right to self-expression and to participation in self-government, the right to freedom of speech has never been considered absolute.");

[21] Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85, 92 ("Expressly in its constitution, Oklahoma has weighted the right with the responsibility for an abuse of that right. That same responsibility is not expressly found in the federal constitution."). *See also* Lyles v. State, 1958 OK CR 79, ¶ 6, 330 P.2d 734 ("[T]he right [of freedom of speech] may be freely exercised so long as it does not infringe upon or injure the rights of others. It is not an absolute, but rather a relative right. It has been aptly said the right of its exercise does not permit one to yell 'fire' in a crowded theatre. … We are of the opinion freedom of speech and press is not a discriminate right, but the equal right of news gathering and disseminating agencies, subject only to the restrictions against abuse and injurious use to individual or public rights and welfare.").

[22] *McCormack*, 613 P.2d at 741.

would be entitled to a jury trial for the determination of his guilt or innocence or his liability or non-liability. In either, truth would be a defense."[23]

Holding speakers and publishers responsible for what they have spoken or written is preferable to imposing prior restraint upon even potentially libelous speech, the court indicated in that case.[24] In unanimously striking down a trial court's injunction barring an unhappy car buyer from posting a sign disparaging the auto dealership, the justices said, "For the courts to act as censors is directly violative of the purpose for which the provision was apparently framed, that of abolishment of censorship and providing adequate and complete remedy for one against whom the defamatory publication was made."[25]

Oklahoma's Campus Free Speech Statute

First Amendment protections apply with the same force on a public university campus as they do in the larger community, the U.S. Supreme Court held in 1972.[26] "The college classroom with its

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[23] *Schmoldt*, 1964 OK 61, ¶ 21.

[24] ¶ 19 ("It is thus apparent that the plaintiff has not sustained the burden of showing facts which bring his suit within the exceptions to the rule that equity will not restrain libel or slander, though the false statement may injure plaintiff's business, profession or trade, in the absence of acts of conspiracy, intimidation or coercion, because the party allegedly wronged has an adequate remedy at law."). *See also* Collier v. Reese, 2009 OK 86, ¶ 20 ("The doctrine known as prior restraint regulates certain speech-related activities in advance, as opposed to retrospectively punishing such activities. It is designed to prevent self-censorship. This Court has generally recognized that a law or an order restraining such conduct must have a close enough nexus to expression, or expression related conduct, to pose a real and substantial threat of the identified censorship risks. We have also noted that in order for a prior restraint to withstand constitutional attack, it must be narrowly drafted so as to suppress only that speech which presents a clear and present danger of resulting in serious, substantial evil.").

[25] *Id*. ¶ 21 (relying upon OKLA. CONST. art. II, § 22) ("The plaintiff in this suit should have been left to his remedy at law by action for damages and/or as an added deterrent, a prosecution for the defamation by criminal prosecution. Such remedy is adequate. We do not, however, express any opinion on the merits of a proceeding at law in either respect.").

[26] Healy v. James, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."). *See also* Joey Senat, *Healy v. James (1972)*, *in* FIRST AMENDMENT ENCYCLOPEDIA (John R. Vile & David

surrounding environs is peculiarly the 'marketplace of ideas,'" Justice Lewis F. Powell Jr. wrote for the majority in *Healy v James*.[27] A state university "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."[28] A year later, the Court said *Healy* made "clear that the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[29]

Despite those pronouncements and others by federal courts protecting the First Amendment rights of public university students,[30] Oklahoma legislators enacted similar protections in 2019.[31] Under the statute, the state's public institutions of higher education[32] must allow "[a]ny person … to engage in noncommercial expressive activity on campus … as long as the person's conduct is not unlawful and does not materially and substantially disrupt the functioning" of the school.[33]

L. Hudson eds., Middle Tenn. State Univ. 2016) (2009), https://mtsu.edu/first-amendment/article/687/healy-v-james.

[27] *Healy*, 408 U.S. at 180.

[28] *Id.* at 188. "The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights," *id*. at 187.

[29] Papish v. Bd. of Curators of Univ. of Mo., 410 U.S. 667, 670, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973). "[T]he First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech…," *id*. at 671. *See also* Joey Senat, *Papish v. Board of Curators of the Univeristy of Missouri (1973)*, *in* FIRST AMENDMENT ENCYCLOPEDIA (John R. Vile & David L. Hudson eds., Middle Tenn. State Univ. 2016) (2009), https://mtsu.edu/first-amendment/article/585/papish-v-board-of-curators-of-the-university-of-missouri.

[30] *See, e.g.,* Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (public universities creating a forum generally open to students may not enforce a content-based exclusion of religious speech); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (public universities may not deny publication funding generally available to student groups based on student group's religious affiliation).

[31] 70 O.S. § 2120 (OSCN 2021) (added by Laws 2019, SB 361, c. 212, § 1). *See also* Carmen Forman, *Stitt signs campus free speech bill*, THE OKLAHOMAN, May 1, 2019, https://www.oklahoman.com/article/5630175/stitt-signs-campus-free-speech-bill.

[32] 70 O.S. § 2120(A)(5) ("'Public institution of higher education' means any institution within The Oklahoma State System of Higher Education or technology center schools overseen by the State Board of Career and Technology Education.").

[33] § 2120(D)(1).

Expressive activity includes, but is not limited to, "any lawful verbal, written, audio-visual or electronic means by which individuals may communicate ideas to one another, including all forms of peaceful assembly, protests, speeches and guest speakers, distribution of literature, carrying signs and circulating petitions."[34]

Campus "outdoor areas"[35] are deemed public forums for the "campus community,"[36] including invited guests. Schools may not create "'free-speech zones' or other designated areas of campus outside of which expressive activities are prohibited."[37]

However, schools may "enforce reasonable time, place and manner restrictions narrowly tailored in service of a significant institutional interest."[38] Though they may do so "only when such restrictions employ clear, published, content- and viewpoint-neutral criteria and provide for ample alternative means of expression."[39] Such restrictions must allow the campus community "to spontaneously and contemporaneously assemble and distribute literature."[40]

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[34] § 2120(B).

[35] § 2120(A)(4) ("'Outdoor areas of campus' means the generally accessible outside areas of campus where members of the campus community are commonly allowed, such as grassy areas, walkways or other similar common areas and does not include outdoor areas where access is restricted from a majority of the campus community.").

[36] § 2120(A)(1) ("'Campus community' means students, administrators, faculty and staff at the public institution of higher education and their invited guests.").

[37] § 2120(C)(1).

[38] *Id*. *See also* § 2120(D)(2) ("Nothing in this subsection shall prohibit public institutions of higher education from maintaining and enforcing reasonable time, place and manner restrictions that are narrowly tailored to serve a significant institutional interest only when such restrictions employ clear, published, content- and viewpoint-neutral criteria."); *Healy*, 408 U.S. at 192-93 ("Just as in the community at large, reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, … , that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition.").

[39] § 2120(C)(1).

[40] *Id*.

The statute's protections do not extend to expression unprotected by the First Amendment, including harassment.[41] Using language from the U.S. Supreme Court,[42] the statute defines harassment as "expression that is unwelcome, so severe, pervasive and subjectively and objectively offensive that a student is effectively denied equal access to educational opportunities or benefits provided by the public institution of higher education."[43]

The statute also does not protect those who try to "materially and substantially disrupt" someone else's speech or meeting, or to keep people from attending.[44] However, the statute's definition of "materially disrupts" excludes conduct protected by the First Amendment or Oklahoma's Article II, Section 22, such as outdoor protests except when the area has been reserved for someone else. The definition also excludes "brief or fleeting nonviolent disruptions of events that are isolated and short in duration."[45]

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[41] § 2120(D)(3) ("Nothing in this subsection shall be interpreted as preventing public institutions of higher education from prohibiting, limiting or restricting expression that the First Amendment does not protect or prohibiting harassment as defined by this section.").

[42] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633, 119 S.Ct. 1661, 143 L.Ed. 839 (1999) (in cases of student-on-student harassment, a private damages action under Title IX may lie against a school board "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

[43] § 2120(D)(3).

[44] § 2120(D)(4) ("Nothing in this section shall enable individuals to engage in conduct that intentionally, materially and substantially disrupts another person's expressive activity if that activity is occurring in a campus space reserved for that activity under the exclusive use or control of a particular group."); § 2120(A)(3) ("'Materially and substantially disrupts' means when a person, with the intent to or with knowledge of doing so, significantly hinders another person's or group's expressive activity, prevents the communication of the message or prevents the transaction of the business of a lawful meeting, gathering or procession by: a. engaging in fighting, violent or other unlawful behavior, or b. physically blocking or using threats of violence to prevent any person from attending, listening to, viewing or otherwise participating in an expressive activity.").

[45] § 2120(A)(3) ("Conduct that 'materially disrupts' shall not include conduct that is protected under the First Amendment to the United States Constitution or Section 22 of Article 2 of the Oklahoma Constitution. Such protected conduct includes but is not limited to lawful protests in the outdoor areas of campus generally accessible to the members of the public, except during times when those areas have

Schools are responsible for notifying and educating the campus community about the statute's provisions. In their handbooks, websites and "through their orientation programs for students," schools must publicize "policies, regulations and expectations of students regarding free expression on campus" that are consistent with the statute.[46] They must also "develop materials, programs and procedures to ensure that those persons who have responsibility for discipline or education of students, including but not limited to administrators, campus police officers, residence life officials and professors, understand the policies, regulations and duties of public institutions of higher education regarding free expression on campus consistent with" the statute.[47]

A report detailing the school's "course of action implemented" to comply with the statute must be posted on its website – as well as submitted to the governor and Legislature annually by Dec. 31. "A report shall also be given in the instance of any changes or updates to the chosen course of action. The information required in the report shall be: accessible from the institution's website home page by use of not more than three links, searchable by key words and phrases, and accessible to the public without requiring registration or use of a user name, password or another user identification."[48] The report must:

- Describe any disruptions of free expression on campus, including "attempts to block or prohibit speakers and investigations into students or student organizations for their speech."

- Describe what disciplinary action "was taken against members of the campus community determined to be responsible for those specific" disruptions involving students without identifying the students.

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been reserved in advance for other events, or minor, brief or fleeting nonviolent disruptions of events that are isolated and short in duration.").

[46] § 2120(E).

[47] § 2120(F).

[48] § 2120(G)(1).

- Include "any other information" the school "deems valuable for the public to evaluate whether free expression rights for all members of the campus community have been equally protected and enforced consistent with this act."[49]

Any school sued for violating the First Amendment must submit "a supplementary report with a copy of the complaint, or any amended complaint," to the governor and Legislature within thirty days.[50]

Schools and their employees acting in their official capacities may be sued for violating the statute's protections. Plaintiffs may seek "injunctive relief, monetary damages, reasonable attorneys' fees and court costs."[51] They must sue "no later than one year after the day the cause of action occurs."[52]

Students and student organizations also may rely upon the statute as a defense against disciplinary proceedings.[53]

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[49] § 2120(G)(2)(a-b).

[50] § 2120(G)(3).

[51] § 2120(H) ("Any person or student organization aggrieved by a violation of this section may bring an action against the public institution of higher education and its employees acting in their official capacities responsible for the violation and seek appropriate relief, including but not limited to injunctive relief, monetary damages, reasonable attorneys' fees and court costs. … Nothing in this subsection shall be interpreted to limit any other remedies available to any person or student organization.").

[52] § 2120(I) ("For purposes of calculating the one-year limitation period, each day that the violation persists and each day that a policy in violation of this section remains in effect shall constitute a new day that the cause of action has occurred.").

[53] § 2120(H) ("Any person or student organization aggrieved by a violation of this section may assert such violation as a defense or counter claim in any disciplinary action or in any civil or administrative proceedings brought against such student or student organization.").

Libel

Libel is generally described as a false and defamatory attack in writing on a person's reputation. To be deemed libelous, the statement must be both false and defamatory. In Oklahoma, libel is statutorily defined as:

> [A] false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.[1]

Libel is typically thought of as applying to print publications. In Oklahoma courts, though, broadcasting also is typically subject to libel law[2] rather than slander, which the state statutorily defines as "a

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[1] 12 O.S. § 1441 (OSCN 2021). Oklahoma's original definition of civil libel in 1890 read, "Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." OKLA. STAT. 1890, § 3985. In 1911, however, Oklahoma legislators adopted the state's 1895 definition of criminal libel as the definition for civil libel. It remains the state's definition of both criminal and civil libel. For a history of Oklahoma's libel definitions, *see* Drake v. Park Newspapers of Northeastern Oklahoma Inc., 1984 OK 50, ¶¶ 12-18, 683 P.2d 1347.

[2] *See, e.g.,* Malson v. Palmer Broad. Group, 1997 OK 42, 936 P.2d 940, 25 Media L. Rep. (BNA) 1957; Crittendon v. Combined Communications Corp, 1985 OK 111, 714 P.2d 1026, 12 Media L. Rep. (BNA) 1649; Johnston v. Corinthian Television Corp., 1978 OK 88, 583 P.2d 1101, 3 Media L. Rep. (BNA) 2518; Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85; Johnson v. KFOR, 2000 OK CIV APP 64, 6 P.3d 1067; Malson v. Palmer Broad. Group, 1998 OK CIV APP 68, 963 P.2d 13; McCain v. KTVY, Inc., 1987 OK CIV APP 13, 738 P.2d 960, 13 Media L. Rep. (BNA) 2278; Benson v. Griffin Television, Inc., 1978 OK CIV APP, 593 P.2d 511.

false and unprivileged publication, other than libel."[3] In 1992, a federal district judge applying Oklahoma law treated a defamation lawsuit against a television station as slander based on the different statutory definitions and because the "televised pictures are not 'fixed' images and, in any event, the alleged defamatory aspects of the broadcasts are the spoken words, not the images accompanying them."[4] However, the judge noted, "As a practical matter, at least in this case, it makes no difference whether the Court treats the alleged defamation as libel or slander since under Oklahoma law, the same result obtains."[5]

It also should be noted that libel is not the concern of only journalists. Libel lawsuits can arise from communications other than news stories. In Oklahoma, for example, a press release led to a $72,500 finding against the health-care services provider whose executive director had distributed the written statement at a press conference.[6]

Any living person, corporation, business, or unincorporated association, organization or society can sue for libel. However, the Oklahoma Supreme Court reaffirmed in 1984 that "libel is one of the few actions which does not survive the death of a plaintiff who has

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[3] 12 O.S. § 1442 (OSCN 2021) ("Slander is a false and unprivileged publication, other than libel, which: 1. Charges any person with crime, or with having been indicted, convicted or punished for crime. 2. Imputes in him the present existence of an infectious, contagious or loathsome disease. 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit. 4. Imputes to him impotence or want of chastity; or, 5. Which, by natural consequences, causes actual damage.").

[4] Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1524 n.3, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992).

[5] 828 F. Supp. at 1524 n.3.

[6] Thompson v. Tulsa Neighborhood Comprehensive Health Serv., Inc, No. 56-766, 1983 Okla. Civ. App. LEXIS 174 (Okla. Civ. App. Oct. 4, 1983). *See also* Cowdrey v. Allen, No. 05-CV-461-TCK-PJC, 2006 U.S. Dist. LEXIS 81839 (N.D. Okla. Nov. 7, 2006) (libel claim resulting from press release issued by city police chief); Wilson v. City of Tulsa, 2004 OK CIV APP 44, 91 P.3d 673 (libel claim resulting from press release issued by city police chief).

been defamed in his own lifetime, and which abates on the death of the defendant."[7]

In *Drake v. Park Newspapers of Northeastern Oklahoma, Inc.*, the relatives of a deceased woman relied upon the state's statutory definition of libel to contend that they could sue. After defining libel as false, malicious, etc., the statute states "or any malicious publication ... designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends."[8] However, the state Supreme Court said the statute was not intended to protect the reputations of relatives who themselves had not been defamed. "If this definition is construed to create a cause of action in favor of a decedent's relatives, would it not also create a cause of action in favor of her friends?" the court asked. "Which relatives and friends would be able to sue?"[9] Instead, the statute "creates or requires a nexus between the vilified decedent and his scandalized surviving relatives and friends," the court explained. "As an example the statute operates where one declares that a deceased uncle took as a lover his present living nephew, thus vilifying the uncle and scandalizing his surviving living relatives."[10]

In the case before the court, the brother, sister, husband and uncle of the deceased woman had sued *The Broken Arrow Daily Ledger* over statements concerning the manner of her death.[11] However, the court said they had "failed to allege that the defamatory matter was spoken at them, therefore they failed to state a cause of action."[12]

Governments may not sue private citizens for libel. In *N.Y. Times Co. v. Sullivan*, the U.S. Supreme Court noted, "[F]or good reason, no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence."[13] Likewise, the Oklahoma

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[7] Drake v. Park Newspapers of Northeastern Oklahoma, Inc., 1984 OK 50, 683 P.2d 1347, 1349, 10 Media L. Rep. (BNA) 2331 (citing OKLA. STAT. 12, §§ 1051-52 (1981)); Alles v. Interstate Power Co., 176 Okl. 252, 55 P.2d 751 (1936)).

[8] 683 P.2d at 1349 (quoting OKLA. STAT. 12, § 1441 (1981)).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1348.

[12] *Id.* at 1351.

[13] 376 U.S. 254, 291, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (internal quotations omitted). "[A] State has no more power than the Federal Government to use

Supreme Court in 2000 barred a county hospital from suing for libel.[14] But government agencies in Oklahoma can *be sued* for libel.[15]

In Oklahoma, the plaintiff has one year from the date of publication to file a libel lawsuit.[16] In 1987, for example, the Oklahoma Court of Civil Appeals held that a plaintiff's libel claim against a television station should have been dismissed because it was filed "well after the one-year statute of limitations."[17] A federal trial judge

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a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials," *id*. at 295 (Black, J., with whom Douglas, J., joined, concurring). *See also* N.Y. Times Co. v. United States, 403 U.S. 713, 724, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971) (Douglas, J., with whom Black, J., joined, concurring) ("It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be."); Rosenblatt v. Baer, 383 U.S. 75, 81, 15 L. Ed. 2d 597, 86 S. Ct. 669 (1966) ("[T]he Constitution does not tolerate in any form … the spectre of prosecutions for libel on government."); and Beedle v. Wilson, 422 F.3d 1059, 1067 n.4 (10th Cir. 2005) ("[O]ur case law makes clear the government cannot lawfully initiate an action against a citizen in retaliation for the exercise of his First Amendment rights.").

[14] *Beedle v. Darby*, 2000 OK 1, 996 P.2d 934 (holding that as a political subdivision of the state, a county hospital was barred from bringing an action for libel).

[15] *See* Bird Constr. Co. v. Oklahoma City Hous. Auth., 2005 OK CIV APP 12, ¶ 13 n.1, 110 P.3d 560 ("Although no reported cases have resulted in a defamation claim succeeding against a governmental entity in Oklahoma, defamation has been considered without comment in at least two cases.") (citing Hughes v. Bizzell, 1941 OK 277, 117 P.2d 763; Wilson v. City of Tulsa, 2004 OK CIV APP 44, 91 P.3d 673). *See also* Cowdrey v. Allen, No. 05-CV-461-TCK-PJC, 2006 U.S. Dist. LEXIS 81839 (N.D. Okla. Nov. 7, 2006); Shero v. City of Grove, No. 05-CV-0137-CVE-PJC, 2006 U.S. Dist. LEXIS 80462 (N.D. Okla. Nov. 2, 2006).

[16] 12 O.S. § 95(A)(4) (OSCN 2021) ("Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: ... 4. Within one (1) year: An action for libel, slander, assault, battery, malicious prosecution or false imprisonment … ."). *See also* Dedovic v. Mowen, No. CIV-06-918-M, 2007 U.S. Dist. LEXIS 39254 (W.D. Okla. May 29, 2007); Cohlmia v. Ardent Health Servs., LLC, 448 F. Supp. 2d 1253, 1268 (N.D. Okla. 2006); Colbert v. World Publ'g Co., 1987 OK 116, 747 P.2d 286, 292, 14 Media L. Rep. (BNA) 2188 (same).

[17] McCain v. KTVY, Inc., 1987 OK CIV APP 13, 738 P.2d 960, 962, 13 Media L. Rep. (BNA) 2278. *See also* Dedovic v. Mowen, No. CIV-06-918-M, 2007 U.S. Dist. LEXIS 39254 (W.D. Okla. May 29, 2007) (libel claim time-barred after one year from date of publication); Cohlmia v. Ardent Health Servs., LLC, 448 F. Supp. 2d 1253, 1268 (N.D. Okla. 2006) (same); Colbert v. World Publ'g Co., 1987 OK 116, 747 P.2d 286, 292, 14 Media L. Rep. (BNA) 2188 ("[H]aving failed to bring this action

dismissed libel claims filed in 2007 against the author of a book originally published in 1987 and republished in 2006. The statements at issue in the lawsuit had been in the original 1987 publication, so the lawsuit was "time barred" because the statute of limitations had expired, the judge ruled.[18]

The limitation period can be extended, however, if the publication was "concealed or published in a secretive manner which would make it unlikely to come to the attention of the injured party."[19] In 2001, the Oklahoma Supreme Court said the rule had been applied in other jurisdictions to defamatory reports filed with credit agencies, placed in employees' personnel files and made in confidential business memoranda.[20] In 2007, a federal district judge applying Oklahoma libel law said the published book at issue in the trial did not fall within any of those categories "and, in fact, is in no way similar to any of the above examples."[21] It is unlikely that this rule would apply to libelous statements published or broadcast by the news media. Exceptions to the one-year limitation should be "strictly construed and are not enlarged on" because of "apparent hardship or inconvenience" or "ignorance of the law."[22]

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within the year following publication, he may not recover for the negligent injury to his reputation under a libel theory.").

[18] Peterson v. Grisham, No. CIV-07-317-RAW, 2008 U.S. Dist. LEXIS 70206, at *10 n.13 (E.D. Okla. 2008).

[19] Digital Design Group, Inc. v. Information Builders, 2001 OK 21, ¶ 17 (applying the discovery rule to libel actions in Oklahoma) ("The discovery rule allows the limitation period in certain tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury."). *See also* Dedovic v. Mowen, No. CIV-06-918-M, 2007 U.S. Dist. LEXIS 39254, at *4 (W.D. Okla. May 29, 2007) (rejecting plaintiff's request that the one-year limitation should be lengthened) ("Specifically, the Court finds that the Book was not likely to be concealed from plaintiff and was not published in a secretive manner which would make it unlikely to come to the attention of plaintiff.").

[20] *Digital Design Group, Inc.*, 2001 OK 21, ¶ 20 ("In these circumstances, the discovery rule is applied because the type of publication is not one in which a plaintiff would ordinarily have reason to suspect or even be presumed to know about – given the short limitations period for libel actions.")

[21] Dedovic v. Mowen, No. CIV-06-918-M, 2007 U.S. Dist. LEXIS 39254, at *4 (W.D. Okla. May 29, 2007).

[22] Johnson v. Nat'l Carrier Inc., No. CIV-06-802-F, 2006 U.S. Dist. LEXIS 82704, at *12 (W.D. Okla. Nov. 13, 2006) ("In light of these rules, the court concludes that plaintiff's ignorance of the law is not a ground for tolling the one-year statute of

To win against a media defendant, libel plaintiffs must prove six elements: (1) the libelous material was published; (2) the plaintiff was identified as the subject of the libelous material; (3) the material was defamatory; (4) the material was false; (5) the journalist was at fault; and (6) the plaintiff was harmed by the communication. This chapter will examine how Oklahoma courts and federal courts applying Oklahoma law have addressed several of these elements:

Publication

The plaintiff must prove that the defamatory material was communicated to a third person, i.e., someone other than the person being defamed.[23] However, "communication inside a corporation, between its officers, employees, and agents, is never a publication for the purposes of actions for defamation," Oklahoma courts have established.[24] "Agents and employees of a corporation are not third parties to the corporation in their relations with the corporation, and therefore communications between those agents and employees are not considered publications, because it is the corporation communicating with itself," the Court of Civil Appeals has explained.[25] In other words,

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limitations.") (citing Resolution Trust Corp. v. Grant, 1995 OK 68, 901 P.2d 807, 813; Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000)).

[23] Young v. First State Bank, Watonga, 1981 OK 53, 628 P.2d 707, 713 (citing Collins v. Oklahoma State Hosp., 76 Okla. 229, 184 P. 946 (Okla. 1919)) ("It is essential in an action for libel for the plaintiff to prove that the alleged defamation was communicated to a third party. It is not sufficient to show only that it was communicated to the person defamed therein.").

[24] Ishmael v. Andrew, 2006 OK CIV APP 82, ¶ 5 137 P.3d 1271 (citing Thornton v. Holdenville General Hosp., 2001 OK CIV APP 133, 36 P.3d 456; Magnolia Petroleum Co. v. Davidson, 1944 OK 182, 148 P.2d 468). *See also* Johnson v. Dillard's, No. CIV-05-29-F, 2005 U.S. Dist. LEXIS 42631 (citing Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1552-53 (10th Cir. 1995)); Order and Judgment, Roush v. Dawson, No. CJ-15-4370 (Okla. Cnty. Dist. Ct. Dec. 1, 2015) ("Specifically regarding his defamation claim, the plaintiff failed to allege or make a clear and specific showing that the defendants … 'published' any statement regarding the plaintiff because the communication on which the plaintiff's claim is based was an intra-company communication to or among employees of the same company and not to a third party.").

[25] *Ishmael*, 2006 OK CIV APP 82, ¶ 14.

such communications "are never actually published if they never go outside the corporation."[26]

The plaintiff must prove actual communication to a third party. In *Young v. First State Bank, Watonga*, for example, the Oklahoma Supreme Court ruled in favor of the defendant because the plaintiff proved only that the letters were mailed, not that they were "read by anyone other than himself."[27] The court said, "While the evidence of mailing may be sufficient to infer that the letters were received, it is insufficient to discharge plaintiff's burden of proving communication to a third party, an essential element of his [libel] action."[28]

Of particular importance for journalists is that the republication rule applies in Oklahoma. In other words, the news media can be held liable for repeating the libelous statements of others, including material contained in letters to the editor. "[W]e are of the opinion that when the public media re-publishes and circulates a 'letter to the editor' which contains libelous statements, such publication may be the subject of an action in libel," the Oklahoma Supreme Court said in *Weaver v. Pryor Jeffersonian*.[29] Relying upon that 1977 decision, the court five years later also rejected a newspaper's attempt to avoid liability by claiming that it had only republished libelous statements contained in a mailgram, not made libelous statements of its own. The "attempted distinction is without merit," the court said.[30]

Identification

The plaintiff must be able to prove that he or she is specifically recognizable in the libelous material.[31] For example, a federal district

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[26] Thornton v. Holdenville General Hosp., 2001 OK CIV APP 133, ¶ 11, 36 P.3d 456 (refusing plaintiff's request to abandon and reject "intra-corporate privilege" in Oklahoma).

[27] *Young*, 628 P.2d at 713.

[28] *Id.*

[29] 1977 OK 163, ¶ 29, 569 P.2d 967, 972, 3 Media L. Rep. (BNA) 1425 (citing El Paso Times, Inc. v. Trexler, 447 S.W.2d 403 (Tex. 1969)).

[30] Luper v. The Black Dispatch Publ'g Co., 1983 OK CIV APP 54, ¶ 26, 675 P.2d 1028, 1034-35.

[31] *See, e.g.,* Layman v. Readers Digest Ass'n, 1965 OK 162, ¶16, 412 P.2d 192, 195 ("It is well settled that 'The language used must, however, be such that persons reading or hearing it will, in the light of surrounding circumstances, be able to understand that it refers to the person complaining, and it must have been so understood

judge held that KFOR-TV had not identified, and thus not defamed, an Iraqi refugee because the station had digitally altered video to obscure his face and never used his name in its stories.[32]

Identification can occur without the plaintiff's name or picture being used. The plaintiff can be identified by a nickname, description, pseudonym, or connecting circumstances.[33]

It is not necessary for the defendant to have intended to refer to the plaintiff for identification to occur. The defendant can be held liable for failing to recognize that others could "mistakenly but reasonably" believe the message referred to the plaintiff.[34] However, the plaintiff would have to prove that the defendant "was negligent in failing to anticipate" such "a reasonable understanding" by a third party.[35] In 2006, the state Court of Civil Appeals said it could "find no Oklahoma cases in which the recipient of the communication mistakenly but reasonably understood a defamatory communication to refer to the plaintiff." But the court considered such a situation

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by at least one other person …") (citations omitted); Bates v. P.C. Cast, 2014 OK CIV APP 8, ¶ 11, 316 P.3d 246; Gonzalez v. Sessom, 2006 OK CIV APP 61, ¶ 12, 137 P.3d 1245 ("In order for a false statement to be defamatory, it must concern the plaintiff.") (citing Sturgeon v. Retherford Publ'ns, Inc., 1999 OK CIV APP 78, 987 P.2d 1218, 1223).

[32] Hussain v. Palmer Communications, CIV-97-1535-L (W.D. Okla. Nov. 17, 1999). *See also* Randy Ellis, TV report ruled not defamatory, THE DAILY OKLAHOMAN, Jan. 5, 2000; *KFOR Stories About 'Possible' John Doe 2 Not Defamatory*, B.-MEDIA REL. COMMITTEE NEWSL. (Okla. Bar Ass'n), Winter 2000 at 1.

[33] Gonzalez v. Sessom, 2006 OK CIV APP 61, ¶ 12, 137 P.3d 1245 (quoting RESTATEMENT (SECOND) OF TORTS § 564 (1977)) ("It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended. Extrinsic facts may make it clear that a statement refers to a particular individual although the language used appears to defame nobody.").

[34] *Id. See also* Nelson v. Am. Hometown Publ'g, Inc., 2014 OK CIV APP 57, ¶ 26, 333 P.3d 962 (quoting *Gonzalez*, 2006 OK CIV APP 61, ¶ 12).

[35] RESTATEMENT (SECOND) OF TORTS § 564 cmt. f (1977) ("[T]he defamer is subject to liability if he knew that the communication would be understood by the recipient to refer to the plaintiff or was negligent in failing to recognize that this might happen. … It is therefore necessary for the plaintiff to prove that a reasonable understanding on the part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate. This is particularly important when the recipient knew of extrinsic facts that make the communication defamatory of the plaintiff but these facts were not known to the defamer.") (quoted in *Gonzalez*, 2006 OK CIV APP 61, ¶ 12).

"analogous to" group defamation, in which the defendant cannot be held liable "unless the recipient of the communication reasonably understands it to refer to the plaintiff." "Therefore, we believe the Oklahoma Supreme Court would apply the same rule in mistaken defamation cases," the Court of Civil Appeals concluded.[36]

In 2014, the Court of Civil Appeals concluded that readers could have reasonably mistaken a Guthrie resident for a sex offender when a newspaper incorrectly published his address as the male sex offender's address.[37] The newspaper's employees also "could reasonably be regarded as negligent in failing to recognize that this might happen when they published the addresses of sex offenders in the county," the court said.[38] The newspaper's reference to the "Plaintiffs' home could also reasonably be regarded as a defamatory statement 'concerning' Plaintiffs."[39] The lawsuit was subsequently settled out of court.[40]

Identification can occur from the use of a person's name in pure fiction but only if "a reasonable reader of the fictional work would understand the fictional character refers to the plaintiff," the Court of Civil Appeals said in 2014.[41] The appellate judges could not find "any Oklahoma precedent speaking to a claim of defamation arising from a work of pure fiction."[42] But they found that based on the *Restatement (Second) of Torts*,[43] courts elsewhere had uniformly held that to

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[36] *Gonzalez*, 2006 OK CIV APP 61, ¶ 13.

[37] Nelson v. Am. Hometown Publ'g, Inc., 2014 OK CIV APP 57, ¶ 28, 333 P.3d 962 ("[A] reader of the News Leader could have understood the sex offender listing to refer to [the plaintiff], because he was a male living at the address listed in the News Leader as housing a sex offender.) "We conclude that Plaintiffs have shown that communication in the newspaper that a sex offender lived at Plaintiffs' address could reasonably be understood by a recipient to refer to Plaintiffs, either as the sex offender himself in the case of Nelson or as someone housing or residing with a sex offender in the case of Ryan…," *id.* ¶ 29.

[38] *Id.*

[39] *Id.* 30.

[40] Dismissal With Prejudice, Nelson v. Am. Hometown Publ'g, Inc., No. CJ-2010-4209, (Okla. Cnty. Dist. Ct. Nov. 3, 2014).

[41] Bates v. P.C. Cast, 2014 OK CIV APP 8, ¶ 14, 316 P.3d 246 (citing RESTATEMENT (SECOND) OF TORTS § 564 cmt. d (1977)).

[42] *Id.* ¶ 13.

[43] *Id.* ¶ 14. *See* RESTATEMENT (SECOND) OF TORTS § 564 cmt. d (1977)) ("*Fictitious characters*. A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious

establish such a claim, the plaintiff must prove that, "viewing the work of fiction as a whole, the fictional character depicts the plaintiff, and the test is whether a reasonable reader would understand the fictional character 'was, in actual fact, [the plaintiff] conducting herself as described."[44] But the libel lawsuit fails if, after examining the entire work, "it appears that no reasonable reader would regard the complained-of statements as anything other than 'rhetorical hyperbole,' the author's 'fictional imaginings' or an 'imaginative explanation of an episode in that person's life about which no actual facts were known."[45]

In the case at hand, the Oklahoma appellate court rejected the plaintiff's contention that she had been identified through the use of her name in a book "about a school for vampyres" and even though during a book promotion, one of the authors had identified the character "as a real person living in Tulsa." The court explained:

> Considering in its totality Defendants' fictional work of fantasy about a school for vampyres, populated by vampyre students, we are hardpressed to say, even viewing the evidentiary materials in the light most favorable to Plaintiff, that any reasonable reader would conclude that the book's fictional 'Erin Bates' character actually depicts Plaintiff conducting herself as described in the book. The Erin Bates character is a teenager while Plaintiff is in her mid-twenties. The locale of the book is entirely fictional. The only similarity is the identity of the fictional character's name and Plaintiff's name.[46]

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characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. Mere similarity of name alone is not enough; nor is it enough that the readers of a novel or the audience of a play or a moving picture recognize one of the characters as resembling an actual person, unless they also reasonably believe that the character is intended to portray that person….").

[44] *Id.* ¶ 14.

[45] *Id.*

[46] *Id.* ¶ 15. "Given the fictitious, 'other-worldly' setting of Defendants' book and its cast of wholly fictitious vampyres, no reasonable reader of the Defendants' book would conclude the fictional character, Erin Bates, depicts Plaintiff acting in the way portrayed in the book," *id.* ¶ 17.

Even though the author had identified the "plaintiff as the 'real' Erin Bates, internet comments by the book's fans disparage the fictional Erin Bates character, and in no way point to Plaintiff as the subject of scorn," the judges said. "It seems clear to us that 'any reasonable person who read the book and was in a position to identify [Plaintiff] with [the Erin Bates character] would more likely conclude that the author created the latter in an ugly way so that none would identify her with' Plaintiff."[47]

Group Libel: The plaintiff could be identified as an unnamed member of a group that has been libeled. In 1998, the Oklahoma Supreme Court said that in determining if an individual member of such a group may sue for libel:

- The size of the group alone is not controlling although it is a factor to be considered, and
- The intensity of suspicion cast upon the plaintiff is the true test in determining a plaintiff's right to maintain a personal action for group libel.[48]

The leading Oklahoma case on this issue is 1962's *Fawcett Publications, Inc. v. Morris*, in which a fullback on the 1956 University of Oklahoma football team sued *True* magazine over an assertion that OU players used an amphetamine nasal spray to increase their aggression and competitive spirit.[49] The magazine had written: "[D]uring the 1956 season, while Oklahoma was increasing its sensational victory streak, several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer. And during a televised game, a close-up showed Oklahoma spray jobs to the nation."[50] At trial, evidence showed the nasal spray was "spirits of

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[47] *Id.* ¶ 16 (quoting Wheeler v. Dell Pub. Co., 300 F.2d 372 (7th Cir. (Ill.) 1962)).

[48] Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 147 (citing McCullough v. Cities Serv. Co., 1984 OK 1, 676 P.2d 833, 835-36; Fawcett Publications, Inc. v. Morris, 1962 OK 183, 377 P.2d 42, 51-52, *appeal dismissed, cert. denied*, 376 U.S. 513 (1962), *reh'g denied*, 377 U.S. 925 (1964)). *See also* Brock v. Thompson, 1997 OK 127, 948 P.2d 279, 292.

[49] 1962 OK 183, 377 P.2d 42, 47.

[50] 377 P.2d at 47.

peppermint, a harmless substance used for the relief of 'cotton mouth', or dryness of mouth, resulting from prolonged or extreme physical exertion"; the player had not used amphetamines or any other narcotics; and no evidence existed that his teammates had used them.[51]

In the magazine's defense against the libel claim, it contended that because the team had sixty to seventy players and the article had not referred to the plaintiff by name, he was not entitled to sue. However, the Oklahoma Supreme Court, after analyzing numerous legal authorities, said the group's size should not by itself be a conclusive factor, particularly when the plaintiff was "as well known and identified in connection with the group as was the plaintiff in this case."[52] The court adopted as its test "the intensity of the suspicion cast upon the plaintiff." In other words, the primary consideration should be whether the plaintiff was indeed defamed.[53]

The court held that the article had libeled "every member of the team, including the plaintiff." In concluding that the plaintiff had "established his identity in the mind of the average lay reader as one of those libeled," the court said it was mindful that a fullback "who has played in nine out of eleven all victorious games in one season will not be overlooked by those who were familiar with the team, and the contribution made by its regular players. It should be remembered that plaintiff was a constant player, and not a part of the 'changing' element of that group."[54]

Likewise, the court in 1978 held that one member of a two-person group had sufficiently established his identity.[55] In this case, a newspaper editorial had referred to "other people indicted by the

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[51] *Id.*

[52] *Id.* at 51-52 ("[W]e have found no substantial reason why size alone should be conclusive. We are not inclined to follow such a rule where, as here, the complaining member of the group is as well known and identified in connection with the group as was the plaintiff in this case.").

[53] *Id.* at 52 (quoting 31 COLUM. L. REV. 1322) ("[T]he primary consideration would properly seem to be whether the plaintiff was in fact defamed, although not specifically designated. ... A more realistic approach would recognize that even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff.").

[54] *Id.*

[55] Grove v. Morgan, 1978 OK 25, 576 P.2d 1155, 1157, 3 Media L. Rep. (BNA) 2053.

federal grand jury." The court noted that "only two 'other people'" had been indicted by that grand jury.

A decade later, the Oklahoma Supreme Court announced several principles regarding the individual's right to sue for libel as a member of a group that had been defamed:

- Generally, an impersonal reproach of an indeterminate class is not actionable. The underlying premise of this principle is that the larger the collectivity named in the libel, the less likely it is that a reader would understand it to refer to a particular individual.[56]

- [A]n individual belonging to a small group may maintain an action for individual injury resulting from a defamatory comment about the group by showing that he is a member of the group. Because the group is small and includes few individuals, reference to the individual plaintiff reasonably follows from the statement and the question of reference is left for the jury.[57]

- Size alone is too narrow a focus to determine the issue of individual application in group-defamation.[58]

- The intensity of suspicion test recognizes that even a general derogatory reference to a group may affect the reputation of every member. In order to determine personal application it requires that a factual inquiry be made to determine the degree that the group accusation focuses on each individual member of the group. The numerical size of the group is a consideration, but is not the only factor to be considered. One element to be considered is the

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[56] McCullough v. Cities Serv. Co., 1984 OK 1, 676 P.2d 833, 836-37 ("The rule was designed to encourage frank discussions of matters of public concern under the First Amendment guarantees. Thus the incidental and occasional injury to the individual resulting from the defamation of large groups is balanced against the public's right to know.").

[57] 676 P.2d at 837.

[58] *Id.* The Oklahoma court noted that while individual identification was generally accepted nationwide for members of groups with fewer than 25 members, no court had announced that "26 is 'too large,'" *id.* at 836.

prominence of the group and the prominence of the individual within the group.[59]

The case before the court involved a publication criticizing the training of doctors of osteopathy.[60] The state Supreme Court, noting that nearly 19,700 doctors of osteopathy existed in the United States, concluded that the publication "constitutes an impersonal reproach of an indeterminate class [and] ... there can be no intensity of suspicion cast upon the plaintiff. Whatever aspersions are cast by the publication fall upon the profession of osteopathy, and not upon a small or identifiable group within the class of osteopaths."[61]

The court applied similar reasoning in the late 1990s to conclude that publications calling for tort reform were aimed at the legal system itself and not at the legal profession or even trial lawyers as a group.[62] "No individual nor even a small group of individuals is identified (or isolated) as a target for odium, opprobrium, criticism or for legal action," the court said in both cases.[63]

Defamatory Content

To be libelous, a statement must be both false and defamatory. A false statement that is not defamatory is not considered libelous. Under Oklahoma's statute, a false statement is defamatory if it "exposes any person to public hatred, contempt, ridicule or obloquy, or … tends to deprive him of public confidence, or to injure him in his occupation ... ."[64] In other words, the Oklahoma Supreme Court said in

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[59] *Id.*

[60] *Id.* at 834 ("M.D. doctors have a medical education and post-graduate training superior to that of D.O.'s. Chiropractors have no standard medical training at all; their theory of what causes disease is based on assumptions that are not scentifically [sic] proven. A D.O.'s training is similar to that of an M.D.'s, but in most of their schools and hospitals the standard of training is still below that of the M.D. institutions.").

[61] *Id.*

[62] Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 148; Brock v. Thompson, 1997 OK 127, 948 P.2d 279, 292.

[63] *Gaylord*, 958 P.2d at 148; *Brock*, 948 P.2d at 292.

[64] 12 O.S. § 1441 (OSCN 2021). *See also* Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 146 (quoting 12 O.S. § 1441 (1991)) ("Actions for libel are statutorily defined. A publication is libelous per se (when the defamatory impact is apparent on its face) if it 'exposes any person to public hatred, contempt, ridicule or

1999, "A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[65] Oklahoma courts have consistently recognized that words claimed to be defamatory fall into three classes:

- Not of defamatory meaning;
- Clearly defamatory on their face (defamatory per se); and
- Reasonably susceptible of both a defamatory and an innocent meaning (defamatory per quod).[66]

The distinction between defamatory per se and defamatory per quod is important because of the different corresponding damages that the plaintiff also is required to prove. In a per quod defamation case, the plaintiff has to prove special damages, i.e., the person suffered monetary or economic loss because of the reporter's story.[67] Therefore,

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obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation ... .'").

[65] Herbert v. Christian Coal., 1999 OK 90, 992 P.2d 322, 327 n.4.

[66] *See, e.g.,* Fite v. Oklahoma Publ'g Co., 146 Okla. 150, 293 P. 1073 (Okla. 1930); Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494 (Okla. 1919).

[67] *See* Sellers v. Oklahoma Publ'g Co., 1984 OK 11, 687 P.2d 116, 121, 10 Media L. Rep. (BNA) 1795 ("The established rule for determining the validity of a petition in a libel suit is that where a writing is not libelous per se, recovery is dependent on allegation of special damages."); Miskovsky v. Tulsa Tribune Co., 1983 OK 73, 678 P.2d 242, 248 ("Where the article itself is not libelous per se, there must be an allegation of special damages, before a recovery can be had."); Winters v. Morgan, 1978 OK 24, 576 P.2d 1152, 1154, 3 Media L. Rep. (BNA) 2021 ("[C]ase law of this jurisdiction has long held special damages must be alleged where the words published were not libelous per se."); Sturgeon v. Retherford, 1999 OK CIV APP 78, 987 P.2d 1218, 1223, 28 Media L. Rep. (BNA) 1144 ("A party relying on a publication that is not per se defamatory must plead and prove special damages."). *See also* Willis v. Department Stores National Bank, 613 Fed. Appx. 755, 757, 2015 U.S. App. LEXIS 14695 (10th Cir. 2015) (quoting Peterson v. Grisham, 594 F.3d 723, 728 (10th Cir. 2010) ("[U]nder Oklahoma law '[u]nless a plaintiff demonstrates that a defendant committed libel per se, [he] must also plead and prove special damages caused by publication.'").

it is to the defendant's advantage to have the content deemed per quod defamation.[68]

In determining if the words amount to per se or per quod defamation, Oklahoma courts consider the entire publication[69] and "ascribe to the words used their ordinary, natural, and obvious meanings."[70]

To be considered defamatory, the communication must be a statement of fact. Opinions and rhetorical hyperbole cannot be defamatory because they are not assertions of fact. For example, the Oklahoma Court of Civil Appeals in 1995 agreed that a newspaper editorial titled "The Rape of a Neighborhood" did not constitute per se defamation.[71] The editorial complained about a wall, built by the plaintiffs, where a cul-de-sac had been on a residential street. The plaintiffs apparently argued that using "rape" in the headline was defamatory per se. The appellate court, however, said, "[A] complete and fair reading of the editorial shows that the use of this word was metaphorical only, and no reasonable interpretation could conclude that the author was accusing or suggesting Plaintiffs had committed the crime of rape."[72]

In contrast, a six-member majority of the Oklahoma Supreme Court concluded in 1978 that a newspaper editorial – read in its entirety – left readers with a "logical conclusion … that the plaintiff is guilty of the crime of which he has been charged and that he is seeking a weak Judge or incompetent jury that will acquit him in spite of his guilt."[73] The editorial had complained about a federal district judge's decision to move a criminal trial for the plaintiff because of prejudicial press

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[68] *See, e.g.,* Strong v. The Oklahoma Publishing Co., 1995 OK CIV APP 89, 899 P.2d 1185, 1187, 24 Media L. Rep. (BNA) 1315 (seeking to have a cutline mistakenly identifying the plaintiff as a rape suspect deemed defamatory per quod).

[69] *See, e.g., Winters*, 576 P.2d at 1154 ("The entire editorial needs to be examined. That is what was published. Language out of context may have a different meaning than the same language within the four corners of the editorial.").

[70] *Strong*, 899 P.2d at 1187 (citing Sellers v. Oklahoma Publ'g Co., 1984 OK 11, 687 P.2d 116, 10 Media L. Rep. (BNA) 1795; Miskovsky v. Tulsa Tribune Co., 1983 OK 73, 678 P.2d 242).

[71] Sturgeon v. Retherford, 1999 OK CIV APP 78, 987 P.2d 1218, 1224, 28 Media L. Rep. (BNA) 1144 (without holding).

[72] 987 P.2d at 1224 n.2.

[73] *Winters*, 576 P.2d at 1154.

coverage. The newspaper wrote: "[The plaintiff] and all of the other people indicted by the federal grand jury recently are just as guilty in Guymon in the panhandle, Idabel in Southeastern Oklahoma, Bartlesville in the northeast, Lawton in the southwest, or right smack in downtown Oklahoma City. Seeking out possible weak juries or less fair federal judges is not the American Way of justice ... ."[74] The Supreme Court majority found the editorial's language defamatory per se, reasoning that the newspaper had essentially stated that the plaintiff "was just as guilty in small towns as he was in Oklahoma City." The majority reasoned:

> If the writer had wanted to indicate that the juries were just as fair in the country as in the city, he could have said that he was just as innocent or guilty in the country as he was in the city. On the contrary, the next paragraph was designed to nail down his guilt by insinuating that he was seeking weak juries or a less fair Federal Judge to acquit him even though he was guilty.[75]

In contrast, Justice Robert E. Lavender, writing for the three-member dissent, said although the editorial writer could have chosen "better language," the editorial was not defamatory per se because it did not state that the plaintiff was guilty.[76] "[T]he editorial found it difficult to understand why [the plaintiff] could not have as fair a trial in Oklahoma City as in any other part of the state due to news media coverage," Lavender wrote. "The same newspapers and television broadcasts were available to the people of Oklahoma both in and out of Oklahoma City. [The plaintiff] would be just as guilty in one part of the state as the other. It does not state [the plaintiff] was guilty."[77] The editorial was not per se defamation, Lavender argued, because it was "not susceptible to only one meaning so as to be clearly defamatory on its face."[78]

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[74] *Id.* at 1153.
[75] *Id.* at 1154.
[76] *Id.* at 1155 (Lavender, V.C.J., dissenting).
[77] *Id.*
[78] *Id.*

Statements that are defamatory must also apply specifically to the plaintiff.[79] For example, the Oklahoma Supreme Court in 1984 found that the defamatory words in a newspaper story did not pertain to the plaintiff.[80] The article had explained that a district court judge, who was a former law partner of the libel plaintiff, was being investigated over allegations that he had shifted a jury venire to benefit the libel plaintiff. The plaintiff claimed that the story had damaged his reputation as an attorney and falsely accused him a crime.[81] The court, however, concluded that while the article detailed the accusations against the judge, "no reasonable reader could have interpreted the words of the article as imputing unethical and criminal conduct" to the plaintiff.[82]

Defamatory Per Se: The trial judge determines whether the words are defamatory per se.[83] To be considered as such, the words must be "susceptible of but a single meaning that is opprobrious."[84] The words "alone must be construed, stripped of all insinuations,

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[79] *See, e.g.,* Sellers v. Okla. Publ'g Co., 1984 OK 11, 687 P.2d 116, 120, 10 Media L. Rep. (BNA) 1795; Fite v. Okla. Publ'g Co., 146 Okla. 150, 293 P. 1073, 1075 (Okla. 1930); Hargrove v. Okla. Press Publ'g Co., 130 Okla. 76, 265 P. 635, 636 (1928); Strong v. Okla. Publ'g Co., 1995 OK CIV APP 89, 899 P.2d 1185, 1187, 24 Media L. Rep. (BNA) 1315.

[80] Sellers v. Okla. Publ'g Co., 1984 OK 11, 687 P.2d 116, 10 Media L. Rep. (BNA) 1795.

[81] 687 P.2d at 118.

[82] *Id.* at 120.

[83] *Gaylord*, 958 P.2d at 147 ("Whether a writing is libelous per se presents an issue of law for the trial court's resolution. A fact determination, if necessary to decide whether a publication is libelous per quod, is for the jury."); *Sellers*, 687 P.2d at 120-21 ("[T]he court makes the libel per se determination as a matter of law…."); Akins v. Altus Newspapers Inc., 1977 OK 179, 609 P.2d 1263, 1267, 3 Media L. Rep. (BNA) 1449. ("It is a matter of law for the court to determine if the publication was libelous per se, as opposed to a fact determination for the jury as to the publication being libelous per quod."); *Winters*, 576 P.2d at 1154 ("[I]t is always a question for the court to determine as a matter of law whether or not the article was libelous per se.").

[84] *Gaylord*, 958 P.2d at 146. *See also* Brock v. Thompson, 1997 OK 127, 948 P.2d 279, 292 ("A writing is actionable per se when the language used is susceptible of but a single meaning that is opprobrious."); *Sturgeon*, 987 P.2d at 1223. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 814 (10th ed. 2001) (opprobrium: 1: something that brings disgrace. 2a: a public disgrace or ill fame that follows from conduct considered grossly wrong or vicious).

innuendo, colloquialisms and explanatory circumstances."[85] They are measured by their "natural and probable effect upon the mind of the average lay reader – i.e., if the article identifies the plaintiffs ... and imparts a defamatory statement."[86] "[N]o mere claim of the plaintiff can add a defamatory meaning where none is apparent from the publication itself."[87] Words that "prejudicially impugn a person's skill, knowledge, or conduct in ... business" are defamatory per se.[88] Accusing someone of being a "drunkard" or of having being "[r]uined by tobacco and whisky" falls within this category of words.[89]

Accusing someone of a crime is per se defamation.[90] In *Akins v. Altus Newspapers, Inc.*, for example, the Oklahoma Supreme Court said accusing a police officer of having "kidnapped a boy at gunpoint" and "removing the other youth from a Blair home at gunpoint" were defamatory per se.[91] "The news item is susceptible to only a meaning so as to be clearly defamatory on its face," the court said.[92] Likewise, identifying someone in the cutline for a photograph as a "rape suspect" is per se defamation, the Oklahoma Court of Civil Appeals said in 1995.[93] "We discern no way in which the appellation of 'rape suspect' can have an innocent, non-defamatory connotation."[94] In 1962, the Oklahoma Supreme Court had said a magazine article accusing the

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[85] *Sellers*, 687 P.2d at 120-21.

[86] *Gaylord*, 958 P.2d at 147. *See also Brock*, 948 P.2d at 291 ("To determine whether a publication is libelous per se, the writing must be measured by its natural and probable effect upon the mind of the average lay reader."); Strong v. The Oklahoma Publishing Co., 1995 OK CIV APP 89, 899 P.2d 1185, 1187, 24 Media L. Rep. (BNA) 1315 ("In determining whether the *Oklahoman's* publication amounts to libel per se or per quod, we consider the publication in its entirety, and ascribe to the words used their ordinary, natural, and obvious meanings.").

[87] *Sellers*, 687 P.2d at 120.

[88] *Gaylord*, 958 P.2d at 147. *See also Brock*, 948 P.2d at 292 ("Those words are deemed actionable on their face which prejudicially impugn a person's skill, knowledge, or conduct in his (or her) business.").

[89] Dawkins v. Billingsley, 69 Okla. 259, 172 P. 69-70 (Okla. 1918).

[90] *See, e.g.,* Luper v. The Black Dispatch Publ'g Co., 1983 OK CIV APP 54, 675 P.2d 1028, 1031 ("Plaintiff contends these articles are libelous per se because they charge her with criminal acts. We agree.").

[91] 1977 OK 179, 609 P.2d 1263, 1267, 3 Media L. Rep. (BNA) 1449.

[92] 609 P.2d at 1267.

[93] *Strong*, 899 P.2d at 1187.

[94] *Id.*

University of Oklahoma football team of illegally using amphetamines was defamatory per se.[95] Said the court:

> After reading the entire article and considering its effect upon the mind of the average lay reader, we are convinced that the article is clearly defamatory on its face and does expose the entire O.U. team to public hatred and contempt and tends to deprive the team and its membership of public confidence. The reader was unequivocally informed that the members of the team illegally used amphetamine; the article explained that amphetamine could be administered with a nasal spray and that for 95 cents one could purchase 'enough to hop up an entire football team'. The use of the phrase 'hop up' negates any implication that the amphetamine was legally administered under the direction of a physician for medical purposes. The reference to the 1956 O.U. football team is so well tied into, or interwoven, into the article that the full weight and import of the article falls upon the O.U. team.[96]

In 2014, the Court of Civil Appeals overturned a trial judge's decision that a home address mistakenly published as belonging to a sex offender could not be considered defamatory per se as a matter of law. The appellate court explained:

> One could reasonably conclude that the impact of the publication of Plaintiffs' address as that of a convicted sex offender is apparent on its face and susceptible of but one opprobrious meaning, can be 'measured by its natural and probable effect upon the mind of the average lay reader,' and could expose Plaintiffs to public hatred or contempt.[97]

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[95] Fawcett Publications, Inc. v. Morris, 1962 OK 183, 377 P.2d 42, *appeal dismissed, cert. denied*, 376 U.S. 513 (1962), *reh'g denied*, 377 U.S. 925 (1964).

[96] 377 P.2d at 47.

[97] Nelson v. Am. Hometown Publ'g, Inc., 2014 OK CIV APP 57, ¶ 43, 333 P.3d 962. "Whether it is susceptible of a different, innocent meaning is an issue for the trial court," *id.* The case was subsequently settled out of court. Dismissal With Prejudice, Nelson v. Am. Hometown Publ'g, Inc., No. CJ-2010-4209, (Okla. Cnty. Dist. Ct. Nov. 3, 2014).

The term "slush fund" in a headline, however, was "susceptible of innocent meanings," the Oklahoma Supreme Court said in *Hodges v. Oklahoma Journal Publishing Co.*[98] The plaintiff had pointed to two dictionary definitions of a slush fund as a money used for bribery and corrupt political practices.[99] The newspaper defendant, though, noted that one of the same dictionaries also defined slush fund as a "fund raised for undesignated purposes."[100] The state Supreme Court said that headline and three others[101] at issue were, "at most, ambiguous in their defamatory content" and that isolating them from their explanatory articles would be "inappropriate."[102]

In 1995, the Oklahoma Court of Civil Appeals found "nothing [defamatory] per se about the ownership of property or a business," which in the particular case was a restaurant.[103]

Would an accusation of homosexuality be considered defamatory per se or per quod in Oklahoma? In 2006, the Oklahoma Court of Civil Appeals noted that publicizing a person's homosexuality has been treated as defamatory per quod by "the better reasoned line of authorities."[104] It cited state courts of appeals in Ohio, North Carolina and Colorado, all of which had said that publicizing someone is a homosexual could not be defamatory per se. The Ohio Court of Appeals had reasoned, "[B]eing a homosexual is not a crime nor is it a disease. Additionally, being a homosexual would not tend to injure a

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[98] 1980 OK 102, 617 P.2d 191-92, 195-96, 6 Media L. Rep. (BNA) 1750 ("AUDIT TURNS UP TAG SLUSH FUND").

[99] 617 P.2d at 194 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, THE UNABRIDGED EDITION (1967) which states: "1. A sum of money used for illicit or corrupt political purposes, as for buying influence or votes, bribing public officials, or the like.") (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1975) which defines "slush fund" as: "1. A fund raised for undesignated purposes; especially: a. A fund raised by a group, such as office employees, for entertainment or the like. b. A fund raised by a political group for bribery or other corrupt practices.").

[100] *Id.*

[101] *Id.* at 192 ("DA Awaits Evidence In Tag Agent Audit," "AGENT TO PUSH TAG FUND HUNT," "Ex-Tag Agent to Return Money").

[102] *Id.* at 195.

[103] Broyles v. Park Newspapers of Sapulpa, Inc., No. 83-208 (Okla. Civ. App. Aug. 22, 1995), *available at* Oklahoma Pub. Legal Research Sys., http://www.oklegal.onenet (July 11, 2001).

[104] Trice v. Burress, 2006 OK CIV APP 79, ¶ 11 n.7, 137 P.3d 1253.

person in his trade or occupation."[105] However, the Ohio court said an accusation of homosexuality could be considered defamatory per quod if it were false. [106]

The Colorado Court of Appeals gave three reasons why accusing someone of homosexuality could not be defamatory per se:

- "The fact that sexual activities between consenting adults of the same sex are no longer illegal in Colorado tends to indicate that an accusation of being a homosexual is not of such a character as to be slanderous *per se*."

- Because per se defamation denotes "belonging in a category deserving of social approbation, *i.e.,* thief, murderer, prostitute, etc., ... [a] court should not classify homosexuals with those miscreants who have engaged in actions that deserve the reprobation and scorn which is implicitly a part of the slander/libel *per se* classifications."

- "For a characterization of a person to warrant a *per se* classification, it should, without equivocation, expose the plaintiff

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[105] *Wilson v. Harvey*, 164 Ohio App. 3d 278, 2005 Ohio 5722, ¶ 19, 842 N.E.2d 83 (Ohio App. 2005). *See also* Donovan v. Fiumara, 114 N.C. App. 524, 528-29, 442 S.E.2d 572 (N.C. App. 1994) ("Defendant allegedly referred to plaintiffs as being 'gay' and 'bisexual.' This simple statement neither impeaches plaintiffs in their trade or business (the second traditional category of utterances considered slanderous *per se*) nor alleges them to have a 'loathsome disease' (the third traditional category), and plaintiffs do not maintain otherwise."). The N.C. Court of Appeals rejected the plaintiffs' contention "that because engaging in certain activity practiced by homosexuals is a felony in North Carolina, falsely claiming plaintiffs are gay or bisexual *imputes* to them commission of a crime, and thus falls within the first class of utterances considered slanderous *per se*. ... [T]he state neither by its terms nor by judicial gloss proscribes sexual preference or the status of being homosexual; in order to violate the statute, a person must commit one of the specific acts coming within the purview of the statute, *id.* at 529-30. "We agree ... that referring to a person as 'gay' or 'bisexual' is not tantamount to charging that individual with the commission of a crime," *id.* at 531.

[106] *Wilson*, 2005 Ohio 5722, ¶ 23 ("Although this flyer may be facially innocent, it may become defamatory through interpretation or innuendo that someone is a homosexual, when in fact, they are not. Therefore, we find that falsely publicizing that someone is a homosexual may be libel per quod, but only if special damages are pled and proven.")

to public hatred or contempt. However, there is no empirical evidence in this record demonstrating that homosexuals are held by society in such poor esteem. Indeed, it appears that the community view toward homosexuals is mixed."[107]

Despite those decisions, the Oklahoma Court of Civil Appeals treated the implication of homosexuality as defamatory per se but limited the classification to the discussion for that case. Apparently because at trial, the plaintiff had not pleaded or offered evidence of special damages as required for defamation per quod.[108]

Public officials in Oklahoma "face an especially heavy burden in attempting to demonstrate libel per se," noted the U.S. Court of Appeals for the Tenth Circuit in 2010.[109] Citing the state's qualified privilege statute, the court said: "'Any and all criticisms upon the official acts of any and all public officers' are privileged and cannot be considered libelous, unless a defendant makes a false allegation that the official engaged in criminal behavior.[110] To fall into this category, 'the words alleged to have been spoken of the plaintiff, when taken in their plainest and most natural sense, and as they would be ordinarily understood, [must] obviously import the commission of crime punishable by indictment.'"[111]

Defamatory Per Quod: In contrast to per se defamation, a statement is deemed per quod defamation "if the words are reasonably susceptible of both a defamatory and an innocent meaning."[112] For example, the Oklahoma Court of Civil Appeals in 1995 rejected *The Daily Oklahoman's* contention that a cutline mistakenly identifying the

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[107] *Hayes v. Smith*, 832 P.2d 1022, 1026 (Colo. App. 1991) (citations omitted).

[108] *Trice*, 2006 OK CIV APP 79, ¶ 11 ("But, Plaintiff neither plead nor presented evidentiary materials arguably demonstrating actionable special damages to support a claim of defamation *per quod*. For purposes of the following discussion only, however, we assume the statement was published and constitutes slander *per se*.").

[109] Peterson v. Grisham, 594 F.3d 723, 728-29, 2010 U.S. App. LEXIS 2116, 38 Media L. Rep. 1330 (10th Cir. 2010).

[110] *Id.* at 729 (quoting 12 O.S. § 1443.1 (OSCN 2009)).

[111] *Id.* (quoting Okla. Publ'g Co. v. Kendall, 1923 OK 999, 96 Okla. 194, 221 P. 762, 764 (Okla. 1923).

[112] *Gaylord*, 958 P.2d at 147. *See also Brock*, 948 P.2d at 292; *Kee*, 182 P. at 496 (Okla. 1919).

plaintiff as a "rape suspect" was per quod defamation.[113] The newspaper argued that "to be defamatory the reader would have to possess the additional knowledge that the man depicted in the photograph was not" the actual suspect. The court, however, said, "[T]he objectionable publication, considered in its entirety, and without reference to any other fact, is reasonably susceptible of only one interpretation, that the man therein depicted is a suspected serial rapist and burglar."[114]

To prove per quod defamation, the plaintiff must explain the special circumstances or facts that make the words defamatory.[115] The plaintiff's explanation of a statement's defamatory meaning "cannot be used to enlarge the meaning of words, nor attribute to them a meaning which they would not bear."[116] In *Miskovsky v. Tulsa Tribune*, for example, the plaintiff – a political candidate – complained about an editorial cartoon showing him "sucking upon a sewer pipe."[117] He claimed that the pipe had "the appearance of a male penis," and, therefore, "the publication by innuendo is capable of charging him with the crime of sodomy."[118] The state Supreme Court, however, said the cartoon "neither by its unembellished presentation nor by the addition of any possible innuendo imparts to the plaintiff the commission of the crime of sodomy, and when viewed in its most derogatory sense, does

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[113] *Strong*, 889 P.2d at 1187.

[114] *Id.*

[115] *Gaylord*, 958 P.2d at 147 (Per quod defamation "requires proof by extrinsic facts to show a defamatory meaning."); *Brock*, 948 P.2d at 292 (Per quod defamation "requires proof by extrinsic facts to show a defamatory meaning."); *Kee*, 182 P. at 498 ("In order for the petition to state a cause of action, it is necessary for the plaintiff to plead by way of inducement or averment, colloquium and innuendo, certain extrinsic facts which connect the plaintiff with the libelous publication and to plead the meaning the words have and that they would be understood to have in connection with the libelous article as published."); *Sturgeon*, 987 P.2d at 1223 (citing *Brock*, 948 P.2d at 292) (Per quod defamation "requires proof of extrinsic facts to show a defamatory meaning.").

[116] *Kee*, 182 P. at 500 (quoting Penry v. Dozier, 161 Ala. 292, 49 So. 909) ("An innuendo cannot enlarge or restrict the natural meaning of words, nor can it introduce new matter."). *See also* Miskovsky v. Tulsa Tribune Co., 1983 OK 73, 678 P.2d 242, 249 (citing *Kee* with approval).

[117] 1983 OK 73, 678 P.2d 242, 249.

[118] 678 P.2d at 249-250.

no more than express the writer's opinion of the political tactics of plaintiff's political campaign."[119]

The trial judge determines "whether given words or given publications are capable of the meaning ascribed to them" by the plaintiff; the jury determines "whether such meaning is truly ascribed to them."[120]

Fault

This is the level of error by the journalist that resulted in the libelous statement being published or broadcast. Fault must be proved by the plaintiff, and the degree of required fault varies according to the status of the plaintiff. In *New York Times v. Sullivan*, the U.S. Supreme Court said public officials must prove "actual malice" on the part of the defendant.[121] In other words, the Court said, the plaintiff must prove that the defendant made the statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[122]

In *Curtis Publishing Co. v. Butts*, the Court extended the "actual malice" standard to public figures.[123] In *Gertz v. Robert Welch Inc.*, the Court left it up to the states to decide the appropriate level of fault that must be proved by private figures.[124] In 1976, the Oklahoma Supreme Court adopted negligence as that fault level.[125] The state court noted that the rationale for adopting a lesser standard for private figures

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[119] *Id.* at 250.

[120] *Kee*, 182 P. at 498. *See also Gaylord*, 958 P.2d at 147 ("Whether a writing is libelous per se presents an issue of law for the trial court's resolution. A fact determination, if necessary to decide whether a publication is libelous per quod, is for the jury."); *Brock*, 948 P.2d at 292 ("The issue whether a writing is libelous per se is a matter of law for decision by the trial court. A fact determination, if necessary to decide whether a publication is libelous per quod, is for the jury."); *Akins*, 609 P.2d at 1267 ("It is a matter of law for the court to determine if the publication was libelous per se, as opposed to a fact determination for the jury as to the publication being libelous per quod."); *Sturgeon*, 987 P.2d at 1223 (citing *Brock*, 948 P.2d at 292).

[121] 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

[122] 376 U.S. at 279-80.

[123] 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

[124] 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 1 Media L. Rep. (BNA) 1633 (1974).

[125] Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85, 92 ("We conclude a reasonable balance between the right of the news media and the right of the private individual is best achieved by the negligence test.").

was that public officials and figures enjoy greater access to "channels of effective communication" and becoming a public official or figure is "usually voluntary."[126]

Determining the status of the plaintiff is key to determining the fault level that must be proved. The plaintiff categories are public official, public figure and private figure.

Public Official: Who is a public official for the purpose of a libel action is not determined by state definitions of "public officials for local administrative purposes."[127] Instead, the U.S. Supreme Court has given guidelines for making that determination, which the state Supreme Court in 1978 listed in *Johnston v. Corinthian Television Corp.*[128] Quoting from *New York Times v. Sullivan* and *Rosenblatt v. Baer,*[129] the state court said public officials are:

- Elected officials;[130]
- "At the very least, to those among the hierarchy of government employees who have or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs";[131] or
- "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance[s] of all government employees."[132]

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[126] 549 P.2d at 90.

[127] Hodges v. Oklahoma Journal Publ'g Co., 1980 OK 102, 617 P.2d 191, 193, 6 Media L. Rep. (BNA) 1750 ("Whether appellant was a 'public official' within New York Times may not be determined by reference to state-law standards. States have developed definitions of 'public officials' for local administrative purposes, not for purposes of a national constitutional question."). *See also* Johnston v. Corinthian Television Corp., 1978 OK 88, 583 P.2d 1101, 1103, 3 Media L. Rep. (BNA) 2518 (citing Rosenblatt v. Baer, 383 U.S. 75 (1966)).

[128] 1978 OK 88, 583 P.2d 1101, 3 Media L. Rep. (BNA) 2518.

[129] 383 U.S. 75 (1966).

[130] 583 P.2d at 1102 (citing New York Times v. Sullivan, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)).

[131] *Id.* at 1103 (quoting *Rosenblatt*, 383 U.S. at 85).

[132] *Id.*

The guidelines also require that the alleged libel relate to the plaintiff's official capacity, the state court noted.

In *Johnston*, the Oklahoma Supreme Court relied upon the third guideline to find that a volunteer wrestling coach at an elementary school was a public official.[133] In a television newscast, the coach had been accused of whipping a sixth-grade boy, who was seeking to rejoin the team, while the boy was "naked and crawling, with his legs tied, through the legs of other team members."[134] The court said the public had an independent interest in the coach's performance "as to the method of disciplining a sixth grade boy in conjunction with the grade school wrestling team. This interest went beyond the general interest as to the performance of 'all government employees,' as indicated by the number of withdrawals of students by parents from [the coach's] physical education classes."[135] Even though his coaching duties were voluntary, the court reasoned that he "was operating within the framework of the public school system, an obvious governmental function. ... [W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system. This includes the athletic program."[136]

In 1980, the Oklahoma Supreme Court applied the second guideline and ruled that a tag agent was a public official, even though the plaintiff contended that he was an independent contractor, not a government employee.[137] The court said the second guideline "was not intended to limit it to those individuals who have a traditional 'employee-employer' relationship with a governmental unit. It extends to those who have, or appear to have, substantial responsibility for or control over the conduct of governmental affairs." This definition applied to the tag agent, who – the court said – "held a position of substantial public impact, and had duties which involved the collection and accounting for substantial amounts of public funds, as well as

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[133] *Id.* at 1102-03.

[134] *Id.* at 1102.

[135] *Id.* at 1103.

[136] *Id.*

[137] Hodges v. Okla. Journal Publ'g Co., 1980 OK 102, 617 P.2d 191, 194, 6 Media L. Rep. (BNA) 1750.

administering an area of the law which affected practically every citizen of Oklahoma County, the area in which he served."[138]

The Oklahoma Court of Civil Appeals combined the second and third guidelines in 1995 to declare that the vice president of a school board was a public official.[139] Apparently believing that the court in *Johnston* had used the "substantial responsibility" guideline to declare a "physical education teacher" a public official, the Court of Civil Appeals said, "[I]t cannot now be seriously argued it would not apply to a school board member possessing the power to officially influence the employment of teachers."[140] The court then applied the third guideline, saying, "The debate may be whether a night watchman is a public official, but clearly the Plaintiff here meets the test of one who's [sic] position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the charges in controversy."[141]

Oklahoma courts also have declared that police officers are public officials, saying that such a conclusion is "unmistakable."[142] Some libel plaintiffs concede that they are public officials. For example, a public middle school principal,[143] a public school teacher,[144] and a police chief have made that concession.[145]

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[138] 617 P.2d at 194.

[139] Strong v. Okla. Publ'g Co., 1995 OK CIV APP 89, 899 P.2d 1185, 24 Media L. Rep. (BNA) 1315.

[140] 899 P.2d at 1188-89 (citing Johnston v. Corinthian Television Corp., 1978 OK 88, 583 P.2d 1101, 1103, 3 Media L. Rep. (BNA) 2518).

[141] 899 P.2d at 1189 (citing Rosenblatt v. Baer, 383 U.S. 75 (1966)).

[142] Hennessee v. Mathis, 1987 OK CIV 35, 737 P.2d 958, 962 ("That [police officers] are 'public officers' or 'public officials' for purposes of this case is unmistakable."). *See also* Cowdrey v. Allen, No. 05-CV-461-TCK-PJC, 2006 U.S. Dist. LEXIS 81839, at **24-25 (N.D. Okla. Nov. 7, 2006) (police officer is a public official who must prove actual malice); Akins v. Altus Newspapers Inc., 1977 OK 179, 609 P.2d 1263, 3 Media L. Rep. (BNA) 1449, *cert. denied*, 449 U.S. 1010 (1977); *Wilson v. City of Tulsa,* 2004 OK CIV APP 44, ¶ 22, 91 P.3d 673.

[143] Jordan v. World Publ. Co., 1994 OK CIV APP 30, ¶ 9, 872 P.2d 946, 22 Media L. Rep. (BNA) 1796.

[144] Luper v. Black Dispatch Publ'g Co., 1983 OK CIV APP 54, 675 P.2d 1028, 1031.

[145] Tanner v. W. Publ'g Co., 1984 OK CIV APP 22, 682 P.2d 239, 241. *See also* Jurkowski v. Crawley, 1981 OK 110, 637 P.2d 56, 7 Media L. Rep. (BNA) 2113 (police chief is a public official).

For a plaintiff to be categorized as a public official, the libelous statement must also apply to the plaintiff's official conduct or conduct relevant to fitness for office. "[A]nything which might touch on an official's fitness for office is relevant," the U.S. Supreme Court said in *Garrison v. Louisiana*.[146] This rule "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants," the Court said. "Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."[147]

The Oklahoma Court of Civil Appeals has said that "allegations of the crimes of adultery, bigamy, and criminal conspiracy ... directly relate to a public official's conduct"[148] and that accusations of "criminal conduct, no matter how remote in time or place, can never be irrelevant to official's or candidate's fitness for office."[149] Accusations that a Midwest City police chief had conspired to commit robbery and murder as a Florida police chief a decade earlier still applied to his fitness for office in Oklahoma, the state Supreme Court said in 1981.[150] Even though the police chief had not been accused of the misconduct in Midwest City, the alleged misconduct in Florida was "directly material" to his fitness for office because it referred "to abuse of the same type of authority" he held in Oklahoma, the state court said.[151]

In 1995, the Oklahoma Court of Civil Appeals said being identified as a rape suspect would be relevant to a public official's fitness for office.[152]

If the plaintiff no longer holds the same position, the public official designation still applies if the defamatory remarks relate to the plaintiff's previous conduct as a public official and the manner in

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[146] 379 U.S. 64, 76-77, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964).

[147] 379 U.S. at 76-77.

[148] *Luper*, 675 P.2d at 1031-32.

[149] *Strong*, 899 P.2d at 1189 (citing Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S. Ct. 621, 28 L. Ed. 2d 35 (1971)).

[150] Jurkowski v. Crawley, 1981 OK 110, 637 P.2d 56, 7 Media L. Rep. (BNA) 2113.

[151] 637 P.2d at 58-59.

[152] *Strong*, 899 P.2d at 1189. The plaintiff, the vice president of a school board, had been misidentified in a newspaper photograph as a rape suspect.

which the plaintiff performed those responsibilities is still a matter of public interest.[153] For example, an FBI agent of 30 years was considered a public official in Oklahoma even though he had retired. The U.S. Court of Appeals for the Tenth Circuit noted that the plaintiff had served in the "high echelons of the FBI where he had an influential role in fundamental issues of this country's national and foreign policy."[154]

Public Figure: If a plaintiff is not deemed a public official, the next category to be considered is that of public figure. In *Gertz*, the U.S. Supreme Court outlined two kinds of public figures:

- All-Purpose Public Figure: Those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes," and
- Limited-Purpose Public figure: Those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[155]

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[153] Revell v. Hoffman, 309 F.3d 1228, 1233 (10th Cir. 2002) (quoting Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) ("That the person defamed no longer holds the same position does not by itself strip him of his status as a public official for constitutional purposes. If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times*.").

[154] *Id*. at 1230. The plaintiff had risen to the position of Associate Deputy Director and served on the Vice President's Task Force on Terrorism, the National Foreign Intelligence Board, and the Terrorist Crisis Management and Deputies Committee of the National Security Council. He also had served as Vice Chair of the Interagency Group for Counterintelligence and the President's Commission on Civil Aviation Security and Terrorism. He had testified before committees in both the House and Senate and had appeared on various national news programs, including *60 Minutes*, *Face the Nation* and *Nightline*.

[155] 418 U.S. at 345. Though *Gertz* did not define "public controversy," federal courts have said it must be more than "simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. ... Essentially private concerns or disagreements do not become public controversies simply because they attract attention. ... Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1293 n.12 (D.C. Cir.), *cert. denied*, 449

"In either event," the Court said, "they invite attention and comment."[156]

The Oklahoma Supreme Court has adopted the *Gertz* definitions of public figures.[157] In 1978, for example, the author of a letter to the editor published in the University of Oklahoma student newspaper was declared a limited-purpose public figure by the state Supreme Court.[158] In his letter, the author had defended a citizens group that he belonged to and its involvement in local policy issues. The court said the author had "voluntarily injected himself into the vortex of the public controversy by writing his letter addressed to the editor with the intent it be published." He had "sought to engage the public's attention to influence public issues" and made "himself an issue through his own labeling of himself as 'an individual having radical opinions on a number of contemporary social issues.'"[159]

Oklahoma courts applying the *Gertz* definitions also have found candidates for political office to be limited-purpose public figures. "[U]nquestionably the filing of a declaration of candidacy for public office places the declarant in the position of special prominence in the resolution of a public issue, that is, the election of a candidate to public office by the voting citizenry," the Oklahoma Supreme Court said in 1977.[160] In that case, a former sheriff was seeking to regain his

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U.S. 898 (1980). *See also* Anderson v. LibertyLobby, Inc., 477 U.S. 242, 246 n.3, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (citing *Waldbaum*) ("[A] person has become a public figure for limited purposes if he is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants.").

[156] 418 U.S. at 345.

[157] *See* Weaver v. Pryor Jeffersonian, 1977 OK 163, 569 P.2d 967, 973, 3 Media L. Rep. (BNA) 1425 ("We adopt the *Gertz* test in ascertaining if a particular allegedly defamed person is a 'public figure' and subject to the *New York Times* rule.").

[158] Wright v. Haas, 1978 OK 109, ¶ 4, 586 P.2d 1093 ("Wright is a public defamation plaintiff for the limited range of issues encompassed within his letter.").

[159] *Id.* ¶ 3.

[160] *Weaver*, 569 P.2d at 973. *See also* Hart v. Blalock, 932 P.2d 1124, 1126 (Okla. 1997) (political candidates are public figures); Richardson v. Tribune Media Co., No. 117,806, at 10 (Okla. Civ. App. Aug. 4, 2020) (not for official publication) (gubernatorial candidate is a public figure).

political office by running against the incumbent.[161] In 1982, a candidate for one of Oklahoma's U.S. Senate seats agreed that he was a public figure.[162]

That rule also seems to apply to incumbents running for re-election. For example, a state senator seeking re-election was declared a public figure by the Oklahoma Supreme Court in 1999.[163] However, the court did so without explaining why the senator was treated as a "political candidate"[164] and not as an elected official, which would have resulted in him being categorized as a public official. The court noted that he was re-elected by the largest margin of his career.[165]

Categorization as a public figure can come without much disagreement from the plaintiff or explanation from the court.[166] For example, televangelist Robert G. Tilton agreed in his lawsuit against PrimeTime Live that he was a public figure.[167] In *Luper v. Black Dispatch Publishing Co.*, the plaintiff – a public school teacher – had conceded that she was a public official, but the Oklahoma Court of Civil Appeals said she also was a public figure "by virtue of her civil rights work, radio show, and books."[168] In 2016, a district judge said the plaintiff qualified "as a public figure" because in addition to the publicity he had received as the defense attorney in a much-publicized murder trial three years earlier, he also had published a book about the murder case and had received publicity when he later "resigned from

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[161] 569 P.2d at 969-70.

[162] Miskovsky v. Okla. Publ'g Co., 1982 OK 8, 654 P.2d 587, 590, 7 Media L. Rep. (BNA) 2607, *cert. denied*, 459 U.S. 923, 103 S. Ct. 235, 74 L. Ed. 2d 186 (1982).

[163] Herbert v. Christian Coal., 1999 OK 90, 992 P.2d 322, 328 ("It is undisputed that the plaintiff in the case at bar is a public figure."). *See also* Hart v. Blalock, 932 P.2d 1124 (Okla. 1997), in which the plaintiff was an incumbent state district judge who had been appointed to the position and was running for election.

[164] 992 P.2d at 328.

[165] *Id.* at 324.

[166] *See, e.g.,* Grogan v. KOKH, LLC, 2011 OK CIV APP 34 (high school teacher treated as public figure). "The parties seem to be in essential agreement as to the law applied by the district court. Grogan is a public figure," *id.* ¶ 10.

[167] Tilton v. Capital Cities/ABC, Inc., 905 F. Supp. 1514, 1518, 23 Media L. Rep. (BNA) 2057 (N.D. Okla 1995).

[168] 675 P.2d at 1031.

membership in the Oklahoma Bar Association while under investigation."[169]

For a plaintiff to be categorized as a public figure who thrust to the forefront of a particular public controversy, the alleged libel must relate directly to that controversy. In other words, the plaintiff is a public figure only for that public controversy.[170] For statements concerning private matters, the plaintiff would be considered a private figure.

Private Figure: In *Gertz*, the U.S. Supreme Court said the media could assume that public officials and public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."[171] But such an assumption is not justified with respect to private figures, the Court said. It explained:

> [Gertz] has not accepted public office or assumed an "influential role in ordering society." ... He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.[172]

If the plaintiff cannot be categorized as a public official or public figure, then the plaintiff is considered a private figure. For example, in 1976's *Martin v. Griffin Television, Inc.*, the Oklahoma Supreme Court applied the *Gertz* public figure definitions to find that a pet shop owner was a private figure.[173] The court explained:

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[169] Order, Elias v. Griffin Communications LLC, No. CJ-2017-00032, at 4 (Creek Cnty. Dist. Ct., Bristow Div., May 8, 2018).

[170] *See, e.g., Wright*, 586 P.2d 10 at 1096 ("Wright is a public defamation plaintiff for the limited range of issues encompassed within his letter.").

[171] 418 U.S. at 345.

[172] *Id.* (citation omitted).

[173] 549 P.2d at 89 ("Here, Martin, as was Gertz, must be characterized as a private individual.").

> Martin was not a public figure for all purposes and in all contexts by achieving pervasive fame and notoriety. He had not become a public figure for a particular issue by voluntarily injecting himself into a particular public controversy; he had not thrust himself into the vortex of a public issue nor attempted to engage the public's attention to influence the outcome of a public issue.[174]

In 1997, the media defendant agreed that the owners of a 55-gallon drum cleaning company accused of dumping toxic chemical residues directly into the Oklahoma City sewer system were private figures.[175] Likewise, a construction company that had contracted with a public housing authority was a private figure not required to prove actual malice, the Oklahoma Court of Civil Appeals held in 2005.[176] Two plaintiffs whose home address had been mistakenly listed by a newspaper as the residence of a sex offender were "clearly private persons and not subject to the same strictures of pleading and proof as a public figure…," the court said in 2014.[177]

Plaintiff category is important because it determines the level of fault, or error, on the part of the defendant that must be proved by the plaintiff. Public officials and public figures must prove actual malice on the part of the defendant.[178]

Actual Malice: In *New York Times v. Sullivan*, the U.S. Supreme Court defined actual malice as knowledge of falsity or

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[174] *Id.*

[175] Malson v. Palmer Broad. Group, 1997 OK 42, 936 P.2d 940, 942, 25 Media L. Rep. (BNA) 1957.

[176] Bird Constr. Co. v. Oklahoma City Hous. Auth., 2005 OK CIV APP 12, ¶ 8, 110 P.3d 560 ("Bird, however, was not required to prove malice, because it is not a public figure.") (citing Sturgeon v. Retherford Publ'ns, Inc., 1999 OK CIV APP 78, ¶ 10, 987 P.2d 1218, 1223).

[177] Nelson v. Am. Hometown Publ'g, Inc., 2014 OK CIV APP 57, ¶ 20, 333 P.3d 962. "It is conceded that Plaintiffs are not public figures but private persons," *id.* ¶ 46.

[178] *See, e.g.,* Herbert v. Christian Coal., 1999 OK 90, 992 P.2d 322 (public figure must prove actual malice); Jurkowski v. Crawley, 1981 OK 110, 637 P.2d 56, 7 Media L. Rep. (BNA) 2113 (public official must prove actual malice). *See also* Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85 (private figure seeking punitive damages must prove actual malice).

reckless disregard for the truth.[179] Under the standard adopted by the Oklahoma Supreme Court, "actual malice must be proven with convincing clarity by showing that the defendant had a high degree of awareness of probable falsity or in fact entertained serious doubts as to the truth of the publication."[180] "The standard is met by proof of 'actual knowledge of probable falsity,'[181] or 'a high degree of awareness of [a statement's] probable falsity.'"[182] "The test is a 'subjective one' measured by the defendant's state of mind rather than by what a reasonably prudent publisher would have done, and even conduct that constitutes an extreme departure from responsible journalism does not necessarily establish reckless disregard," a federal trial judge noted.[183]

"The Oklahoma Supreme Court has held that reckless disregard is not 1) a failure to conduct a thorough or reasonably prudent investigation, 2) negligence, 3) ill will or a desire to injure, 4) reliance on the unverified statement of a third party, or 5) a showing that the statement was derogatory or untrue," a federal district judge noted in 2018.[184]

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[179] 376 U.S. at 279-80. *See also* Martin v. Griffin Television, Inc., 1976 OK 13, ¶ 28, 549 P.2d 85 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726 (1964))

[180] Talley v. Time, Inc., 2018 WL 4558993, *6 (W.D. Okla. 2018) (citing Colbert v. World Publ'g Co., 1987 OK 116, 747 P.2d 286, 290). *See also* Garrison v. Louisiana, 379 U.S. 64, 75 (1964); St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 57, 417 P.3d 1240 ("Mere negligence is not enough. Rather, the plaintiff must establish 'that the defendant in fact entertained serious doubts as to the truth of his publication,' or had a 'high degree of awareness of … [the] probable falsity' of the published information.") (internal citations omitted). "Actual malice generally consists of '[c]alculated falsehood,'" Krimbill, 2018 OK CIV APP 37, ¶ 57 (internal citation omitted).

[181] *Talley*, 2018 WL 4558993, *6 (quoting Jurkowski v. Crawley, 637 P.2d 56, 60 (Okla. 1981)).

[182] *Id*. (quoting Herbert v. Okla. Christian Coal., 992 P.2d 322, 328-29 (Okla. 1999)).

[183] Tally v. Time, Inc., 2015 U.S. Dist. LEXIS 16558, 43 Media L. Rep. 1818 (W.D. Okla. Feb. 11, 2015) (quoting Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 664-66, 688, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989)). *See also Talley*, 2018 WL 4558993, *6 ("The test is a 'subjective one' measured by the defendant's state of mind rather than a reasonable-publisher standard.").

[184] *Talley*, 2018 WL 4558993, *6 (citing Herbert v. Okla. Christian Coal., 992 P.2d 322, 328-29 (Okla. 1999)).

To determine if actual malice existed, courts look at the direct, state-of-mind evidence indicating what the reporter thought or believed at the time of the story. The inquiry should not focus on "the defendant's attitude toward the plaintiff, but rather on the defendant's attitude toward the truth or falsity of the statement alleged to be defamatory," the state court said.[185] "Evidence of hatred, spite, vengefulness, or deliberate intention to harm can never, standing alone, warrant a verdict for the plaintiff in such cases." However, journalists "cannot automatically insulate themselves from liability for defamation by a bare assertion that they believe the lies to be true."[186]

Based on the U.S. Supreme Court cases *Curtis Publishing Co. v. Butts*[187] and *Associated Press v. Walker,*[188] lower courts also examine indirect, circumstantial evidence consisting of the credibility of the sources used or not used, the nature of the story and the inherent probability or believability of the defamatory statement to determine if the defendant recklessly disregarded the truth. This test is "subjective"[189] and "not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."[190] In fact, failing to investigate or conducting an inadequate investigation is not evidence alone of reckless disregard for the truth.[191]

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[185] *Id.* at 331 (citing Varanese v. Gall, 35 Ohio St. 3d 78, 518 N.E.2d 1177, 1180 (Ohio 1988)). *See also* Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 57, 417 P.3d 1240 ("Reckless disregard is a subjective standard, focusing on a defendant's state of mind.").

[186] *Luper*, 675 P.2d at 1033. *See also Herbert*, 992 P.2d at 329 (citing Greenbelt Coop. Publ'g Ass'n. v. Bresler, 398 U.S. 6, 10-11, 90 S. Ct. 1537, 1540, 26 L. Ed. 2d 6 (1970); Garrison v. Louisiana, 379 U.S. at 73-74, 85 S. Ct. at 215) ("That the publisher acted out of ill will, hatred or a desire to injure the official is not enough to establish actual malice.").

[187] 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, 1 Media L. Rep. 1568 (1967).

[188] 389 U.S. 28, 88 S.Ct. 106, 19 L.Ed.2d 28 (1967).

[189] *Luper*, 675 P.2d at 1033 (citing Herbert v. Lando, 441 U.S. at 160; Gertz v. Robert Welch, Inc., 418 U.S. 323, 334, 41 L. Ed. 2d 789, 94 S. Ct. 2997 n.6 (1974); Jurkowski v. Crawley, 637 P.2d at 62).

[190] *Luper,* 675 P.2d at 1033.

[191] *Herbert*, 992 P.2d at 328 ("Failure to conduct a thorough investigation is not a sufficient basis to establish actual malice."); *Luper*, 675 P.2d at 1033 ("Failure to investigate or inadequacy of investigation alone does not constitute actual malice.");

The plaintiff must prove actual malice with "clear and convincing evidence,"[192] meaning that it is "highly probable or reasonably certain"[193] that the defendant knew the statement was false or recklessly disregarded the truth. This burden of proof is greater than the preponderance of evidence standard required in most civil trials but less than the reasonable doubt standard in criminal cases.[194] A television reporter's admission that he had obtained a copy of and was "familiar" with a federal lawsuit upon which he based his story "is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity," the state Court of Civil Appeals said in 2002. That the reporter had not read all of a public body's documents related to the plaintiff also was evidence that the reporter "knew the statement was false or acted with reckless disregard of whether it was false or not."[195]

A trial judge cannot grant summary judgment[196] for the media defendant in a libel action if the plaintiff has shown clear and convincing evidence of actual malice.[197]

Miskovsky v. Okla. Publ'g Co., 654 P.2d at 596 ("The mere failure to investigate cannot establish reckless disregard for the truth.").

[192] *Herbert*, 992 P.2d at 327 ("Because plaintiff has not shown clear and convincing evidentiary material of actual malice, we find that the trial court correctly granted summary judgment to defendant."). *See also* Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 8, 60 P.3d 1058 ("[T]he evidence must be sufficient for a trier of fact to find or infer its existence subject to a clear and convincing standard of proof.").

[193] BLACK'S LAW DICTIONARY 457 (7th ed. 2000) ("Evidence indicating that the thing to be proved is highly probable or reasonably certain.").

[194] *Id.*

[195] Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 21, 60 P.3d 1058, 1063.

[196] BLACK'S LAW DICTIONARY 1166 (7th ed. 2000) ("A judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. This procedural device allows the speedy disposition of a controversy without the need for trial.").

[197] *See, e.g., Herbert*, 992 P.2d at 327 ("Because plaintiff has not shown clear and convincing evidentiary material of actual malice, we find that the trial court correctly granted summary judgment to defendant."). *See also* Weaver v. The Pryor Jeffersonian, 1977 OK 163, 569 P.2d 967, 973, 3 Media L. Rep. (BNA) 1425 ("[O]n a motion by defendant for summary judgment in a libel action, the defendant has the burden of showing there is no issue of actual malice in the case."); Hodges v. Oklahoma Journal Publ'g Co., 1980 OK 102, 617 P.2d 191, 6 Media L. Rep. (BNA) 1750 (affirming trial court's grant of summary judgment in favor of defendant because no

In 1977, the Oklahoma Supreme Court found evidence of actual malice on the part of newspaper editors who published a letter accusing a former sheriff running for re-election of having been willing to "fix" criminal charges in exchange for a favor and of stealing from jail inmates.[198] The court noted that the editors did not know the letter's author, did not ask to see her evidence and did not contact the candidate about the accusations.[199] The editors, the court said, made no "inquiry into the truth of the inherently improbable statements."[200] The court also emphasized that a "strained relationship" existed between the editors and the candidate, that one of the editors was the brother-in-law of the candidate's opponent, and that the letter was published in the weekly newspaper's last issue prior to the election. Those circumstances were "sufficient to raise a question in the minds of reasonable men as to whether the defendants ... acted with actual malice," the court said.[201] It overturned the trial judge's summary judgment in favor of the newspaper and remanded the case to a jury trial.

The same year, the state Supreme Court also found "evidence of heedless conduct to show wanton indifference to consequences" by a daily newspaper's staff and refused to overturn a jury's conclusion that the publisher, editor and reporter had "entertained serious doubts as to truth of the publication."[202] The story alleged that a police officer had "kidnapped" a youth from the teenager's home "at gunpoint." The Supreme Court found that:

- The reporter's information came from "casual conversations" at the sheriff's office and overhearing one side of a telephone conversation involving an assistant district attorney;[203]

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evidence of actual malice existed); Luper v. The Black Dispatch Publ'g Co., 1983 OK CIV APP 54, 675 P.2d 1028, 1029 (reversing trial court's grant of summary judgment in favor of defendant because evidence of actual malice existed).

[198] *Weaver*, 569 P.2d at 969.

[199] *Id*. at 970.

[200] *Id.* at 974.

[201] *Id.*

[202] Akins v. Altus Newspapers Inc., 1977 OK 179, 609 P.2d 1263, 1267, 3 Media L. Rep. (BNA) 1449.

[203] *Id.* at 1266.

- A police report on the incident, read by the reporter, made no reference to "a kidnapping at gunpoint";[204]
- The reporter did not contact anyone involved in the incident;[205]
- Because the story told of an investigation by the district attorney and the reporter had gone to the district attorney's office, the editor assumed the reporter had checked with the district attorney;[206] and
- No detailed discussions of the story occurred between the publisher, editor and reporter before the decision to publish it.[207]

The court said the reporter, editor and publisher "acknowledged a real concern for, and the seriousness of, a news story that affects one's reputation."[208]

In 1983, the Oklahoma Court of Civil Appeals found ample evidence that a weekly newspaper editor had acted with actual malice, only to have a jury later conclude that he had not. In the first of the newspaper's two articles, the former husband of the plaintiff – who was a well-known public school teacher, civil rights worker, author and radio talk show host – claimed that the couple had never obtained a legal divorce and that she was "living in adultery" and was "a bigamist."[209] The article referred to a court case number supplied by the former husband to support his claim. The court emphasized that the "sole basis" for the article was a copy of a mailgram, distributed by the former husband five months earlier, in which he demanded his wife's firing from a high school. "The tone and tenor of the scandalous material is, on its face, venomous and obviously consists of the rantings of a bitter ex-husband," the court said. "More importantly, the material was all lies, the falsity of which could have been determined by a simple telephone call to the local court clerk. However, [the editor]

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[204] *Id.*

[205] *Id.*

[206] *Id.* at 1267.

[207] *Id.* ("Before reading the copy, [the editor] asked [the reporter] if he had 'checked it out.' [The reporter] replied, 'Yes.' There was no detailed discussion of the story between the editor and the reporter. [The publisher] was shown the story by his editor. This is sometimes, but not usually, done. He inquired of [the editor], 'Can you verify this?' She said, 'Yes.' [The publisher] said, 'Run it.'").

[208] *Id.*

[209] Luper v. The Black Dispatch Publ'g Co., 1983 OK CIV APP 54, 675 P.2d 1028, 1030.

testified he did not check the court file nor contact Plaintiff before publishing this first article. He claims to have printed the story without knowledge of the truth or falsity of the allegations."[210]

After the story was published, the plaintiff called the editor to protest the article, tell him that her ex-husband "had been committed to a mental hospital" and ask the editor not to publish any more allegations. A week later, the editor printed another article calling attention to the first one but conceding that the couple had indeed legally divorced ten years earlier. However, the editor included new allegations, obtained during an interview with the ex-husband, that the plaintiff was part of "a gangster style plot against him."[211]

The editor testified that he believed the ex-husband was a "reliable source" and that "he had no malice when he published what he thought was 'newsworthy' and 'more probably true than not.'"[212] The editor "claimed to retain this belief," the court said, "despite the fact that he had personally investigated the previous lies" told by the ex-husband and knew him "to be an ex-convict and ex-mental patient. In this regard, Editor displays a remarkably tenacious intellectual innocence rarely found amidst the publishing community." The court said: "[T]he second catalogue of lies" told by the ex-husband, "on its face, reveals the same venomous, nearly hysterical, outrageous quality as the first set of lies reveals, if not more so. We find Editor's bare assertion of a lack of malice to be unpersuasive and grossly outweighed by other, more objective evidence."

After the first article, the court said, the editor "had ample reason to doubt the veracity" of the ex-husband.[213] Having been told of the article's falsity and of the source's mental state, the editor "had a duty to view any of [his] future statements with commensurate skepticism." But the editor "nevertheless printed the second article based on even more patently scandalous material supplied by [the former husband], whom [the editor] now knew to be an outrageous liar and embittered ex-husband."[214] The court concluded that a jury "could

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[210] *Id.*
[211] *Id.*
[212] *Id.* at 1031.
[213] *Id.* at 1034.
[214] *Id.*

justifiably find" that the editor had written the second article with "a high degree of awareness of the probable falsity of the material."[215]

If the first article had been the only one, the court would have seriously doubted that it was published with actual malice. "However," the court said, "the clearly libelous second publication, together with all its surrounding circumstances, necessarily also casts grave doubt on [the editor's] initial publication."[216] The court explained:

> We compare it by analogy to the case where a man discharges his gun from his window into the crowded street and kills a passer-by. From these facts alone we cannot presume he intended to kill or even to harm because we cannot inferentially rule out accident or mistake. After, however, he has been apprised of the damage he has inflicted, and yet he fires his gun again, all doubt is erased as to his intent the second time he fired. And, inferentially, the doubt as to his intent the first time he fired is also justifiably removed.[217]

The appellate court overturned the trial judge's summary judgment in favor of the newspaper and ordered the case to be heard by a jury. In contrast to the appellate court's condemnation of the editor's actions, an Oklahoma County jury in 1985 rejected the plaintiff's claim that she had been libeled.[218] According to newspaper coverage of the trial, the defense attorneys argued that the newspaper had not published with reckless disregard for the truth, telling jurors that:

- The plaintiff had refused to tell her side to the editor for the second story but had granted an interview to a competing newspaper;
- The ex-husband's accusations were in the couple's district court divorce file and, therefore, a matter of public record;

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[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] Ray Robinson, *Paper Not Guilty of Libel Charges*, THE DAILY OKLAHOMAN, Feb. 28, 1985.

- Despite the ex-husband's past, an editor could reasonably assume he was a "reliable source in his own divorce."[219]

In 2019, the Tenth Circuit rejected the plaintiff's contention that *Sports Illustrated* reporters had demonstrated actual malice because they had "interviewed and quoted some Oklahoma State University football players who used drugs or had criminal records." It explained:

> Courts have consistently held that reliance on tainted or troubled sources does not alone establish actual malice. The fact that some of the Defendants' sources were not "paragons of virtue" is thus insufficient to show actual malice.
>
> Courts also have noted that "newspaper investigation of reports of corruption must often obtain first-hand corroboration from those present in the barrooms or gambling houses, rather than from citizens who spend their time only at home, in church, or at work in less colorful occupations."[220]

To prepare their five-article series on drug use, financial misconduct and academic dishonesty in the OSU football program, the court said, the reporters "necessarily had to rely on sources who may have participated in these activities. Rather than demonstrating that the Defendants published with actual malice, this shows they sought information from the sources who were in the best position to describe these possible features of the OSU program."[221] And unlike the

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[219] *Id.*

[220] Talley v. Time, Inc., 923 F.3d 878, 903 (10th Cir. 2019) (dismissing false light claim because plaintiff failed to prove actual malice). Though the case involved a false light claim, the Tenth Circuit noted that Oklahoma courts analyzing actual malice under that tort "routinely look to and rely on both defamation and false light case law," *id*. at 895 n.16 (citing *Grogan*, 256 P.3d at 1031 ("analogizing to defamation law" where there is no clear false light case law on point)). Therefore, the Tenth Circuit discussion of source credibility in a false light lawsuit is instructive as to how courts could analyze the element relative to a libel claim.

[221] *Id*.

reporters in *Curtis Publishing Co. v. Butts,*[222] the *Sports Illustrated* reporters "did not rely on a single, questionable source without fact-checking, interviewing additional witnesses, or seeking independent support," the Tenth Circuit said.[223] The court emphasized the reporters had "conducted a long and thorough investigation before publishing their article." It explained:

> For ten months, the reporters sought out and spoke to dozens of OSU players, coaches, and administrators. They recorded their interviews electronically and in writing. They consulted their notes and each other while drafting the article, and they occasionally re-interviewed individuals to ensure that their information was correct. They also fact-checked and edited their article several times and had their legal team review the piece before publication.

The reporters "did not deliberately ignore sources that might have disputed their account. Rather, they interviewed multiple sources around the country who substantially corroborated each other. They also verified the information they published by re-interviewing their sources and fact-checking the final piece."[224]

While public officials and public figures must prove actual malice by the journalist, private figures generally have to prove that the media defendant was negligent,[225] which is easier for the plaintiff to establish.

Negligence: Courts have defined negligence as the defendant's failure to exercise ordinary care. "[T]he news media must exercise ordinary care in reporting news stories concerning private individuals," the Oklahoma Supreme Court said in 1976.[226] Requiring journalists to meet the standard of ordinary care balances "the public interest in the

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[222] 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, 1 Media L. Rep. 1568 (1967).

[223] 923 F.3d at 904.

[224] *Id*. at 898.

[225] *See* Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 5, 60 P.3d 1058 (To recover for defamation, a private figure must prove "fault amounting at least to negligence on the part of the publisher.").

[226] *Martin*, 549 P.2d at 92.

free flow of information and the public interest in protecting a private individual injured by defamatory material."[227]

The state Supreme Court defined "ordinary care" as "that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances."[228] This means that a reporter who failed to follow professional standards and practices accepted within the journalism industry could be declared negligent. The evidence of "negligence with respect to customs and practices within the news industry would normally come from a qualified expert in the field."[229] In 1984, the state Supreme Court said an expert in newspaper journalism was qualified to be an expert in television reporting. The expert and the television reporters "are engaged in reporting, and the difference in their area of expertise relates to the method of dissemination of the reporting product."[230]

The standard of ordinary care requires that courts recognize "the peculiar needs of the electronic and printed media," the Oklahoma Court of Civil Appeals said in 1978. "The need to report matters as quickly as possible is not merely good competition but serves a paramount concern of society to have access to information of public concern as soon as possible."[231]

In that case, *Benson v. Griffin Television*, the court concluded that a television reporter had "exercised due care" even though he had falsely implicated the plaintiff in a bank robbery. "The report on the air, although erroneous, reasonably reflects what a reporter could have concluded based on the undisputed facts," the court said. "The reporter noted what he observed, was reasonably faithful to those observations,

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[227] Benson v. Griffin Television, Inc., 1978 OK CIV APP, 593 P.2d 511, 513.

[228] *Martin*, 549 P.2d at 92. *See also Malson*, 936 P.2d at 942 ("[T]he best evidence of ordinary care is the degree of care which ordinarily prudent persons, engaged in the same kind of business, customarily have exercised and commonly do exercise under similar circumstances.").

[229] Malson v. Palmer Broad. Group, 963 P.2d 13, 15. *See also Malson*, 936 P.2d at 942 (quoting THE RESTATEMENT (SECOND) OF TORTS § 580B, cmt. g at 228 (1977) ("[I]n defamation cases involving private individuals, evidence of customs and practices within the news profession, which may be relevant in determining whether ordinary care was practiced in a given situation, will normally come from an expert.")).

[230] Crittendon v. Combined Communications Corp., No. 53,029, 1984 Okla. LEXIS 100, at ¶ 14 (Okla. Jan. 31, 1984).

[231] 593 P.2d at 513-14.

and displayed [no] indifference or negligence regarding their accuracy."[232]

Damages

The most common libel damages are known as general damages or actual damages. In *Akins v. Altus Newspapers Inc.*, the Oklahoma Supreme Court noted that the "more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[233] In that case, for example, the plaintiff – a police officer accused of kidnapping a teen-ager at gunpoint – testified that he was depressed and confused after the newspaper article. He claimed his reputation in the police department was harmed because "[a]fter reading the article and with all the talk going around in terms of dismissal and suspension, his riding partner on the police force didn't ride with [the plaintiff] for he 'just didn't want to be part of it.'"[234] The state Supreme Court affirmed the $5,000 in actual damages awarded to the police officer by the jury.

To collect actual damages, public officials and public figures must prove actual malice on the part of the defendant. Private figures must prove negligence.[235]

Actual damages also "must be proved, not presumed," the state Court of Civil Appeals said in 2002 when it overturned a $6 million judgment against KWTV in Oklahoma City.[236] The trial judge had erred in instructing the jury that (1) the plaintiff, a veterinarian, was presumed to have suffered actual damages if he had shown that KWTV acted with actual malice, and (2) the jury could award presumed actual damages without proof of harm.[237]

Plaintiffs may seek special damages, i.e., compensation for actual monetary or economic loss resulting from the libelous statement. When the publication has been deemed per quod defamation, the

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[232] *Id.* at 514.

[233] 1977 OK 179, 609 P.2d 1263, 1267, 3 Media L. Rep. (BNA) 1449.

[234] 609 P.2d at 1267.

[235] Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85.

[236] Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 28, 60 P.3d 1058, 1065.

[237] *Id.*

plaintiff must be able to prove special damages to win.[238] To collect special damages, the plaintiff must be able to establish precisely the monetary loss that occurred because of the libelous statement.[239] For example, in *Broyles v. Park Newspapers of Sapulpa, Inc.*, a restaurant owner attributed a decline in business at her eatery to the newspaper's stories.[240] The Oklahoma Court of Civil Appeals, however, noted that other evidence tied the losses to her restaurants elsewhere and "to inclement weather in Sapulpa at the time." The appellate court agreed with the trial court that her proof of damages was "speculative and not reasonably connected with" the newspaper's stories.

Any plaintiff also may seek punitive damages, which are intended to punish the defendant rather than compensate the plaintiff. For example, a Creek County jury awarded the veterinarian $500,000 in punitive damages ($250,000 each from the reporter and KWTV).[241] Actual damages must be awarded before punitive damages can be awarded.[242] To collect punitive damages, public officials, public

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[238] *See* Sellers v. Okla. Publ'g Co., 1984 OK 11, 687 P.2d 116, 121, 10 Media L. Rep. (BNA) 1795 ("The established rule for determining the validity of a petition in a libel suit is that where a writing is not libelous per se, recovery is dependent on allegation of special damages."); Miskovsky v. Tulsa Tribune Co., 1983 OK 73, 678 P.2d 242, 248 ("Where the article itself is not libelous per se, there must be an allegation of special damages, before a recovery can be had."); Winters v. Morgan, 1978 OK 24, 576 P.2d 1152, 1154, 3 Media L. Rep. (BNA) 2021 ("[C]ase law of this jurisdiction has long held special damages must be alleged where the words published were not libelous per se."); Sturgeon v. Retherford, 1999 OK CIV APP 78, 987 P.2d 1218, 1223, 28 Media L. Rep. (BNA) 1144 ("A party relying on a publication that is not per se defamatory must plead and prove special damages.").

[239] *See, e.g.,* Miskovsky v. Okla. Publ'g Co., 1982 OK 8, 654 P.2d 587, 248, 7 Media L. Rep. (BNA) 2607, *cert. denied*, 459 U.S. 923, 103 S. Ct. 235, 74 L. Ed. 2d 186 (1982) ("It is insufficient to allege generally that the plaintiff 'was and is greatly and permanently injured and damaged in his good name and reputation and was and is exposed to public contempt, hatred, and ridicule and has been caused to resign his with the said city of Ardmore and has been damaged in his business and reputation in the amount of $ 10,000' without showing by proper averment how the special damages were occasioned.").

[240] No. 83-208 (Okla. Civ. App. Aug. 22, 1995), *available at* Oklahoma Publ'g Legal Research Sys., http://www.oklegal.onenet (July 11, 2001).

[241] Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 39, 60 P.3d 1066.

[242] Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 39, 60 P.3d 1066 (instructing trial judge to vacate punitive damages if no actual damages were awarded on remand).

figures, and private figures involved in a matter of public concern must prove that the defendant committed actual malice.[243]

Defenses

Oklahoma's statutes and common law provide libel defendants with a number of affirmative defenses.

Truth: Under Oklahoma's libel statutes, truth is an affirmative defense against libel claims, meaning that the journalist would have to prove that the defamatory statement was true.[244] If the jury determines that the statement was true, then no other issue or defense needs to be considered by the jury.[245] In 2011, for example, an Oklahoma City television station won a libel lawsuit stemming from its report that parents had accused a high school teacher of threatening to shoot students. "That statement is true," the Oklahoma Court of Civil Appeals said. "In fact, part of the broadcast replayed interviews with parents in which they made that claim." Whether the coach has actually threatened to shoot students was "immaterial," the court said. "Parents accused him of doing so and KOKH reported that fact."[246]

If the defamatory statement accuses the subject of committing a crime and the media defendant has chosen truth as a defense, the jury

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[243] *See, e.g.,* Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85 (libel plaintiff seeking punitive damages must prove actual malice). *See also* Dunn & Bradstreet Inc. v. Greenmoss Builders Inc., 472 U.S. 749 (1985) (plurality opinion) (holding that actual malice is not required for punitive damages when the defamatory statement did not involve a matter of public concern); Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 6, 60 P.3d 1058 ("Upon a showing of actual malice, the [private] plaintiff may recover punitive damages … .").

[244] 12 O.S. § 1444.1 (OSCN 2021) ("As a defense thereto the defendant may ... prove that the matter charged as defamatory was true ... ."). *See also* Hetherington v. Griffin Television, Inc., 430 F. Supp. 493, 498 (W.D. Okla. 1977) (applying Oklahoma law) ("[T]ruth is an affirmative defense. The burden of proving truth rests upon the defendant."); Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85, 93 ("The appellant television station raised the affirmative defense of the truth of the broadcast. 12 O.S.1971, §§ 304 and 1444 codifies that defense."); Dawkins v. Billingsley, 69 Okla. 259, 172 P. 69 (1918).

[245] *Martin*, 549 P.2d at 94.

[246] Grogan v. KOKH, LLC, 2011 OK CIV APP 34, ¶ 11.

would decide by reading the language of the criminal statute at issue in light of the accused subject's actions.[247]

***Qualified Privilege**:* Also known as the fair-report privilege and as reporter's privilege, qualified privilege exists by statute[248] and common law[249] in Oklahoma. When there is no dispute over "what the publication was, what it was about, and who made it – or where the language in the publication is plain and unambiguous," the question of whether the publication is protected by qualified privilege is one for the trial judge, not the jury, to answer.[250]

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[247] *Hetherington*, 430 F. Supp. at 498 ("In every libel case where one party has imputed the commission of a crime to another and the imputing party chooses to defend by showing the truth of the statement, the language of the criminal statute must be read in light of the actions of the party to whom the crime has been imputed."). "Because the statement in the broadcast on which Grogan based his defamation theory of recovery was true, the district court correctly granted the KOKH defendants' motion for summary judgment as to Grogan's defamation theory of liability … ," *id*.

[248] 12 O.S. § 1443.1(A) (OSCN 2021) ("A privileged publication or communication is one made: ... Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law."); *Gaylord*, 985 P.2d at 143-44 ("The 12 O.S. 1991 § 1443.1 privilege protects from civil liability the publication of an accurate account of judicial, legislative or other proceedings authorized by law.").

[249] Wright v. Grove Sun Newspaper Co. Inc., 1994 OK 37, 873 P.2d 983, 989, 22 Media L. Rep. (BNA) 1801 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977): "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported."); *Wright*, 873 P.2d at 987 ("While in some respects the statutory privilege overlaps the common-law fair report privilege, it does not provide the media with identical protection. The scope of the fair report privilege is broader than the terms of the statute; since the latter does not abrogate the other, the former remains a viable defense to libel.").

[250] Cobb v. Okla. Publ'g Co., 42 Okla. 314, 140 P. 1079, 1081 (1914). *See also* Price v. Walters, 1996 OK 63, ¶ 26, 918 P.2d 1370, 1375 ("In Crittendon v. Combined Communications Corp., … this Court upheld our well-settled rule that where the circumstances of a publication are not in dispute, the issue of whether the publication was privileged under section 1443.1 is a question of law for the court.) (citation omitted); Crittendon v. Combined Communications Corp, 1985 OK 111, 714 P.2d 1026, 1028, 12 Media L. Rep. (BNA) 1649 (reversing the trial court's decision to submit the question of qualified privilege to the jury); Tuohy v. Halsell, 35 Okla. 61, 128 P. 126 (Okla. 1912); Johnson v. The Black Chronicle, 1998 OK CIV APP 77, 964 P.2d 924, 927 ("It is well settled that where the circumstances of a publication are not

Qualified privilege is intended to protect "people who report on defamatory statements made in the course of official proceedings" from civil liability.[251] "The … underlying rationale is that if any member of the public were present, he (or she) might see and hear the statements made at a public proceeding, so that 'the reporter is merely a substitute for the public eye,'" the Oklahoma Supreme Court said.[252] "The accurate and true reporting of material disseminated on official public occasions is critical to the maintenance of our democratic institutions of government," the court has said.[253] "Without accurate media coverage of official public events, it is highly doubtful that the general public would be able to make informed decisions and participate intelligently in their governance; nor would representatives of government be able to perform their assigned tasks effectively."[254] Hence, qualified privilege serves an important role in the dissemination of government information in a self-governing society. The court explained:

> Without this privilege the media would be compelled to engage in acts of self-censorship whenever republishing information released by governmental officials to the public at official functions. The damage by reputational harm which goes unredressed because of the fair report privilege defense

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in dispute and the publication's language is plain and unambiguous, the issue of whether a publication is privileged under section 1443.1 is a question of law.").

[251] Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 144 n.60. *See also* Stewart v. NYT Broadcast Holdings, LLC, 2010 OK CIV APP 89, ¶ 15 ("The fair report privilege does not provide the media with absolute immunity, but is an exemption from liability, whether the publication is true or false, so long as the nature of the occasion which was reported qualifies as an official action and the report accurately and fairly disseminates the information gathered on that occasion.").

[252] *Gaylord*, 958 P.2d 144-45 (quoting PROSSER AND KEETON ON TORTS § 115 (5th ed. 1984)). *See also* Wright v. Grove Sun Newspaper Co. Inc., 1994 OK 37, 873 P.2d 983, 984 n.1, 22 Media L. Rep. (BNA) 1801 ("The underpinning of the qualified privilege of fair report is derived from an agency concept. It rests upon the notion that since the activity covered by the press was open to the public, the media merely functioned as a substitute for the public eye and ear – i.e., the public's agent.").

[253] *Wright*, 873 P.2d at 986.

[254] *Id.*

> must be subordinated to the larger societal interests in the values which the privilege protects.[255]

Journalists, however, are not afforded absolute protection under Oklahoma's fair-reporting statute or common law.[256] Under each, the protection is first limited to reporting about official proceedings.[257] To make that determination, courts look at whether the proceeding is "authorized by law."

For example, the Oklahoma Court of Civil Appeals in 1999 held that "a disciplinary proceeding before the State Board of Dentistry … including what the witnesses said and what the Board did, is clearly a 'proceeding authorized by law' and is covered by the statutory privilege."[258] Likewise, a complaint filed with the state Board of Medical Licensure and Supervision and the Board itself was covered by the statutory privilege.[259] The court rejected the plaintiff's assertion that an article on the complaint was "not a report of a 'judicial

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[255] *Id.* at 986-87.

[256] Stewart v. NY Broad. Holdings, LLC, 2010 OK CIV APP 89. "The fair report privilege does not provide the media with absolute immunity, but is an exemption from liability, whether the publication is true or false, so long as the nature of the occasion which was reported qualifies as an official action and the report accurately and fairly disseminates the information gathered on that occasion," *id.* ¶ 15 (relying upon RESTATEMENT (SECOND) OF TORTS § 611 cmt.).

[257] 12 O.S. § 1443.1(A) (OSCN 2021) ("A privileged publication or communication is one made: … Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law."); *Gaylord*, 985 P.2d at 143-44 ("The 12 O.S. 1991 § 1443.1 privilege protects from civil liability the publication of an accurate account of judicial, legislative or other proceedings authorized by law."); *Wright*, 873 P.2d at 989 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977): "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported."). *See also* Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 64, 417 P.3d 1240 ("The courts have generally restricted the reach of § 1443.1 to reports of things *actually stated or discussed* in court proceedings or records, or during other official proceedings.") (emphasis included).

[258] Johnson v. KFOR, 2000 OK CIV APP 64, 6 P.3d 1067, 1069.

[259] Ahmad v. The Black Chronicle, No. 92-422 (Okla. Civ. App. April 27, 1999). *See also* Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1526, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992) ("A proceeding to suspend a physician's license to practice is one authorized by law, … and the placement of a physician on probation by the State Board of Medical Licensure and Supervision is authorized by law.")

proceeding' … because no judicial action had yet been taken."[260] Both the complaint and the Board were authorized by separate state statutes, the court reasoned. The absence of a "judicial proceeding" was "irrelevant," the court said, "because the complaint was clearly a 'proceeding authorized by law.'"[261] A federal district judge in 1992 similarly held that a hearing before the same Board on a doctor's application to be "board certified" in cosmetic breast surgery was a "proceeding authorized by law."[262]

In 1987, the Court of Civil Appeals concluded that an Oklahoma City-County Health Department restaurant inspection report, created pursuant to an Oklahoma City ordinance that also made the document available to the public, was "a proceeding authorized by law within the meaning of" the state's fair-report statute.[263]

"The media must be able to inform the public of health hazards discovered and reported by the Health Department without fear of resulting lawsuits," the appellate court emphasized. "Publishers of privileged information provide a conduit by which a broader distribution of public information is possible."[264]

In a similar case in 2005, qualified privilege protected a news website that had republished online a sex offender registry the state Department of Corrections was statutorily required to maintain and make available to the public.[265] The plaintiff had tried to overcome the defense by arguing that:

- NewsOK knew the information could have been incorrect;
- Such reporting was "below journalistic standards";
- No other news outlets were publishing the information; and

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[260] *Ahmad*, No. 92-422, slip op. at 8.

[261] *Id.*

[262] Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1527, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992).

[263] McCain v. KTVY, Inc., 1987 OK CIV APP 13, 738 P.2d 960, 961, 13 Media L. Rep. (BNA) 2278.

[264] 738 P.2d at 961-62.

[265] Stewart v. Okla. Publ'g Co., No. 100,099, ¶ 5 (Okla. Civ. App. Apr. 1, 2005). At the time, the Department of Corrections did not have a website, but the public could request a hard copy from the agency. NewsOK, a news website shared by *The Oklahoman* and KWTV, republished an electronic copy of the database.

- The website contained advertising.[266]

"None of this matters," the Court of Civil Appeals said in reversing a $3.7 million verdict against *The Oklahoman* and KWTV. "The Legislature has stated that the Sexual Offender Registry is a public document. Republication of it was privileged as a matter of fair report. NewsOK was immune from liability. The trial court should have directed a verdict in favor of Defendants."[267]

Under the common law, qualified privilege also extends to an official "meeting open to the public that deals with a matter of public concern."[268] The Oklahoma Supreme Court, by a 5-4 vote in 1994, used that common law definition to declare that a district attorney's press conference at a county courthouse was "an official function of that office" and, therefore, gave rise to qualified privilege for a newspaper reporting on the event.[269]

Writing for the majority, Justice Marian P. Opala reasoned that the press conference about a previously conducted narcotics investigation was "within the penumbra of the official duties" of the district attorney's office because Oklahoma district attorneys "have historically used press conferences to distribute information about the activities of their offices to the citizenry they represent. Disseminating information to the public enhances, within the communities served by the prosecutor's office, confidence and understanding of his governmental mission."[270] The district attorney's comments, "together with the materials disseminated, which were of general public interest, must be treated as official because they concern the investigative function of the office," Opala concluded.

However, he emphasized that the court's ruling was "narrowly limited to situations where the media, sans any trickle of judgmental gloss, republish information disseminated by public officials at press

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[266] *Id*. ¶ 10.

[267] *Id*.

[268] *Wright*, 873 P.2d at 989 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977): "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.").

[269] *Id.* at 988.

[270] *Id.*

conferences open to the public."[271] He also noted that the common law privilege "is not conditioned upon the truth or falsity of the reported material, the character of the defamed person, nor on the newsworthiness of the event; rather, its applicability is determined by the nature of the occasion at which the republished material was secured for news coverage."[272]

In 2010, the Court of Civil Appeals deemed a police department's press release and press conference held in conjunction with Crime Stoppers to be an official action within the scope of the fair report privilege.[273] The public information officer's official duties included issuing the press release and conducting the press conference. The court added:

> Police Departments regularly seek the public's help in identifying suspects or providing information relating to crimes against the community. It is a Police Department's primary function to solve or prevent crimes, and these types of press conferences are an official means to effectuate that function. Without the public's help, many crimes would go unsolved.[274]

To receive protection under Oklahoma's statute and common law, journalists are required to provide a "fair and true report"[275] – or

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[271] *Id.* at 992. The newspaper had published "verbatim" a transcript provided by the district attorney that made reference to the libel plaintiff. Justice Opala emphasized that the newspaper "did not embellish upon, make any comments regarding, or take editorial license with, the contents of the [transcript] furnished by the district attorney," *id.* at 985.

[272] *Id.* at 989. *See also* Ahmad v. The Black Chronicle, No. 92,422, slip op. at 7 (Okla. Civ. App. April 27, 1999) ("The existence of the privilege does not depend upon the truth of the report, the character of the person who is the subject, or the newsworthiness of the event; instead it depends upon the nature of the occasion at which the republished material was secured for the report.").

[273] Stewart v. NYT Broad. Holdings, LLC, 2010 OK CIV APP 89, ¶ 17.

[274] *Id.* ¶ 16.

[275] 12 O.S. § 1443.1(A) (OSCN 2021) ("A privileged publication or communication is one made: ... Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law … .").

an "accurate and complete"[276] account – of what was contained in the government document or said in the official proceeding. For example, KWTV in Oklahoma City could not claim a qualified privilege when its reporter did "not truly and fairly report the allegations" made in a federal lawsuit against a veterinarian, the state Court of Civil Appeals said in 2002.[277] According to the reporter's broadcast, the veterinarian was accused of knowing that a horse was hobbling before a show and of medicating the horse with a painkiller to mask its lameness from a buyer. The court, however, said the lawsuit did not make those allegations.[278] The court also said the reporter had inaccurately reported on a state Racing Commission investigation of the veterinarian.[279] The reporter testified that he had read only parts of the Commission's documents prior to KWTV saying the veterinarian was "connected to the doping of" a racehorse.[280] The Commission, however, had issued an order specifically concluding that the evidence was insufficient to prove the veterinarian helped the owner and trainer in running an unfit horse. The Commission also had dismissed the

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[276] *Wright*, 873 P.2d at 989 (quoting RESTATEMENT (SECOND) OF TORTS § 611 cmt. a (1977) regarding the common-law fair-report privilege: "The publication ... is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported."). *See also Gaylord*, 958 P.2d at 143 ("The statutory privilege's fair-report component protects the republication of accurate accounts of official action or proceedings, even though the reports may contain defamatory statements.").

[277] Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 13, 60 P.3d 1058, 1062.

[278] *Id*. ¶ 12, 60 P.3d at 1062 ("The complaint in the federal suit did not say [the veterinarian] knew the horse was hobbling before the horse show. While it did accuse the trainer of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege [the veterinarian] acted with that purpose. It alleged [the veterinarian] told the buyer he blocked the horse. It alleged the block is a veterinary technique to numb pain, so that the horse will not appear unsound, but it did not allege [the veterinarian] intended it for the purpose of masking the horse's unsoundness. The complaint did not accuse [the veterinarian] of concealing the horse's condition when he did the prepurchase exam; rather it alleged the horse's condition was concealed from [the veterinarian] by the silicone pad on the mare's left hoof.").

[279] *Id*. ¶ 21, 60 P.3d at 1063.

[280] *Id*. ¶ 18, 60 P.3d at 1063 ("We were looking for specific documents that support the allegations in front of us about [the veterinarian]. … [W]e couldn't read every word of those documents and didn't. We were looking for key pieces that would support our story and maybe shed some light on some areas that didn't support our story.").

doping charges against the owner and trainer because the results of an independent laboratory test had not confirmed that a painkiller was given to the horse.[281]

It is not necessary, however, that the journalist's story is "exact in every immaterial detail or that it conform to that precision demanded in technical and scientific reporting."[282] Oklahoma has adopted the "substantial accuracy test,"[283] under which it is only necessary that the journalist's reporting "conveys to the persons who read it a substantially correct account of the proceedings."[284] The Court of Civil Appeals explained, "Basically, a news story is substantially accurate as long as the 'gist' or 'sting' of the entire story is both fair and true."[285] The statutory privilege "is not lost simply because some of the information reported was unclear in meaning and susceptible to being interpreted adversely to the subject of the story," the court said in late 1999.[286]

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[281] *Id*. ¶ 17, 60 P.3d at 1063.

[282] Crittendon v. Combined Communications Corp, 1985 OK 111, 714 P.2d 1026, 1029, 12 Media L. Rep. (BNA) 1649 ("The majority of jurisdictions have adopted the position of the Restatement (Second) of Torts 611, Comment f (1977) that provides it is unnecessary that a report be 'exact in every immaterial detail or that it conform to that precision demanded in technical and scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceedings.'"); Johnson v. KFOR, 6 P.3d at 1069 (quoting *Crittendon*, 714 P.2d at 1029) ("It is well established that it is unnecessary that a news story be 'exact in every immaterial detail or that it conform to that precision demanded in technical and scientific reporting. It is enough that it conveys to the persons who read it a substantially correct account of the proceeding.'").

[283] Johnson v. KFOR, 6 P.3d at 1069 ("This substantial accuracy test, as stated in the Restatement (Second) of Torts § 611 cmt. f (1977), has been adopted by most jurisdictions, including Oklahoma."). *See also* Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1526, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992) (citing Crittendon v. Combined Communications Corp., 714 P.2d at 1029-30) ("Whether or not a broadcast is a 'fair and true report' of a hearing is determined by application of the 'substantial accuracy' [test] of the Restatement (Second) of Torts § 611, Comment f (1977).").

[284] *Crittendon*, 714 P.2d at 1029 (quoting RESTATMENT (SECOND) OF TORTS § 611 cmt. f (1977)); Johnson v. KFOR, 6 P.3d at 1069 (citing *Crittendon*).

[285] Johnson v. KFOR, 6 P.3d at 1069. *See also* Johnson v. The Black Chronicle, 1998 OK CIV APP 77, 964 P.2d 924, 927 (citing *Crittendon*) ("To fall within the privilege, a report need not be exact in every detail. It is enough that it is substantially accurate, or if its 'gist' or 'sting' is true.").

[286] Johnson v. KFOR, 6 P.3d at 1069.

For example, the plaintiff in that case – a dentist – asserted that KFOR-TV's story had "falsely implied the patient had to go to an emergency room immediately after her visit to his office and falsely implied he provided inadequate treatment to her mother." However, the Court of Civil Appeals, after applying the substantial accuracy test to what it called the "isolated language" the dentist claimed was misleading, concluded that the station's "entire story" was "both fair and true." The "gist of the story" was that the State Board of Dentistry had brought a disciplinary action against the dentist "and ultimately reprimanded him because he left a patient in the middle of a procedure," the court said. "KFOR fairly and truly reported on the disciplinary proceeding, including giving [the plaintiff's] side of the story."[287]

Likewise, the state Supreme Court had said in a 1985 opinion that even if it were to find some "isolated language" untrue, it believed that the "gist" of a television station's "entire report was both fair and true."[288] The plaintiff – a doctor – had been sued for malpractice, a default judgment had been entered against the doctor, and damages had been awarded to his patient upon the trial judge's finding that the doctor had "performed unnecessary surgery," the court said.

In 1992, a federal district judge said KFOR-TV had been fair to a doctor when it reported he was appealing a $100,000 malpractice verdict against him.[289] The judge also said the television station's use of a photograph of the medical condition that was the subject of the malpractice lawsuit was an accurate depiction of the condition even though the photo was not actually of the patient who had sued the doctor.

"In assessing accuracy, courts generally avoid dissection of language in search of precise technical denotations," the Oklahoma Supreme Court said in 1985. "Instead they focus on the common understanding of the words."[290] In that case, for example, the television reporter had quoted the patient as saying a pathologist's report had

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[287] *Id.*

[288] *Crittendon*, 985 OK 111, ¶ 17.

[289] Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1526, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992).

[290] *Crittendon*, 985 OK 111, ¶ 15. *See also* Johnson v. The Black Chronicle, 964 P.2d at 928 (citing *Crittendon*).

indicated her uterus was "perfectly healthy."[291] The doctor claimed this was the story's "gravest falsehood of all" because the pathologist's report had not used those words.[292] The patient's expert, though, had testified during the malpractice default hearing that the pathology report indicated her uterus was "normal."[293]

In determining whether the television station had broadcast a "fair and true report of the default hearing," the state Supreme Court examined various dictionary definitions of "healthy" and "normal." The court concluded: "[I]n the common understanding, the concept of healthy encompasses that of normal. Given the overlapping meanings, the gist or sting of the statement would be the same, whichever term were used."[294] Applying the substantial accuracy test, the court said, "[T]he gist of the reported statement was the same as the statement actually made during the judicial proceeding."[295] Therefore, the court said, the broadcast was protected by the fair-report statute.[296]

In 2005, the Court of Civil Appeals was willing to accept two definitions for the word "charged" as it was used in the newspaper headline "Husband, wife charged with embezzlement."[297] The article made clear that the couple had been named as defendants in a civil lawsuit claiming they embezzled money from a law firm and that no criminal charges had been filed. The wife was subsequently charged and convicted of embezzlement. The husband was never charged with a crime, but he contended the headline reported that he had been. The court, however, accepted the newspaper's assertion that "the word 'charged' does not necessarily mean charged with a crime." Relying upon *The American Heritage Dictionary*, the court noted, "The term

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[291] *Crittendon*, 985 OK 111, ¶ 4 ("She says the pathologist report later showed that her uterus was perfectly healthy.").

[292] *Id.* ¶ 13. The pathologist report had been introduced into evidence during the malpractice default hearing but the KOCO-TV reporter had not reviewed it. The pathology report stated: "The squamous epithelium of the ectocervix is free of signs of malignant change. Squamous metaplasia is noted and focal areas of active chronic cervicitis are encountered. Epithelial erosion has occurred in some instances."

[293] *Id.* ¶ 14.

[294] *Id.* ¶ 16.

[295] *Id.*

[296] *Id.* ¶ 17.

[297] McGhee v. Newspaper Holdings Inc., 2005 OK CIV APP 41, ¶ 3, 115 P.3d 896.

'charge' has numerous definitions, including 'to hold [one] financially liable.'"[298]

The Court of Civil Appeals emphasized that the text of the article clearly stated the husband had been named as a defendant in a civil lawsuit and had not been charged with a crime.[299] "We hold the article at issue is accurate and complete," the court concluded. "It conveys a substantially correct account of the substance of the law firm's civil pleading against Plaintiff and his wife."[300] As such, the article received qualified privilege, the court said.

In contrast, a newspaper lost its qualified privilege when the Court of Civil Appeals examined the meaning of the words used by the newspaper and those words contained in the actual document being reported on.[301] *The Black Chronicle* had written that a former executive director of the Oklahoma Human Rights Commission had faced a "sexual harassment" complaint by an agency employee. However, the court found that the employee's complaint "did not assert sexual harassment," but rather "verbal abuse, job harassment, humiliation and degradation."[302] The court noted, "Sexual harassment, whether in the legal sense or in the popular vernacular, involves gender-based discrimination."[303] Because the employee's complaint could not "be said to be based on sexual harassment," the court reasoned, the newspaper had not written a "fair and true" report and, therefore, was not entitled to qualified privilege.[304]

"Mild hyperbole," however, is protected by the statutory privilege, the Court of Civil Appeals said in 1999.[305] *The Black Chronicle*, in reporting about a complaint filed with the state licensing

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[298] 2005 OK CIV APP 41, ¶ 9.

[299] *Id*.

[300] *Id*. ¶ 10.

[301] Johnson v. The Black Chronicle, 964 P.2d at 927-28.

[302] *Id.* at 927.

[303] *Id.* at 928.

[304] *Id.* ("The nature of the story's accusations against [the plaintiff], especially considering his position as head of the Human Rights Commission, go to the heart or gist of the publication. It cannot be said, as a matter of law, that the news story that Johnson faced a sexual harassment complaint was 'fair and true.' It is not, therefore, covered by the statutory privilege.").

[305] Ahmad v. The Black Chronicle, No. 92-422, slip op. at 10 (Okla. Civ. App. April 27, 1999) (citing Price v. Walters, 1996 OK 63, 31, 918 P.2d at 1376).

board against a local doctor, had used a two-part headline: "A Pediatrician May Lose Medical License" and "Paternity Suit and Doctor's 'Bedside Manner' Play Role." "At most, the characterization 'bedside manner' is a mild form of hyperbole which is also protected by the privilege," the court said.

In the same case, the court also rejected the doctor's assertion that a second article was not a "fair and true report" because it failed to disclose that one of the three counts in the complaint against him was dismissed. The court noted that while the article had reiterated the third count, it did not state that the plaintiff was found guilty of it. "Although the article would have been more accurate had it disclosed that the third count was dismissed without prejudice to its refiling, the fact that it did not does not render the article 'not fair and substantially accurate,'" the court said.[306]

Even if the government information reported by the media was false, journalists are protected so long as their reporting of the information was substantially accurate, the Court of Civil Appeals said in 2010.[307] In that case, a company had provided the wrong ATM video to Norman police, which in turn had made it available to television stations for a Crime Stoppers segment. The public information officer's press release and statements at a press conference referred to the unidentified woman in the video as a suspect. The subsequent police investigation cleared her. She sued KFOR and KWTV for libel. After a six-day trial, the jury found in favor of the television stations.

Upholding that decision, the appellate court said the stations had produced evidence that Norman police were looking for a woman, later identified as the plaintiff, in connection with the theft of a wallet and had distributed surveillance video of her using what was believed to be a stolen ATM card. In contrast, the plaintiff's evidence consisted of showing the public information officer used the word "'suspect' in the press release and press conference" but the stations "used the word 'thief' in their reports." The court concluded, "The record contains competent evidence from which a jury could conclude the Defendants' reports were a substantially accurate account of the information they

[306] *Id.* slip op. at 10.

[307] Stewart v. NYT Broad. Holdings LLC, 2010 OK CIV APP 89, ¶ 18.

were given from the official press release and at the official press conference."[308]

Journalists are not required to conduct their own investigations to determine the accuracy of statements made in an official document or proceeding.[309] For example, the Court of Civil Appeals in 1987 rejected a restaurant owner's assertion that KTVY should have independently investigated the eatery before reporting the findings of a health department inspection.[310] Likewise, the court in 1999 said *The Black Chronicle* was not required by state statute to investigate the complaint filed with the state medial licensing board before reporting on it.[311] "The Newspaper's 'failure' to independently investigate the allegations against [the plaintiff] does not bar it from asserting that its publication of the Board's actions was privileged," the court said. Similarly in 2005, the court said NewsOK did not have a duty to check the accuracy of the sexual offender registry provided by the state Department of Corrections. "Where §1443.1 provides a privilege to publish a government report, there is no requirement to verify the report," the court said.[312]

Journalists also are not required under the fair-report statute to state that the government information may be inaccurate, the Court of Civil Appeals said in 2005.[313] It rejected the plaintiff's contention that NewsOK.com had a duty to state that the sex offender registry provided

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[308] *Id.* at ¶ 19.

[309] McCain v. KTVY, Inc., 1987 OK CIV APP 13, 738 P.2d 960, 962, 13 Media L. Rep. (BNA) 2278 (rejecting plaintiff's assertion that a television station had an independent duty to determine the accuracy of a health inspection report by inspecting the restaurant prior to broadcasting).

[310] 738 P.2d at 962.

[311] *Ahmad*, No. 92-422, slip op. at 11 (citing *McCain*, 738 P.2d at 961-62) ("Section 1443.1 does not require a newspaper to make any investigation before it reports on a proceeding authorized by law.").

[312] *Stewart*, No. 100,099, ¶ 9 n.6. The plaintiff's house had previously been occupied by a sex offender who had moved, but the information had not been changed in the registry, *id*. ¶ 2.

[313] *Id*. ¶ 9 n.6 ("Where § 1443.1 provides a privilege to publish a government report, there is no requirement to verify the report or to state that the government report may contain inaccuracies.")

by the Department of Corrections might contain inaccuracies when the news website republished the database online.[314]

Fair Comment and Criticism: This defense against libel claims is "predicated upon the principle that the interests of society are furthered through a free discussion of public affairs and matters of public interest," the Oklahoma Supreme Court said in 1998.[315] Early common-law courts "recognized that actions for defamation could frustrate the valuable discourse fostered by the free flow of evaluative ideas," the court noted.[316] In its earliest form, the court said, fair comment "provided limited protection for expressions of opinion. Over time, fair comment was deemed to protect expressions of opinion about the conduct of public officials and political candidates regardless of the reasonableness of the opinion."[317] The court repeated with apparent approval the observation of a 1949 commentator:

> It must be conceded that fair comment sometimes enables journalists and others to escape liability for defamatory language which offends the taste and moral sense of a substantial part of the community. This occasional abuse is part of the price of free speech.[318]

As early as 1935, the state Supreme Court had recognized the value of protecting journalists who fairly comment on and criticize matters of public interest, saying:

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[314] *Id*. Such a disclaimer was included in hard copies of the registry that the agency provided to the public, but the NewsOK site did not note the information could contain errors, *id*. ¶ 5.

[315] Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 144. *See also* Magnusson v. N.Y. Times Co., 2004 OK 53, ¶ 9, 98 P.3d 1070 ("Fair comment is a common law defense to a defamation action. The principle affords legal immunity for comment by any and all members of the public and extends to virtually all matters of legitimate public interest. Its purpose is to promote the free and open exchange of ideas.").

[316] 958 P.2d at 144 n.62 (citing Rodney A. Smolla, LAW OF DEFAMATION § 6.02[1] (1994)).

[317] *Id.*

[318] *Id*. (quoting Note, Fair Comment, 62 HARV. L. REV. 1207, 1216 (1949)).

> Private individuals who claim the confidence of the public and seek the possession of public funds are subject to a fair bona fide criticism. Such criticism offers a measure of public security and should be encouraged, not suppressed. A continued recognition of these principles is essential to the maintenance and preservation of the 'freedom of the press' as an American institution.[319]

In Oklahoma, the same statute that provides the fair-report privilege[320] also supplies journalists with a defense of fair comment and criticism, protecting against libel claims "any and all expressions of opinion ... and criticisms" regarding government proceedings and "any and all criticisms upon the official acts of any and all public officers," except where that criticism "falsely imputes crime to the officer so criticized."[321] While the fair-report privilege protects the accurate and fair reporting of official proceedings or actions, the statutory defense for fair comment and criticism protects "the expression of opinion on matters" related to them, the state Supreme Court said.[322] Together, the court noted, "the statutory fair-report and comment-and-criticism privileges provide the media with a complete defense to libel on matters pertaining to official proceedings."[323]

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[319] Holway v. World Publ'g Co., 171 Okla. 306, 44 P.2d 881, 889 (1935) ("A comprehensive review of the previous decisions of this court dealing with the subject of libel and slander impresses upon us that it has long been the law of this state that matters of public interest are legitimate subjects of fair comment and honest criticism. Such comment and criticism, no matter how severe its terms may be, is not libelous, unless it is written maliciously.").

[320] Also known as qualified privilege and as reporter's privilege.

[321] 12 O.S. § 1443.1(A) (OSCN 2021) ("A privileged publication or communication is one made: … Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized."). *See also* Hennessee v. Mathis, 1987 OK CIV 35, 737 P.2d 958, 961 ("[I]t is clear that Oklahoma law has recognized a privilege to criticize the acts of public officers.").

[322] *Gaylord*, 958 P.2d at 144.

[323] *Id.* at 145.

Federal courts relied upon the statutory comment-and-criticism defense to dismiss a libel lawsuit filed against author John Grisham and others by three former public officials. "Absent some false allegation of criminal behavior, criticism of public concern is absolutely protected," said U.S. District Judge Ronald A. White.[324]

The U.S. Court of Appeals for the Tenth Circuit agreed, saying, "Any and all criticisms upon the official acts of any and all public officers' are privileged and cannot be considered libelous, unless a defendant makes a false allegation that the official engaged in criminal behavior.[325] To fall into this category, 'the words alleged to have been spoken of the plaintiff, when taken in their plainest and most natural sense, and as they would be ordinarily understood, [must] obviously import the commission of crime punishable by indictment.'"[326]

Oklahoma also recognizes fair comment and criticism under the common law.[327] This common law defense is broader than its statutory counterpart, the state Supreme Court has said, covering "comments or criticism of general public interest."[328] The court explained:

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[324] Peterson v. Grisham, CIV-07-317-RAW, 2008 U.S. Dist. LEXIS 70206, at *10 (E.D. Okla. 2008) (citing 12 O.S. § 1443.1 (OSCN 2008)).

[325] Peterson v. Grisham, 594 F.3d 723, 729, 2010 U.S. App. LEXIS 2116, 38 Media L. Rep. 1330 (10th Cir. 2010) (quoting 12 O.S. § 1443.1 (OSCN 2009)).

[326] *Id.* (quoting Okla. Publ'g Co. v. Kendall, 1923 OK 999, 96 Okla. 194, 221 P. 762, 764 (Okla. 1923).

[327] Magnusson v. N.Y. Times Co., 2004 OK 53, ¶ 9, 98 P.3d 1070 ("Fair comment is a common law defense to a defamation action."); Sturgeon v. Retherford, 1999 OK CIV APP 78, 987 P.2d 1218, 1225 n.4, 28 Media L. Rep. (BNA) 1144 ("In addition to the statutory privilege found at § 1443.1, Oklahoma also recognizes the common-law 'fair comment' defense to a defamation action.").

[328] Wright v. Grove Sun Newspaper Co. Inc., 1994 OK 37, 873 P.2d 983, 991, 22 Media L. Rep. (BNA) 1801. *See also Gaylord*, 958 P.2d at 145 ("These statutory privileges are more narrow in scope than their common-law counterparts. The statute restricts the defense of fair report and fair comment to republications in the course of official action or proceedings, whereas the common-law privilege extends to communications on matters of public interest."); *Magnusson*, 2004 OK ¶ 10 ("Although all three concepts overlap, the scope of the common law fair comment privilege, encompassing expressions of opinion on all matters of public opinion, is broader than either the common law fair report doctrine or the terms of the statute – both of which have their roots in political speech concepts and encompass public interest reports of official actions or proceedings.").

> The common-law fair-comment privilege was not limited to communications regarding government officials. It was applied to comments directed at those who were involved in matters of public concern and to candidates for public office. Its purview extends to anyone who presented himself or his services or goods to the public for its evaluation.[329]

Fair comment and criticism under the common law generally applies when the comment "(a) deals with a matter of public concern; (b) is based on true or privileged facts; and (c) represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm."[330] The defense, therefore, "applies only to an expression of opinion, not to a false statement of fact, whether it is expressly stated or implied in an expression of opinion," the state Supreme Court said.[331] For example, the state Court of Civil Appeals held in 2014 that publishing sex offender information, including addresses, was not protected by this defense because it "was not a statement or expression of opinion, and cannot be reasonably construed as such."[332]

Under the common law defense, the opinion "must be based on facts truly stated,"[333] meaning that it "does not extend to misstatements of fact, however bona fide."[334] The defense could be lost if the journalist "did not, in fact, actually hold the stated opinion but nevertheless published the comment, or otherwise intended to do

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[329] *Gaylord*, 958 P.2d at 144 n.63 (citing RESTATEMENT OF TORTS §§ 606-609 (1938)).

[330] *Id.* at 144 n.62. *See also Magnusson*, 2004 OK 53, ¶ 11; *Sturgeon*, 987 P.2d at 1225 n.4.

[331] *Gaylord*, 958 P.2d at 144 n.62 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 13).

[332] Nelson v. Am. Hometown Publ'g, Inc., 2014 OK CIV APP 57, ¶ 34, 333 P.3d 962. "If a statement about an individual can be proven true or false, it is not an opinion," *id.*

[333] *Gaylord,* 958 P.2d at 144 n.64 (citing PROSSER AND KEETON ON TORTS § 115 (5th ed. 1984)).

[334] *Id.* (citing Gatley, LIBEL AND SLANDER (5th ed. 1960) § 588, at p. 325).

harm."[335] The comment "could not constitute an attack on the character or motives of the plaintiff or his work."[336]

To determine if the common law fair comment defense is applicable, "courts look to the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a consideration of whether the statement implies the existence of undisclosed facts," the Oklahoma Supreme Court said in 2004.[337]

In determining that the defense was applicable in the case at hand, the court noted first that the opinions expressed in KFOR's "In Your Corner" consumer news reports about a plastic surgeon clearly involved a matter of public concern. "Public health is clearly a matter of public consonance. Furthermore, the availability and skills of surgeons constitute matters relating to a community's public health."[338]

The court then observed that the television reporter had interviewed patients who "were clearly basing their statements about the doctor's professionalism – both those patients who were upset with their results and the one patient who was very pleased with hers – on their individual experiences and the opinions or conclusions they developed therefrom." Hence, it concluded, those statements were protected opinions based on a review of the doctor's actions.[339]

The court found that statements in the news segments could not "reasonably be interpreted as stating actual facts about the doctor" but were instead judgmental, opinionative statements. "Furthermore,

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[335] *Id.* at 144 n.63 (citing Veeder, Freedom of Public Discussion, 23 HARV. L. REV. 413, 425-26 (1910); RESTATEMENT OF TORTS § 606(1)(b)(c) (1938)).

[336] *Id.* (citing Veeder, Freedom of Public Discussion, 23 HARV. L. REV. 413, 424-25 (1910)).

[337] *Magnusson*, 2004 OK 53, ¶ 11 (citing Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2705; NBC Subsidiary, Inc. v. Living Will Center, 879 P.2d 6, 11 (Colo. 1994), *cert. denied*, 514 U.S. 1015, 115 S. Ct. 1355, 131 L. Ed. 2d 214 (1995)). *See also* Metcalf v. KFOR-TV, Inc., 828 F. Supp. 1515, 1529 (W.D. Okla. 1992) ("[I]f an opinion is stated as or 'is in the form of a factual imperative,' or if an opinion is expressed without disclosing the underlying factual basis for the opinion, the opinion is actionable under Oklahoma law if the opinion implies or creates a reasonable inference that the opinion is justified by the existence of undisclosed defamatory and false facts.").

[338] *Magnusson*, 2004 OK 53, ¶ 12 ("[T]here is no question that the opinions expressed in the broadcasts involved a matter of public concern.").

[339] *Id.* ¶ 13.

where the tone of the broadcast is pointed, exaggerated and heavily laden with emotional rhetoric and moral outrage, listeners are put on notice to expect speculation and personal judgment. References to 'botched' surgeries and 'devastating' scars clearly fall within this category rather than being statements which could reasonably be interpreted as stating actual facts."[340]

The state Supreme Court also observed that "an overwhelming majority of jurisdictions – including the Tenth Circuit applying Oklahoma law – faced with the issue of whether to protect similar broadcasts have determined such exaggerated criticisms to be the type of statements that our society, interested in free and heated debate about matters of social concern, has chosen to protect."[341] The reports were "clearly identified as investigations into claims by patients in which both negative and positive disclosures were made about [the surgeon] and to which the doctor was given the opportunity to respond. There was nothing about the broadcasts indicating that facts were being withheld. Rather, the majority content of the broadcasts were interviews of the patients and quotations of their expressed opinions about the treatment they received."[342]

The court concluded that the station was protected by the common law fair comment defense because even though the language used in the stories "was clearly couched to grab the attention of the listener and indicated the possibility of malpractice, the broadcasts

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[340] *Id.* ¶ 14.

[341] *Id.* ¶ 15 (citing a dozen cases, including Metcalf v. KFOR-TV, Inc., 828 F. Supp. 1515, 1528 (W.D. Okla. 1992) (Broadcast involving commentary on physician engaging in plastic surgery titled "Beauty and the Buck" questioning whether a physician was qualified, indicating some said such procedures were "unsuitable," in which patients indicated doctor treated them as "guinea pig" and where patient made statements about own condition was protected as encompassing opinion.); Green v. CBS, Inc., 286 F.3d 281, 283 (5th Cir. 2002), *cert. denied,* 537 U.S. 887, 123 S.Ct. 132, 154 L.Ed.2d 148 (2002) (Unattractive statements about lottery winner protected expression of opinion.); Campbell v. Citizens for an Honest Government, 255 F.3d 560, 575-76 (8th Cir. 2001), *reh'ng & reh'ng en banc denied* (2001) (Broadcast implicating two police officers with death of teenage boys protected opinion.); NBC Subsidiary, Inc. v. Living Will Center, 879 P.2d 6, 11 (Colo. 1994), *cert. denied*, 514 U.S. 1015, 115 S.Ct. 1355, 131 L.Ed.2d 214 (1995) (News broadcasts concerning company offering living will kits indicating the kits were not worth the charges were constitutionally privileged statements of opinion.)).

[342] *Id.*

merely presented the opinions of several dissatisfied and one satisfied patient."[343]

The court also declared for the first time that the common law defense of fair comment could be used in Oklahoma when the libel plaintiff is a private person.[344]

Opinion: The Oklahoma Supreme Court has recognized that the First Amendment protects expressions of pure opinion – "judgmental statement[s]" that are not factual and, therefore, cannot be proved true or false.[345] For example, statements that a racehorse and show horse were doped and that a veterinarian was connected to their doping "are sufficiently factual to be susceptible of being proved true or false" and, therefore, "are not protected opinion."[346] But calling someone a "hatchet man," "scalawag," "rake," or "scoundrel" "is not libelous because it is not a statement of fact, but rather a judgmental statement in which the maker … expresses his views," the court reasoned in 1982. "Such statements are opinionative and not factual in nature. Thus, such statements can hardly be said to constitute falsehoods. As they cannot be false, they cannot be considered libelous."[347]

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[343] *Id*. ¶ 25.

[344] *Id*. ¶ 23 (Relying upon Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128; Mitchell v. Griffin Television, 2002 OK CIV APP 115, 60 P.3d 1058; Martin v. Griffin Television, Inc., 1976 OK 13, 549 P.2d 85; Sturgeon v. Retherford, 1999 OK CIV APP 78, 987 P.2d 1218, 28 Media L. Rep. (BNA) 1144).

[345] Herbert v. Christian Coal., 1999 OK 90, 992 P.2d 322, 328 ("The statements are in the nature of a non-actionable 'judgmental statement' which is opinionative and not factual in nature."). *See also* Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1529, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992) (applying Oklahoma law) ("As a general rule, statements which are opinionative and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel under Oklahoma law."); Miskovsky v. Okla. Publ'g Co., 1982 OK 8, 654 P.2d 587, 593, 7 Media L. Rep. (BNA) 2607 ("As opinions they are not statements of fact, and therefore cannot be false."), *cert. denied*, 459 U.S. 923, 103 S. Ct. 235, 74 L. Ed. 2d 186 (1982); Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 70, 417 P.3d 1240 ("As a general rule, statements which are opinionative and not factual in nature, and which cannot be verified as true or false, are not actionable as slander or libel under Oklahoma law.")

[346] Mitchell v. Griffin Television, 2002 OK CIV APP 115, ¶ 32, 60 P.3d 1058, 1065.

[347] *Miskovsky*, 654 P.2d at 593.

Likewise, the court also said in *Miskovsky v. Oklahoma Publishing Co.*, the newspaper editorial's use of the phrases "scurrilous defamation" and "gutter theatrics" was not libelous because those were "not statements of fact, but statements of opinion." The court explained:

> What one individual may consider scurrilous, another may think commendable. What one might consider 'gutter theatrics', another may think of as 'strategical genius'. Likewise, one might refer to an individual as a 'scoundrel', while another thinks him a 'saint'. Such characterizations are not factual, but rather judgmental. Accordingly, they cannot form the basis of a libel action, as they cannot be verified as true or false.[348]

Relying on *Miskovsky*, the Court of Civil Appeals two years later said characterizing a police chief as "egotistical" was the type of adjective the state Supreme Court had deemed as "judgmental," rather than "factual," and, therefore, was not libelous because it could not be proved true or false.[349]

Saying in a television newscast that "[d]octors who sell beauty can make big bucks and that can sometimes mean big problems for patients" was an opinion "as to whether the profitability of plastic surgery is the cause of big problems for patients," a federal trial judge applying Oklahoma law said in 1992.[350] "It is not objectively provable as true or false and no reasonable viewer/listener would interpret the statement as stating actual facts. 'Big problems' in and of itself is an evaluative term." The judge also said the terms "qualified," "incompetent," "sloppy and irresponsible" were "variously interpretable and too indefinite in meaning to be capable of being true

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[348] *Id.* at 594.

[349] Tanner v. W. Publ'g Co., 1984 OK CIV APP 22, 682 P.2d 239, 241. *See also* Steidley v. Cmty. Newspaper Holdings, Inc, No. 118,322, at 10 (Okla. Civ. App. Nov. 6, 2020) (not for official publication) (police officer's quoted statement that district attorney "would abuse her power" was an opinion, not a statement of fact that the district attorney "was actually guilty of abuse of power").

[350] Metcalf v. KFOR-TV, 828 F. Supp. 1515, 1529, 21 Media L. Rep. (BNA) 1481 (W.D. Okla. 1992) (applying Oklahoma law).

or false."[351] Stating that particular medical organizations were "shams perpetrated on the public by greedy doctors" was an expression of opinion because "[w]hether or not something is a 'sham' and a doctor or doctors are 'greedy' are matters of opinion," the judge said.[352]

However, "if an opinion is expressed without disclosing the underlying factual basis for the opinion," it can be actionable under Oklahoma law if it "implies or creates a reasonable inference that the opinion is justified by the existence of undisclosed defamatory and false facts," the federal judge noted.[353] He relied upon a 1984 case in which the Oklahoma Supreme Court held that criticisms of the training required for doctors of osteopathy were not constitutionally protected opinions because the publication did "not give underlying facts on the basis of which an opinion is expressed."[354] The critical statements were an "assertion of a categorical fact," meaning they were in the "form of a factual imperative which is either based upon no facts or which implies undisclosed factual basis for the categorical statements."[355]

Also, couching a statement in terms of what someone thought, believed, or felt does not by itself make the statement an opinion.[356]

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[351] 828 F. Supp. at 1530.

[352] *Id.* (relying upon Phantom Touring, Inc. v. Affiliated Publ'n, 953 F.2d 724 (1st Cir. 1992), which held that a description of a touring production of "Phantom of the Opera" as "a rip-off, a fraud, a scandal, a snake-oil job" was protected opinion).

[353] *Id.* at 1529 (citing McCullough v. Cities Serv. Co., 1984 OK 1, 676 P.2d 833, 835). *See also* Fountain View Manor v. Sheward, 2019 OK CIV APP 77, ¶ 14, 455 P.3d 9 (defendant's opinions were not actionable in part because he had disclosed the underlying factual basis on which he formed his opinions) (citing Bird Const. Co., Inc. v. Oklahoma City Hous. Auth., 2005 OK CIV APP 12, ¶ 10, 110 P.3d 560, 564).

[354] McCullough v. Cities Serv. Co., 1984 OK 1, 676 P.2d 833, 835. *See also* Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 70, 417 P.3d 1240 ("[I]f the defendant expresses a derogatory opinion without disclosing the facts on which it is based, there may be liability 'if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts.'") (quoting McCullough v. Cities Serv. Co., 1984 OK 1, 676 P.2d 833, 835).

[355] 676 P.2d at 835 (relying upon RESTATEMENT (SECOND) OF TORTS § 566 (1977) which states, "If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts.").

[356] *See, e.g., Metcalf*, 828 F. Supp. at 1531 ("[T]he mere fact that a statement is couched in such terms is not conclusive on the issue of whether a statement implies an assertion of fact which is susceptible of being proved true or false."). *See also*

For example, a patient's statement that she "feels that [surgical] methods used were 'guinea pig' methods because they don't seem like the medical thing to do" was an expression of opinion only because the television station made it clear that she was a "layperson" and "[n]o reasonable viewer or listener would understand [her] statement as conveying facts," the federal judge said.[357]

Oklahoma courts also have recognized protection for another category of opinion known as rhetorical hyperbole.[358] In doing so, they have relied upon the U.S. Supreme Court's descriptions of rhetorical hyperbole as "a vigorous epithet"[359] or "a lusty and imaginative expression"[360] often stated in a vehement or politically charged debate in which the audience understands the speech to be an unbelievable exaggeration, not an assertion of fact.

Rhetorical hyperbole is shielded against libel claims, the Oklahoma Supreme Court said in 1996, "because of the 'realization

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Ollman v. Evans, 750 F.2d 970, 983 (D.C. Cir. 1984) ("When a statement is as 'factually laden' as the accusation of a crime, ... cautionary language is by and large unavailing to dilute the statement's factual implications. However, in statement less clearly factual, cautionary language may make a more substantial difference to the reader's understanding."); Cianci v. N.Y. Publ'g Co., 639 F.2d 54, 64 (2d Cir. 1980) ("[I]t would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think.'").

[357] *Id.* at 1531-32.

[358] Price v. Walters, 1996 OK 63, 918 P.2d 1370, 1376-78 (recognizing First Amendment protection for rhetorical hyperbole). *See also Herbert*, 992 P.2d at 332; *Tanner*, 682 P.2d at 242.

[359] Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1974) ("It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.").

[360] National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) ("[R]hetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join. The Court in *Linn* recognized that such exaggerated rhetoric was commonplace in labor disputes and protected by federal law.").

that there exists a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that the discussion may well include vehement, caustic and sometimes unpleasantly sharp attack on public officials.[361] Where the tone of a piece is 'pointed, exaggerated and heavily laden with emotional rhetoric and moral outrage,' readers are notified 'to expect speculation and personal judgment.'"[362]

In finding that a press release issued during a gubernatorial campaign was rhetorical hyperbole, the state Supreme Court relied in part upon Judge Robert Bork's concurring opinion in *Ollman v. Evans*,[363] a 1984 case in which the U.S. Court of Appeals for the District of Columbia outlined four guidelines[364] for distinguishing between an assertion of fact and an opinion.[365] Oklahoma courts have not, however, applied the entire *Ollman* test to make that determination.

Anti-SLAPP Statute: In 2014, Oklahoma became one of thirty-two states[366] with a statutory defense against "Strategic Lawsuits Against Public Participation," or SLAPPs.[367] The term, coined in 1996

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[361] *Price*, 918 P.2d at 1376 (quoting Jurkowski v. Crawley, 637 P.2d 56, 58 (Okla. 1981)).

[362] *Id.* (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 32, 110 S. Ct. 2695, 2712, 111 L. Ed. 2d 1 (1990) (Brennan, J., dissenting)).

[363] 750 F.2d 970 (D.C. Cir. 1984).

[364] *Id.* The four guidelines can be summarized as: (1) What is the common usage or meaning of the specific language of the challenged statement itself? (2) Is the statement capable of being objectively characterized as true or false? (3) What is the full context, including the journalistic setting, in which the statement was made? (4) What is the broader social context into which the statement fits?

[365] *Price*, 918 P.2d at 1377 (citing 750 F.2d at 994 (Bork, J., concurring)) ("Judge Robert Bork, in his concurring opinion in *Ollman v. Evans*, spoke of statements which the reader should perceive as functionally more 'opinion' than 'fact' because they appear in the context of swirling political controversy. Like the statements at issue in *Ollman*, the statements here are not actionable; they fall into the category the U.S. Supreme Court calls 'rhetorical hyperbole.'").

[366] PUBLIC PARTICIPATION PROJECT, STATE ANTI-SLAPP REFERENCE CHART, https://anti-slapp.org/your-states-free-speech-protection/#2 (last visited Jan. 7, 2020).

[367] *See* Laura Long, *Slapping Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implication on the Right to Petition*, 60 OKLA. L.REV. 419 (2007). The author discusses the state's "anti-SLAPP" act as it existed at that time under the qualified privilege statute. *See also* Anagnost v. Tomecek, 2017 OK 7, ¶ 16,

by George W. Pring and Penelope Canan, describes meritless lawsuits – typically filed as libel claims – meant to silence those who exercised their First Amendment rights to criticize the plaintiffs on issues of public concern.[368] The Reporters Committee for Freedom of the Press has noted that the plaintiff's goal in such a case "is not necessarily to actually win the lawsuit, but to drag their critics to court and bury them under a pile of attorney's fees and embarrassment until they cry 'uncle!' and agree to be quiet."[369] To counter such lawsuits, "anti-SLAPP acts typically provide an accelerated dismissal procedure, available immediately after a suit is filed in order to weed out meritless suits early in the litigation process," the Oklahoma Court of Civil

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390 P.3d 707 (comparing older qualified privilege statute to newer Oklahoma Citizens Participation Act) ("[T]he changes made to the OCPA appear substantive, rather than merely procedural. Section 1434 creates a new defense to causes of action involving first amendment rights, which effectively provides immunity from suit and would act as a complete bar to the plaintiff's claim in this cause."); Southwest Orthopaedic Specialists v. Allison, 2018 OK CIV APP 69, ¶ 6, 439 P.3d 430 ("The OCPA is an example of 'anti-SLAPP' (Strategic Lawsuit Against Public Participation) legislation, the purpose of which is to curb 'lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.'" (quoting Cal. Civ. Proc. Code § 425.16(a)).

[368] GEORGE W. PRING & PENELOPE CANAN, SLAPPs GETTING SUED FOR SPEAKING OUT (Temple Univ. Press 1996). *See also* PUBLIC PARTICIPATION PROJECT, http://www.anti-slapp.org (last visited Oct. 14, 2015). *See also* Southwest Orthopaedic Specialists v. Allison, 2018 OK CIV APP 69 ¶ 6 ("Anti-SLAPP legislation appears to be the result of an increasing tendency by parties with substantial resources to file meritless lawsuits against critics or opponents, with the intent of discouraging or silencing those critics by burdening them with the time, stress, and cost of a legal action.").

[369] The Reporters Committee for Freedom of the Press, *Anti-SLAPP Laws,* DIGITAL JOURNALIST'S LEGAL GUIDE, *available at* http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/anti-slapp-laws-0 (last visited Oct. 14, 2015). *See also* Anagnost v. Tomecek, 2017 OK 7, ¶ 8, 390 P.3d 707 ("These types of acts are enacted to counteract lawsuits commonly known as SLAPP suits or strategic lawsuits against public participation which are aimed at deterring public participation in decision-making forums."); Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 7, 417 P.3d 1240 ("Anti-SLAPP legislation appears to be the result of an increasing tendency by parties with substantial resources to file meritless lawsuits against legitimate critics, with the intent to silence those critics by burdening them with the time, stress, and cost of a legal action.").

Appeals explained in *Krimbill v. Talarico* in 2018.[370] The goal is to save defendants time and money.

The plaintiff's legal action is suspended when the defendant files a motion to dismiss under the Oklahoma Citizens Participation Act (OSCPA).[371] The statute "very broadly" defines legal action as "a lawsuit, cause of action, petition, complaint, cross-claim, counterclaim or any other judicial pleading or filing that requests legal or equitable relief," the Oklahoma Supreme Court has noted.[372]

The OSCPA[373] mirrors Texas' anti-SLAPP statute, the Oklahoma Court of Civil Appeals observed in *Krimbill*.[374] Therefore, Oklahoma courts can look to the Texas Supreme Court's numerous

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[370] 2018 OK CIV APP 37, ¶ 7, 417 P.3d 1240. *See also* Steidley v. Singer, 2017 OK 8, ¶ 5, 389 P.3d 1117 ("Consistent with its stated purpose, the entire [Oklahoma Citizens Participation] Act is devoted to deterring, preventing and dismissing certain free speech/association /participation type lawsuits as soon as possible after filing."); Anagnost v. Tomecek, 2017 OK 7, ¶ 16, 390 P.3d 707 ("The OCPA employs a special motion to dismiss with expedited trial court and appellate review and the stay of discovery pending a decision on the motion which benefits targets of such lawsuits by reducing the time commitment and financial resources to combat the lawsuits, thereby lessening the chill effect on petitioning activity."); Southwest Orthopaedic Specialists v. Allison, 2018 OK CIV APP 69, ¶ 6 ("To carry out this purpose, anti-SLAPP acts typically provide an accelerated dismissal procedure, available immediately after a suit is filed, in order to weed out meritless suits early in the litigation process.").

[371] 12 O.S. § 1432(C) (OSCN 2021) ("Except as provided in Section 6 of the Oklahoma Citizens Participation Act, on the filing of a motion under subsection A of this section, all discovery in the legal action shall be suspended until the court has ruled on the motion to dismiss."). "A motion to dismiss a legal action under this section shall be filed no later than sixty (60) days after the date of service of the legal action. The court may extend the time to file a motion under this section on a showing of good cause," § 1432(B). *See also* Steidley v. Singer, 2017 OK 8, ¶ 5, 389 P.3d 1117 (citing 12 O.S. § 1432(C) (2014)); Anagnost v. Tomecek, 2017 OK 7, ¶ 9, 390 P.3d 707.

[372] Steidley v. Singer, 2017 OK 8, ¶ 5, 389 P.3d 1117 (citing 12 O.S. § 1431(6) (2014)). *See also* Anagnost v. Tomecek, 2017 OK 7, ¶ 9, 390 P.3d 707.

[373] 12 O.S. §§ 1430-40 (OSCN 2021). *See also* Order and Judgment, at 1, Roush v. Dawson, No. CJ-15-4370 (Okla. Cnty. Dist. Ct. Dec. 1, 2015) (Oklahoma Citizens Participation Act does not violate U.S. Constitution or Oklahoma Constitution).

[374] 2018 OK CIV APP 37, ¶ 5 ("Oklahoma's Act, which became effective in 2014, mirrors that of the Texas Citizens' Participation Act (TCPA or Texas Act), enacted in 2011 under the title, 'Actions Involving the Exercise of Certain Constitutional Rights,' Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001 through 27.011.").

rulings on its statute as persuasive authority[375] when interpreting Oklahoma's, the court ruled.[376]

The purpose of Oklahoma's statute "is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."[377] Courts are to construe the Act "liberally to effectuate its purpose and intent fully."[378] However, the statute could not be applied retroactively against legal actions that accrued prior to its becoming effective on Nov. 1, 2014, the Oklahoma Supreme Court ruled.[379]

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[375] Oklahoma courts may consult the Texas cases but, unlike binding authority, need not apply them. *See Persuasive Authority*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2nd ed. 2008).

[376] 2018 OK CIV APP 37, ¶ 5 (citing In re Fletcher's Estate, 1957 OK 7, ¶ 25, 308 P.2d 304 ("[G]eneral rule, with some exceptions, is that a statute adopted by Oklahoma from another state which at the time of adoption has been construed by the highest court of the first state, is presumed adopted as so construed; however, if decisions by the highest court of the other state occurred after adoption of the statute in Oklahoma, such decisions are persuasive only.")).

[377] 12 O.S. § 1430(B) (OSCN 2021). "If a legal action is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association, that party may file a motion to dismiss the legal action," § 1432(A). *See also* Steidley v. Singer, 2017 OK 8, ¶ 4, 389 P.3d 1117 ("It accomplishes this goal by allowing parties to file motions to dismiss legal actions if the legal action relates or is in response to free speech.")

[378] 12 O.S. § 1440(B) (OSCN 2021).

[379] Steidley v. Singer, 2017 OK 8, ¶ 1, 389 P.3d 1117. "[T]he terms of the Okla. Const., Art. 5, §54 protect matured rights from the effects of after-enacted legislative change, and that because the OCPA affects substantive rights, it must be prospectively applied to legal actions filed after the November 1, 2014, effective date," *id.* ¶ 8. *See also* Anagnost v. Tomecek, 2017 OK 7, ¶ 10, 390 P.3d 707 ("[T]his question is critical because our Constitution, Art. 5 §§ 52, 54 protect the accrual of an action when the plaintiff could have first maintained the action by safeguarding substantive rights which remain unaffected by later-enacted legislation, despite statutory language to the contrary."). "Because the OCPA affects substantive rights, it must be prospectively applied to legal actions filed after the November 1, 2014, effective date. Consequently, the OCPA cannot be applied retroactively to the doctor's claim in this cause," 2017 OK 7, ¶ 17. *See also* Steidley v. Higgins, No. 114,804, at 6 n.6 (Okla. Civ. App. Feb. 15, 2017) (not for official publication) (OCPA applies to date on which a legal claim could accrue, i.e., when the plaintiff had a legal right to sue, not when the action was actually filed) (The *Anagnost* Court statement "must be read in the context of the entire Opinion. Read in its entirety, *Anagnost* clearly stands for the

The Oklahoma Citizens Participation Act "has certain inherent contradictions" and could "be interpreted as radically changing the mode of procedure in many cases, and establishing an unprecedented system of mandatory bench trials on the merits before an answer is even filed," the Court of Civil Appeals concluded in *Krimbill*. "However, the Act also contains clear legislative statements that it 'shall not abrogate or lessen any other defense, remedy, immunity or privilege' and that the purpose of the OCPA is to weed out *meritless* suits while protecting 'the rights of a person to file *meritorious* lawsuits for demonstrable injury.'"[380]

An example of an inherent contradiction in the statute is the one existing between sections 1431(7) and 1439(2) involving commercial speech, the court said. The statute cannot be used to dismiss a lawsuit "brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct the action is based upon arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer."[381] That provision seems at odds with the statute's protection for "speech on a matter of public concern related to a good, product or service in the marketplace," the court said.[382] To apply the "commercial speech" exemption, the Oklahoma court relied upon two requirements used by the Texas courts: "(1) The parties are involved in

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proposition that it is the date the action accrues – i.e., the date a plaintiff could have first maintained the action – that is the controlling date for the purpose of determining whether the OCPA applies, not the date a plaintiff actually exercises her rights by filing, refiling, or amending a petition."). "[A] libel action generally accrues on the date of publication," *Steidley,* No. 114,804, at 6-7 (quoting Digitial Design Grp., Inc. v. Info. Builders, Inc., 2001 OK 21, ¶ 19, 24 P.3d 834).

[380] Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 75, 417 P.3d 1240. *See also* Southwest Orthopaedic Specialists v. Allison, 2018 OK CIV APP 69, ¶ 7 ("The OCPA contains several unusual procedures that have no precedent in Oklahoma law.")

[381] 12 O.S. § 1439(2) (OSCN 2021).

[382] 2018 OK CIV APP 37, ¶ 38 ("Oklahoma has not attempted to reconcile the covered speech noted by § 1431(7), i.e., 'speech on a matter of public concern related to a good, product or service in the marketplace,' with the speech exempted by § 1439(2). The two clauses raise substantial questions, including such issues as the difference between speech 'related to a good, product or service' and speech that 'arises out of the sale or lease of goods [or] services'; and the difference between speech aimed at 'an actual or potential buyer or customer' rather than 'the public.'").

the same general area of business; and (2) the statements forming the basis of the suit were made at least partially for the purpose of promoting sales of the goods or services of the person making the statement."[383] If both requirements are met, the Texas appellate courts held that its anti-SLAPP statute "does not apply and cannot be interposed as a defense," the Oklahoma court explained.[384]

For a court to determine if the plaintiff's lawsuit is meritless and must be dismissed, "[t]he OCPA contains several unusual procedures that have no precedent in Oklahoma law," the Court of Civil Appeals noted in 2018.[385] Under the statute:

1. The defendant must first show "by a preponderance of the evidence" that the plaintiff's lawsuit "is based on, relates to or is in response to the [defendant's] exercise of the right of free speech, the right to petition, or the right of association."[386]

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[383] *Id.* ¶ 43 (relying upon Epperson v. Mueller, 01-15-00231-CV, 2016 WL 4253978 (Tex. App. 2016); Backes v. Misko, 486 S.W.3d 7 (Tex. App. 2015); Whisenhunt v. Lippincott, 474 S.W.3d 30 (Tex. App. 2015); and Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd., 416 S.W.3d 71 (Tex. App. 2013)).

[384] *Id.* But in the case at hand, the court said that based on the limited evidence presented to the trial court, "it would be speculative at best" to determine if the plaintiff and defendants are in the same business "or that Defendants made the statements at issue to promote their business aims. We therefore do not base our decision on an interpretation of the OCPA's 'commercial speech' exemption, but instead presume that Defendants met their initial burden and that the Act applies in this case," *id.* ¶ 44.

[385] *Southwest Orthopaedic Specialists*, 2018 OK CIV APP 69, ¶ 7.

[386] §1434(B). *But see also Southwest Orthopaedic Specialists*, 2018 OK CIV APP 69, ¶ 11 ("This 'based on, relates to or is in response to' test is one of several OCPA requirements that are not defined. The plaintiff in such a case *will* normally have some legal rationale of at least minimal validity, and therefore will argue that the suit is one not 'related' to speech as defined in § 1431 but instead is based on some other legitimate harm. … The existence of a legitimate rationale for suit is examined in the second stage, however, and is thus not a likely question in the first-stage inquiry. The first-stage inquiry is simply whether the defendant can make a plausible showing that the plaintiff's lawsuit was driven, at least in part, by one of the forms of speech enumerated in § 1431."). "[I]n an OCPA proceeding, the defendant first establishes the possibility that he or she has been involved in one of the broad forms of speech protected by the Act, and that the plaintiff's lawsuit is somehow connected or related to that speech. In the second stage, the plaintiff must establish that a legitimate basis for suit – other than suppression of the protected speech – exists by showing a *prima facie* case. The question of whether this stated rationale is simply a pretext for attacking

2. The burden then shifts to the plaintiff to establish "by clear and specific evidence a prima facie[387] case for each essential element" of the plaintiff's claim.[388]

3. The burden then shifts back to the defendant to establish "by a preponderance of the evidence each essential element of a valid defense" against the plaintiff's lawsuit.[389]

The statute broadly defines the exercise of First Amendment rights.[390] For example, exercising the right of association is "a communication between individuals who join together to collectively express, promote, pursue or defend common interests."[391] The right to petition includes "a communication in or pertaining to … a public meeting dealing with a public purpose, including statements and

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the defendant for his or her underlying speech, and whether the OCPA addresses this situation, is a more complex issue, and we need not address it here," *id.* ¶ 14.

[387] *What is PRIMA FACIE?* BLACK'S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2nd ed.) (last visited July 23, 2021) ("Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably. A litigating party is said to have a prima facie case when the evidence in his favor is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced on the other side.").

[388] 12 O.S. § 1434(C) (OSCN 2021) ("The court shall not dismiss a legal action under this section if the party filing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.").

[389] 12 O.S. § 1434(D) (OSCN 2021) ("[T]he court shall dismiss a legal action against the moving party if the moving party establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim.").

[390] *See Krimbill*, 2018 OK CIV APP 37, ¶ 8 ("Anti-SLAPP acts may be generally characterized as 'narrow' or 'broad.' A narrow act protects only certain speech made in limited circumstances, often when the speech is discussing a political or municipal issue. The acts of Texas, Oklahoma and California are, by comparison, 'broad' acts, directed at protecting a wide spectrum of First Amendment speech, with limited exceptions."). *See also* OKLA. CONST. art. II, § 3 ("Right of assembly and petition. The people have the right peaceably to assemble for their own good, and to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance.").

[391] 12 O.S. § 1431(2) (OSCN 2021). "Communication" is broadly defined by the statute as "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual or electronic, " § 1431(1).

discussions at the meeting or other matters of public concern occurring at the meeting."[392] Exercising freedom of speech is "a communication made in connection with a matter of public concern,"[393] which the statute defines as "an issue related to health or safety, environmental, economic or community well-being, the government, a public official or public figure, or a good, product or service in the marketplace."[394] The speech and associational rights protected by the statute "are not

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[392] § 1431(4)(a)(9). *See also* § 1431(4)(a-e) (Exercising the right to petition "means any of the following: (a) a communication in or pertaining to: (1) a judicial proceeding, (2) an official proceeding, other than a judicial proceeding, to administer the law, (3) an executive or other proceeding before a department or agency of the state or federal government or a political subdivision of the state or federal government, (4) a legislative proceeding, including a proceeding of a legislative committee, (5) a proceeding before an entity that requires by rule that public notice be given before proceedings of that entity, (6) a proceeding in or before a managing board of an educational or eleemosynary institution supported directly or indirectly from public revenue, (7) a proceeding of the governing body of any political subdivision of this state, (8) a report of or debate and statements made in a proceeding described by division (3), (4), (5), (6) or (7) of this subparagraph, or (9) a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting, (b) a communication in connection with an issue under consideration or review by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding, (c) a communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding, (d) a communication reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial or other governmental body or in another governmental or official proceeding, and (e) any other communication that falls within the protection of the right to petition government under the Constitution of the United States or the Oklahoma Constitution."); Lewis v. Corrente, 2020 OK CIV APP, ¶ 19, 473 P.3d 531 ("[A] defendant asserting that a plaintiff's theory is based on that defendant's exercise of the right to petition must make some showing that the communication in question is categorizable as an exercise of a constitutional right to petition.").

[393] § 1431(3).

[394] § 1431(7)(a-e). *See Southwest Orthopaedic Specialists*, 2018 OK CIV APP 69, ¶ 12 (noting that Texas courts interpreting the substantially identical Texas Citizens Participation Act have concluded that the category of speech "is considerably *wider* than the category of speech protected by the First Amendment.") (citing ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895, 900 (Tex. 2017); Elite Auto Body LLC v. Autocraft Bodywerks, Inc., 520 S.W.3d 191, 201 (Tex. Ct. App. 2017) (reh'g denied May 25, 2017, review dismissed Jan. 19, 2018)).

limited to communications 'relating to participation in government,'" Oklahoma County District Judge Patricia Parrish ruled in 2015.[395]

Based on the statute's stated purpose, the Court of Civil Appeals in 2020 said the defendant's communication must arise from "exercising a relevant constitutional right."[396] In that case, the court rejected the defendants' contention that filing a mechanic's and materialmen's lien was an exercise of the right to petition protected by the OCPA.[397]

In contrast, a Henryetta, Okla., resident's "allegations of misuse of city resources for the benefit of a private business with which the mayor had a close relationship" exemplified the exercise of First Amendment rights protected under the statute, the Court of Civil Appeals agreed in 2019.[398] The district court had found that the private company engaged in a SLAPP by filing a libel lawsuit against the resident, Howard Sheward Jr, "primarily for the purpose of silencing Sheward from criticizing a 'public figure' on a 'matter of public concern.'"[399] In upholding the district judge's dismissal of the lawsuit under the OCPA, the appellate court explained:

> Sheward's effort to gather information and provide information to the citizens and city taxpayers about the sewage leaking into the street, the use of city resources on the private property of FVM a business with which the mayor was closely related, FVM's request for reimbursement of its sewage repair from the city, and FVM's possible role in damaging the sewer line in the first place, having built part of its facility over the city easement that held the sewer line, are all matters of public concern about which Sheward was

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[395] Order and Judgment, at 2, Roush v. Dawson, No. CJ-15-4370 (Okla. Cnty. Dist. Ct. Dec. 1, 2015).

[396] Lewis v. Corrente, 2020 OK CIV APP, ¶ 19, 473 P.3d 531. "[A] defendant asserting that a plaintiff's theory is based on that defendant's exercise of the right to petition must make some showing that the communication in question is categorizable as an exercise of a constitutional right to petition," *id.*

[397] *Id.* ¶ 22.

[398] Fountain View Manor v. Sheward, 2019 OK CIV APP 77, 455 P.3d 9.

[399] *Id.* ¶ 12. "Sheward also successfully demonstrated FVM brought suit against him in an effort to keep him from publicly criticizing the mayor and questioning the use of city finances," *id.* ¶ 13.

> trying to inform the public. The raw sewage leaking into the street could impact both public health and environmental well being; the mayor's possible role in securing city services to help with the sewer repair (requesting money and use of vacuum trucks) implicated economic and community well being, a public official and local government in general, including government finances. As a result, Sheward's communication endeavors were aimed at legitimate matters of public concern for which he had the right to petition in the exercise of his free speech, under the terms of 12 O.S. §1431 and the First Amendment….[400]

Oklahoma courts also have agreed with media defendants invoking the OCPA that they were reporting on matters of public concern. For example, "[a] news story covering a gubernatorial candidate's campaign and the public's reaction to a campaign ad is clearly of public concern, particularly during a campaign," the state Court of Civil Appeals said.[401] Likewise, coverage of a police major's public comments about racism in policing and police shootings of African Americans was "a protected activity." "The health, safety and well-being of the African-American community as it relates to policing is certainly a matter of public concern," a trial judge said.[402]

If the defendant "shows by a preponderance of the evidence" that the lawsuit is "based on, relates to or is in response to" the defendant's exercise of the rights to free speech, to petition the

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[400] *Id*. ¶ 12. "Based on the record provided, we do not find error in the district court's grant of Sheward's summary judgment motion. His communications were an effort to alert the public to a matter of public concern, about a public official, who had a close relationship to a private entity and Sheward believed the mayor was abusing her public office by funneling public resources and requests for reimbursement to the private entity," *id*. ¶ 15.

[401] Richardson v. Tribune Media Co., No. 117,806, at 10 (Okla. Civ. App. Aug. 4, 2020) (not for official publication).

[402] Order on Defendants' Motions to Dismiss, CJ-2020-270, at 3 ("The Court finds this lawsuit deals with a protected activity since it is a communication made in connection with a matter of public concern. As a result, the Court finds the OCPA applies to the activity dealt with in this lawsuit; the Defendants have satisfied their initial burden.").

government, or to association,[403] the trial court[404] must dismiss the SLAPP unless the plaintiff establishes "by clear and specific evidence a prima facie case for each essential element of the claim in question."[405] In other words, "the burden shifts to the plaintiff to show by 'clear and specific evidence a *prima facie* case for each essential element of the claim in question.'"[406]

To show a prima facie case under the OCPA, the Oklahoma Court of Civil Appeals said, "Something more fact-intensive than general allegations that the required elements exist should be necessary… Pleadings that would be sufficient to withstand a traditional motion to dismiss will not always withstand a dismissal motion under the OCPA."[407]

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[403] § 1434(B)(1-3).

[404] *See also* Anderson v. Wilken, 2016 OK CIV APP 35, ¶ 11, 377 P.3d 149 ("We therefore interpret the OCPA as placing a duty upon the district court to set and hold hearing pursuant to the statutory provisions; and as providing for a writ to require the court to fulfill its statutory duty. … The failure of the trial court to perform the mandatory duty of the statute is clear, and thus requires the grant of writ.").

[405] § 1434(C). *See also Krimbill*, 2018 OK CIV APP 37, ¶ 11 ("Interpreting the OCPA requires balancing the unusual judgment/dismissal provisions of § 1434 against two other OCPA provisions, §§ 1430 and 1440. The tension between these sections is immediately evident."). "Section 1434(C) appears to introduce a new evidentiary standard of 'clear and specific evidence' that has no prior history in Oklahoma," *id.* ¶ 12. "The Act does not define 'clear and specific evidence,' and that phrase has not previously appeared in published Oklahoma appellate case law," *id.* ¶ 14. Reasoning that Oklahoma jurisprudence defines a *prima facie* case as "Such as will suffice until contradicted and overcome by other evidence. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded," the Oklahoma Court of Civil Appeals concluded that the "definition of 'clear and specific evidence' in § 1434(C) is in harmony with the established standard for *prima facie* case" "because the Legislature would not have stated two contradictory standards in the same sentence," *id.* ¶ 15 (internal citations omitted). "We hold that, even though the Oklahoma Act initially demands more information about a plaintiff's underlying claim by requiring a showing of a *prima facie* case, 'the Act does not impose an elevated evidentiary standard or categorically reject circumstantial evidence,'" *id.* ¶ 17 *(*quoting *In re* Lipsky, 460 S.W.3d 579, 591 (Tex. 2015)).

[406] *Richardson,* No. 117,806, at 15 (quoting 12 O.S. Supp. 2014 § 1434(C)).

[407] Southwest Orthopaedic Specialists v. Allison, 2018 OK CIV APP 69, ¶ 19. "Because this opinion clarifies a previously opaque point of law, however, we make our ruling on the need to bring evidence of damages prospective only, and remand this matter for a new OCPA hearing, at which SOS should be given the

Requiring the plaintiff to establish actual malice under the statute "presents an especially difficult problem" because "malice is decided by a subjective standard, focusing on the defendant's state of mind, knowledge, and intent," the Court of Civil Appeals said in *Krimbill*.[408] "The difficulty to a plaintiff of showing a *prima facie* case for a subjective belief or knowledge by the defendant in a 'trial' held before discovery cannot be overestimated." The appellate court concluded that such a prima facie case could be demonstrated through circumstantial evidence, explaining:

> Unless a defendant includes his/her mental processes and subjective understanding as part of a motion to dismiss, a plaintiff would appear to have little chance of adducing any direct proof whatsoever of this element beyond the plaintiff's own belief that the defendant acted with actual malice. Given the practical improbability of direct evidence, unless the Oklahoma Legislature's intention was to effectively abolish defamation actions by public figures, it appears that a *prima facie* case for this element may be shown by circumstantial evidence.[409]

In 2015, failure to prove the required element of publication was one reason for dismissing a libel claim when the OCPA was applied. The trial judge ruled the communication at issue was an intra-company communication.[410]

In 2020, a former Oklahoma gubernatorial candidate's libel lawsuit was dismissed under the OCPA because he failed to prove a TV news station made a false statement when reporting on controversy arising from his campaign ad.[411] Gary Richardon's 2018 ad presented

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opportunity to demonstrate by 'clear and specific evidence' the required damage element of its remaining claims," *id.* ¶ 1.

[408] Krimbill v. Talarico, 2018 OK CIV APP 37, ¶ 58, 417 P.3d 1240.

[409] *Id.* The Oklahoma court noted that Texas courts had adopted this approach under that state's anti-SLAPP statute, *id.* ¶ 59.

[410] Order and Judgment, Roush v. Dawson, No. CJ-15-4370 (Okla. Cnty. Dist. Ct. Dec. 1, 2015).

[411] Richardson v. Tribune Media Co., No. 117,806, at 13 (Okla. Civ. App. Aug. 4, 2020) (not for official publication) (but remanding the case for further proceedings on false light claim).

his "immigration platform and discussed the death of KFOR sportscaster Bob Barry, Jr., who was killed in a 2015 automobile accident caused by a driver who was an undocumented immigrant."[412] KFOR's story included B-roll footage of Richardson laughing while the voiceover noted that Richardson was using the story of Barry's death in his political ad.[413] In Richardson's lawsuit against the station, he argued that the story made a false statement "that he laughed during a discussion of Barry's death." But the Could of Civil Appeals disagreed, saying:

> Simply showing the Clip while the reporter recounted Barry's death and referred to Richardson's ad alluding to that death does not mean a false factual statement about Richardson was made. The video Clip without its accompanying audio appears to be from a different discussion and not a part of Richardson's comments on Barry's death. Other segments in both broadcasts show Richardson seriously and sympathetically discussing Barry's death without laughing or smiling. Neither the Clip nor the Broadcast makes any factual statement of the kind urged as the basis for this defamation claim.[414]

Likewise, a Tulsa police major's libel lawsuit against several media defendants was dismissed in 2021 because nothing in their articles or headlines was "materially false and defamatory."[415] During a radio show in early June 2020, Maj. Travis Yates had discussed racism in policing and police shootings of African Americans. He denied that systemic racism exists in policing. He added, "And by the way, all the research says - including Roland Fryer, an African-American Harvard professor, Heather MacDonald, and the National Academy of Sciences-all of their research says, we're shooting

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[412] *Id*. at 2.

[413] *See* Sarah Stewart, *Gary Richardson political ad stirs controversy*, KFOR, May 1, 2018, https://www.youtube.com/watch?v=t0UyS7Pzz6I.

[414] *Richardson*, No. 117,806, at 13.

[415] Order on Defendants' Motions to Dismiss, Yates v. Gannett Co., Inc, CJ-2020-270, at 6 (Rogers Cnty. Dist. Ct. Feb. 22, 2021) (also dismissing claims of false light and intentional infliction of emotional distress).

African-Americans at about 24 percent less that we probably ought to be based upon the crimes being committed."[416] Yates asserted that the resulting media coverage of his comments "created a false narrative that he is racist and espouses a belief that law enforcement should be shooting African· Americans more often."[417] His lawsuit pointed to the following headlines: "TPD Major [stated] Police Shoot Black Americans 'Less Than We Probably Ought To'"; "African Americans 'probably ought to be' shot more by police, a top Tulsa officer said."; and "Oklahoma cop faces backlash but won't apologize after saying African Americans 'probably ought to be' shot more by police."[418]

But while his exact words might have been shifted some, their meaning was not changed, the trial judge ruled. The defendants had accurately conveyed his words, including the context. "As a result, the Plaintiff cannot establish a cause of action for defamation and this cause of action is likewise dismissed against all Defendants."[419]

Even if the plaintiff establishes each element, the court must dismiss the SLAPP if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense" against the plaintiff's lawsuit.[420] "[T]hat dismissal based on a defense may be

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[416] *Id*. at 2.

[417] *Id*. at 3.

[418] Petition, Yates v. Gannett Co., Inc, CJ-2020-270, at 6-8 (Rogers Cnty. Dist. Ct. Sept. 14, 2020).

[419] Order on Defendants' Motions to Dismiss, CJ-2020-270, at 6.

[420] 12 O.S. § 1434(D). *See also Krimbill*, 2018 OK CIV APP 37, ¶ 25 (applying libel defenses of absolute privilege, truth, opinion and common law fair comment under the OCPA) ("rejecting literal interpretation of § 1434(D) that would allow a judge to decide disputed facts traditionally reserved for a jury"). "This section appears to provide for a pre-answer bench trial on the merits. Such a procedure would be unprecedented in Oklahoma law," *id.* ¶ 20. "Unless we interpret the Act as transforming any action at law that may be subject to the OCPA -- and there are likely many affected actions – into a case that would allow the trial judge to decide disputed questions of material fact in a dismissal procedure, § 1434(D) must be more narrowly construed. Accordingly, …, we find that disputed questions of material fact cannot be resolved in an OCPA dismissal proceeding," *id.* ¶ 20 (internal footnote omitted). "Since disputes of fact on the required elements of a tort prevent summary judgment, *those same disputed facts cannot warrant dismissal under the OCPA," id.* ¶ 24 (emphasis included).

obtained only if the defense is *one of law*, not one requiring the court to decide disputed facts," the Court of Civil Appeals said.[421]

For example, Henryetta resident Howard Sheward Jr. had demonstrated that his statements were either "substantially true" or were opinions accompanied by the underlying factual basis for the opinions, the Court of Civil Appeals agreed with the trial judge.[422]

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[421] Southwest Orthopaedic Specialists v. Allison, 2018 OK CIV APP 69, ¶ 8 (citing *Krimbill*, 2018 OK CIV APP 37, ¶ 32) ("Based on these restrictions, in *Krimbill* we found that the third stage of proceeding implied by the Act – which appears to allow a defendant to obtain dismissal by showing a defense 'by a preponderance of the evidence' per § 1434(D) – is inconsistent with the restrictions of §§ 1430 and 1440. The law of Oklahoma has never provided for mandatory bench trials on the merits to be held pre-answer and pre-discovery. We held, therefore, that dismissal based on a defense may be obtained only if the defense is *one of law*, not one requiring the court to decide disputed facts.") (emphasis included).

[422] Fountain View Manor v. Sheward, 2019 OK CIV APP 77, ¶ 14, 455 P.3d 9. "Sheward expressed his opinions and included the disclosure of the underlying factual basis on which he formed the opinion. As a result, Sheward's narratives were either confessed by FVM as true or were accompanied by the underlying explanations, neither kind of statement is actionable under the rationale of *Bird Construction* and anti-SLAPP legislation," *id*. (citing Bird Const. Co., Inc. v. Oklahoma City Hous. Auth., 2005 OK CIV APP 12, ¶ 10, 110 P.3d 560, 564). *See also* Order, Elias v. Griffin Communications LLC, No. CJ-2017-00032, at 4 (Creek Cnty. Dist. Ct., Bristow Div., May 8, 2018), *aff'd,* No. 117,074 (Okla. Civ. App. April 19, 2019) (not for official publication) (Media defendant had "established valid defenses such as Oklahoma's common law and statutory fair report privileges," as well as "the Neutral Reportage Privilege").

If the court dismisses[423] the SLAPP, the defendant is awarded "court costs,[424] reasonable attorney fees and other expenses incurred in defending against the legal action as justice and equity may require."[425] In 2018, for example, a trial judge awarded two media defendants a combined $68,000 in attorney fees and $1,000 in court costs, plus expenses under the OCPA.[426] Attorney fees must be awarded even if not all the plaintiff's claims are dismissed under the Oklahoma Citizens Participation Act, the Court of Civil Appeals said in 2021.[427]

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[423] *Southwest Orthopaedic Specialists*, 2018 OK CIV APP 69, ¶ 36 ("A dismissal motion under the Oklahoma Citizens Participation Act is a new procedure that has no real analogue in any existing Oklahoma statute, and is not precisely defined in every element by the Act itself. As such, it presents something of a procedural minefield for practitioners until some uniform standards and procedures can be determined."). "The drafting of the Act raises a further question, however. OCPA § 1434 describes the required judicial remedy as 'dismissal,' without stating whether such dismissal is with or without prejudice, or possibly with leave to amend. Pursuant to § 2012(G), leave to amend should be given if a pleading fails to adequately state a claim and the defect can be corrected. The pleadings in this case were, however, adequate pursuant to the pleading code. An OCPA dismissal is based not on a *failure to plead correctly*, but on a *failure to demonstrate a prima facie case.* The failure is not, therefore, in the allegations of the pleadings, but in the evidence presented at hearing. Given that the pleading was not defective in the first instance, there is nothing to amend. Dismissal with leave to amend or without prejudice would likely be a grant of *a second OCPA dismissal hearing* after the plaintiff has failed at the first hearing," *id*. ¶ 37.

[424] Thacker v. Walton, 2021 OK CIV APP 5, ¶ 8 (costs incurred on appeal should be evenly split when the trial judge's order is reversed in part and affirmed in part) (relying on 12 O.S. § 978.1).

[425] § 1438(A)(1). *See also* Steidley v. Cmty. Newspaper Holdings, Inc., 2016 OK CIV APP 63, ¶ 19, 383 P.3d 780, 788 ("Now, in the event the special motion to dismiss [filed pursuant to the OCPA] is granted, the claimant is responsible for mandatory attorney fees . . . .[T]he trial court must award such damages leaving only the appropriate amount of the award to the discretion of the trial court."); Thacker v. Walton, 2021 OK CIV APP 5, ¶ 3 (reaffirming holding in Steidley v. Cmty. Newspaper Holdings, Inc., 2016 OK CIV APP 63, that attorney fees must be awarded).

[426] Order, Elias v. Griffin Communications LLC, No. CJ-2017-32 (Creek Cnty. Dist. Ct., Bristow Div., June 29, 2018).

[427] *Thacker*, 2021 OK CIV APP 5, ¶ 6 (rejecting contention that awarding of attorney fees is discretionary if not all claims are dismissed under § 1438(A)(1)). "If we were to accept the proposition that 'legal action' does not include separate claims within a lawsuit, a motion filed pursuant to the OCPA's special dismissal procedure would be appropriate only if all claims in the lawsuit could be subjected to the OCPA. That would lead to an absurd result. The fear of dismissal and related repercussions (e.g. an award of attorney fees) for filing a meritless claim as determined under the

The trial judge also must award to the defendant sanctions against the plaintiff "as the court determines sufficient to deter" the plaintiff from filing similar lawsuits in the future.[428] In 2020, Epic Charter Schools was ordered to pay $500,000 to state Sen. Ron Sharp after its libel lawsuit against him was dismissed under the OCPA.[429] In numerous news releases and comments to the media, Sharp had alleged the state's largest virtual charter school system had unlawfully counted student attendance and misused taxpayer funds.[430] Oklahoma County District Judge Cindy H. Truong described Epic Charter Schools' lawsuit as "precisely the type of lawsuit proscribed under the OCPA."[431] She emphasized that Sharp was a sitting state senator "who spoke on matters of public concern involving Epic, which is a recipient of public funds."[432] She noted that she found no evidence of actual malice by Sharp. Saying Sharp's statutory and constitutional rights

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OCPA would cease to exist anytime a plaintiff includes in the petition, perhaps strategically, a claim not subject to the OCPA (e.g. a federal claim). Such an outcome would also circumvent the means (i.e. motions to dismiss) by which the legislature accomplished the purpose of the OCPA, which, in pertinent part, 'is to encourage and safeguard the constitutional rights of persons 'to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law,'" *id*.

[428] § 1434(A)(2) ("If the court orders dismissal of a legal action under the Oklahoma Citizens Participation Act, the court shall award to the moving party: … Sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in the Oklahoma Citizens Participation Act."). *See also* Order, Cnty. Strategies, Inc. v. Ron Sharp, No. CJ-2019-6881, at 1-2 (Okla. Cnty. Dist. Ct. Aug. 17, 2020) ("A sanction is also mandatory under the OCPA when the court orders dismissal of the legal action under the statute. The amount of sanctions is in the Court's discretion.") (internal citations omitted).

[429] Order, Cmty. Strategies, Inc. v. Ron Sharp, No. CJ-2019-6881 (Okla. Cnty. Dist. Ct. Aug. 17, 2020).

[430] *See* Nuria Martinez-Keel, *Oklahoma County judge imposes $500,000 fine on Epic Charter Schools' nonprofit*, THE OKLAHOMAN, Aug. 13, 2020, https://www.oklahoman.com/article/5669001/oklahoma-county-judge-imposes-500000-fine-on-epic-charter-schools-nonprofit; Andrea Eger, *State senator sued by Epic Charter Schools awarded legal fees plus $500,000 in sanctions*, TULSA WORLD, Aug. 13, 2020, https://tulsaworld.com/news/local/education/state-senator-sued-by-epic-charter-schools-awarded-legal-fees-pus-500-000-in-sanctions/article_b2558811-57a4-5e93-a1d2-84d1c55c9944.html.

[431] Order, at 4.

[432] *Id*. at 4-5.

must be protected, Truong explained, "[A] sanction of $500,000 is necessary and sufficient to deter this plaintiff from bringing other similar actions."[433]

Under the OCPA, if the trial court determines that the defendant's motion to dismiss under the statute is "frivolous or solely intended to delay, the court may award court costs and reasonable attorney fees" to the plaintiff.[434]

Political Speech: Even before the Oklahoma Citizens Participation Act was enacted, state and federal courts had said the state and federal constitutions provide political speech with a strong protection against libel lawsuits.[435] In *Gaylord Entertainment Co. v. Thompson*, the Oklahoma Supreme Court explained:

> Because the *mere threat* (or *actual imposition)* of liability may impair the unfettered exercise of free speech, the constitution imposes stringent limitations upon its permissible scope. *The State can neither impede the exchange of ideas nor make that exchange costly through litigious action.* Even the

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[433] *Id*. at 5.

[434] § 1434(B). *See* Thacker v. Walton, 2021 OK CIV APP 5, ¶ 7 (rejecting plaintiff's request for attorney fees because not all claims were dismissed). "Although § 1438(B) allows a court to award fees if a motion to dismiss is deemed frivolous, we do not find the appellants' request for dismissal of [plaintiff's] federal claims was frivolous, regardless of how frivolous is defined. The issue of whether … federal claims were subject to the OCPA dismissal procedure was one of first impression in Oklahoma. [The defendants'] argument, while unsuccessful, was not asserted in bad faith or without any rational argument based in law or facts," *id*.

[435] Peterson v. Grisham, 2008 U.S. Dist. LEXIS 70206 (E.D. Okla. Sept. 17, 2008), *aff'd,* 594 F.3d 723 (10th Cir. 2010) (relying upon Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128). "Because the Plaintiffs are public officials and the alleged harmful statements concern their official acts, their claims must viewed in light of free speech and free press clauses of the state and federal constitution," *id.* at *10-11. *See also* Gaylord Entm't Co. v. Thompson, 1998 OK 30, ¶ 18, 958 P.2d 128 ("A*bsent some element of clearly unlawful activity by the speaker, the State can neither punish political speech nor make its utterances costly by imposing civil liability*. Under our system of government, no one can be made civilly responsible or accountable to the government for robustly pressing political views that others oppose with equal vigor. *To allow a defamation action to continue once it has been determined that the speech concerned protected political ideas and did not incite lawless action is in itself a violation of the constitution*.") (internal citations omitted).

> *mere threat* of unfounded liability would have a "chilling effect" on the discussion of public issues. No less of a limitation is imposed when, as in this case, the action is taken by a private plaintiff under the aegis of state civil law. Civil actions by private parties will violate the free-speech guarantee when the discussion alleged to be defamatory concerns public issues and no unlawful activity occurs.[436]
>
> If there is a rational connection between the communication or utterance complained of as defamatory and the author's quest for a political change, the communication should be viewed as protected political speech and a means of securing a change in the government's conduct of its business. While the so-called *offending conduct* may be injurious (or offensive) to the plaintiffs' interests, it nonetheless constitutes protected political speech which must be more jealously and intensely guarded than any other form of permissible expression.[437]

The court noted that the term "political … pertains 'to the policy or the administration of government' or to 'the influence by which individuals of a state seek to determine or control its public policy.'" It concluded: "*Political speech is hence any expression concerning the ideas and art of governing*. Protected *political speech* is vital to self-government. It must be available without any governmental hindrance. There should be 'no potential interference' with a meaningful dialogue of ideas concerning self-government; nor should there be a threat of liability that causes 'self-censorship.'"[438]

Neutral Reportage Privilege: The status of the neutral reportage rule in Oklahoma is unresolved. In 1992, the Oklahoma

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[436] *Gaylord,* 1998 OK 30, ¶ 16, 958 P.2d 128, 148.

[437] *Id.* at ¶ 17.

[438] *Id.* at ¶ 14. *See also Peterson*, 2008 U.S. Dist. LEXIS 70206, at *13 (quoting Gaylord Entm't Co. v. Thompson, 1998 OK 30, 958 P.2d 128) ("Speech concerns protected political ideas if it is rationally connected to the 'author's quest for a political change' and even though it may be 'injurious (or offensive) to the plaintiffs' interests ... [it] must be more jealously and intensely guarded than any other form of permissible expression.'").

Court of Civil Appeals adopted this constitutional defense.[439] On appeal, however, the Oklahoma Supreme Court said that because the common-law fair-report privilege provided an alternative defense in that case, consideration of the First Amendment-based neutral reportage was not necessary and, therefore, inappropriate.[440]

The neutral reportage defense protects journalists when they accurately report newsworthy statements. "What is newsworthy about the statements is not necessarily the content, but rather that a particular person uttered the statements."[441] The defense was created in 1977 by the U.S. Court of Appeals for the Second Circuit, which expanded the common-law fair-report privilege by holding that the First Amendment provides a defense to libel when (1) the source relied upon by the reporter is "responsible and prominent"; (2) the statements are about a public figure or official; (3) the reporting was accurate; and (4) the reporting was "fair," "disinterested," "reasonable" and in "good faith."[442]

In 1994, the Oklahoma Supreme Court noted that neutral reportage is not the same as the common-law fair-report privilege.[443] While the latter defense "protects the accurate and fair reporting of material distributed at official public occasions," the court said, "[t]he neutral reportage privilege appears to extend to the fair and accurate

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[439] *Oklahoma Court of Appeals Adopts Neutral Reportage Privilege*, B.-MEDIA REL. COMMITTEE NEWSL. (Okla. Bar Ass'n), Summer 1992 at 1 ("On April 7th, the Oklahoma Court of Appeals promulgated an opinion that made Oklahoma the sixth state to recognize the 'neutral reportage' privilege."). *See also* Wright v. Grove Sun Newspaper Co. Inc., 1994 OK 37, 873 P.2d 983, 989, 22 Media L. Rep. (BNA) 1801 ("The court of appeals rested its opinion on the neutral reportage privilege.").

[440] *Wright*, 873 P.2d at 990 ("We do not reach for discussion today the applicability of the constitutional privilege of neutral reportage recognized by the U.S. Court of Appeals for the Second Circuit. When, as here, the legal relief sought clearly is affordable upon alternative grounds, the common-law fair report privilege, consideration of constitutional challenges is inappropriate in view of our self-erected 'prudential bar' of restraint.").

[441] *Legalize*, B.-MEDIA REL. COMMITTEE NEWSL. (Okla. Bar Ass'n), Summer 1992 at 1.

[442] *See* Edwards v. Nat't Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977).

[443] *Wright*, 873 P.2d at 989 n.29.

coverage of statements of private persons to the media and hence goes beyond the sweep of the common-law privilege."[444]

Two years earlier, the Oklahoma Court of Civil Appeals had used the neutral reportage defense to uphold a trial judge's dismissal of a libel claim against a newspaper. According to the Oklahoma Bar Association's coverage of the decision, the court said the First Amendment protected "the accurate and disinterested reporting" of charges made by a district attorney at a press conference, regardless of the newspaper editors' views regarding the validity of those charges.[445] The news stories were "plainly disinterested and neutral" and the newspaper didn't "assume responsibility for the underlying accusations," the court reasoned.[446]

However, the Oklahoma Supreme Court said the lower court "need not have rested its opinion on" the newspaper's constitutional neutral reportage privilege because the reporting was protected by the common law fair report privilege. "There was hence no occasion for reaching the constitutional question," the court said.[447]

The Communications Decency Act: Websites are protected by The Communications Decency Act of 1996 (CDA)[448] against libel claims arising from the publication of information provided by third parties, the Oklahoma Court of Civil Appeals held in 2005.[449]

The federal statute would have made it a crime to transmit indecent material over computer systems to minors, but the U.S. Supreme Court in 1997 struck down its key provisions as unconstitutionally overbroad.[450] However, a provision intended to protect children by encouraging online service providers to censor indecent material on the internet was not challenged in court and

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[444] *Id.* at 990 n.30.

[445] *Oklahoma Court of Appeals Adopts Neutral Reportage Privilege*, B.-MEDIA REL. COMMITTEE NEWSL. (Okla. Bar Ass'n), Summer 1992 at 1.

[446] *Id.*

[447] *Wright*, 873 P.2d at 986 n.27.

[448] 47 U.S.C. § 230 et seq. (2002).

[449] Stewart v. Okla. Publ'g Co., No. 100,099, ¶ 11 (Okla. Civ. App. Apr. 1, 2005) (Even if the news website had not been protected by qualified privilege, it would have been immune from liability under The Communications Decency Act.).

[450] Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329; 138 L. Ed. 2d 874, 25 Media L. Rep. (BNA) 1833 (1997).

subsequently remained in effect. Under that section, an online service provider cannot be treated as the publisher of information provided by third parties.[451] This was a direct response by Congress to court rulings in the early 1990s that indicated online service providers assumed liability for content provided by third parties if the OSPs exercised editorial control over the material. Congress feared that such liability would deter service providers from blocking and screening offensive material from children.[452]

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[451] 47 U.S.C. § 230 (C) "Protection for 'Good Samaritan' blocking and screening of offensive material.

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil Liability

No provider or user of an interactive computer service shall be held liable on account of -

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1)."

[452] Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (An interactive computer service company was declared a mere distributor of information and could not be held responsible for defamatory statements made in news publications loaded into its computer library by an independent third party.); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995) (An online service provider was a publisher subject to libel laws because it "exercised sufficient degree of editorial control" over the content of messages posted on its bulletin boards.). Unlike CompuServe, Prodigy was not a passive conduit because it advertised itself to the public and to its subscribers as controlling the content of the bulletin board messages. By using technology and board leaders to delete bulletin board messages on the basis of offensiveness and "bad taste," Prodigy was making editorial content decisions similar to those made at newspapers. With that editorial control came increased liability. *Prodigy*, 23 Media L. Rep. (BNA) at 1796.

See Zeran v. Am. Online, Inc. 129 F.3d 327, 331 (4th Cir. 1997) ("Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, Stratton Oakmont, Inc. v. Prodigy Servs. Co. … Congress enacted § 230 to remove the disincentives to self-regulation created by the *Stratton Oakmont* decision. Under that court's holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in

A number of courts have since interpreted the liability section of the CDA as granting various online service providers and interactive websites immunity from libel claims arising from information provided by third parties.[453] The Oklahoma Court of Civil Appeals joined those courts in 2005 when it held that NewsOK.com was immune under the Communications Decency Act from a libel claim arising from a sex offender registry provided by the state Department of Corrections. The Oklahoma court first determined that NewsOK.com met the statute's definition of "interactive computer service."[454] It then relied upon a

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the role of a publisher. Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity 'to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.' 47 U.S.C. § 230(b)(4). In line with this purpose, § 230 forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.").

[453] *See, e.g.,* Green v. Am. Online (AOL), 318 F.3d 465 (3rd Cir. 2003) (Internet service provider immune under 47 U.S.C.S. § 230 for actions of John Does who defamed customer in chat rooms.); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 28 Media L. Rep. (BNA) 2185 (10th Cir. 2000), *cert. denied*, 531 U.S. 824, 121 S. Ct. 69, 148 L. Ed. 2d 33 (2000) (Online service provider not liable under 47 U.S.C.S. § 230 for inaccurate information provided by third party about the plaintiff company's publicly traded stock.); Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997) ("Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties."); Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp 2d. 1069, 29 Media L. Rep. (BNA) 2530 (D.S.D. 2001) (Provider of interactive computer service not liable under 47 U.S.C.S. § 230 for defamatory statements made by third party who had rented computer from provider.); Schneider v. Amazon.com, Inc., 31 P.3d 37, 29 Media L. Rep. (BNA) 2421 (Wash. Ct. App. 2001) (Amazon.com was not liable for critical comments made on its interactive Web site about an author's book.).

[454] *Stewart*, No. 100,099, ¶ 11 (quoting 47 U.S.C. § 203 (f)(2)) ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."). The Oklahoma court noted that other courts had found websites to be "interactive computer services." *Stewart*, No. 100,099, ¶ 12 (citing Optinrealbig.com, LLC v. Ironpot Systems, Inc., 323 F. Supp. 2d 1037 (N.D. Cal. 2004); Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002); Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003); Donato v. Moldow, 865 A.2d 711 (N.J. Super. Ct. 2005); Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. Ct. App. 2001)) ("A website has been held to be an 'interactive computer service.'").

Ninth U.S. Circuit Court of Appeals decision to find that the CDA immunizes service providers from liability when an information content provider such as the Department of Corrections "creates or develops information and furnishes it to the service provider, under circumstances where a 'reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other interactive computer service.'"[455]

"There is no dispute here that DOC provided the Registry in order for it to be part of the NewsOK website," the Oklahoma Court of Civil Appeals said. "Thus, NewsOK had immunity under § 203 (c)(1) to publish the registry on the Internet that was provided by DOC for that purpose."[456]

Retraction Statutes

Oklahoma provides retraction statutes for newspapers and periodicals, as well as for broadcast stations.

Print Retraction Statute: Oklahoma law allows newspapers and periodicals to retract false defamatory statements under certain conditions and, thereby, avoid the possibility of later paying special and punitive damages to a libel plaintiff. "[I]f the evidence shows that the article was published in good faith and that its falsity was due to an honest mistake of the facts," the plaintiff may recover only actual damages if a retraction is printed.[457] The jury decides whether the mistake was an honest one.[458] The retraction can be requested by the

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[455] *Stewart*, No. 100,099 at ¶ 12 (quoting Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003)).

[456] *Id*. at ¶ 13 (citing *Batzel*, 333 F.3d at 1034).

[457] 12 O.S. § 1446a (OSCN 2021). *See also* Strong v. Oklahoma Publ'g Co., 1995 OK CIV APP 89, 899 P.2d 1185, 1187, 24 Media L. Rep. (BNA) 1315 (citing 12 O.S. § 1446a (1991)) ("That statute provides that where falsity is due to an honest mistake and a retraction is printed meeting certain guidelines, only actual damages may be recovered.").

[458] § 1446a ("[A]nd the question of 'honest mistake' shall be a question of fact to be determined by a jury, unless a jury be waived by the parties … ."). *See also Strong*, 899 P.2d at 1187 ("[E]xistence of an honest mistake is reserved as a question of fact for the jury. The statute so provides using the mandatory language 'shall be a question of fact to be determined by a jury.'").

defamed person either in writing or orally.[459] For the journalist to avoid all other damages, the printed retraction must be:

- Headed "RETRACTION" in at least eighteen-point type;
- On the same page and in the same type as the defamatory material;
- In two regular issues of the publication;
- Published within a reasonable time, but for a daily newspaper not to exceed one week of being notified, or
- For a weekly newspaper not to exceed two weeks after being notified.[460]

Other limitations also exist. The retraction statute does not apply to:

- Any libel imputing unchastity to a woman;
- Any case in which the evidence shows the publication was made maliciously or with a premeditated intention and purpose to injure, defame or destroy the reputation of another or to injuriously alter a person's reputation;
- Anonymous communications or publications;
- Any article pertaining to a candidate for public office when the article is published within three weeks of a primary, run-off primary, special or general election.[461]

Broadcast Retraction Statute: Oklahoma law requires that broadcast stations air a correction, for free, when asked to by the defamed person, association, business, corporation or social, economic or religious organization. The correction must be broadcast in the same time periods and as many times as the false statement.[462] In 1978, an

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[459] § 1446a ("The person claiming to have been libeled shall notify the publisher, either orally or in writing, stating or setting forth the particular matter claimed to be libelous and requesting that the same be retracted.").

[460] *Id.*

[461] *Id. See also* Weaver v. The Pryor Jeffersonian, 1977 OK 163, 569 P.2d 967, 974 n.4, 3 Media L. Rep. (BNA) 1425 (citing 12 O.S. § 1446a (1971)) (state's "Honest Mistake Law" was inapplicable because the letter to the editor defaming a candidate for sheriff was published in the weekly newspaper five days before the run-off primary).

[462] 12 O.S. § 1447.5 (OSCN 2021) ("If any broadcasting station, at any time, broadcasts, publishes, or circulates any false statement, allegation or rumor pertaining

Oklahoma City television station attempted to challenge the statute in federal court as a violation of the First Amendment.[463] However, the U.S. Court of Appeals for the Tenth Circuit, agreeing with the federal trial judge, concluded that the federal courts did not have jurisdiction to grant KWTV permission to not broadcast a demanded retraction. The trial judge had reasoned that it would be improper for a federal court to review the Oklahoma statute before the state courts had done so.[464]

Broadcast Station Liability

Under Oklahoma law, a broadcast station is not liable for defamatory statements made over the air by someone not connected with the station unless the defamed person can prove that the station "failed to exercise due care" to prevent the statement from being broadcast.[465] A station also is not liable for over-the-air defamatory

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or relating to any individual or association of individuals, or to any trade, labor business, social, economic or religious organization or to any firm, corporation or business or to any public official or candidate for a public office, the said broadcasting station upon demand of any person or persons affected or their representatives, shall broadcast, without charge, any statement setting forth in proper language the truth pertaining to such statement, allegation, or rumor, which said person or persons or their representatives shall offer to said broadcasting station for broadcast. Provided, that the truth statement shall be broadcast as many times as the untrue statement was broadcast. Provided further, that the truth statement shall be broadcast at a like or comparable time in the daily routine as was the untrue statement.").

[463] Monks v. Hetherington, 573 F.2d 1164, 3 Media L. Rep. 2150 (10th Cir. 1978). *See also* Hetherington v. Griffin Television, Inc., 430 F. Supp. 493 (W.D. Okla. 1977).

[464] *Hetherington*, 430 F. Supp. at 500 ("There is no indication in the briefs that the Oklahoma courts have had an opportunity to construe this statute. This Court, through its own research, was unable to find any case wherein the Oklahoma Supreme Court has had an opportunity to review the statute and the argument here put forward by counsel. It would be improper for this Court to grant removal [from state court] for the purpose of reviewing a state law until the courts of this state have had an opportunity to examine that law. Since, until the state courts have had an opportunity to construe the statute, there exists no basis upon which to find that the defendants will be unable to enforce their constitutional rights in the Oklahoma courts, the elements for removal … are not established.").

[465] 12 O.S. § 1447.1 (OSCN 2021) ("The owner, licensee or operator of a television and/or radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a television and/or

statements made by a political candidate unless the political candidate is also an owner or employee of the station.[466]

Preserving Political Utterances

Oklahoma law requires broadcast stations "to record and preserve all political utterances."[467] The recording must be kept for two years and must be made available to anyone "instituting legal actions for libel or defamation."[468] Any person or station convicted of violating this requirement is guilty of a misdemeanor and can be fined up to $1,000 plus costs.[469]

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radio broadcast, by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.").

[466] § 1447.2 ("In no event, however, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such television and/or radio station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by any candidate for public office, where such statement is not subject to censorship or control by reason of any federal statute or any ruling or order of the Federal Communications Commission made pursuant thereto; PROVIDED, HOWEVER, that this section shall not apply to any owner, licensee, or operator, or any agent or employee of such owner, licensee or operator, of such visual or sound radio broadcasting station, or network of stations, when such owner, licensee, or operator, or agent or employee of such owner, licensee or operator, is a candidate for public office or speaking on behalf of a candidate for public office.").

[467] § 1447.4 ("It shall be the duty of such television and/or radio broadcasting station or network to record and preserve all political utterances. Said recording to be preserved for a period of two (2) years and made available to any person or persons instituting legal actions for libel or defamation. Any person, firm or corporation violating this section shall be guilty of a misdemeanor and upon conviction thereof fined not to exceed One Thousand Dollars ($1,000.00) and costs.").

[468] *Id.*

[469] *Id.*

Disparagement of Agricultural Food Products

Oklahoma is one of 13 states[470] with a "veggie-libel" statute.[471] In the 1995 statute, Oklahoma legislators created a cause of action allowing "producers of perishable agricultural food products to recover damages for the disparagement of any perishable agricultural food product." Legislators said the statute was necessary because agricultural food products constitute "a large proportion of the Oklahoma's economy" and "it is beneficial to the citizens of this state to protect the vitality of the agricultural economy."[472] Critics of these statutes, however, say they only serve to chill speech on an important topic of public concern – food safety – and may be unconstitutional under the libel rules promulgated in *New York Times v. Sullivan* and its progeny.[473]

Oklahoma's statute defines disparagement as "dissemination of information to the public in any manner which casts doubt on the safety of any perishable agricultural food product to the consuming public."[474] The statute applies "when the disparagement is based on false information which is not based on reliable scientific facts and scientific data and which the disseminator knows or should have known to be false."[475]

"Perishable agricultural food product" is defined by the statute as "an agricultural product ... intended for human consumption which is sold or distributed in a form that will perish or decay beyond

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[470] The other twelve states are Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, South Dakota and Texas. *See* Debra Cassens Weiss, *Judge refuses to dismiss food-libel case against ABC News over its 'pink slime' coverage*, ABA JOURNAL, March 14, 2017, http://www.abajournal.com/news/article/judge_refuses_to_dismiss_food_libel_case_against_abc_news_over_its_pink_sli; Anne Hawke, *Veggie disparagement*, QUILL, September 1998, at 13; FoodSpeak: Coalition for Free Speech, *Existing Food-Disparagement Laws*, at http://www.cspinet.org/foodspeak/laws/existlaw.htm (last modified March 19, 1998).

[471] 2 O.S. §§ 5-100-102 (OSCN 2021).

[472] *Id*. § 5-100.

[473] *See, e.g.,* Anne Hawke, *Veggie disparagement*, QUILL, September 1998, at 13; Ronald K.L. Collins and Paul McMasters, *Veggie Libel Law Still Poses a Threat*, LEGAL TIMES, March 23, 1998, at 28; FoodSpeak: Coalition for Free Speech, at http://www.cspinet.org/foodspeak/laws/existlaw.htm.

[474] § 5-101(1) (OSCN 2021).

[475] *Id.* § 5-102(A).

marketability within a period of time."[476] According to the statute, that includes "horticultural, viticultural, nut, dairy, livestock, poultry, bee and any other farm products."[477]

As of mid-2021, Oklahoma's food disparagement statute had not been put to use by a libel plaintiff. However, a federal judge's 1998 ruling regarding a nearly identical statute in Texas may shed some light on how courts could interpret Oklahoma's law, at least in regard to some products. In Texas, cattlemen claimed that the U.S. beef industry had been defamed during a discussion of mad cow disease on Oprah Winfrey's talk show.[478] While the statutes in Texas and Oklahoma use nearly the same definition of "perishable food product," Texas' law more specifically applies to products "sold or distributed in a form that will perish or decay beyond marketability within a *limited* period of time."[479] Oklahoma's statute applies to those that "will perish or decay beyond marketability within a period of time."[480]

U.S. District Judge Mary Lou Robinson ruled that live cattle did not fall within the Texas statute's definition of "perishable food product."[481] The cattlemen had contended "fed cattle in a feedlot are a perishable food product because there is an optimal time for fed cattle to be marketed to the slaughterer."[482] Robinson, however, reasoned that live fed cattle "may decay in the sense that as they age they may pass into a state of less perfection," meaning that they may be less profitable because feed cost exceeds the price obtained for additional pounds gained and that they may be discounted or not purchased by certain buyers.[483] None of that is evidence, however, that "live fed cattle fit

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[476] *Id.* § 5-101(2).

[477] *Id.* (citing 2 O.S. § 17-3(A)(1) (OSCN 2021)).

[478] The U.S. Court of Appeals for the Fifth Circuit later noted that perhaps from the audience's perspective, the most important statement in the discussion was "Winfrey's exclamation that she was 'stopped cold from eating another hamburger.' When Ms. Winfrey speaks, America listens. But her statement is neither actionable nor claimed to be so." Instead, the case focused on statements made by a guest interviewed on the show. Texas Beef Group v. Winfrey, 201 F.3d 680, 688 (5th Cir. 2000).

[479] TEX. CIV. PRAC. & REM. CODE ANN. § 96.001 (Vernon 1996) (emphasis added).

[480] 2 O.S. § 5-101(2).

[481] Texas Beef Group v. Winfrey, 11 F. Supp. 2d 858, 863 (N.D. Tex. 1998).

[482] *Id.*

[483] *Id.*

within the carefully crafted statutory language which requires the food product ... perish or decay 'beyond marketability,'" she said.[484]

"The cattle in question are still marketable, although they may be less profitable, and in some cases not marketable to every buyer," she concluded. "Plaintiffs do not produce a food product that will perish or decay beyond marketability within a limited period of time."[485]

Robinson also ruled the cattlemen had not proved the defendants "knowingly disseminated false information," another requirement of the Texas statute.[486] The case continued as a common law business disparagement lawsuit, which the cattlemen lost.[487]

Criminal Libel

When former state Sen. Gene Stipe requested criminal libel charges be filed against the operator of a web forum in 2005, an official of the state organization that trains district attorneys said that in his 23-year career, he had never heard of someone filing such a complaint with police.[488] When a Tulsa police officer was charged with criminal libel in 1999, a county prosecutor had likewise professed surprise that such a charge was even possible. "It's definitely rare," then-Assistant District Attorney Mark Collier told the *Tulsa World*. "When the charge was first suggested, I said I didn't think there was such a thing as criminal libel. But it exists."[489]

Oklahoma is one of 24 states with criminal libel statutes still on the books.[490] Though rare, prosecutions occur here and elsewhere.

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[484] *Id.*

[485] *Id.*

[486] *Id.*

[487] *Id.* at 864-65. *See also* Texas Beef Group v. Winfrey, 201 F.3d 680, 688 (5th Cir. 2000) (upholding district court ruling that no knowingly false statements had been made about the cattle but not reaching the issue of whether cattle are "a perishable food product" as defined by the Texas statute).

[488] Tony Thornton, *Web site operator is investigated; Postings draw ire of ex-official*, THE OKLAHOMAN, Aug. 18, 2005, at 9A (quoting Trent Baggett, assistant executive coordinator of the Oklahoma District Attorneys Council).

[489] Brian Barber, *Tulsa police Webmaster charged with criminal libel*, TULSA WORLD, Mar. 23, 1999, at 7 (Metro Section).

[490] 21 O.S. §§ 771-78 (OSCN 2021). *See* ACLU, *Map of States With Criminal Laws Against Defamation*, https://www.aclu.org/issues/free-speech/map-states-criminal-laws-against-defamation (last visited Aug. 1, 2021) (The 23 other states

In 2002, for example, the editor and publisher of a free-distribution newspaper in Kansas were each convicted on seven counts of criminal libel for falsely reporting that elected officials did not live in the required county. They were each fined $700 and sentenced to one year of unsupervised probation.[491]

While the purpose of civil libel is to restore the plaintiff's reputation, "the first function of criminal libel has always been social order and control. More accurately, its purpose historically has been to protect power and privilege," media law scholar Gregory C. Lisby contended in his 2004 study of criminal libel.[492] In an earlier article, law professor Susan W. Brenner, explained, "While the notion of punishing those who defame others dates back to antiquity, common law criminal libel originated with the 1275 statute criminalizing scandalatum magnatum - the reporting of false 'news' about the English king or the 'great men of the realm.'"[493]

Criminal libel in Colonial America differed significantly from its civil counterpart, Brenner noted. A civil lawsuit could not be filed "if the defamatory statement was made to the person defamed, on the assumption that he would not 'be harmed if no one else knew about it.' This was not true for criminal libel; because 'of its tendency to stir up a breach of the peace, criminal libel could be committed by communicating the defamatory matter to ... the one defamed.'"[494]

Perhaps more significantly, as Brenner pointed out, "Truth was a defense in a civil suit but not in a prosecution."[495] The Oklahoma Criminal Court of Appeals noted in 1926 that under a common law

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are Alabama, Florida, Idaho, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, Nevada, New Mexico, North Carolina, North Dakota, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin and Wyoming.).

[491] Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm. L. & Pol'y 433, 479 (Autumn 2004); The Reporters Committee for Freedom of the Press, *Newspaper editor, publisher get fines and probation for criminal libel*, NEWS MEDIA UPDATE (Dec 4, 2002), *available at* http://www.rcfp.org /news/2002/1204kansas.html (last visited June 12, 2007).

[492] Lisby, *supra* note 491, at 438.

[493] Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?* 13 ALB. L.J. SCI. & TECH. 273, 315-16.

[494] *Id*. at 316-17.

[495] *Id.*

prosecution for libel, "evidence that the libelous matter was true was not admissible, and there prevails the maxim quoted by the poet, Tom Moore, in one of his satirical poems:

> For oh, 'twas nuts to the father of lies,
> (As this wily fiend is named in the Bible.)
> To find it settled by laws so wise,
> That the greater the truth the worse the libel."[496]

However, the court noted that under the state's constitution and criminal libel statute, truth could be a defense if the defendant also proved to the jury "that the libelous matter was written or published with good motives and with justifiable ends, or was a privileged communication."[497]

Oklahoma first criminalized libel in 1890. It was amended in 1895 to its current language:

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his

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[496] Thomas v. State, 1926 OK CR, 34 Okla. Cr. 63, 66-67, 244 P. 1116. *See also* Brenner, *supra* note 488, at 316-17 ("[T]he theory was that one who had been 'falsely libeled might get satisfaction by proving that the statement was not true' but the 'only hope for satisfaction by one truly libeled was to cause harm to the defamer' by having her punished."). *See also* Garrison v. Louisiana, 379 U.S. 64, 68, 85 S. Ct. 209, 13 L. Ed. 2d 125, 1964 U.S. LEXIS 150, 1 MEDIA L. REP. (BNA) 1548 ("Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace.").

[497] *Thomas*, 34 Okla. Cr. at 66. OKLA. CONST. art. 2, § 22, states in part, "In all criminal prosecutions for libel, the truth of the matter alleged to be libelous may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous be true, and was written or published with good motives and for justifiable ends, the party shall be acquitted." 21 O.S. § 774 (OSCN 2021) similarly reads, "In all criminal prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it be made to appear by the defendant that the matter charged as libelous was true, and in addition thereto was published with good motives, and for justifiable ends, or was a privileged communication, the defendant shall be acquitted."

> occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.[498]

In 1911, state legislators adopted the criminal libel definition for the definition of civil libel as well.[499] "The Legislature in adopting the same definition as for civil cases in defining the crime of libel placed emphasis on the tendency of the publication to harm the individual libeled rather than upon its tendency to disturb the public peace," said the Oklahoma Criminal Court of Appeals in 1929 when it upheld a conviction for criminal libel.[500]

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[498] 21 O.S. § 771 (OSCN 2021). *See* Drake v. Park Newspapers of Northeastern Okla. Inc., 1984 OK 50, ¶ 14, 683 P.2d 1347, 1349 ("The criminal libel definition was altered slightly in 1895 by the Oklahoma Territory Legislative Assembly, in the Act of March 5, 1895, Ch. 33, Laws 1895, p. 163. The legislature specifically changed the definition of criminal libel to read exactly as our current definitions of criminal and civil libel.").

[499] *See Drake*, 1984 OK 50, ¶¶ 15-17 ("The legislature has never specifically amended the definition of civil libel. The 1890 definition of civil libel remained unchanged until it was discarded by the Code Commission in 1910. The Code Commission was created by the legislature in 1909 to 'collect, revise, annotate and reduce into one Act the different statutes.' Comp.Laws 1909, § 8704. The Commissioners were 'authorized to rear-range chapters; to renumber and transpose sections; to provide other and different headnotes; to omit the repealed and enacting provisions in existing statutes, and in every other respect to complete such revisal in such manner as to them shall seem most proper and needful to render said statutes plainer, and easier to be understood.' Id. They were also authorized 'to correct inaccuracies and conflicts and to harmonize the different parts of the statutes.' Id. § 8750. The five-member Code Commission polarized into two camps. Both groups submitted a report to the 1910 legislature. The minority report was adopted by the 1911 legislature as the Revised Laws of 1910. Act of March 3, 1911, Ch. 39, Laws 1910-11, p. 70. In the Revised Laws of 1910, the two members constituting the minority group of the Code Commission had taken it upon themselves to eliminate the civil libel definition, and to replace it with the criminal libel definition. In an explanatory note to the civil libel definition, which was copied verbatim from the criminal libel definition, the Code Commission said: 'The definitions formerly carried in `Crimes and Punishments,' having been amended in 1895, are used, as being the latest expression of the legislature on the subject, those [definitions of civil libel and slander] contained in the old chapter on 'Persons' having been adopted in 1890.' Revised Laws 1910, § 4956.'").

[500] Tucker v. State, 1929 OK CR, 42 Okl. Cr. 204, 207, 275 P. 382 ("In the instant case the entire trend of the article is a criminal libel. The publication has a tendency to harm the individual libeled and also to incite to a breach of the peace, as it

In Oklahoma, criminal libel is a misdemeanor, punishable by up to one year in the county jail and a fine of up to $1,000.[501]

Libel prosecutions in Oklahoma were more common in the early 1900s than they are today. In 1902, for example, a newspaper editor was arrested in Guthrie and charged with criminal libel over a story accusing a Perry lawyer of extorting money from saloon owners while he was the Anti-Saloon League's attorney.[502] Between 1899 and 1931, Oklahoma's Criminal Court of Appeals struck down criminal libel convictions in three[503] cases and upheld those in five,[504] including a 1928 trial in which two men were each given the maximum punishment of one year in jail and a $1,000 fine.[505] Research for this book could locate no appeals of criminal libel convictions in Oklahoma subsequent to 1931.

In *Garrison v. Louisiana (1964)*,[506] a unanimous U.S. Supreme Court dealt a blow to libel prosecutions by holding them subject to the same constitutional limitations the Court had required of civil libel claims in *N.Y. Times Co. v. Sullivan*[507] just eight months earlier. In other words, a person charged with criminal libel of a public official

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is clear that it charges the person libeled with a breach of duty, as well as of professional ethics and probity, and tends to subject him to public contempt."),

[501] 21 O.S. § 773 (OSCN 2021) ("Every person who makes, composes or dictates such libel or procures the same to be done; or who willfully publishes or circulates such libel; or in any way knowingly or willfully aids or assists in making, publishing or circulating the same, shall be punishable by imprisonment in the county jail not more than one (1) year, or by fine not exceeding One Thousand Dollars ($1,000.00), or both, and shall also be civilly liable to the party injured.").

[502] John W. Reagor Jr., *From the Pages of The Oklahoman*, THE DAILY OKLAHOMAN, June 13, 2002, at 2A.

[503] Lawhead v. State, 1911 OK CR 172, 5 Okla. Cr. 676, 113 P. 1134; Thomas v. State, 1926 OK CR, 34 Okla. Cr. 63, 244 P. 1116; Tucker v. State, 1929 OK CR, 43 Okla. Cr. 92, 277 P. 286.

[504] Martin v. Territory of Oklahoma, 1899 OK 31, 8 Okla. 41, 56 P. 712; Crane v. State, 1917 OK CR 175, 14 Okla. Cr. 30, 166 P. 1110; Tucker v. State, 1929 OK CR, 42 Okla. Cr. 204, 275 P. 382; Nance v. State, 1929 OK CR, 41 Okla. Cr. 379, 273 P. 369; Jackson v. State, 1931 OK CR, 50 Okla. Cr. 422, 298 P. 313.

[505] Jackson v. State, 1931 OK CR, 50 Okla. Cr. 422, 298 P. 313.

[506] 379 U.S. 64, 68, 85 S. Ct. 209, 13 L. Ed. 2d 125, 1964 U.S. LEXIS 150, 1 MEDIA L. REP. (BNA) 1548 ("Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards.").

[507] 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964).

could be found guilty only if the allegedly defamatory statement was false and made with actual malice.[508] Justice Brennan explained:

> We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times* apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.[509]

Because "'erroneous statement is inevitable in free debate, and … it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive,' only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government," Brennan wrote.[510]

He noted that the American Law Institute's Model Penal Code, completed in 1962, excluded criminal libel. Brennan quoted the explanation given by the drafters of the Model Code for the omission:

> [P]enal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally

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[508] *But see also* 379 U.S. at 72 n.8 ("We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.").

[509] *Id.* at 74.

[510] *Id*. at 74-75 (quoting *N.Y. Times*, 376 U.S. at 271-72).

> disturbs the community's sense of security. … It seems evident that personal calumny falls in neither of these classes in the U.S.A., that it is therefore inappropriate for penal control.[511]

However, Lisby contends that the *Garrison* decision "both undermined and eviscerated the American Law Institute's modernization efforts with regard to the crime of libel" because the Court made it possible for such prosecutions to succeed rather than declaring all criminal libel statutes unconstitutional.[512]

In the U.S. Supreme Court's only other review of criminal libel, it ruled Kentucky's common-law definition of criminal libel to be unconstitutionally vague.[513] "Vague laws in any area suffer a constitutional infirmity," the Court said in *Ashton v. Kentucky (1966)*. "When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."[514]

The Court agreed with the dissenting judges on the Kentucky Court of Appeals, who had said, "[S]ince the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky."[515] Among the problems, Justice Douglas emphasized, was "that to make an offense of conduct which is 'calculated to create disturbances of the peace' leaves wide open the

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[511] *Id.* at 70 (quoting MODEL PENAL CODE § 250.7 cmt. at 44 (Tentative Draft No. 13 1961). *See also* Lisby, *supra* note 491, at 479 ("[I[t is clear that state legislatures have not followed the Model Penal Code's lead [regarding criminal libel] as they have in most other areas of the criminal law.").

[512] Lisby, *supra* note 491, at 479.

[513] Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L. Ed. 2d 469 (1966). The trial judge had defined criminal libel as "as any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable," 384 U.S. at 198. *See* Lisby, *supra* note 491, at 478 (describing the Court in *Ashton* has having "declared the common law of criminal libel unconstitutional").

[514] 384 U.S. at 200.

[515] *Id*. at 198.

standard of responsibility. It involves calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments *per se*."[516]

Since *Garrison* and *Ashton*, at least two successful prosecutions for criminal libel have occurred in Oklahoma. Newspaper and appellate court records indicate that in the 1970s, a man was "convicted of criminal libel in Tulsa after alleging two assistant district attorneys and a special judge had conspired 'to railroad him on a false charge.'"[517] In 1999, a Tulsa police officer pleaded no contest to a criminal libel charge after being accused of placing a female neighbor's name, address and phone number in an Internet advertisement as a "sex toy business and a vendor in pornographic sites."[518] He received a one-year deferred sentence.

In 2005, however, Pittsburg County District Attorney Chris Wilson refused to file a criminal libel charge based on the complaint by Stipe. "The things that were posted on that site do not violate Oklahoma's criminal statutes," Wilson told *The Oklahoman*.[519] The newspaper reported that the website "publishes opinions and rumors" about local government and Stipe. According to the newspaper, Stipe had taken particular offense to a posting "alleging Stipe and another man were hurt by a third man in a fight at Stipe's house."[520]

A number of legal scholars and First Amendment advocates contend that criminal libel statutes should no longer be on the books. "It is contrary to the rights guaranteed by the First Amendment to the Constitution, it is inimical to the free expression of ideas in the United States, and it is antithetical to any and every form of representative

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[516] *Id*. at 200.

[517] Ray Robinson, *Clara Luper's Libel Suit Asks $10 Million Award*, THE DAILY OKLAHOMAN, Feb. 20, 1985 (quoting testimony of a former Tulsa County district judge regarding Thomas J. Clark). *See also* Luper v. Black Dispatch Publ'g Co., 1983 OK CIV APP 54, ¶ 11 n.1, 675 P.2d 1028 ("Clark had previously been convicted of criminal libel.").

[518] Bill Braun, *Officer receives deferred sentence*, TULSA WORLD, May 22, 1999, at 11 (News Section); The Associated Press, *Tulsa Officer Gets Sentence In Libel Case*, THE DAILY OKLAHOMAN, May 23, 1999, at 29; Brian Barber, *Tulsa police Webmaster charged with criminal libel,* TULSA WORLD, Mar. 23, 1999, at 7 (Metro Section).

[519] Tony Thornton, *Stipe is denied request to have man charged*, THE OKLAHOMAN, Sept. 8, 2005, at 11A.

[520] *Id.*

government," contended Lisby, who gave five reasons to support his assertion:

- "It is a historical 'throwback to pre-Magna Carta England and to the common-law principles the monarchy used to justify keeping its heel on critics' necks' and, therefore, contrary to the principles of free expression enshrined in the First Amendment.

- "Its authoritarian philosophical and political foundations cannot be reconciled with the democratic, libertarian ideals on which America was founded.

- "It functionally serves the same purpose as civil libel, as American courts have now allowed truth to be a defense for the crime.

- "Its 'breach of the peace' rationale has been discarded by American courts, making its purpose no different from that of civil libel.

- "The American experience with criminal libel and its concomitant abuse of prosecutorial discretion is humiliating, embarrassing, shameful and reprehensible."[521]

Paul K. McMasters of the First Amendment Center likewise argued that to still have criminal libel "lurking in the laws of the United States is a grievous affront to our democratic traditions." In an editorial published online and in newspapers, McMasters warned, "As long as criminal-libel laws remain on the books, the discourse and dissent that enlivens democracy, ensures government accountability and preserves individual liberty remains in danger."[522]

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[521] Lisby, *supra* note 491, at 437-38.

[522] Paul K. McMasters, *Inside the First Amendment: The crime of speaking ill of your betters*, FIRST AMENDMENT CENTER, (Nov. 6, 2005), *at* http://www.first amendmentcenter.org/commentary.aspx?id=16019.