DEFAMATION AND BUSINESS DISPARAGEMENT DAMAGES

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Charles "Chip" Babcock is a First Amendment lawyer and trial and appellate attorney who has handled many high-profile litigation matters including more than 100 jury cases. Mr. Babcock was selected as one of *Texas Lawyer*'s "25 Greatest Texas Lawyers of the Past Quarter-Century," named a Texas Super Lawyer by *Super Lawyers* magazine and listed in Best Lawyers 2015 and Martindale-Hubbard Peer Review Rated Preeminent™. Mr. Babcock is additionally ranked as a top First Amendment lawyer, commercial litigator, and trial attorney, and one of America's leading lawyers for business in *Chambers & Partners*. Over the course of his career, he has represented a myriad of Fortune 500 clients, both as plaintiffs and defendants. Today, Mr. Babcock serves as a fellow of the American College of Trial Lawyers, American Board of Trial Advocates, the International Academy of Trial Lawyers, and the Litigation Counsel of America.

Mr. Babcock's practice focuses on issues pertaining to civil trials, arbitration, commercial litigation, catastrophic litigation, intellectual property matters, breaches of contract, appellate work and First Amendment law. He began his legal career serving as a clerk under Judge Robert Porter in the United States District Court for the Northern District of Texas. Shortly thereafter Mr. Babcock joined Jackson Walker, where he has defended clients in a diverse array of matters including an ERISA case in Rhode Island, a shareholder derivative action in Fort Worth, a trademark dispute in New York, and arbitration in Houston involving the sale of oil and gas properties.

Top Litigator

Among Mr. Babcock's many successes is his representation of Oprah Winfrey's Harpo Productions Inc. in numerous litigation matters pertaining to First Amendment law across the United States. He successfully defended *The Chicago Tribune* in the Circuit Court of Cook County Illinois. He served as lead counsel for Dr. Phil in his game-changing case for the broadcast industry regarding the California Retraction Statute against the Kalpoe brothers – onetime suspects in the murder of Natalee Holloway. He defeated an effort to remove the presiding judge from the Texas Court of Criminal Appeals by the Texas Commission on Judicial Conduct. The trial judge ruled in favor of Mr. Babcock's client and a Special [Appellate] Court of Review dismissed all charges. In 2012, he successfully

defended Celanese Ltd. in a multi-billion dollar fraud and breach of contract case involving a methanol supply agreement. In 2014, he represented the plaintiff in a jury trial against Nissan North America, Inc.

Appellate and Supreme Court Cases

Mr. Babcock has approved before the United States Courts of Appeal for the First, Fourth, Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, as well as the Texas, California, and Illinois Intermediate Appellate and Supreme Courts. He has appeared for oral argument in more than 50 cases including the Dallas Court of Appeals, where the Court heard the first case on the merits of a dismissal under the new Texas Citizens Participation Act – anti-SLAPP (strategic lawsuit against public participation) statutes. His cases include an important matter concerning the speech and debate clause of the Federal Constitution in the Ninth Circuit. He established the First Amendment right of journalists to protect confidential sources in a Fifth Circuit case involving the TransAmerican Press. In the First Circuit, the seasoned First Amendment lawyer successfully defended Harpo in a copyright/misappropriation appeal. In January 2013, the California Court of Appeal found that the state's retraction statute applied to all television broadcasts and not just breaking news, thus vindicating Mr. Babcock's clients. Mr. Babcock has argued and won several significant libel, defamation, and First Amendment law-related cases on behalf of major media defendants, including Oprah Winfrey, Dr. Phil, Warner Brothers, Inc., FOX Entertainment Group, Bill O'Reilly, and Univision.

Early Years

Mr. Babcock was born in Brooklyn, New York, raised in West Palm Beach, Florida, and graduated from Brown University, where he was a four-year member of the varsity crew team and the sports director for the university radio station. For a time after college, Mr. Babcock remained in the sports business as a writer and columnist for the *Philadelphia Inquirer*, but left journalism to attend the Boston University School of Law, where he was a member of the law review and served as its Executive Editor.

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2010, Texas
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Jamila M. Brinson is an associate in the litigation section at Jackson Walker. Ms. Brinson has experience in commercial, and oil and gas litigation, labor and employment, international arbitration, insurance law, and healthcare litigation.

While in law school, Ms. Brinson interned in the office of Chief United States Bankruptcy Judge Marvin Isgur, Southern District of Texas, and was a Law Clerk in the Civil Division of the United States Attorney's Office. She has also been a Legal Extern in the Office of General Counsel at Baylor College of Medicine, and with BP America, Inc. Ms. Brinson was selected as a University of Houston Law Center Health Law Fellow during the 81st Texas Legislative Session, and worked as a Health Policy Analyst for former Texas State Senator Leticia Van de Putte.

Languages

Fluent in Spanish

Memberships

Ms. Brinson is a member of the Litigation and Health Law sections of the Houston Bar Association. She is also a member of the American Health Lawyers Association and the Health Care Compliance Association.

Community Involvement

- Director, Houston Volunteer Lawyers Board of Directors
- Leadership Academy Graduate, Houston Young Lawyers Association (HYLA) 2013–2014
- Volunteer, Panelist, Moderator with the National Black Pre-Law Conference and Law School Fair
- Volunteer, LegalLines
- Pro bono attorney for Hague Convention cases through the U.S. Department of State
- Peace Corps Volunteer (2004 - 2006); co-authored HIV/AIDS Behavior Change Communication manual used country-wide in Saint Lucia, Eastern Caribbean

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DEFAMATION AND BUSINESS DISPARAGEMENT DAMAGES

I. INTRODUCTION

The right to speak freely is an enumerated right enshrined in both the Texas and Federal Constitutions. TEX. CONST. art. 1, § 8 ("Every person shall be at liberty to speak, write or publish his opinions on any subject…; no law shall ever be passed curtailing the liberty of speech or of the press."); § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law." (emphasis added)); U.S. CONST. amend. I ("Congress shall make no law…abridging the free exercise of speech, or of the press…"); *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 145-46 (Tex. 2014). However, this right is not absolute, and the law of defamation provides legal recourse for injury to one's reputation when the requisite elements are met and there is no privilege that protects such communications.

In this paper, Section II provides a general overview of a defamation action. Section III lays out its elements and provides important considerations regarding their establishment. Section IV provides a detailed discussion of the types of damages that can be recovered in a defamation action. Finally, Section V provides an overview of a business disparagement claim, and its elements and available damages.

II. DEFAMATION: A GENERAL OVERVIEW

> *"It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense."*

W. Page Keeton et. al., Prosser and Keeton on Torts §111, at 771 (5th ed. 1984 & Supp.1988).

There is no easy way to explain the law of defamation. It is a strangely complicated mix of common-law rules, state statutory provisions, and Constitutional protections.

A. Libel & Slander: What is the Difference?

If the false statement is expressed in writing, it is usually referred to as libel, which in Texas, is a statutory cause of action. TEX. CIV. PRAC. & REM. CODE §§ 73.001-.006 ("A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury."). If the statement is communicated orally, it may fall within the category of slander, which is governed by common law. *Randall's Food Mkts., Inc. v. Johnson,* 891 S.W.2d 640, 646 (Tex. 1995). However, the broadcast of defamatory statements read from a script is libel, no slander. *Neely v. Wilson,* 418 S.W.3d 52, 60 (Tex. 2013). The practical consequence of a communication being labeled libel or slander relates to the type of damages available and the requisite pleading and proof needed to recover them.

B. A Person or Corporation May be Defamed

Since defamation is in essence an invasion of a person or a corporation's interest in its reputation and good name, a cause of action for defamation aims to protect the personal reputation of a plaintiff—whether a person, corporation or other entity. *Hancock v. Variyam,* 400 S.W.3d 59, 63 (Tex. 2013); Prosser and Keeton on Torts §111, at 771 (5th Ed. 1984 & Supp. 1984); *Neely v. Wilson,* 418 S.W.3d 52, 72 (Tex. 2013) ("Our precedent makes clear that corporations may sue to recover damages resulting from defamation.").

C. Defamation *Per Se* Versus Defamation *Per Quod*

Defamation is further broken down into two categories: (1) defamation *per se*; and (2) defamation *per quod*. *Hancock,* 400 S.W.3d at 63. "Historically, defamation *per se* has involved statements that are so obviously hurtful to a plaintiff's reputation that the jury may presume general damages, including for loss of reputation and mental anguish." *See Bentley v. Bunton,* 94 S.W.3d 561, 604 (Tex. 2002). For instance, a statement is typically defamatory *per se* when it injures a person in her office, profession or occupation by "accus[ing] a professional of lacking a peculiar or unique skill that is necessary for the proper conduct of [her] profession." *Hancock,* 400 S.W.3d at 67. In contrast, defamation *per quod* is understood as defamation that is not actionable *per se*. *Hancock,* 400 S.W.3d at 64. Whether a defamatory statement constitutes defamation *per se* or defamation *per quod* also has an impact on the type of damages available to a plaintiff.

III. HOW TO PROVE A DEFAMATION CLAIM

A. The Elements May Vary

Because the U.S. Supreme Court has "infused the state common law of defamation with a constitutional dimension", the elements of a defamation action "differ dramatically from case to case depending upon at least four factors:

(1) The identity of the plaintiff;

(2) The identity of the defendant;

(3) The character of the allegedly defamatory statement; and

(4) The jurisdiction whose law applies."

Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 2.1 (4th ed. 2010 & Supp.2013).

For example, whether a plaintiff is a public official, a public figure, or a private plaintiff impacts the plaintiff's burden of proof in a defamation action. *HBO v. Harrison,* 983 S.W.2d 31, 35-36 (Tex. App.—Houston [14th Dist.] 1998, no pet.) ("The degree and burden of proof required in a defamation case hinges on the status of the plaintiff as either a public official or a private individual."); *see WFAA TV, Inc. v. McLemore,* 978 S.W.2d 568, 571 (Tex. 1998) (stating that to maintain a defamation cause of action, the plaintiff must prove among other factors, that the defendant acted either with actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, when the defendant published the defamatory statement concerning the plaintiff).

Similarly, whether a defendant is a media defendant or non-media defendant impacts the requisite elements a plaintiff must establish. *See* 1 Smolla, Law of Defamation, § 5:13 (2d ed. 2014) ("The U.S. Supreme Court has not decided whether falsity must be proved when the defendant is not a member of the media…"). Whether the statement at issue concerned a public or private issue further determines what a plaintiff must establish in a defamation claim. In a defamation action, the First Amendment provides greater protection to speech that is a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758-59 & n.5 (1985). In this instance, the plaintiff would have to meet a higher burden of proof than she would if the defamatory statement involved merely a matter of private concern. A statement involves a matter of private concern when it is solely in an individual's interest. *Id.* at 762 (person's credit report was matter of private concern).

B. The Typical Elements

Notwithstanding these various considerations, in its most simplified context, the elements of a defamation claim generally include the following:

(1) The defendant published a statement of fact to a third party.

(2) The statement was "of and concerning" the plaintiff.

(3) The statement was defamatory.

(4) The statement was false.

(5) With regard to the truth or falsity of the statement, the defendant was:

(1) acting with actual malice,

(2) negligent, or

(3) liable without regard to fault (strict liability).

(6) The plaintiff suffered pecuniary injury (unless injury is presumed).

WFAA TV, Inc., 978 S.W.2d at 571; *Leyendecker & Assocs. v. Wechter,* 683 S.W.2d 369, 374 (Tex. 1984). Due to the variable nature of what is required to establish a defamation claim, a detailed discussion of each of the above mentioned elements is outside of the scope of this paper. Instead, below are some general considerations when pleading and proving a defamation cause of action:

1. Statement Must be Published to a Third Party

- A defamatory statement is not published when it is communicated only to the plaintiff, the plaintiff's spouse or an agent of the plaintiff. *Baubles & Beads v. Louis Vuitton, S.A.,* 766 S.W.2d 377, 380 (Tex. App.—Texarkana 1989, no writ) ("The term "publication" is defined as any negligent or intentional act that communicates defamatory matter to a person *other than the person defamed*.")(Emphasis added); s*ee Flowers v. Smith*, 80 S.W.2d 392, 393 (Tex. App.—Amarillo 1934, no writ) ("A communication to the relatives of a party

defamed, when made on request or in the discharge of a duty, social, moral or legal, is qualifiedly privileged."); *Schulze v. Jalonick*, 44 S.W. 580, 584-85 (Tex. Civ. App.—Austin 1898, no writ) ("…[I]n law, the agent is privileged, and it is his duty to communicate any fact to his principal necessary for the protection of his interests or property; and the principal is privileged to communicate any fact to the agent necessary to enable him to protect the interests of the principal.")

- A publication that is assented to or invited will not support an action for defamation. *Mayfield v. Gleichert*, 437 S.W.2d 638, 642 (Tex. App.—Dallas, 1969 no writ) (holding that hospital had not defamed physician when that physician filed a complaint with the County Medical Society and requested the hospital to furnish relevant information to the Society, including the defamatory report); *Conlay v. Baylor College of Med.*, 688 F.Supp.2d 586, 590-91 (S.D. Tex. 2010) ("Texas has long followed this general rule. "[I]f the publication of which the plaintiff complains was consented to, authorized, invited, or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication.").

- In order for a statement to be actionable in defamation, it must assert facts that are objectively verifiable; this applies to opinions as well as any other statements. *Bentley v. Bunton*, 94 S.W.3d 561, 585-86 (Tex. 2002) (adopting test set out by the U.S. Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990) for determining when a statement is actionable in defamation.)

- A person or entity may be liable for republishing the defamatory statement of another. *See Pittsburgh Press Co. v. Pittsburgh Comm' on Human Relations*, 413 U.S. 376, 386 (1973) (noting that a "newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own."). However, the Texas Legislature passed Senate Bill 627 that went into effect in May 2015 and extends the truth defense to media republishers in certain situations. *See* TEX. CIV. PRAC. & REM. CODE § 73.005(b). This statute allows newspapers or other periodicals or broadcasters to assert truth as a defense to libel actions for republication where a newspaper, other periodical or broadcaster accurately reports allegations made by a third party regarding a matter of public concern. *Id.*

- Publication does not exist as a matter of law for certain internet posts pursuant to Section 230 of the Communications Decency Act. 47 U.S.C. § 230. The Act mandates that "[n]o 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." 47 U.S.C. § 230(c)(1).

2. <u>Statement Must Be Of and Concerning Plaintiff</u>

- The defamatory statement must be "of and concerning" the plaintiff. *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 904 (W.D. Mich. 1980)("…a publication is not actionable unless it is "of and concerning" the individual plaintiff."); s*ee Vice v. Kasprzak*, 318 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("A publication is "of and concerning the plaintiff" if persons who knew and were acquainted with him understood from viewing the publication that the defamatory matter referred to him.").

- Whether a communication can reasonably be understood to be of and concerning the plaintiff depends on the circumstances of the case. *See Vice*, 318 S.W.3d at 13 (defendant's defamatory letter to the editor specifically referred to plaintiff by name and to his position); *Newspapers, Inc. v. Matthews*, 339 S.W.2d 890-894 (Tex. 1960) (although a defamatory news broadcast did not mention the name of plaintiff, plaintiff's friends and acquaintances as well as others engaged in "newspaper work" understood from viewing the broadcast that it referred to plaintiff); *Allied Mktg. Grp. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 173 (Tex. App.—Eastland 2003, pet. denied) ("Because the test is based on the reasonable understanding of the viewer of the publication, it is not necessary for the plaintiff to prove that the defendant intended to refer to the plaintiff…A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer.")

- A general condemnation of a large group or class of persons (e.g. "all lawyers are

shysters") does not constitute defamation because this statement cannot reasonably be regarded as referring to each individual or any particular individual within the group. *See* Prosser & Keeton on Torts § 111, at p. 783-84 (5th ed. 1984 & Supp.1988). For a member of a group to bring a defamation claim based on the defamation of the group, the group must be small, generally under 25 persons. Restatement (2d) Torts § 564A cmt. b. However, when a group is named and a plaintiff is a readily identifiable member of that group, that plaintiff has a cause of action for defamation if those who know and are acquainted with plaintiff understand the defamatory statement made against the group to refer to her. *Sellards v. Express-News Corp.*, 702 S.W.2d 677, 680 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) (while newspaper articles about passengers involved in a deadly car accident did not specifically refer to plaintiff as one of the passengers involved with drugs and contemplating suicide, the statements, as written, could be taken to refer to any or all of the passengers, including plaintiff).

- A dead person cannot be defamed but if a person dies after being defamed, that person's estate may file suit for defamation under the Survival Statute. *See Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 248 (Tex. 1942) (stating that although civil libel is partly defined by Texas statute as a writing or other graphic form that "tends to blacken the memory of the dead," the defamation of the dead cannot be made the basis of recovery); *see* Tex. Civ. Prac. & Rem. Code § 71.021 (Survival Statute).

- In addition to individual plaintiffs, most nongovernmental entities that are capable, with a reputation, and that are legally competent to sue may bring an action for defamation. *Waste Mgmt. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 149 n.17 (Tex. 2014) ("[I]t is well settled that corporations, like people, have reputations and may recover for harm inflicted on them."); *see also* Prosser & Keeton on Torts § 111 (corporation can be defamed by words that smear its reputation for honesty, efficiency or other business character). However, when a business is defamed, the proper plaintiff is the owner of the business—not the business itself—whether the owner is a corporation, partnership, professional association or an individual. *Waste Mgmt.*, 434 S.W.3d at 150-51 n.35.

3. Statement Must be Defamatory

- A statement that is written or in other graphic form is defamatory under the Texas libel statute when it "tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury." TEX. CIV. PRAC. & REM. CODE § 73.001; *Houseman v. Publicaciones Paso Del Norte*, 242 S.W.3d 518, 524 (Tex. App.—El Paso 2007, no pet.).

- Slander, which is defined by common law, is a defamatory oral statement communicated or published to a third party without justification or excuse. *Randalls Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) (employer did not slander employee when other employees orally communicated during course of investigation about allegation that employee took wreath from store without paying for it). It is a question of law whether words are capable of the defamatory meaning the plaintiff attributes to them. *Diaz v. Rankin*, 777 S.W.2d 496, 498 (Tex. App.—Corpus Christi 1989, no writ). To determine whether the words used are reasonably capable of a defamatory meaning, the publication "must be construed as a whole, in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." *Id.*

- Regardless of whether a statement is libel or slander, such statement is defamatory *per se*, meaning it is actionable without proof of damage, when it falls within one of four categories of *per se* defamatory speech:

  1. Injures a person in her office, profession, or occupation by accusing her of lacking a peculiar or unique skill that is necessary for the proper conduct of her profession. *Hancock v. Variyam*, 400 S.W.3d 59, 62; 67 (Tex. 2013) (holding that defendant-physician's written statement to plaintiff-physician's superiors and colleagues that plaintiff- physician "lacked veracity and dealt in half-truths" was not defamatory

per se under this standard because "the specific trait of truthfulness is not peculiar or unique to being a physician," so these statements did not harm plaintiff in his profession as a physician);

2. Imputes the commission of a crime. *Moore v. Waldrop,* 165 S.W.3d 380, 384 (Tex. App.—Waco 2005, no pet.) (standing alone, defendant's oral statement before others that plaintiff was a "crook," while a general disparagement, did not constitute slander *per se*); *Leyendecker & Assocs., Inc. v. Wechter,* 683 S.W.2d 369, 374 (Tex. 1984) (letter written by employee of builder falsely accusing homeowners of attempting to conspire with builder to file fraudulent insurance claims constituted libel *per se*);

3. Imputes contraction of a "loathsome disease." *Villasenor v. Villasenor,* 911 S.W.2d 411, 418 (Tex. App.—San Antonio 1995, no writ) ("…[T]o be actionable on the loathsome disease basis, the allegedly slanderous words must claim a present infection."); or

4. Imputes sexual misconduct. *Villasenor,* 911 S.W.2d at 418 (holding that ex-wife's telephone message to another that ex-husband had cheated was not slanderous *per se* in the sexual misconduct context because ex-husband admitted his adultery so truth was a defense to his claims against ex-wife); *Miranda v. Byles,* 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (defendant's oral statement that plaintiff had sexually molested his step-granddaughter imputed both sexual misconduct and commission of a crime).

4. Statement Must be False

- The publication must contain a false statement of fact. *See e.g., Neely v. Wilson,* 418 S.W.3d 52, 62 () ("[S]tatements that are not verifiable as false cannot form the basis of a defamation claim.").

- A statement that cannot be proved either true or false cannot form the basis of a defamation claim. *See, e.g., Harvest House Publ'rs v. Local Church,* 190 S.W.3d 204, 211-12 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (whether labeling a church as a "cult" is defamatory depends on religious beliefs).

- In some instances, plaintiff has the burden to prove that the defamatory statement was false at the time it was made. *See Phila. Newspapers v. Hepps*, 475 U.S. 767, 777 (1986) ("To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.") Under other circumstances, the falsity of a defamatory statement is presumed and the defendant must prove truth as an affirmative defense. *See Randalls Food Mkts., Inc. v. Johnson,* 891 S.W.2d 640, 646 (Tex. 1995) (where a private individual brings a defamation suit, truth is an affirmative defense to slander). The varying rules requiring proof of falsity are a result of the "constitutionalizing" of the tort of defamation by the U.S. Supreme Court in the seminal case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

5. Defendant's Level of Fault

- To prove the tort of defamation, plaintiff may be required to prove that defendant published the defamatory statement with some degree of fault—(a) actual malice; or (b) negligence. In the seminal case *Gertz v. Robert Welch, Inc.*, the U.S. Supreme Court stated that for a certain class of plaintiffs, specifically, public figures and public officials, "the fault element is "actual malice," but for private figures, the states were free to choose a fault standard so long as they did not fall below a constitutional minimum of negligence." Charles "Chip" Babcock, Speech Based Torts: Libel, Slander, Business Disparagement and Invasion of Privacy 1111 (Sofia Androgué & Caroline Baker eds., Texas Business Litigation 2015); *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). Subsequently, the Texas Supreme Court adopted the negligent fault standard for cases involving private figures in *Foster v. Laredo Newspapers*. 541 S.W.2d 809, 819-20 (Tex. 1976). Under *Foster,* the private plaintiff must prove that the media defendant knew or should have known that the defamatory statement was false, but the Court warned there would be no liability unless the content would warn the reasonably prudent media defendant of its defamatory potential. *Id.*

- Actual malice requires proof by "clear and convincing evidence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Turner v. KTRK TV, Inc.*, 38 S.W.3 d 103, 120 (Tex. 2000). Evidence is clear and convincing if it supports a firm conviction that the fact to be proved is true. *Bentley v. Bunton*, 94 S.W.3d 561, 597 (Tex. 2002).

- In defamation cases, the term "actual malice" does not have the same meaning as it has in common law. The definition depends on the type of defamatory statement to which it is applied. When a claim for defamation is based on individual statements, actual malice is defined as a statement that is published with knowledge of or reckless disregard for its falsity. *Neely v. Wilson*, 418 S.W.3d at 69. When a claim for defamation is based on the defamatory message created by a broadcast as a whole, not individual statements, actual malice is defined as the publication of a statement the defendant knew or strongly suspected could present, as a whole, a false and defamatory impression of events. *Turner*, 38 S.W.3d at 120 ("A publisher's presentation of facts may be misleading, even negligently so, but is not a "calculated falsehood" unless the publisher knows or strongly suspects that it is misleading.").

- For an omission to be evidence of actual malice, plaintiff must prove that the publisher knew or strongly suspected that it could create a substantially false impression. *Turner*, 38 S.W.3d at 120.

- In order to prove negligence in a defamation action, a private plaintiff must show the following:

    - Defendant knew or should have known the defamatory statement was false; and

    - The content of the publication would warn a reasonably prudent person of its defamatory potential. *Foster v. Laredo Newspapers*. 541 S.W.2d 809, 819-20 (Tex. 1976) ("Negligent conduct is determined by asking "whether the defendant acted reasonably in checking the truth or falsity or defamatory character of the communication before publishing it."') citing Restatement (2d) of Torts § 580B cmt. g.

- Where a private plaintiff sues a non-media defendant for speech involving private concerns, strict liability may apply. *Dun & Bradstreet, Inc. v. Greenmoss*, 472 U.S. 749, 757-63 (1985); *Thomas-Smith v. Mackin*, 238 S.W.3d 503, 509 (Tex. App.—Houston [14th Dist.] 2007, no pet.). In a strict liability case, plaintiff does not have to prove defendant knew the statement was false; if the statement is false, defendant is liable. *Thomas-Smith*, 238 S.W.3d at 509. In *Thomas-Smith*, defendant, who was the Provost and Senior Vice President of Academic and Student Affairs at Prairie View A&M University, commented in a telephone conversation with the Dean of Arts and Science for the university that the Dean had a "love" or "lover" relationship with plaintiff, a professor at the University who the Dean was recommending to be appointed as interim Chairman of an academic department. After plaintiff, a married man, learned of the comment, he filed this action for slander against plaintiff. The Court of Appeals analogized the facts of this case to a case where there was "not alleged to be a public figure plaintiff, a media defendant, or a defamatory statement involving a matter of public concern," and stated that in such cases, "the falsity of the statement is generally presumed, and the truth of the statement is an affirmative defense that must be proved by the defendant." *Id.* The Court further stated that in "the absence of a privilege, malice is inferred from the fact that a defamatory statement is false." *Id.* However, the Court ultimately did not apply strict liability because the defendant alleged the affirmative defense of a qualified privilege, and the Court stated, "[c]onversely, where a defamatory statement is privileged, the inference of malice is overcome, and it becomes the plaintiff's burden to establish malice by evidence other than the falsity of the statement, if any." *Id.*

6. Plaintiff Suffers Injury

A plaintiff who prevails on a defamation action is entitled to damages caused by defendant's defamatory conduct. Section III of this paper will detail the various types of damages available under this cause of action.

IV. DAMAGES IN DEFAMATION ACTIONS

In addition to other types of damages, a plaintiff may recover in a defamation case damages for what is

oddly labeled "actual" injury, even though the Supreme Court has said that '"[t]he more customary types of actual harm inflicted by defamatory statements include [such things as] impairment of reputation, and standing in the community, personal humiliation, and mental anguish and suffering."' Robert Sack, Sack on Defamation: Libel, Slander & Related Problems § 10.1 (4th ed. 2010 & Supp. 2013) citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974). In Texas, such damages as referred to as general damages in a defamation case. *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex. 2002).

A. General Damages

Under some circumstances, a plaintiff must plead and prove she is entitled to general damages while in other cases, such damages are presumed. *Compare Gertz*, 418 U.S. at 349 (general damages must be proved when a private plaintiff proves negligence in a suit against a media defendant for speech that is defamatory *per se* and involves a public concern) *with Hancock v. Variyam*, 400 S.W.3d 59, 66-66 n.7 (Tex. 2013) (damages are presumed when a private or public plaintiff proves negligence in a suit against a media defendant for speech that is defamatory *per se* and involves a private concern). Factors like (a) the type of defamation involved, (b) the type of speech involved, (c) the types of parties involved, and (d) the degree of fault proved impact whether a plaintiff must prove her entitlement to general damages or whether they are presumed.

1. What are General Damages?

General damages are non-economic damages that do not require any special pleading to recover them. General damages include compensation for injury to character or reputation, injury to feelings, mental anguish, and similar wrongs suffered by the plaintiff. *Waste Mgmt. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 155 (Tex. 2014).

"Non-economic damages [] cannot be determined by mathematical precision; by their nature, they can be determined only by the exercise of sound judgment." *Bentley*, 94 S.W.3d at 605. However, the Texas Supreme Court made clear in *Bentley* that "the that the First Amendment requires appellate review of the amounts awarded for non-economic damages in defamation cases to ensure that any recovery only compensates the plaintiff for actual injuries and is not a disguised disapproval of the defendant." *Id.* As a result, courts will determine not only whether there is evidence of the existence of compensable mental anguish, but also whether there is evidence to justify the amount awarded. *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) (holding there was no evidence that plaintiff suffered mental anguish or that $ 250,000 would be fair and reasonable compensation).

2. What is Needed to Prove Mental Anguish?

Proof of mental anguish damages are "direct evidence of the nature, duration, or severity of [plaintiffs'] anguish, thus establishing a substantial disruption in the plaintiffs' daily routine" or other evidence of "a high degree of mental pain and distress' that is 'more than mere worry, anxiety, vexation, embarrassment, or anger'". *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). As further guidance, the Texas Supreme Court stated in *Saenz*, "[w]hile the impossibility of any exact evaluation of mental anguish requires that juries be given a measure of discretion in finding damages, that discretion is limited. Juries cannot simply pick a number and put it in the blank. They must find an amount that, in the standard language of the jury charge, "would fairly and reasonably compensate" for the loss. Compensation can only be for mental anguish that causes "substantial disruption in . . . daily routine" or "a high degree of mental pain and distress"'. 925 S.W.2d at 614 (citing *Parkway Co.*, 901 S.W.2d at 444).

3. Evidence was Sufficient

In *Bentley v. Bunton*, a call-in talk show host on a public access channel in a small community repeatedly accused a local district judge of being corrupt, and made such defamatory statements over several months. The Texas Supreme Court stated "the record leaves no doubt that [plaintiff] suffered mental anguish as a result of [defendants'] statements." 94 S.W.3d at 606. Plaintiff testified, among other things, that defendants' conduct "cost him time, deprived him of sleep, caused him embarrassment in the community in which he had spent almost all of his life, disrupted his family, and distressed his children at school." *Id.* However, the Court held there was no evidence plaintiff suffered mental anguish damages in the amount of $7 million, "more than forty times the amount awarded him for damage to his reputation." *Id.* at 607. The Court found that "the amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support." *Id.*

In *Beaumont v. Basham*, the Waco Court of Appeals affirmed the trial court's damages award to plaintiff for mental anguish stating that "As with the plaintiff in *Bentley, "*[t]he record leaves no doubt that Basham suffered mental anguish as a result of [the

defamatory] statements."' 205 S.W.3d 608, 617 (Tex. App.—Waco 2006, pet. denied). Plaintiff sued the co-owner of her former employer, and that co-owner's daughter for defamation, among other claims, for filing a false police report against her for embezzlement, and spreading rumors about plaintiff in their small town. *Id.* at 613. Plaintiff testified that as a result of defendants' defamatory conduct, her friends began to avoid and ignore her, there was a lot of whispering about her, she stopped going into town as much or attending her children's school functions, she started grocery shopping in another town, she experienced anxiety attacks on those occasions when she did go into town as well as shortness of breath and accelerated heart rate, she suffered from many sleepless nights, and constant thinking about what had occurred, she was no longer able to trust people, felt discomfort in social settings, no longer participated in social events, and her dating life was significantly impacted. *Id.* at 616-17. The Court further held there was some evidence and factually sufficient evidence to support the jury's determination that the amount awarded was "fair and reasonable compensation" for plaintiff's mental anguish suffered. *Id.* at 618.

4. Evidence was Insufficient

In *Leyendecker & Assocs., Inc. v. Wechter*, the employee of defendant-builder alleged that plaintiffs-husband and wife homeowners had filed suit to force their neighbors to buy a disputed area, and that they were generally hard to work with. 683 S.W.2d 369, 374 (Tex. 1984). Although these statements were false, they were not libelous *per se* so plaintiffs were required to show they had suffered injury to their reputation as a result of the statements in order to recover such damages. *Id.* The only evidence of injury to the wife was her husband's testimony that she was "very much upset", "morose" and "depressed." *Id.* The Texas Supreme Court found that this evidence was insufficient to demonstrate injury to the wife's reputation. *Id.* As such, her award for mental anguish damages was reversed. *Id.*

In *Waste Mgmt. v. Tex. Disposal Sys. Landfill, Inc.,* defendant-competitor anonymously published a community "Action Alert" and distributed it to environmental and community leaders claiming that plaintiff's landfills did not meet environmental standards. 434 S.W.3d 142, 147 (Tex. 2014). The extent of plaintiff's evidence of injury to its reputation was the testimony of its chief executive officer who testified that plaintiff's reputation was "priceless," and estimated the value to be in the range of $10 million. *Id.* at 150-60. Without any supporting evidence of reputation harm, the Texas Supreme Court held that plaintiff was only entitled to nominal damages for injury to its reputation "in accordance with [its] decisions on presumed damages in defamation per se cases." *Id.* at 161. Plaintiff did also recover special damages, which are discussed in Section IV.D.3 of this paper.

B. Presumed Damages

At common law, defamatory statements that were proved as slanderous *per se* or libelous *per se* (generally categorized as defamatory *per se*) entitled a plaintiff to a presumption of general damages. *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (libel *per se*); *Bolling v. Baker*, 671 S.W.2d 559, 570 (Tex. App.—San Antonio 1984, writ dism'd) (slander *per se*). Proof that a statement was defamatory *per se* was sufficient evidence to establish some degree of damage, and the factfinder was permitted to estimate the amount without additional evidence that those damages had actually been sustained. *Id.* In *Dun & Bradstreet v. Greenmoss Builders*, the U.S. Supreme Court noted, "the rationale of the common-law rules has been the experience and judgment of history that "proof of actual damages will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." 472 U.S. 749, 760 (1985). It further stated that, "[t]his rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. " *Id.*

But in the U.S. Supreme Court's decision in *Gertz*, the Court restricted this common law rule of presumed damages when the case involves a media defendant and a matter of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). Under these circumstances, a plaintiff must prove actual malice in order to obtain a presumption of damages. *Id.* When the case involves a non-public plaintiff and a non-media defendant in a matter of private concern, the U.S. Supreme Court in a plurality opinion held that a plaintiff is not required to prove actual malice to obtain presumed damages. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (holding, "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice.").

"[E]ven though Texas law presumes general damages when the defamation is *per se* and involves a matter of private concern, it does not presume "any particular amount of damages beyond nominal

damages."' *Salinas v. Salinas*, 365 S.W.3d 318, 320 (Tex. 2012) ("However, even if some mental anguish can be presumed in cases of defamation per se, and if it is assumed that a statement was defamatory per se, the law does not presume any particular amount of damages beyond nominal damages."); *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015).

1. Evidence was Sufficient

In *Leyendecker & Assocs., Inc.*, the employee of defendant-builder, in response to a formal complaint filed by plaintiffs-husband and wife homeowners to a building association, also wrote a letter to that association as well as to plaintiffs' mortgagee, accusing the husband of the criminal act of attempting to conspire with builder to file fraudulent insurance claims. 683 S.W.2d 369, 374 (Tex. 1984). The Texas Supreme Court stated that these statements constituted libel *per se*, which is presumed under the law to defame a person and injure his reputation. *Id.* Because of this presumption of injury to reputation, the Court held that the husband could properly recover the amount of $1,500 for mental anguish awarded by the trial court. *Id.* The Texas Supreme Court must have determined this amount to be nominal because although the builder raised the issue that the evidence was insufficient to support the husband's general damages award, there was no discussion about the sufficiency of the evidence or whether the amount awarded "would fairly and reasonably compensate" the husband for his loss. *Id.*

2. Evidence was Insufficient

In *Hancock v. Variyam*, a physician published a defamatory statement against the Division Chair of the Gastroenterology Division of a Texas medical school when he sent a letter to the Chair of the Department, the Dean of the School of Medicine, a Division colleague, and the entity reviewing the Division's application for accreditation for its gastroenterology fellowship contending that the supervisor "had a reputation for a lack of veracity," and " deals in half-truths, which legally is the same as a lie." 400 S.W.3d 59, 62 (Tex. 2013). The Division's fellowship was not accredited and the Chair of the Department ultimately removed the Division Chair from his position. *Id.* The Texas Supreme Court concluded that the defamatory statements were not defamatory *per se* because they did not adversely affect the Division Chair's "fitness for the proper conduct of being a physician." *Id.* at 68. As such, there was no presumption of general damages, and the evidence was insufficient to support the Division Chair's mental anguish damages because he failed to introduce evidence of a "substantial disruption in his daily routine or a high degree of mental pain and distress." *Id.*

C. Nominal Damages

Nominal damages "are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." *Hancock v. Variyam*, 400 S.W.3d 59, 65 (Tex. 2013). Nominal damages are recoverable for defamation *per se*, but not for defamation *per quod***.** *Shipp v. Malouf*, 439 S.W.3d 432, 440 (Tex. App.—Dallas 2014, pet. denied) (citing *Hancock v. Variyam***,** 400 S.W.3d at 65.) In defamation *per se* cases, nominal damages are awarded when '"there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation" or "when they are the only damages claimed, and the action is brought for the purpose of vindicating the plaintiff's character by a verdict of a jury that establishes the falsity of the defamatory matter."' *Hancock*, 400 S.W.3d at 65.

D. Special Damages

Special damages are economic in nature and compensate a party for the loss of something having economic or pecuniary value, such as lost income or loss of employment. *Hancock v. Variyam*, 400 S.W.3d 59, 64 n.4 (Tex. 2013); *Hou. Belt & Terminal Ry. V. Wherry*, 548 S.W.2d 753, 753 (Tex. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.). In order to recover for special damages, they must be specifically pleaded. TEX. R. CIV. P. 56; *Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

1. What Are Special Damages?

Special damages are those that proximately result from the defendant's wrongful conduct but are of such an unusual nature that they would normally vary with the circumstances of the individual case in which they occur." *Sherrod*, 580 S.W.2d at 28. A failure to plead special damages can result in a reversal of an award. *Id.* (reversing an award to residents against a developer for special damages because residents' pleading did not specifically plead this measure of damages).

2. When Are Special Damages Recoverable?

Whether a defamatory statement constitutes defamation *per se* or defamation *per quod* impacts the type of damages available to a plaintiff. Cases involving defamation *per quod* are actionable only upon pleading and proof of special damages. *Kelly v.*

Diocese of Corpus Christi, 832 S.W.2d 88, 91 (Tex. App.—Corpus Christi 1992, writ dism'd) ("The general rule regarding oral statements, however, is that they are not actionable without proof of special damages, unless [they fall into one of the categories outlined below]."); *see Salinas v. Salinas*, No. 13-09-00421, 2012 Tex. App. LEXIS 7835, at *13-14 (Tex. App.—Corpus Christi September 13, 2012, no pet.) (community activist's statement to mayor and city council at a city council meeting that "some of you will be judged for the way you have stolen and lied and killed" was not slanderous *per se* and because mayor did not plead or prove special damages, the trial court was bound to dismiss the mayor's defamation claim regarding this statement); *see also In re Lipsky*, 460 S.W.3d 579, 596 (Tex. 2015) (stating that although evidence was insufficient to substantiate plaintiff's claim to special damages, such evidence was unnecessary because plaintiff's defamation claim was actionable *per se*); *see Cullum v. White*, 399 S.W.3d 173, 189 (Tex. App.—San Antonio 2011, no pet.) (because owner of exotic animal ranch pled and proved libel *per se* against her former ranch hand, she was not required to prove special damages in order to prove this defamation claim).

In such cases, this is a threshold requirement that must be met, and plaintiff has no cause of action for defamation without proof of special damages. David A. Anderson, Reputation, Compensation and Proof, 25 WM & MARY L. REV. 747, 748 (1984). Once this requirement is met, only then can a plaintiff in a defamation *per quod* action recover general damages.

As previously defined, a defamatory statement constitutes defamation *per se* when it falls into at least one of the following four categories: (a) injures a person in her office, profession, or occupation by accusing that person of lacking a peculiar or unique skill that is necessary for the proper conduct of her profession; (b) imputes the commission of a crime; (c) imputes contraction of a loathsome disease; or (d) imputes sexual misconduct. This includes defamatory statements that constitute either libel or slander. In addition, a libelous statement is defamatory *per se* if, on its face, it falls within the statutory definition of libel. *See* Section III of this Paper for further discussion.

In contrast, defamation *per quod* is understood as defamation that is not actionable *per se*. *Hancock*, 400 S.W.3d at 64. A statement is considered defamation *per quod*—whether libel or slander—when it is ambiguous, meaning it is not obviously hurtful on its face, and requires extrinsic facts or circumstances to explain its defamatory nature or meaning. *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 374 (Tex. 1984) (libel *per quod*) (written statement that plaintiffs had filed a lawsuit to force their neighbors to buy a disputed area and that they were generally hard to work with); *Kelly v. Diocese of Corpus Christi*, 832 S.W.2d 88, 91 (Tex. App.—Corpus Christi 1992, writ dism'd) (slander *per quod*) (verbal statements to parishioners by priests investigating sexual misconduct allegation of soon-to-be ordained priest that the family who made the allegations had recanted their story, admitted to fabrication or apologized to the soon-to-be priest for making baseless accusations). A statement typically falls into this category when it has a defamatory meaning and a non-defamatory meaning. *Turner v. KTRK TX, Inc.*, 38 S.W.3d 103, 113 (Tex. 2000).

Special damages are never presumed as they represent specific economic losses that must always be proven. *Shipp v. Malouf*, 439 S.W.3d 432, 44 (Tex. App.—Dallas 2014, pet. denied (citing *Hancock v. Variyam*, 400 S.W.3d 59, 66 (Tex. 2013)); *In re Lipsky*, 460 S.W.3d 579, 593 (Tex. 2015).

3. Evidence was Sufficient

In *Waste Management of Texas, Inc. v. Texas. Disposal System Landfill, Inc.*, the Texas Supreme Court held that there was sufficient evidence to uphold the trial court's award of $450,000 in remediation costs to Texas Disposal. 434 S.W.3d 142, 161 (Tex. 2014). Texas Disposal's evidence consisted of 271 pages of invoices, expenses, time spent on curative work, supplies, mileage, etc. *Id.* This evidence, combined with testimony from its Chief Executive Officer that Texas Disposal devoted more than $700,000 worth of time and incurred more than $450,000 in out-of-pocket expenses were sufficient to prove that Waste Management's defamatory community action alert caused Texas Disposal to suffer special damages in the form of mediation costs. *Id.*

4. Evidence Was Insufficient

In *El-Khoury v. Kheir*, a private individual claimed that another private individual slandered him by telling others that the first individual agreed to pay him money but did not keep his promise. 241 S.W.3d 82, 84 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The first individual claimed that as a result of the defamatory statements, he was unable to obtain credit for a planned expansion of his business and stated that vendors and suppliers discontinued their previous practice of permitting him to pay accumulated invoices at the end of a season. *Id.* at 89. However, the Court of Appeals concluded that this evidence was insufficient to support the first individual's claim for

damages because the evidence showed his credit problems resulted from problems other than the defamatory statements. *Id.*

E. Mitigation Considerations

1. Defamation Mitigation Act

In 2013, the Texas Legislature passed the Defamation Mitigation Act ("DMA"). *See* TEX. CIV. PRAC. & REM. CODE §§ 73.003; 73.051-62. The DMA encourages publishers of defamatory material to voluntarily come forward to correct, clarify, or retract the defamatory material. It also encourages plaintiffs to resolve claims quickly by requiring them to request a correction, clarification or retraction from the defendant within a certain period of time if one has not already been made or else face the possibility of losing the right to maintain a defamation suit and recover exemplary damages. TEX. CIV. PRAC. & REM. CODE § 73.055(a), (c). This statute is applicable to both libel and slander claims based on harm to a plaintiff's personal reputation in which the allegedly defamatory statement was published on or after June 14, 2013. *See Id.* at § 73.054.

Section 73.055(a) states that a plaintiff "may maintain an action for defamation only if" she makes "timely and sufficient request for a correction, clarification, or retraction from the defendant; or [if] the defendant has made a correction, clarification, or retraction. Section 73.055(b) clarifies that such a request is timely if it is made "during the applicable period of limitation for commencement of an action for defamation." If the request is made within 90 days of receiving knowledge of publication, pursuant to Section 73.055(c), a plaintiff may recover exemplary damages. Under Section 73.055(d), a retraction request is sufficient if the request: (1) is served on the publisher; (2) is in writing, reasonably identifies the person making the request, and is signed by the individual claiming to have been defamed or by an authorized attorney or agent; (3) identifies the false and defamatory statement, including to the extent known, the time and place of publication; (4) alleges the defamatory meaning of the statement; and (5) specifies the circumstances that cause the defamatory meaning if it arises from something other than the express language of the publication. Once the request is made, a defendant may then request "reasonably available information regarding the falsity of the allegedly defamatory statement" within 30 days of receiving the request. *Id.* at § 73.056(a). If the correction, clarification, or retraction is not made, and plaintiff fails to provide the information requested by the publisher within 30 days of receiving the request, the plaintiff no longer may seek exemplary damages unless she proves the publication was made with actual malice. *Id.* at § 73.056(b).

2. Statutory Mitigation

A defendant has a statutory right to introduce evidence that may mitigate against her liability for libel. Section 73.003 of Texas Civil Practice & Remedies Code outlines the type of evidence a defendant may introduce. Specifically, Section 73.003 states, "[t]o determine the extent and source of actual damages and to mitigate exemplary damages, the defendant in a libel action may give evidence of the following matters if they have been specially pleaded: (1) all material facts and circumstances surrounding the claim for damages and defenses to the claim; (2) all facts and circumstances under which the libelous publication was made; and (3) any public apology, correction, or retraction of the libelous matter made and published by the defendant. To mitigate exemplary damages, the defendant in a libel action may give evidence of the intention with which the libelous publication was made if the matter was specially pleaded."

3. Plaintiff's Duty to Mitigate Damages

In addition to the requirements under the Defamation Mitigation Act, a plaintiff alleging a defamation action has the customary duty to mitigate her damages. This principle is manifested in a plaintiff's general ineligibility to recover for "self-defamation" or self-publication. Self-defamation is a plaintiff's reporting to third parties what the defendant said to the plaintiff if the plaintiff was aware of the defamatory nature of the communication. *See Doe v. Smith Kline Beecham Corp.,* 855 S.W.2d 248, 259 (Tex. App-Austin 1993), *aff'd as modified on other grounds,* 903 S.W.2d 347 (Tex. 1995) ("The rule remains that "if the publication of which the plaintiff complains was consented to, authorized, invited or procured by the plaintiff, he cannot recover for injuries sustained by reason of the publication.").

F. Exemplary Damages

Exemplary damages are not available unless a plaintiff establishes actual damages. *Hancock v. Variyam,* 400 S.W.3d 59, 71 (Tex. 2013); TEX. CIV. PRAC. & REM. CODE § 41.004(a) ("…exemplary damages may be rewarded only if damages other than nominal damages are awarded."); *El-Khoury v. Kheir,* .241 S.W.3d 82, 89 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (concluding that because individual

could not recover actual damages, he was not entitled to recover exemplary damages).

However, the Texas Supreme Court in *Hancock* stated, [b]ut if more than nominal damages are awarded, recovery of exemplary damages are appropriately within the guarantees of the First Amendment if the plaintiff proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice." *Hancock,* 400 S.W.3d at 66-67 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)); s*ee also Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984).

Further, exemplary damages are governed by the statutory caps outlined in Section 41.008 of Texas Civil Practice and Remedies Code. Generally, the caps provide that "exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:" (1) twice the amount of economic damages; plus an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000. TEX. CIV. PRAC. & REM. CODE § 41.008(b).

G. Equitable Relief

The Texas Constitution presumes all restraints against expression are unconstitutional. *See* TEX. CONST. art. 1 § 8. Further, the U.S. Supreme Court has long recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Kinney v. Barnes*, 443 S.W.3d 87, 90 (Tex. 2014) (citing *Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 562 (1976). As such, it is extremely difficult, if not almost impossible, for a plaintiff to obtain injunctive relief to prevent defamatory speech. *Hajek v. Bill Mowbray Motors, Inc.*, 647 S.W.2d 253, 255 (Tex. 1983) ("Defamation alone is not a sufficient justification for restraining an individual's right to speak freely."); *Kinney v. Barnes*, 443 S.W.3d 87, 99 (Tex. 2014) ("In keeping with Texas's longstanding refusal to allow injunctions in defamation cases, the well-settled remedy for defamation in Texas is an award of damages.").

A few things to consider:

- When restraining the publication of a defamatory statement would be essential to avoid an impending danger or protect a business or other property interest that is threatened by intimidation or coercion, injunctive relief may be proper. *See Hajek,* 647 S.W.2d at 255 (noting that because the language enjoined did not pose a threat of danger to anyone, it may not be subject to the prior restraint of an injunction).

- Texas courts may be more inclined to grant injunctive relief when the injunction only requires the deletion or removal of speech that has already been adjudicated as defamatory. *See Kinney*, 443 S.W.3d at 93 (stating that a party's request for an injunction ordering the removal of the already adjudicated defamatory statements from the other party's website and request that third party republishers of those statements do the same would be "accurately characterized as a remedy for one's abuse of the liberty to speak and is not a prior restraint").

H. Interest

Plaintiffs can recover prejudgment and post-judgment interest.

I. Court Costs

A plaintiff who prevails in a defamation suit and recovers at least $20 in damages can recover court costs. *See* TEX. R. CIV. P. 137 ("In civil actions for assault and battery, slander and defamation of character, if the verdict or judgment shall be for the plaintiff, but for less than twenty dollars, the plaintiff shall not recover his costs, but each party shall be taxed with the costs incurred by him in such suit."); *Maas v. Sefcik*, 138 S.W.2d 897, 900 (Tex. App.—Austin 1940, no writ).

J. Attorneys' Fees

A party who prevails in a suit cannot recover attorneys' fees from an opposing party unless permitted to do so by (a) statute; (b) a contract between the parties; or (c) equity. *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 95 (Tex. 1999) (attorneys' fees recoverable as dictated by statute or contract); *Knebel v. Capital Nat'l Bank,* 518 S.W.2d 795, 799 (Tex. 1974) (equity). There is no statute that provides for attorneys' fees in an action for defamation.

V. BUSINESS DISPARAGEMENT: A GENERAL OVERVIEW

Business disparagement is commonly defined as "interference with commercial or economic relations." *Hurlbut v. Gulf Atlantic Life Ins. Co.,* 749 S.W.2d 762, 766 (Tex. 1987). The tort of business disparagement, while similar to defamation in many respects, protects

a different interest. An action for business disparagement protects the economic interests of a plaintiff against pecuniary loss. Conversely, an action for defamation protects the personal reputation of a plaintiff.

A. How do I Prove a Claim for Business Disparagement?

To recover for business disparagement "a plaintiff must establish that (1) the defendant published false and disparaging information about the plaintiff's economic interests, (2) the words were false; (3) defendant published the words with malice, (4) without privilege, and (5) that resulted in *special damages* to the plaintiff." *Waste Mgmt. v. Tex. Disposal Sys. Landfill, Inc.,* 434 S.W.3d 142, 155 (Tex. 2014) citing *Hancock v. Variyam,* 400 S.W.3d 59, 63-64 (Tex. 2013). An essential part of a plaintiff's claim is proof of special damages. *Hurlbut*, 749 S.W.2d at 767. Special damages can include loss of a specific sale, loss of credit, and loss of business, such as its complete destruction. *Id.* (loss of sale and loss of business); *FDIC v. Perry Bros.*, 854 F.Supp 1248, 1275-76 (E.D.Tex. 1994)(loss of credit).

The Texas Supreme Court in *Hurlbut* explained that, [this] requirement goes to the cause of action itself and requires that plaintiff "establish pecuniary loss that has been realized or liquidated as in the case of specific lost sales." Furthermore, the communication must play a substantial part in inducing others not to deal with the plaintiff with the result that special damage, in the form of the loss of trade or other dealings, is established." *Id.* In *Hurlbut*, two insurance professionals sued their former employer and its parent company for business disparagement based on the former employer's false representation to the Texas Attorney General that the professionals were not authorized to sell group insurance for the employer through the employer's trust plan. *Id.* at 764. Despite the Court's acknowledgement of the former employer's false and malicious statement, the Court found the record contained no evidence of the "direct, pecuniary loss necessary to satisfy the special damage element of a claim for business disparagement." *Id.* at 767. Instead, the damages proven were more directly caused by issues that were deemed "personal" to plaintiffs, such as the business' receivership, an order revoking the plaintiffs' insurance licenses, and their prosecution for misappropriation of insurance premiums. *Id.*

While a plaintiff can recover exemplary damages in a business disparagement suit, injunctive relief, on the other hand, is generally not available.

B. The Correlation between Defamation & Business Disparagement Actions

If a corporation or other business entity seeks to recover economic damages for injury to the business, it may assert a claim for defamation and an additional or alternative claim for business disparagement. *Burbage v. Burbage*, 447 S.W.3d 249, 261 n.6 (Tex. 2014). As the Texas Supreme Court stating in *In re Lipsky*, "[i]mpugning one's reputation is possible without disparaging its commercial interests and vice versa. Depending on the circumstances, then, a plaintiff may have a claim for defamation**,** or for business disparagement, or both." 460 S.W.3d 579, 587 (Tex. 2015).