2500 DEFAMATION: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

1. **Elements**. Under Wisconsin law, the three basic elements of a defamatory communication are:

(1) the statement is false;

(2) the statement is communicated by speech, by conduct, or in writing to a person other than the person defamed; and

(3) the communication is unprivileged and tends to harm one's reputation so as to lower the person in the estimation of the community or to deter third persons from associating or dealing with the person.[1]

However, beyond these elements, additional constitutional requirements may apply based on the plaintiff's and defendant's status.

2. **Libel or Slander**. A defamation action can be founded upon either libel or slander.[2]

3. **Truth**. Substantial truth of the statement is an absolute defense to a defamation claim.[3] "By definition, a defamatory statement must be false."[4] Therefore, the truth of a communication is an absolute defense to a defamation claim. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true."[5] It is the defendant's burden in these circumstances to establish that the statement was substantially true.[6]

4. **Publication**. Actionable defamation requires publication or communication. The required parts of this element are:

(a) the words must be intentionally or negligently communicated to a person other than the person defamed, and

(b) the communication must identify the person defamed expressly or by reasonable inference.[7]

5. **Opinion**. Defamatory communication must typically consist of a statement of fact,

as expressions of opinion generally cannot serve as the basis of a defamation action. However, where the defamer departs from expressing "pure opinion" and communicates what the courts have described as "mixed opinion," then liability may result. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), the Supreme Court stated that there can be no such thing as a "false idea." "Mixed opinion" is a communication which blends an expression of opinion with a statement of fact. This type of a communication is actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion.[8] Communications are not made non-defamatory as a matter of law merely because they are phrased as opinions, suspicions, or beliefs.[9]

6. **Privilege**. Some defamatory statements are protected by privileges created by common law, state and federal constitutions, or by statute. These privileges are discussed on pages 7 and 8 of this law note.

7. **Status**. In defamation cases, the degree of fault—actual malice or negligence—varies depending on the plaintiff's status and whether they are a public figure or a private individual.[10] For public figures suing for defamation against a media defendant, the First Amendment is implicated and requires the plaintiff to prove actual malice on the defendant's part to establish liability for the defamatory statement.[11]

Conversely, a private individual suing for defamation only needs to show that the media defendant was negligent in publishing the defamatory falsehood to establish liability and receive actual damages.[12] However, if the private individual seeks to recover presumed or punitive damages, they must then prove actual malice.[13]

KEY DEFINITIONS

1. **Defamatory**. Wisconsin has adopted the definition of "defamatory" stated in Restatement, Second, Torts § 559 (1977):

> A communication is defamatory if it tends so to 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. Restatement, 3 Torts, p. 156, sec. 559; Ranous v. Hughes, 30 Wis.2d 452, 460 (1966).

2. **Level of fault**. The status of the plaintiff as a public figure or public official is significant in determining the level of "fault" the plaintiff must show to recover. A public figure, either general purpose or limited purpose, suing a defendant protected by a conditional constitutional privilege must show actual malice instead of simple negligence.

3. **Implied Malice**. Wisconsin law applies a strict liability theory to the communication of a defamatory falsehood by a private defendant about a private plaintiff when there is no conditional privilege involved. The law implies "malice" in the communication and no showing of "malice" is required to recover compensatory damages.[14]

4. **Express Malice**. Express malice arises from ill will, bad intent, or malevolence towards the defamed party. Such malice exists when slanderous words are uttered or libelous words are published from motives of ill will, envy, spite, revenge, or other bad motives against the person defamed.[15] This type of malice is sometimes referred to as "common-law" malice. See page 4 for a discussion of the difference between actual and express malice.

5. **Actual Malice**. Actual malice exists when there is a statement made with knowledge that it is false or with reckless disregard of whether such statement is false or not.[16] The constitutional standard of actual malice is applicable to two broad categories of public individuals: public officials and public figures.[17] See page 4 for a discussion of the difference between actual and express malice.

6. **Public Official**. Per Wagner v Allen Media Broadcasting, 2024 WI App 9, 410 Wis.2d 666, 3 N.W.3d 758, according to Wisconsin case law, "the 'public official' designation 'applies at the very least to those ... governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'"[18] This definition includes both elected officials and some officials who are not elected.[19] For an individual to be classified as a public official, their role must be of a nature that attracts public attention and debate about the person occupying it, independently of any scrutiny and discussion arising from specific allegations in question.[20]

In Rosenblatt v. Baer, 383 U.S. 75, the U.S. Supreme Court addressed, in a footnote, whether individuals who leave public office are still treated as public officials regarding defamatory statements about their actions while in office. The Court provided that such retired individuals could still be seen as public officials, emphasizing that their past actions in office continue to be of public interest and relevance despite no longer holding their positions.

However, in Lewis v. Coursolle Broad. of Wisconsin, Inc., 127 Wis. 2d 105, 377 N.W.2d 166, the Wisconsin Supreme Court ruled that a former state legislator, who had been out of office for three years, did not retain the status of a public official after retirement. Similarly, in Biskupic v. Cicero, 2008 WI App 117, ¶¶18-19, 313 Wis. 2d 225,

756 N.W.2d 649, the court of appeals determined that a former district attorney was no longer a "public official" following his term. Both cases established that individuals who are public officials while in office lose this designation for First Amendment purposes after they retire.[21]

Although Lewis and Biskupic appear to be inconsistent with Rosenblatt, the court of appeals is bound to follow them pursuant to Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) and Zarder v. Humana Ins. Co., 2010 WI 35, ¶¶53-58, 324 Wis. 2d 325, 782 N.W.2d 682.[22] This was affirmed in Wagner v Allen Media Broadcasting, 2024 WI App 9, ¶50, 410 Wis.2d 666, 3 N.W.3d 758.

7. **Public Figure**. "Public figures" are individuals who are not "public officials" but in whom the public has a justified and important interest for at least some purposes.[23] The court in Denny v. Mertz, 106 Wis.2d 636, 649-50, 318 N.W.2d 141 (1982) adopted the following test based on Gertz v. Robert Welch, Inc., supra, to determine whether an individual is a public figure:

> Analyzing the above cases, we consider the following criteria applicable to whether a defamation plaintiff may be considered a public controversy. First, there must be a public controversy. While courts are not well-equipped to make this determination as pointed out in Gertz, the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he has voluntarily injected himself into the controversy so as to influence the resolution of the issues involved. Factors, relevant to this test are whether the plaintiff's status gives him access to the media so as to rebut the defamation and whether a plaintiff should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Gertz, 418 U.S. at 344-45.

An individual can be categorized as a public figure plaintiff either in a "general" sense or for "limited" specific contexts.[24]

A "general purpose public figure" refers to a widely recognized celebrity, a person whose name is familiar in many households and whose actions and opinions are closely followed by the public due to their perceived significance or influence.[25]

A "limited purpose public figure" refers to a person who, while not broadly famous or well-known, has become a public figure for a limited purpose due to their involvement in a particular public controversy.[26]

A person can become a public figure with respect to a limited public controversy either by voluntarily injecting themselves into it, or because their activities "almost inevitably" thrust them in a central role within that controversy.[27] A person can also become an involuntary public figure unintentionally, either due to bad luck or by being drawn into a public controversy.[28]

Whether an individual is a limited purpose public figure is a question of law.[29]

Determining Limited Purpose Public Figure Status: The question of whether a person is a limited purpose public figure is an issue left solely to the court to decide as a matter of law, not an issue of fact to be decided by the jury. Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis.2d 105, 110, 377 N.W.2d 166 (1985). The court of appeals has said, that while the ultimate question of whether a plaintiff is a limited purpose public figure is a question of law, material factual disputes on this issue can arise. These factual disputes are not to be left to the jury at trial but should be resolved by the trial court, after an evidentiary hearing solely on that issue. Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995). See also Erdmann v. SF Broad. of Green Bay, Inc., 229 Wis. 2d at 165, 599 N.W.2d 1

In Denny v. Mertz, 106 Wis. 2d 636, 649-650, 318 N.W.2d 141, the Wisconsin Supreme Court established the following two-prong test to determine whether a plaintiff is a limited purpose public figure:

(1) there must be a public controversy; and
(2) the court must look at the nature of the plaintiff's involvement in the public controversy."

Bay View Packing, supra, at 678 (citing Denny v. Mertz, 106 Wis. 2d 636, 649-50, 318 N.W.2d 141 (1982)).

In Wiegel, supra, the court of appeals expanded on Denny and provided the following three-step analysis to be used when considering the second prong of the test:

(1) isolate the controversy at issue;
(2) examine the plaintiff's role in the controversy to determine whether it is more than trivial or tangential; and
(3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy.

Wiegel, supra, at 82-82.

The U.S. Supreme Court has recognized that "it may be possible for someone to become a public figure through no purposeful action of [their] own." Gertz v. Robert Welch, 418 U.S. at 345, 94 S.Ct. 2997. Hypothetically, a person may become an involuntary public figure "without their consent or will, purely through bad luck, or by being drawn into public controversies." Bay View Packing, supra, at 682-83.

8. **Media Defendant**. Although case law does not explicitly define "media defendant," the Court in Denny v. Mertz, supra, did suggest that the term generally refers to any entity that publishes or broadcasts an allegedly defamatory statement.[30]

It is important to note that the Wisconsin Supreme Court has not yet addressed whether the actual malice standard, applicable when the plaintiff is a public figure, also applies in situations where the defendant is not a media entity. However, the court of appeals in Sidoff v. Merry, 2023 WI App 49, 409 Wis. 2d 186, 203, 996 N.W.2d 88, considered the opinion in Underwager v. Salter, 22 F.3d 730, 732 (7th Cir. 1994) persuasive on the issue. In that particular case, the Seventh Circuit Court of Appeals determined that, according to Wisconsin law, some non-media defendants are entitled to the same actual malice protection as media defendants.[31]

TRIAL COURT'S INQUIRY ON WHETHER THE STATEMENT IS DEFAMATORY

The initial inquiry in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is normally presented on a motion to dismiss. On a motion to dismiss, it is the function of the court to determine whether a communication is capable of a defamatory meaning. If the communication is capable of a defamatory as well as a nondefamatory meaning, then a jury question is presented. Only if the communication cannot reasonably be understood as defamatory should the motion be granted.[32] The question to the jury is whether the communication made was reasonably understood in a defamatory sense by the persons to whom it was published.[33]

The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one.[34] In Frinzi v. Hanson, 30 Wis.2d 271, 276, 140 N.W.2d 259 (1966), the court said:

> The words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered.

Thus, Wisconsin applies the "reasonable interpretation" test. The trier of fact should not give the statement a "strained" or "unstructured construction," and the statement should be evaluated in context.[35] On a motion to dismiss, how does this "reasonable interpretation" standard relate to the requirement that complaints are to be liberally construed? Wis. Stat. § 802.03(6) governs pleadings in an action for libel or slander:

> (6) LIBEL OR SLANDER. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

MALICE IN DEFAMATION ACTIONS

Wisconsin defamation law recognizes three types of malice: implied malice, actual malice, and express malice.

1. **Implied Malice**. The element of malice creates some confusion in analyzing the various types of defamation actions. As a general principle, Wisconsin tort law holds that malice is an element of actionable defamation.[36] However, the Supreme Court has implied the existence of such malice from the publication of a defamatory statement itself unless a conditional privilege applies.[37]

2. **Actual Malice and Express Malice**. In cases where a constitutional privilege is involved or where punitive damages are being sought, the difference between actual and express malice is important. The definitions of these two types of malice are contained in the following passage from Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975):

> "Actual malice" in defamation cases refers to a constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis.2d 578, 587, 588, 196 N.W.2d 685:
>
> At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the Supreme Court in Rosenbloom also referred to this type of malice as "common law malice." "Actual malice" (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement

was false or published with reckless disregard of whether it was false or not. "Actual malice" is what is required for a constitutional determination of libel under New York Times.

"Express" and "actual" malice are very different concepts.

The term "actual malice" arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[38]

The problem of actual malice arises in the cases involving first amendment protections afforded to the media, such as newspapers, television and radio, or comments made about public officers or public figures.

DEFENSES TO A DEFAMATION CLAIM

1. Truth. As stated earlier, the "substantial truth" of the alleged defamatory statement is an absolute defense to the claim.[39] In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false.[40] The holding in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common, law which placed the burden of proving that the statement was true on the defendant as an affirmative defense.[41] The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-media defendants was resolved in Laughland v. Beckett, 365 Wis. 2d 148, ¶¶23, 26 (Ct. App. 2015). There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true.[42] Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.

2. **Privilege**. Wisconsin law recognizes certain privileges that protect the communicator of a defamatory statement from liability. These privileges have been created to allow citizens, public officials, and media personnel to engage in communications that are useful to society with some protection from liability for the consequences that result from the communications. The most litigated of these privileges involve conditional privileges.

a. Absolute privilege

This type of privilege protects participants in judicial and legislative proceedings.[43] As

a general rule, this privilege protects the communicator of the defamatory statement if the statement has some relation to the matter involved in the proceeding.

b. Conditional privileges created by common law

Wisconsin law recognizes that some communications are conditionally privileged. In Lathan v. Journal Co.,[44] the court stated:

> There are also certain occasions where a defamation is conditionally privileged. Conditional privileges or immunities from liability for defamation are based on public policy which recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation.

At common law, a person is privileged to make a statement about another person even though it is defamatory, so long as he or she is making the statement to protect certain defined interests and he or she did not abuse the privilege.

The types of communications that are protected by a conditional privilege are those statements (1) to protect the communicator's interest; (2) to protect the interest of the recipient or a third person; (3) to protect a common interest or a family relationship; and (4) statements to a person who may act in the public interest.[45]

When the defamatory communication is privileged, the law will not imply or impute malice.[46] If the privilege is abused, the communicator of the defamatory statement is not protected. In earlier case law, the court had held that this type of privilege is "conditional" because the statement must be reasonably calculated to accomplish the privileged purpose and must be made without "malice."[47] Later, in Ranous v. Hughes, supra, the court recognized that the word "malice" expressed in the Hett decision was "probably unfortunate."[48] The court, instead of retaining the "malice" concept from Hett, adopted the Restatement approach which speaks in terms of "abuse of privilege." The court then recognized the five conditions contained in Restatement, Second, Torts which may constitute an abuse of the privilege: (1) because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter (see §§ 600-602); (2) because the defamatory matter is published for some purpose other than that for which the particular privilege is given (see § 603); (3) because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege (see § 604); (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (see § 605); or (5) the publication includes unprivileged matter as well as

privileged matter (see § 605A).

A finding of express malice, i.e., ill will, spite, etc., will also constitute an abuse of the conditional privilege.[49]

Subsequent to the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., supra, the Restatement substituted a new test of abuse of privilege, namely: "actual knowledge of falsity or reckless disregard as to truth or falsity."

C. Conditional privileges created by the United States Constitution

A constitutional conditional privilege refers to the protection afforded media sources (and also to nonmedia persons, where the statement involves a matter of a public interest or concern) under the first amendment. The principal case establishing this constitutional privilege is New York Times Co. v. Sullivan, supra. The effect of the constitutional conditional privilege is that the court will require some finding of "fault" on the part of the defendant instead of allowing the strict liability which exists at common law where malice is implied. The degree of "fault" required by this privilege depends on the nature of the plaintiff. Where the plaintiff is a private individual, only negligence by the defendant media source or individual is required to be shown. Denny v. Mertz, supra. However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e., actual knowledge or with reckless disregard of whether the statement was true or false. In discussing the Gertz decision, the court, in Denny v. Mertz, explained the rationale in Gertz for permitting a less rigorous showing of "fault" when a private plaintiff was seeking recovery. The court, in Denny, supra, stated:

The [Gertz] court justified divergent standards for public figures and private individuals on the ground that public figures had greater access to the media and so could more effectively counteract defamations. It also reasoned that public figures had, by seeking prominent roles for themselves, assumed a risk of being libeled, which was not true of private individuals. 418 U.S. at 344.[50]

In Gertz v. Robert Welch, Inc., supra, the United States Supreme Court permitted the states to adopt the degree of protection to be afforded statements involving private persons so long as the states did not impose liability without fault. The Wisconsin Supreme Court, in response to Gertz, stated that in a defamation action involving a private plaintiff in a matter of private concern, the required showing of fault is simple negligence. Denny v. Mertz, supra.

D. Statutory privilege

Wisconsin statutes create an absolute privilege which protects persons reporting legislative, judicial, or other public official proceedings. Wis. Stat. § 895.05(1) states:

Damages in Actions For Libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication of such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

TYPES OF DEFAMATION ACTIONS

Generally, an action for defamation will fall into one of four categories according to the nature of the parties. At the end of this law note, there is a chart that compares the various types of defamation actions. These categories are:

a. Private individual versus a private individual with no conditional privilege applicable.

b. Private individual versus a private individual with a conditional nonconstitutional privilege applicable.

c. Private individual versus a media defendant which will always involve a conditional constitutional privilege.

d. Public official or public figure versus a media or nonmedia defendant which will always involve a conditional constitutional privilege.

In each of these categories, the requisite showing of "fault" is different.

1. When the action is brought by a private individual against another private individual, with no privilege involved, existence of malice is implied from the libelous matter itself.[51]

2. When the action is brought by a private individual against another private individual, with a conditional nonconstitutional privilege involved, liability can be established by proof of the defamatory statement[52], and abuse of the conditional privilege.[53]

3. When the action is brought by a private individual against a media defendant, thereby involving a conditional constitutional privilege, liability is established by proof that the media defendant was negligent in broadcasting or publishing the defamatory statement.[54]

4. In a case involving a public official or public figure, as defined in Denny, against a media defendant or a nonmedia individual, thereby involving a conditional constitutional privilege, the plaintiff must prove actual malice.[55]

BURDEN OF PROOF TO ESTABLISH CAUSE OF ACTION

1. In a case involving a private individual against another private individual, with no privilege involved, existence of malice is implied. The burden of proof of showing the defamatory statement was made is the ordinary burden.[56]

2. In the case involving a private individual versus a private individual, with a conditional nonconstitutional privilege involved, the plaintiff has the ordinary burden of proof to show the defamatory statement was made; i.e., greater weight of the credible evidence to a reasonable certainty.[57] The defendant has the ordinary burden to prove privilege as a defense to the action.[58]

3. In the case involving a private individual versus a media defendant, the plaintiff has the ordinary burden of proof; i.e., the greater weight of the credible evidence to a reasonable certainty. There is no Wisconsin case directly stating that the plaintiff has the ordinary burden of proof. However, the Gertz decision permits individual states to define for themselves the appropriate standard of liability in such cases. The court in Denny, supra[59], established for Wisconsin that a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. With negligence as the standard, the Committee concluded that ordinary burden of proof applies.

4. In cases involving a public official or a public figure versus a media defendant or private individual, the plaintiff has the middle burden of proof, i.e.; by evidence that is clear, satisfactory, and convincing to a reasonable certainty.[60]

RECOVERY OF COMPENSATORY DAMAGES

It is not necessary in libel actions to plead or prove actual damages of a pecuniary nature, called special damages.[61] If the writing alleged to be libelous is determined by the court to be capable of a defamatory meaning, an allegation of general damages is sufficient. Slanderous statements may, in certain instances, be classified as defamatory and slanderous per se, and, in such instances, the plaintiff may plead and recover general damages.[62] Oral statements imputing certain crimes, a loathsome disease, or affecting the plaintiff in his business, trade, profession, or office, or of unchastity to a woman are actionable without proof of special damages. All other slander not falling into these seemingly artificial categories is not actionable without alleging and proving special damages.[63]

In Denny v. Mertz, supra, the court stated that items of damage recoverable in libel and slander actions in Wisconsin are set forth in Wis JI-Civil 2516.

The burden of proof is the ordinary civil burden.

RECOVERY OF PUNITIVE DAMAGES

In cases involving a private individual against a private individual, whether or not a conditional unconstitutional privilege is involved, the plaintiff must establish express malice to recover punitive damages.[64] In cases involving a private individual against a media defendant, the plaintiff must prove actual malice to recover punitive damages.[65]

In cases involving a public official or public figure against a media defendant or nonmedia individual, the plaintiff can only recover punitive damages upon a showing of express malice.

It should finally be noted that in a case such as this where the New York Times standards apply and where punitive damages are sought, there must be a finding of both express and actual malice to support an award of punitive damages: "Express malice" to meet the criteria for awarding punitive damages and "actual malice" to meet the constitutional requirements for liability at all.[66]

The decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), establishes the standard for the required degree of proof to be applied to punitive damage claims. In Wangen, the court held that the middle burden of proof shall apply to punitive damage claims. Therefore, the plaintiff must establish its punitive damage claims to a reasonable certainty by evidence that is clear, satisfactory, and convincing. This burden of proof applies to all types of defamatory actions, whether involving conditional privileges

or not.

TYPES OF DEFAMATION ACTIONS - CHART

The following page compares the different types of defamation actions as to elements and burdens of proof.

DEFAMATION SERIES

The following list shows the instructions on substantive law and damages included in this defamation series.

2501 Defamation: Private Individual Versus Private Individual, No Privilege
2505 Defamation: Truth as a Defense (Nonmedia Defendant)
2505A Defamation: Truth of Statement (First Amendment Cases)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard)
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice)
2513 Defamation: Express Malice
2516 Defamation: Compensatory Damages
2517.5 Defamation: Public Official: Abuse of Privilege
2520 Defamation: Punitive Damages

TYPES OF DEFAMATION ACTIONS IN WISCONSIN

Type of Plaintiff	Type of Defendant	Degree of "Fault" Necessary for Compensatory Damages	Burden of Proof for Compensatory Damages	Conduct Necessary for Punitive Damages	Burden of Proof for Punitive Damages
Private individual	Private with no confidential privilege	Defamatory statement only (malice is implied or imputed)	Ordinary Calero v. Del Chemical 68 Wis.2d 487, 500	Express malice Dalton v. Meister 52 Wis.2d 173, 179, Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Private with nonconstitutional conditional privilege	Defamatory statement and abuse of privilege Ranous v. Hughes, 30 Wis.2d 452, 468	Ordinary, Calero, supra at 500	Express malice Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, p. 183	Negligence Gertz v. Robert Welsh, Inc., 418 U.S. 323, 347, held that states establish the standard of liability; Denny v. Mertz, 106 Wis.2d 636, 654 established the negligence standard	Ordinary	Actual malice Denny, supra at 659 Gertz, supra at 350	Middle - Wangen, supra at 300
Public figure	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, supra at 183	Actual malice New York Times v. Sullivan, 376 U.S. 254, 279-280 Calero, supra at 500 Polzin v. Helmbrecht, 54 Wis.2d 578, 587-588	Middle Calero, supra at 500	Express malice Polzin, supra at 588	Middle - Wangen, supra at 300

NOTES

1. See Donohoo v. Action Wisconsin Inc., 2008 WI 56, ¶37, 309 Wis. 2d 704, 750 N.W.2d 739. In Sidoff v. Merry, 2023 WI App 49, 409 Wis. 2d 186, 996 N.W.2d 88, the court observed in a footnote that the Wisconsin Supreme Court acknowledged a shift in the Court of Appeals' approach to the elements of defamation. While earlier opinions referenced four elements following the Restatement (Second) of Torts § 558 (1981), since 2008, the Court of Appeals has consistently adhered to the three elements outlined in Donohoo.

2. See Martin v. Outboard Marine Corp., 15 Wis.2d 452, 113 N.W.2d 135 (1962).

3. See Schaefer v. State Bar of Wis., 77 Wis.2d 120, 252 N.W.2d 343 (1977). See also DeMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973).

4. Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275.

5. Anderson, supra.

6. Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

7. See Ranous v. Hughes, 30 Wis.2d 452, 461 62, 141 N.W.2d 251 (1966). See also Schoenfeld v. Journal Co., 204 Wis. 132, 235 N.W. 442 (1931); Wis. Stat. § 802.03(6); and Restatement, Second, Torts § 577 (1977).

In Wagner v. Allen Media Broadcasting, 2024 WI App 9, 410 Wis.2d 666, ¶33, 3 N.W.3d 758(2024), the court noted the following:

> Our case law provides that, for a statement to be defamatory, it must "refer to some ascertained or ascertainable person, and that person must be the plaintiff." Arnold v. Ingram, 151 Wis. 438, 452, 138 N.W. 111 (1912) (citation omitted); see also Luthey v. Kronschnabl, 239 Wis. 375, 379, 1 N.W.2d 799 (1942). "If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory." Arnold, 151 Wis. at 452, 138 N.W. 111. This concept is sometimes referred to as "ascertainment." See Giwosky v. Journal Co., 71 Wis. 2d 1, 10 & n.9, 237 N.W.2d 36 (1976).

8. Restatement, Second, Torts § 566 (1977).

9. See, Converters Equip. Corp. v. Condes Corp., 80 Wis.2d 257, 263-64, 258 N.W.2d 712 (1977). See also Laughland v. Beckett, 2015 WI App 70, supra.

10. Sidoff v. Merry, 2023 WI App 49, ¶14, 409 Wis. 2d 186, 996 N.W.2d 88. See also Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 535, 563 N.W.2d 472 (1997).

11. Sidoff, supra, at ¶14. See also New York Times Co., supra, at 279-80.

12. Denny v. Mertz, 106 Wis.2d 637, 654, 318 N.W.2d 141 (1982).

13. Denny, supra, at 639.

14. Denny, supra, at 657.

15. See Polzin v. Helmbrecht, 54 Wis.2d 578, 587, 196 N.W.2d 685 (1972).

16. See New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964); Polzin, supra, at 587-88.

17. See Lewis v. Coursolle Broad. of Wisconsin, Inc., 127 Wis. 2d 105, 114, 377 N.W.2d 166 (1985).

18. Wagner v Allen Media Broadcasting, 2024 WI App 9, ¶51, 410 Wis.2d 666, 3 N.W.3d 758, citing Pronger v. O'Dell, 127 Wis. 2d 292, 295, 379 N.W.2d 330 (Ct. App. 1985).

19. Miller v. Minority Broth. of Fire Prot., 158 Wis. 2d 589, 599, 463 N.W.2d 690 (Ct. App. 1990).

20. Rosenblatt v. Baer, 383 U.S. 75, 87, 86 S.Ct. 669.

21. Following its decision that Lewis, due to his retirement, was no longer a public official, the Wisconsin Supreme Court further concluded that he was a general purpose public figure. This determination was based on the recognition that his actions while in office had brought him widespread fame and notoriety, thus requiring him to allege actual malice in his case. Lewis v. Coursolle Broad. of Wisconsin, Inc., 127 Wis. 2d 105, 115-16, 377 N.W.2d 166 (1985). Adopting a similar stance, the court in Biskupic determined that the plaintiff had achieved the status of a general purpose public figure. This was due to his controversial actions while in office, which continued to be a topic of active public discussion, thus obliging him to allege actual malice in his claim. Biskupic v. Cicero, 2008 WI App 117, ¶¶24-26, 313 Wis. 2d 225, 756 N.W.2d 649.

22. Pursuant to Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) and Zarder v. Humana Ins. Co., 2010 WI 35, ¶¶53-58, 324 Wis. 2d 325, 782 N.W.2d 682.22, the court of appeals cannot dismiss a statement in a prior Wisconsin Supreme Court opinion as dictum. See also Wagner v Allen Media Broadcasting, 2024 WI App 9, ¶50, 410 Wis.2d 666, 3 N.W.3d 758.

23. See Biskupic, supra, at ¶15, and Lewis, supra, at 113.

24. Sidoff, supra, at ¶15.

25. Wiegel v. Capital Times Co., 145 Wis. 2d 71, 82, 426 N.W.2d 43 (Ct. App. 1988).

26. Sidoff, supra, at ¶16. See also Wiegel, supra, at 82; Bay View Packing Co. v. Taff, 198 Wis. 2d 653, 676, 543 N.W.2d 522 (Ct. App. 1995), and Erdmann v. SF Broad. of Green Bay, Inc., 229 Wis. 2d 156, 165, 599 N.W.2d 1 (Ct. App. 1999).

27. Sidoff, supra, at ¶16 (citing Weigel, supra, at 85-86, and Erdmann, supra, at 164).

28. Bay View Packing, supra, at 682-83.

29. Sidoff, supra, at ¶19.

30. Denny, supra, at 660. The Court explained that the constitutional actual malice standard properly applies when "[a] defamation ... is published or broadcast" because it "gets infinitely greater circulation and can do the defamed person much greater harm."

31. Underwager v. Salter, 22 F.3d 730, 732 (7th Cir. 1994).

32. Starobin v. Northridge Lakes, 91 Wis.2d 1, 287 N.W.2d 747 (1980). See also Denny, supra; Westby v. Madison Newspapers, Inc., 81 Wis.2d 1, 5, 259 N.W.2d 691 (1977); Schaefer, supra; DiMiceli,

supra; Polzin, supra; and Lathan v. Journal Co., 30 Wis.2d 146, 140 N.W.2d 417 (1966).

33. Schaefer, supra, at 124-25.

34. Meier v. Meurer, 8 Wis.2d 24, 29, 98 N.W.2d 411 (1959).

35. Schaefer, supra.

36. Denny, supra, at 657.

37. Polzin v. Helmbrecht, supra. See also Denny, supra, at 657.

38. New York Times Co., supra, at 279.

39. Schaefer v. State Bar of Wis., supra.

40. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

41. Denny, supra, at 661.

42. Laughland v. Beckett, 365 Wis. 2d 148, ¶¶23, 26 (Ct. App. 2015).

43. Spoehr v. Mittlestadt, 34 Wis.2d 653, 150 N.W.2d 502 (1967); Hartman v. Buerger, 71 Wis.2d 393, 398 400, 238 N.W.2d 505 (1976); Restatement, Second, Torts §§ 583 92 (1977).

44. Lathan v. Journal Co., supra, at 152.

45. Restatement, Second, Torts §§ 594 98 (1977).

46. Hett v. Ploetz, 20 Wis.2d 55, 121 N.W.2d 270 (1963).

47. Hett v. Ploetz, supra.

48. Ranous v. Hughes, supra, at 468.

49. Calero, supra; Polzin, supra, at 584; Ranous, supra, at 469; Restatement, Second, Torts § 603 Comment a (1977).

50. Denny, supra, at 645.

51. Denny, supra, at 657.

52. Calero v. Del Chemical Corp., supra, at 500.

53. Ranous, supra, at 468.

54. Denny, supra, at 654.

55. New York Times Co., supra, at 726; Calero, supra, at 500; Polzin, supra, at 586; see also Dalton v. Meister, 52 Wis.2d 173, 188 N.W.2d 494 (1971).

56. Denny, supra, at 657.

57. Calero, supra, at 500.

58. Calero, supra, at 499.

59. Denny, supra, at 654.

60. Polzin, supra, at 586; Calero, supra, at 500.

61. Dalton, supra; Lawrence v. Jewell Companies, Inc., 53 Wis.2d 656, 193 N.W.2d 695 (1972).

62. Starobin v. Northridge Lakes Co., supra.

63. Martin v. Outboard Marine Corp., supra.

64. Calero, supra, at 506; Dalton, supra, at 179.

65. Gertz, supra; Denny, supra, at 659.

66. Polzin, supra, at 588.

COMMENT

This law note was approved in 1987 and revised in 2016 and 2022. The format was revised in 2002. This revision, approved by the Committee in May 2024, expanded on the designations of "public official," "public figure," and "media defendant."