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ARTICLES

TOWARD A MODERN DEFAMATION LAW IN VIRGINIA: QUESTIONS ANSWERED, QUESTIONS RAISED

David C. Kohler*

I. INTRODUCTION

Since the United States Supreme Court decided in 1964 that defamatory statements were entitled to some protection under the first amendment,1 the law of defamation has been in a virtual state of chaos.2 For more than twenty years, state courts have been faced with the task of adapting their own rules governing libel and slander—rules which in many cases were already complex and confusing—with newly fashioned, rapidly changing, and often unpredictable layers of first amendment doctrine.3

In only a few cases before 1985 had the Virginia Supreme Court touched on the many difficult questions raised by this newly emerging doctrine, and those cases barely scratched the surface.4

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2. At a recent libel symposium sponsored by the American Bar Association and American Newspaper Publisher’s Association, Professor Marc Franklin of Stanford University likened the subject to visiting a zoo. As reported in the Media Law Reporter:
   First, Franklin said, there is the “camel question;” like that animal libel law is an oddity, operated on by successive generations of judges over several hundred years. Next, there is the “elephant question;” examining libel law is like the proverbial examination of an elephant by six blind men, each finding a different animal, he said. Finally, Franklin said, there is the cage for the “new animal,” an undetermined future form of libel law.


In February, 1985, however, the floodgates opened. Since then, the Virginia Supreme Court has issued five opinions that will affect virtually all actions for defamation in the commonwealth. Part I of this article reviews those opinions and discusses generally their effect on defamation law in Virginia. Part II examines in greater detail some of the more important questions raised by this recent wave of decisions.

II. THE CASES

A. Gazette, Inc. v. Harris: The Standard of Liability and More

The first and possibly most significant shot in the battle of redefining Virginia defamation law was fired in Gazette, Inc. v. Harris, an opinion that considered a wide range of issues, including the standard of liability in actions brought by private individuals seeking compensatory damages, the scope of appellate review of defamation verdicts, and the proper measure of damages for purely intangible injuries. The Virginia Supreme Court's opinion in Harris actually decided a quartet of cases, which had been consolidated for decision. All of the cases were brought by private individuals. Three of them were against small newspapers, while the fourth was against an individual defendant.

In the first case, Harris, three persons filed suit against The Gazette, a small weekly newspaper published in Goochland and Powhatan counties. The case arose out of a report in the public records section of the newspaper on two incidents of aggravated sexual battery involving children. In its story, The Gazette set forth information taken from the Goochland County Juvenile and...
Domestic Relations Court docket book. While all the information reported was factually accurate, the column headings in the docket book designating the status of the various parties (i.e., accused, complainant) were omitted. Because these column headings had been omitted, the plaintiffs, who were the parents of the allegedly victimized children, argued that the report was ambiguous and could be read as accusing them of having committed the crime of aggravated sexual battery. The jury agreed and awarded James and Virginia Harris and Barbara Sweeney compensatory damages in the amounts of $30,000, $10,000, and $10,000, respectively. No punitive damages were awarded.

The second case, *Charlottesville Newspaper, Inc. v. Matthews*, arose out of an article published in *The Daily Progress* in Charlottesville, Virginia, about a rape trial which resulted in an acquittal on the charge of rape, but a conviction for the crime of fornication. Plaintiff, the alleged rape victim, was referred to in the story as Miss Mathews, and it was reported that she was pregnant at the time of the trial. Plaintiff was not, in fact, unmarried, and she claimed that the error, when read in conjunction with the report of her pregnancy, implied that she had committed the crime of fornication and had become pregnant from the act. The jury agreed and assessed compensatory damages against the newspaper in the amount of $25,000. Plaintiff had abandoned her claim for punitive damages.

The third newspaper case, *Port Packet Corp. v. Lewis*, arose in Alexandria, Virginia, out of an article on child abuse published by *The Port Packet*. In addition to discussing the subject generally, the article reported on two suspected incidents of abuse, but did not give the names of the allegedly abused children or any other parties involved. The alleged victim in one of the cases, who was

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9. *Id.* at 20-21, 325 S.E.2d at 728-29.
10. *Id.*
11. *Id.* at 20, 325 S.E.2d at 728.
12. *Id.* at 21, 325 S.E.2d at 728.
13. *Id.*
14. *Id.* at 27-32, 325 S.E.2d at 732-35.
15. *Id.* at 27-28, 325 S.E.2d at 732-33.
16. *Id.* at 27, 325 S.E.2d at 732-33.
17. *Id.*
18. *Id.* at 28, 325 S.E.2d at 732.
19. *Id.* at 32-43, 325 S.E.2d at 735-42.
20. *Id.* at 32, 325 S.E.2d at 735.
21. *Id.* at 33-34, 325 S.E.2d at 736-37.
fictitiously named Mark, was identified only as a nine-month old boy who had recently died of a fractured skull at Alexandria Hospital in early June.\textsuperscript{22} Testimony at trial showed that this was the only information that had been given to the reporter about the identity of the child, and he did not know who Mark or his parents were.\textsuperscript{23} Nevertheless, Mark’s parents, who were the plaintiffs in the case, came forward, alleging that they had been accused of murdering their child.\textsuperscript{24} Plaintiffs proved at trial that the child’s death was the result of an accident, and that the police investigation had been dropped.\textsuperscript{25} The jury awarded compensatory damages of $50,000 and punitive damages of $100,000.\textsuperscript{26}

The final case, \textit{Fleming v. Moore},\textsuperscript{27} involved two individuals, and was before the supreme court for the second time.\textsuperscript{28} Plaintiff, a white professor at the University of Virginia, claimed to have been libeled by an advertisement published in \textit{The Cavalier Daily} accusing him of racism.\textsuperscript{29} Defendant, a black real estate developer, placed the advertisement when his request to develop land next to plaintiff’s residence was denied.\textsuperscript{30} The jury awarded plaintiff $100,000 compensatory damages and $250,000 punitive damages, plus twelve percent interest on the punitive damages from January 16, 1977.\textsuperscript{31}

1. The Dominant Issue

Described by the court as the “dominant issue,” the standard of fault in Virginia applicable to private persons who seek compensatory damages in defamation actions was previously a question of considerable uncertainty.\textsuperscript{32} The question arose in 1974 when the

\begin{itemize}
\item \textsuperscript{22} \textit{Id.} at 33, 325 S.E.2d at 736.
\item \textsuperscript{23} \textit{Id.} at 36, 325 S.E.2d at 739.
\item \textsuperscript{24} \textit{Id.} at 32, 325 S.E.2d at 738.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 43-51, 325 S.E.2d at 742-47.
\item \textsuperscript{28} See Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) (\textit{Fleming I}—opinion issued by Virginia Supreme Court upon the first review of \textit{Fleming}).
\item \textsuperscript{29} \textit{Id.} at 43, 325 S.E.2d at 742.
\item \textsuperscript{30} \textit{Id.} at 44-45, 325 S.E.2d at 743.
\item \textsuperscript{31} \textit{Id.} at 43, 325 S.E.2d at 742.
\end{itemize}
United States Supreme Court, in Gertz v. Robert Welch, Inc., held that in defamation cases brought by private persons for compensatory damages the states were free to set their own standards of liability, so long as they did not impose liability without fault. Effectively, Gertz set negligence as the constitutional minimum.

The four cases before the Virginia Supreme Court involved plaintiffs who had been classified by the trial courts as private persons, not public officials or public figures. On appeal, the defendants argued that a negligence standard was intolerably vague and would necessarily result in substantial restrictions on free speech. Joining the majority of states that have considered the issue, the court rejected these arguments, holding that where a private person sues for compensatory damages, recovery may be had "upon proof by a preponderance of the evidence that the publication was false, and that the defendant either knew it to be false . . . or acted negligently in failing to ascertain the facts on which the publication was based." The standard is applicable to media and non-

34. Gertz held that punitive damages can be recovered only upon clear and convincing proof of knowledge of falsity or reckless disregard for the truth. Gertz, 418 U.S. at 349.
35. See generally R. Sack, supra note 3, at 207.
36. In a series of earlier cases, the United States Supreme Court required that public figures and public officials prove by clear and convincing evidence publication with knowledge of falsity or reckless disregard for the truth before recovering any damages. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (public figures); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (public officials). While knowledge of falsity is self-defining, reckless disregard for the truth is a term of art requiring a showing that the defendant published despite a "high degree of awareness of . . . probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964); see, e.g., St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."). In the three Harris cases involving press defendants, there was no contention that any of the plaintiffs were either public officials or public figures. However, in Fleming, the defendant did argue that the plaintiff was a public figure, having injected himself into a land use controversy. In Fleming I, the court held that plaintiff Moore was not a public figure. See Fleming I, 221 Va. 884, 891-92, 275 S.E.2d 632, 637 (1981). In the second case, it declined to review the issue again. Harris, 229 Va. at 43, 325 S.E.2d at 742.
38. In Harris, the court pointed out that at least 30 states had adopted a negligence standard. 229 Va. at 16, 325 S.E.2d at 726.
39. Id. at 15, 325 S.E.2d at 724-26. In placing the burden of proving falsity as well as fault on the plaintiff, the Virginia Supreme Court anticipated by slightly more than one year the United States Supreme Court's resolution of that issue. See Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986), cert. denied & appeal dismissed, 106 S. Ct. 1784 (1986).
media defendants alike, but is limited "to circumstances where the defamatory statement makes substantial danger to reputation apparent." If the offending words do not present substantial reputational danger, the plaintiff must prove publication of a known or reckless falsity—the standard applicable to public officials and public figures.

Justices Harrison and Poff dissented on the ground that a negligence standard would inadequately protect free speech. Justice Harrison would have required proof of publication with knowledge of falsity or reckless disregard for the truth, while Justice Poff favored an intermediate standard of gross negligence.

2. The Requirement of Identification

To be actionable, a defamation must be "of and concerning" the plaintiff; the plaintiff must show that he or she was identified by the offending publication. In the Port Packet case, the defendants contended that this requirement had not been satisfied, since neither the plaintiffs nor their son had been named in the story. The supreme court rejected the argument on the grounds "that the publication was 'in its description or identification such as to lead those who knew or knew of the plaintiff[s] to believe that the article was intended to refer to [them]." Sufficient identifying details were found in the inclusion of "the child's sex and age, the nature of his injuries, when he died, how he died, the hospital where he died, and how long he lived after sustaining the injuries." Although neither the reporter nor the editor knew the identity of the child, the article and an accompanying editorial focused on parents of abused children, and the editorial advanced publicity as a means to combat child abuse. From these facts, the court held

40. Harris, 229 Va. at 17, 325 S.E.2d at 726.
41. Id. at 15, 325 S.E.2d at 725.
42. See supra note 36; see also infra text accompanying notes 169-86 for a more complete discussion of this issue.
43. Harris, 229 Va. at 53-54, 325 S.E.2d at 748-49 (Harrison, J., dissenting).
44. Id. at 52-53, 325 S.E.2d at 747-48 (Poff, J., dissenting). This is a standard similar to the one adopted by New York, requiring the plaintiff to prove gross irresponsibility by the publisher. See Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).
47. Harris, 229 Va. at 37-38, 325 S.E.2d at 738.
that "the jury could reasonably conclude that the newspaper intended to refer directly to 'Mark's' abusers, his . . . parents, and therefore, indirectly to the [plaintiffs]." In explaining its holding, the court emphasized, however, that "[t]his was not simply a report stating that an infant recently died in a local hospital of head injuries in a case of suspected child abuse." In such a case the publication presumably would not have been actionable.

3. The Status of Common Law Privilege

Because the Harriss court established a new standard for the recovery of compensatory damages, it had to determine whether the traditional common law privileges retained their vitality, or were subsumed by the new standard. Recognizing that the malice required to defeat a common law privilege, which was defined by the court as "personal spite, or ill will, independent of the occasion on which the communication was made," was different from negligence, it opted in favor of retaining the privileges. Thus, a defendant in a defamation suit who negligently publishes a defamatory falsehood may still defeat liability if he can establish that the occasion of publication was a privileged one.

4. The Standard for Appellate Review

In all the cases before it, the court was called on to determine by what standard an appellate court is to review a jury's finding that the applicable standard of fault was violated. To fix the proper scope of appellate review, the court had to interpret the 1984 decla-

48. Id. at 39, 325 S.E.2d at 739.
49. Id. at 38, 325 S.E.2d at 738.
50. At common law, a privilege to publish defamatory words was recognized "where the author or publisher . . . acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests." Williams Printing Co. v. Sanders, 113 Va. 156, 176, 73 S.E. 472, 476 (1912). Some of the more common privileged occasions include publication of fair and substantially accurate reports of public records, see, e.g., Alexandria Gazette Corp. v. West, 198 Va. 154, 93 S.E.2d 274 (1956); comments by an employer to his employees and other interested persons concerning the reason for the discharge of an employee, see, e.g., Kroger Co. v. Young, 210 Va. 564, 172 S.E.2d 720 (1970); and statements made by one in his own defense, see, e.g., Haycox v. Dunn, 200 Va. 212, 104 S.E.2d 800 (1958). To defeat a privilege, the plaintiff must show that the offending words were published with common law malice, or that the privilege was otherwise exceeded, such as by the use of excessively intemperate language. See, e.g., Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 154-55, 334 S.E.2d 846, 853-54 (1985). See generally infra text accompanying notes 91-96.
sion of the United States Supreme Court in Bose Corp. v. Consumers Union of the United States, Inc.\(^{52}\) Bose held that before affirming a finding of publication with knowledge of falsity or reckless disregard for the truth—the standard fashioned in the seminal case of New York Times Co. v. Sullivan\(^{53}\)—the reviewing court must conduct an independent examination of the entire record to determine whether the finding is supported by clear and convincing evidence.\(^{54}\) The Virginia Supreme Court recognized that the requirement of independent review imposed by Bose is a rule of federal constitutional law, and must be applied to all issues requiring application of the New York Times standard.\(^{55}\)

On the question of an award of compensatory damages under a negligence standard, the court rejected the heightened review standards of Bose, reasoning that "[t]he negligence standard for compensatory damages that we have adopted is not a matter of governing federal constitutional law."\(^{56}\) The court held that the standard of review mandated by section 8.01-680 of the Virginia Code—requiring that a judgment be plainly wrong or without evidence to support it—would continue to govern.\(^{57}\)

5. Proof of New York Times Malice

In both the Port Packet and Fleming cases, the jury had awarded substantial punitive damages after determining that the defendants had published with knowledge of falsity or reckless disregard for the truth. Applying the Bose standard of review, the supreme court reversed the finding in Port Packet, but affirmed it in Fleming. In Port Packet, the court found importance in the fact that the story had been "researched in depth" and "edited in a deliberate fashion with consideration given to accuracy."\(^{58}\) The court also noted that the newspaper had relied on an "official source" in preparing the article, and that the editor approving it believed that they had "complied with [the] standards of proper

\begin{footnotes}
\item[52.] 466 U.S. 485 (1984).
\item[53.] 376 U.S. 254 (1964).
\item[54.] Bose, 466 U.S. at 499.
\item[55.] Gazette, Inc. v. Harris, 229 Va. 1, 19, 325 S.E.2d 713, 727 (1985). This includes cases brought by public officials or public figures and those brought by private figures where the offending words do not make substantial danger to reputation apparent and where punitive damages are sought. See supra notes 34, 36; see also infra text accompanying notes 167-86.
\item[56.] Harris, 229 Va. at 20, 325 S.E.2d at 728.
\item[57.] Id.
\item[58.] Id. at 42, 325 S.E.2d at 741.
\end{footnotes}
The plaintiff had argued that the reporter fabricated his description of the alleged incident of child abuse as "a vicious attack, . . . child beating, . . . [and] murder."90 The police officer who had been the source for the story testified that he only told the reporter that the case was one of suspected child abuse which was being treated as a homicide.91 Nevertheless, the court rejected the plaintiff’s attempts to elevate these editorial judgments to the level of deliberate or reckless falsification, effectively holding that publishers are entitled to choose their own words of description, providing there is some basis for doing so.92

The court reached a different conclusion in Fleming, finding that there was ample evidence that the defendant had published with reckless disregard for the truth. In reviewing the evidence presented by the plaintiff, the court stated that “[e]valuation of this element of proof must be from an objective standpoint, not merely from a subjective perspective.”93 This statement should not be misinterpreted, as the United States Supreme Court’s decisions clearly indicate that the New York Times fault standard is a subjective one.94 What the court doubtless was saying is that proof of the subjective standard may, in a proper case, be inferred from objective factors.95 This view is supported by the court’s observation that the defendant had “abandoned all judgment and reason in composing and publishing the advertisement,” and had no legitimate basis to make many of the charges leveled.96

59. Id.; see infra note 135 (concerning the role of expert testimony in such cases).
60. Harris, 229 Va. at 35, 325 S.E.2d at 737.
61. See id.
62. See id. at 42-43, 325 S.E.2d at 741-42; see also Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980).
63. Harris, 229 Va. at 50, 325 S.E.2d at 746.
65. Other cases have held that subjective malice can be inferred from accumulation of various objective indicia. See, e.g., Goldwater v. Ginzberg, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970); Guccione v. Hustler Magazine, Inc., 632 F. Supp. 313 (S.D.N.Y.), rev’d on other grounds, 800 F.2d 298 (2d Cir. 1986).
66. Harris, 229 Va. at 50, 325 S.E.2d at 746. See generally R. Sack, supra note 3, at 214-17.
6. Damages

In all four cases, the court was called on to review the size of various awards of compensatory and punitive damages. A common thread running through the compensatory damage awards was that the claimed injuries were intangible; in none of the cases did the plaintiffs prove any loss of money or any medical consequences of the emotional distress allegedly suffered. The damages allegedly suffered were injuries to reputation, humiliation, and emotional distress. Faced with such claims, the court affirmed compensatory awards of $50,000 or less, but vacated the award of $100,000 compensatory damages in Fleming, holding that it bore no relationship to the actual loss sustained. It thus seems reasonable to suggest, in light of these results, that the court may pay particularly close attention to very large awards which compensate a party for injuries of an intangible nature.

In the Fleming case, the court also found grossly excessive a punitive damages award of $250,000. The propriety of this award was reviewed under the heightened standard of Bose:

The independent examination we make on the punitive-damage issue is not limited to proof of punitive liability. The First Amendment implications flowing from the amount of such an award require the reviewing court to consider the effect of approval of such an award on self-censorship in derogation of the right of free speech.

In relation to the defendant’s net worth of approximately $1,000,000, the award was held to be “destructive.” Additionally, the court emphasized the lack of any tangible injury, recognizing that, “[w]hile the elements of compensatory damages differ from the requirements to establish punitive damages, many factors apply to both on appeal.”

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67. The court ordered that the trial court require the plaintiff to remit a “substantial portion of his recovery” or face a new trial on the issue of damages only. Gazette, Inc. v. Harris, 229 Va. 1, 48, 325 S.E.2d 713, 745 (1985).
69. Harris, 229 Va. at 50, 325 S.E.2d at 746.
70. Id. at 51, 325 S.E.2d at 746-47.
71. Id. at 51, 325 S.E.2d at 747.
B. Great Coastal Express, Inc. v. Ellington: The Purely Private Defamation

In Great Coastal Express, Inc. v. Ellington, the court faced a claim for defamation of a purely private nature: the plaintiff was neither a public official nor a public figure, and the subject matter of the offending words involved no matter of general public concern. The principal question presented was the extent to which the new rules articulated in Harris, which had involved words published on matters of general concern to the public, would apply to matters not of legitimate public interest.

Great Coastal arose out of the termination of Robert Ellington's employment as a truck driver. Mr. Ellington complained that he was defamed when the company gave the reason for his discharge as attempted bribery of a company mechanic in connection with an effort to have the r.p.m.'s of his truck increased. Ellington denied that he had offered the mechanic any bribe, and the company presented no evidence that he had, instead relying principally on its contention that the offending words were never spoken by a company official. The jury rejected this defense and awarded Ellington $20,000 compensatory damages and $50,000 punitive damages.

1. Per Se Defamation and Presumed Damages

The trial court instructed the jury that a charge of "commercial bribery" was defamatory per se, and that damages were thus presumed. Great Coastal challenged this instruction, arguing that whether words constitute a per se defamation is a jury question. This argument was easily dispensed with by the court. Whether such words were actionable per se depended on whether they charged the commission of a crime involving moral turpitude.

73. Id. at 145, 334 S.E.2d at 849.
74. Id. at 156, 334 S.E.2d at 855.
75. Id. at 146, 334 S.E.2d at 849.
76. See id. at 146-47, 334 S.E.2d at 849-50. Virginia recognizes four categories of defamatory words that are actionable per se:

(1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished.

(2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society.
Breaking no new ground, the court properly held that this issue presented a question of law, and that the circuit court's decision of the issue had been correct.\textsuperscript{27}

2. The Standard Applicable to Purely Private Defamations

The court in \textit{Great Coastal} faced the difficult issue of reconciling Virginia's common law, as modified by \textit{Harris}, with recent decisions of the United States Supreme Court relating to defamations involving no matter of public concern. In 1974, in \textit{Gertz v. Robert Welch, Inc.},\textsuperscript{78} the United States Supreme Court reversed the common law rules relating to presumed or punitive damages, holding that absent clear and convincing proof of a knowing or reckless falsity, such damages are unconstitutional.\textsuperscript{79} In addition, the \textit{Gertz} Court ruled that the common law rule of strict liability was no longer permissible in defamation cases.\textsuperscript{80} Shortly before the decision in \textit{Great Coastal}, however, the United States Supreme Court decided \textit{Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.}\textsuperscript{81} In its plurality opinion, the Court seems to have effected a partial return to the common law, holding that, in defamation cases involving no issue of public concern, presumed and punitive damages can be awarded even in the absence of a knowing or reckless falsity.\textsuperscript{82}

\textsuperscript{77} See \textit{Great Coastal}, 230 Va. at 148, 334 S.E.2d at 850. In \textit{Fleming I}, the defendant conceded that the issue was for the court, not the jury. See \textit{Fleming I}, 221 Va. at 889, 275 S.E.2d at 635. Virginia courts have long been deciding the question of moral turpitude as a matter of law. See, e.g., \textit{Bell v. Commonwealth}, 167 Va. 526, 536, 189 S.E. 441, 447 (1937).


\textsuperscript{79} See \textit{Gertz}, 418 U.S. at 349.

\textsuperscript{80} \textit{Id.} at 340; see also supra text accompanying notes 32-35.

\textsuperscript{81} \textit{Id.} at 2944-46. The plurality suggests that \textit{Gertz} was never intended to decide whether constitutional limitations on presumed and punitive damages apply in cases of defamation not involving an issue of public concern. \textit{Id. at 2944}. More persuasively, the dissent argues that a professed distrust of empowering courts to decide what is and what is not of public concern compelled the Court in \textit{Gertz} to hold as it did. See \textit{id.} at 2969-60 n.11 (Brennan, J., dissenting). The plurality's opinion is devoid of any attempt to define what constitutes a question of general public concern.
Only three Justices expressed this view, although Justice White and Chief Justice Burger concurred in the result; four Justices dissented. The Virginia Supreme Court thus was presented with the task of determining how these less than clear pronouncements of the United States Supreme Court should be applied in Virginia.

Although professing to "fully subscribe" to the plurality's opinion in Greenmoss Builders, the Virginia Supreme Court actually accepted only that part of the opinion revitalizing the doctrine of presumed damages in cases involving purely private disputes: "[I]f the published words are determined by the trial judge to be actionable per se at common law, compensatory [sic] damages for injury to reputation, humiliation, and embarrassment are presumed." On the question of when punitive damages can be recovered, the court declined to follow the lead in Greenmoss Builders. Instead, the court relied on the policy concerns expressed in Fleming I, which held that punitive damages may be recovered only upon clear and convincing proof of a knowing falsity or reckless disregard for the truth. Finally, notwithstanding Greenmoss Builders, the court decided that the negligence standard articulated in Harris, including its limitation in cases where no substantial damage to reputation is apparent, applies also to defamation cases arising out of the publication of words involving no issue of general public concern. In reality then, the Virginia Supreme Court carefully

83. See id. at 2940. The opinion of Justice Powell was joined by Justices O'Connor and Rehnquist.
87. Id.
88. Id. at 151, 334 S.E.2d at 853. In Fleming I, the court expressed concern over the unbridled use of punitive damages to punish speech. See Fleming I, 221 Va. 884, 893, 275 S.E.2d 623, 638 (1981) (quoting Gertz, 418 U.S. at 350). The court's concerns over abuse of this power appears to be justified by recent analyses of damage awards in defamation cases. See supra note 68.
89. Fleming I, 221 Va. at 893, 275 S.E.2d at 638.
90. See Great Coastal, 230 Va. at 151-52, 334 S.E.2d at 852. Greenmoss Builders did not consider whether the common law standard of strict liability could be employed in non-public concern defamation cases. See Greenmoss Builders, 105 S. Ct. at 2939. However, in light of the Court's rejection of Gertz in that context and its apparent revitalization of the
considered the implications of *Greenmoss Builders*, and chose only those aspects of the case that it believed struck a proper balance between the right of free expression and the protection of a person's reputation.

3. Qualified Privilege

Also presented in *Great Coastal* was the scope of protection offered by the various defamation privileges recognized at common law. The court's opinion on this point is significant for several reasons.

The court clearly defined what kinds of conduct may constitute an abuse of a common law privilege. Great Coastal argued on appeal that only clear and convincing proof of *New York Times* malice—knowledge of falsity or reckless disregard for the truth—should constitute an abuse of a privilege. The court rejected this view, holding that, in addition to *New York Times* malice, a common law privilege can be defeated by "common law malice," which includes ill will, excessive publication, or willful disregard for the plaintiff's rights. At the same time, while refusing to adopt *New York Times* malice as the only circumstance con-
stituting an abuse of privilege, the court did adopt clear and convincing evidence, the standard applicable to cases involving *New York Times* malice, as the burden of proof required to override the common law privileges. The court did this because it would be too confusing to expect a jury to master different burdens of proof to determine whether there was an abuse of the various constitutional and common law privileges that often both apply in a given defamation case.

C. Chaves v. Johnson and Crawford v. United Steel Workers: Protection for Expressions of Opinion

In two cases, *Chaves v. Johnson* and *Crawford v. United Steel Workers*, the Virginia Supreme Court, in radically different contexts, considered the actionability of statements of opinion. Unfortunately, though, the cases may raise more questions than they answer.

*Chaves* arose out of a proposed study by the City of Fredericksburg of its office space needs. Plaintiff Chaves, an architect, was the successful bidder for the contract to do the study. Defendant Johnson, another architect, was an unsuccessful bidder. After Chaves submitted his plan, the city reached an impasse over how to proceed. At that point, Johnson sent a letter to each council member complaining that he had not been selected to prepare the study, and stating that “it seems unreasonable to me that Council would retain an Architect who has had no prior experience in this type of project and agree to pay an Architectural fee that is over 50% more than what could be considered a reasonable fee.” A week after receiving this letter, the City Council terminated Chaves’ contract and retained Johnson. Shortly thereafter, Chaves filed a two count motion for judgment claiming, first, defamation, and second, tortious interference with his contractual rights. The jury awarded Chaves $70,000 actual damages under both counts, and under the defamation count only $15,000 dam-

95. Id. at 154, 334 S.E.2d at 854.
96. Id.
99. See infra notes 187-215 and accompanying text.
100. Chaves, 230 Va. at 115, 335 S.E.2d at 99.
101. Id. at 117, 335 S.E.2d at 100-01. At trial, eight of the eleven council members testified, each denying that they had been influenced by the letter. Id. at 118, 335 S.E.2d at 101.
ages for humiliation and injury to personal reputation and $15,000 punitive damages.\textsuperscript{102} The circuit court set aside the verdict on both counts. While reversing the circuit court’s ruling on the tortious interference claim,\textsuperscript{103} the supreme court affirmed the trial court’s action with respect to defamation, in large part\textsuperscript{104} on the grounds that

\textsuperscript{102} Id.

\textsuperscript{103} Id. at 122, 335 S.E.2d at 103-04. In reinstating the verdict as it applied to the tortious interference claim, the court rejected the defendant’s argument that his conduct was protected by the first amendment, reasoning that such an “intentional wrong to the property rights of another” is outside the scope of protection afforded by the Constitution. See id. at 122, 335 S.E.2d at 103. By giving such short shrift to this argument, the court ignored a substantial body of precedent to the contrary, and has created a great deal of potential uncertainty over the ability of citizens to exercise their constitutionally protected right to petition the government.

In Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers v. Pennington, 381 U.S. 657 (1965), the United States Supreme Court fashioned what has come to be known as the Noerr-Pennington doctrine. These two cases involved federal antitrust claims, and the Court held that liability cannot attach to the efforts of private parties to influence government officials, even if those efforts are intended to have an anticompetitive effect. The doctrine is grounded in the first amendment right to petition the government, see, e.g., Noerr, 365 U.S. at 136-38, and is not limited to antitrust claims. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912-15 (1982) (peaceful boycott of stores entitled to first amendment protection in action for interference with business). Numerous federal and state courts have held claims for tortious interference with business relationships to be governed by first amendment restrictions. See, e.g., Havoco of Am., Ltd. v. Hollobow, 702 F.2d 643, 648-51 (7th Cir. 1983); Missouri v. National Org. for Women, Inc., 620 F.2d 1301, 1316-19 (8th Cir. 1980); Pennwalt Corp. v. Zenith Laboratories, Inc., 472 F. Supp. 413, 423-24 (E.D. Mich. 1979); Protect Our Mountain Env't, Inc. v. District Court, 677 P. 2d 1361, 1385-69 (Colo. 1984); Searle v. Johnson, 646 P.2d 682, 684-89 (Utah 1982); Webb v. Fury, 282 S.E.2d 28, 33-37 (W. Va. 1981). Although there is a limited “sham” exception to the Noerr-Pennington doctrine, see, e.g., California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 511 (1972), there is no suggestion in Chaves that the exception would apply or was considered by the court. The Chaves court’s imposition of liability for nondefamatory, nonmalicious speech by a private citizen aimed at influencing the actions of his elected representatives may chill the ability of citizens to speak on issues relating to government, and may also reduce the flow of information to those charged with the responsibility for governing.

\textsuperscript{104} Chaves, 230 Va. at 118-19, 335 S.E.2d at 101-02. The supreme court also suggested that the offending words were not capable of a defamatory meaning. See id. at 118, 335 S.E.2d at 101. The court’s opinion in this regard is not entirely clear, as it talks only in terms of the words not being defamatory per se. Id. However, if the issue were so limited, plaintiff’s case would have been permitted to proceed upon proof of special damages. See infra text accompanying notes 216-55. There is no suggestion in the opinion that Chaves was unable to satisfy this burden. To the contrary, since Chaves had lost a profitable contract, it seems evident that the court meant that there was simply no defamation on which to base an action. This aspect of the opinion is consistent with existing precedent, which recognizes that to be capable of a defamatory meaning, words must be more than just unflattering; they must, in the words of Dean Prosser, impute the “idea of disgrace.” See W. Prosser, Law of Torts 739 (4th ed. 1971); see also R. Sack, supra note 3, at 45-48.
[p]ure expressions of opinion, not amounting to "fighting words," cannot form the basis of an action for defamation. The First Amendment to the Federal Constitution and article 1, section 12 of the Constitution of Virginia protect the right of the people to teach, preach, write, or speak any such opinion, however ill-founded, without inhibition by actions for libel and slander.\textsuperscript{105}

Thus, for the first time, Virginia recognized an absolute privilege to express opinion,\textsuperscript{106} and in so doing, entered perhaps the most abstruse area of defamation law that exists today.\textsuperscript{107}

\textsuperscript{105} Chaves, 230 Va. at 119, 335 S.E.2d at 101-02. It is important to note that the court chose to predicate its decision not only on the first amendment to the United States Constitution, but also on article I, section 12 of the Constitution of Virginia. This is the second time in recent memory that the court has chosen to rely on the Virginia Constitution to decide an issue of free speech. See Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 688, 281 S.E.2d 915, 922-23 (1981). In both instances, federal constitutional law was in a state of flux, and the court employed the Virginia Constitution to eliminate the uncertainty existing at the federal level.

\textsuperscript{106} In an earlier case, the Supreme Court of Virginia had refused to dismiss a defamation claim on these grounds, and was reversed by the United States Supreme Court. See Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin, 213 Va. 377, 192 S.E.2d 737 (1972), rev’d, 418 U.S. 264 (1974).

\textsuperscript{107} See infra text accompanying notes 188-215, for a more complete discussion of this issue.

The Virginia Supreme Court’s reinstatement of plaintiff Chaves’ verdict on the tortious interference count is irreconcilable with its holding that defendant’s words were a constitutionally protected opinion, in light of the United States Supreme Court’s decision in McDonald v. Smith, 105 S. Ct. 2787 (1985).

In McDonald, the defendant argued that an allegedly defamatory letter he sent to the President of the United States criticizing a candidate for United States Attorney in North Carolina was absolutely privileged under the petition clause of the first amendment. While rejecting an absolute privilege, the Court did recognize that the defendant’s activity was entitled to constitutional protection, and held that the plaintiff would have to prove publication of a known or reckless falsity as required by New York Times Co. v. Sullivan, 376 U.S. 254 (1964). See also Bagley v. Iowa Beef Processors, 13 Media L. Rep. (BNA) 1113, 1119-20 (8th Cir. 1986) (holding that principles articulated in Sullivan, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and their progeny apply to cases involving petitioning activity).

The Virginia Supreme Court’s Chaves decision runs afoul of McDonald in two respects. First, in Chaves, the Virginia Supreme Court refused to require that the plaintiff prove malice to recover on his tortious interference claim. Chaves, 230 Va. at 120-21, 335 S.E.2d at 102-03. McDonald clearly held that some fault requirement is necessary, strongly suggesting that the New York Times standard must be satisfied. See McDonald, 105 S. Ct. at 2791. While the Court of Appeals for the Eighth Circuit held, in Bagley, that a private figure could recover on a showing of fault consistent with Gertz (which in Virginia would be negligence), the court in Chaves eschewed any fault requirement.

Second, the Virginia Supreme Court’s conclusion that the defendant’s words were opinion should preclude any recovery on the tortious interference count, since that claim was based on the same facts as the defamation count. A simple change of label should not abrogate the applicability of the constitutional principles underlying McDonald. See Fitzgerald v. Penthouse Int’l, Ltd., 525 F. Supp. 585, 603-04 (D. Md. 1981), aff’d in part, rev’d in part on
Crawford v. United Steel Workers is another case in which the words could not be categorized as factual. Crawford, which actually involved three appeals, arose out of a labor dispute. During a protracted strike, the defendants repeatedly subjected the plaintiffs, who were considered "scabs," to a stream of insults and epithets described by the court as "disgusting, abusive, [and] repulsive." Plaintiff brought suit based on, among other grounds, Virginia's insulting words statute, which provides a cause of action for words which "from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace." The circuit court sustained some of plaintiff's insulting words claims while dismissing others, and the principal issue on appeal was whether the use of such epithets in the context of a labor dispute can serve as the basis for an action for insulting words.

The court was deeply divided in its decision and, as a result, the case may not prove to be of significant precedential value. Despite the lack of consensus, the opinion suggests some interesting possibilities.

In a plurality opinion by Justice Thomas, joined by Justices Compton and Poff, the court held that any cause of action that might exist under the insulting words statute was preempted by federal labor laws. The basis for this ruling was two United

other grounds, 691 F.2d 666 (4th Cir. 1982), cert. denied, 460 U.S. 1024 (1983), later proceeding, 776 F.2d 1236 (4th Cir. 1985) (Sullivan actual malice principle applicable to claim for tortious interference with contract when both libel and interference claims based on same publication); cf. Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986) (permitting recovery on claim for intentional infliction of emotional distress on words found by jury not to be capable of a defamatory meaning, but recognizing that Sullivan principles did apply in a modified form to emotional distress claim); Friedman v. Peoples Serv. Drug Stores, Inc., 208 Va. 700, 703-04, 160 S.E.2d 563, 565-66 (1968) (holding that personal injury statute of limitations applies to breach of contract claim arising from injuries suffered since it is the "object of an action and not its form" that governs the applicable period of limitations); see supra note 103.


109. Id. at 234, 335 S.E.2d at 839. Among the epithets employed by the various defendants were "scabby son of a bitch," "ugly-looking cocksucking bastard," "We'll get you, mother fucker nigger," "puny scabby son of a bitch," and others of the same genre. Id. at 229-28, 335 S.E.2d at 831-35.


111. The Virginia Supreme Court recognized that no defamation action lies for the use of epithets or the like, since only statements of fact can be capable of a defamatory meaning. See Crawford, 230 Va. at 234-35, 335 S.E.2d at 838-39. See generally R. Sack, supra note 3, at 58-62.

States Supreme Court opinions that, according to the court, prohibited such actions when they were founded on words which, although abusive, could not be viewed as stating facts.  

Justice Cochran concurred in the result, but on a different ground. He reasoned that, since the insulting words statute has long been completely merged with the common law cause of action for defamation, the plaintiff’s claims should have been dismissed, because no defamatory statements of fact had been made: “An epithet, however repulsive or intemperate, used to convey the speaker’s contempt for another, is not defamatory when it cannot reasonably be understood to convey its literal meaning.”  

The three dissenting justices, in an opinion by Justice Russell, took a different view. Rejecting the preemption theory, they argued that the insulting words statute had not been completely merged with common law defamation, and that where epithets are used under circumstances tending to incite violence, they constitute “fighting words” and are thus actionable. What remains unclear is whether any of the justices in the plurality might subscribe to this view when there is no issue of federal preemption, as the plurality did not consider whether the insulting words statute has any continued viability outside of the labor context where “fighting words” are involved.  

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113. Id. at 234, 335 S.E.2d at 838 (citing Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers, 418 U.S. 264); see also Crawford, 230 Va. at 230-31, 335 S.E.2d 835-36 (citing Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966)). Although the United States Supreme Court relied in part on a privilege rooted in the first amendment, the Virginia Supreme Court did not expressly predicate its decision on the constitutional ground.  

114. Crawford, 230 Va. at 238, 335 S.E.2d at 841 (Cochran, J., concurring).  

115. The dissenters in Crawford rejected the plurality’s preemption theory on the basis of Farmer v. Christian, 430 U.S. 290, 299-300 (1977) (quoting Automobile Workers v. Russell, 356 U.S. 634, 640 (1958) (Warren, C.J., dissenting)), which held that “[n]othing in the federal labor statutes protects or immunizes from state action violence or the threat of violence in a labor dispute.” Id. (emphasis added). The Crawford plurality opinion does not mention Farmer, but notes that the plaintiffs’ cases were based on “pure speech, not conduct but speech—standing alone.” Crawford, 230 Va. at 229, 335 S.E.2d at 835. The plurality opinion thus ignores the fact that many of the offending statements in Crawford were made in a context that strongly suggested an immediate threat of violence. See id. at 223-29, 335 S.E.2d at 831-35.  

116. See id. at 233-44, 335 S.E.2d at 841-45 (Russell, J., dissenting). The United States Supreme Court has long recognized that “fighting words” are not entitled to constitutional protection. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).  

117. See infra note 241.
D. Landmark Communications, Inc. v. Macione: Issues Avoided

The least significant of the five recent opinions touching on the law of defamation, *Landmark Communications, Inc. v. Macione*\(^ {118}\) represents the single case in which the Virginia Supreme Court avoided a number of potentially significant issues. Although the defendant was a newspaper publishing company, the alleged defamation was not published in a newspaper. Plaintiff Macione owned an advertising agency that placed advertising in a Landmark-owned newspaper. The case arose when one of Landmark's advertising representatives stated in a conversation with one of Macione's clients that Macione had been "belligerent and drunk" in one of his dealings with the company.\(^ {119}\) Macione claimed that, as a result of these statements, his advertising agency lost business. He proved no personal injuries, and expressly waived on appeal any claim for humiliation or embarrassment.\(^ {120}\) The jury awarded Macione $9,000 in compensatory damages.\(^ {121}\)

The case presented the court with a number of interesting issues, including the scope of the opinion privilege, whether the offending words were protected by a common law privilege, and whether the words were defamatory per se.\(^ {122}\) The court addressed none of these questions, however, instead deciding the case on the narrow ground that any damages proved by plaintiff at trial belonged to his company and not to him personally.\(^ {123}\) As a result, the opinion clears no new ground\(^ {124}\) and the case will be useful only in those rare circumstances where a party is unable to prove any personal injury.\(^ {125}\)


\(^{119}\) Id. at 139, 334 S.E.2d at 588.

\(^{120}\) Id. at 140, 334 S.E.2d at 588-89.

\(^{121}\) Id.


\(^{123}\) Landmark Communications, 230 Va. at 140, 334 S.E.2d at 588-89.

\(^{124}\) It is well recognized that a shareholder may not sue personally for defamatory statements directed at his corporation, and not at him personally. *See generally R. Sack*, *supra* note 3, at 125.

\(^{125}\) The case should prove rare indeed where a plaintiff will be unable to show that he was damaged personally, as mere allegations of embarrassment, humiliation, and personal distress may be sufficient to present a jury issue under present Virginia law. *See infra* text accompanying notes 216-55 for a more complete discussion of this issue. *But see generally* Anderson, *Reputation, Compensation, and Proof*, 25 Wm. & Mary L. Rev. 747 (1984) (arguing that proof of reputational injury should be required before recovery of damages for other emotional injuries).
III. ISSUES THAT REMAIN

A. The Negligence Standard: What Does It Mean?

1. Professional Malpractice or the Ordinary Man?

Since the United States Supreme Court's decision in *Gertz*, the states have struggled not only to determine what level of fault will govern private figure defamation cases, but also to define the framework within which to analyze the chosen standard. In private figure defamation cases brought against a professional disseminator of news or other information of public concern, one important question that has arisen is whether the negligence standard of liability is to be measured by the conduct of a reasonable journalist—thus creating a journalistic malpractice standard—or by the actions of the ordinary man who is not in the publishing business. While many of the courts adopting a negligence standard in private figure defamation cases have simply failed to address the issue, a number of courts have addressed the issue, and their decisions are inconsistent.

The majority of courts considering the question have adopted a reasonable publisher standard. Generally, these cases have relied upon the Restatement (Second) of Torts, which provides that "[t]he defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession." In following this approach, these courts have simply applied the general rule that one

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126. See Dun & Bradstreet v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985) (discussing standard of liability for presumed and punitive damages in defamation cases involving no issue of public concern); see also supra text accompanying notes 79-90.


129. RESTATEMENT (SECOND) OF TORTS § 580B comment g, at 228 (1976).
engaged in a profession or trade is required to exercise the level of skill and knowledge normally possessed by members of the same profession in similar communities. Thus, once a court adopts negligence as the standard that will govern private figure defamation cases, defining that standard as journalistic malpractice clears no new ground and, indeed, is the approach most consistent with widely recognized principles of tort law.

Notwithstanding the apparent consistency of a journalistic malpractice standard with the common law of torts, a few courts have rejected any notion that the media should be judged on the basis of professional standards, and instead, have opted for a reasonable person standard. The justification for this approach was best stated by the Supreme Court of Illinois, which worried that

[the problem with such an approach] is that it would make the prevailing newspaper practices in a community controlling. In a community having only a single newspaper, the approach suggested would permit that paper to establish its own standards. And in any community, it might tend, in "Gresham's law" fashion, toward a progressive depreciation of the standard of care.

This concern about letting the proverbial fox loose in the hen house is flawed, because it misunderstands the nature of a reasonable publisher standard, where the defendant's conduct is not judged by the standards in the community of publication, but rather, by the standards in "similar communities." Moreover, as

130. See, e.g., id. § 299A (1965).
131. An analysis based on professional standards is not without its problems. As Professor Anderson points out, journalists frequently disagree over what constitutes "reasonable" journalism. See Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 455-56 (1975).
132. See Kohn v. West Hawaii Today, Inc., 65 Haw. 584, __, 656 P.2d 79, 82 (1982); Schrottman v. Barnicle, 386 Mass. 627, __, 437 N.E.2d 205, 214-15 (1982); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 418 (Tenn. 1978); Troman v. Wood, 62 Ill. 2d 184, __, 340 N.E.2d 292, 298 (1975). In McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), cert. denied, 456 U.S. 975 (1982), the Supreme Court of Kentucky stated that the negligence standard articulated by the Tennessee Supreme Court in Nichols "is a reasonable one." McCall, 623 S.W.2d at 886. The court did not say whether it was adopting that portion of Nichols discussing whether a reasonable publisher or ordinary man standard should apply, although it is certainly reasonable to interpret the court's opinion as adopting the Tennessee approach in its entirety.
133. Troman, 62 Ill. 2d at __, 340 N.E.2d at 298-99.
134. Gobin, 216 Kan. at __, 531 P.2d at 84; see, e.g., Seegmiller, 626 P.2d at 976; RESTATEMENT (SECOND) OF TORTS § 580B comment g (1976). Indeed, in Bank of Oregon, the
the Restatement explains, although custom is important in judging whether a publisher was negligent, it is not necessarily controlling. Thus, a single publisher could not, as the Illinois court suggested, control the degree of care due by adopting substandard practices.

By refusing to judge a professional publisher's conduct on the basis of those similarly situated, courts rejecting the Restatement's approach set up an unrealistic framework within which a defamation is to be judged. It simply makes no sense to determine whether a newspaper was reasonable in researching, writing, and publishing a complex story investigating the toxic waste disposal practices of the chemical industry by asking whether that newspaper lived up to the standards of some hypothetical reasonable person, who is not generally engaged in researching, writing, or publishing any news stories, much less stories of great complexity. Arguably recognizing this fact, the United States Supreme Court was careful to limit its holding in Gertz, which paved the way for a negligence standard, to circumstances that would alert "a reasonably prudent editor or broadcaster" to defamatory potential. In doing so, the Court seems to have accepted as the appropriate frame of reference a standard that looks to the publisher's professional standards, and the cases rejecting such an approach may be

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135. Restatement (Second) of Torts § 580B comment g (1976). Underlying the debate over whether professional or ordinary negligence should govern defamation cases against the press is a disagreement over the proper role of expert testimony in such cases. While virtually all cases recognize the admissibility in appropriate cases of testimony on the standards of professional journalism, some courts have suggested that, with a reasonable publisher standard, expert testimony is controlling, and a plaintiff's failure to produce expert testimony is necessarily fatal. See Kohn, 65 Haw. at —, 656 P.2d at 82-83; Schrottman, 386 Mass. at —, 437 N.E.2d at 214. The fear of such a rigid rule appears unfounded. Those courts adopting a reasonable publisher standard have recognized only that expert testimony may, in an appropriate case, be controlling, and not that it is automatically dispositive. See, e.g., Bank of Oregon, 65 Or. App. at —, 670 P.2d at 628-29; Seegmiller, 626 P.2d at 976. See generally Restatement (Second) of Torts § 580B comment g (1976) (explaining that while courts should be reluctant to send a case to the jury in the absence of any showing that professional standards were violated, custom is not necessarily controlling).

Thus, while expert testimony might control in a case involving a detailed and complex example of investigative journalism, it would generally not be dispositive in a case involving, for example, a simple failure to report correctly the contents of a trial transcript, as occurred in one of the Harris cases. See Gazette, Inc. v. Harris, 229 Va. 1, 30, 325 S.E.2d 713, 734 (1985).

Incompatible with this governing precedent.

In Harris, the Virginia Supreme Court joined those jurisdictions that have failed to face this issue squarely, although the opinion does contain a few clues strongly suggesting that Virginia will apply a reasonable publisher standard. First, although the court did not explicitly adopt the Restatement approach, it relied on the Restatement to support its choice of negligence as the applicable standard. Moreover, the language used in Harris to describe the negligence standard very closely tracks that found in the relevant section of the Restatement.

Second, perhaps more than any other court, the Virginia Supreme Court emphasized, in accordance with Gertz, that application of the negligence standard is limited to circumstances where a "reasonably prudent editor or broadcaster" would be warned of a publication's defamatory potential. Thus, in a closely related context, the court has employed as its frame of reference a professional standard of care.

Finally, in discussing the conduct of the various newspaper defendants in Harris, the court seemed to focus on the journalistic reasonableness of the actions taken. For example, in the Port Packet case, the court ruled that "an editor, who was exercising reasonable care" should have been alerted to the harmful potential of the article sued upon. Together, these factors strongly suggest that Virginia will properly measure negligence in defamation cases against the press by the standards of professional disseminators of news.

2. The Problem of Predictability

Whatever form it takes—journalistic malpractice or the ordinary man—the negligence standard has been criticized in the context of defamation because of a perceived lack of predictability in its application, and many fear that it will not adequately protect a publisher from the undue imposition of liability. Perhaps the most

137. See Harris, 229 Va. at 17, 325 S.E.2d at 726.
138. Compare id. at 15, 325 S.E.2d at 724-25 with Restatement (Second) of Torts § 560B.
139. See infra text accompanying notes 167-86.
140. Harris, 229 Va. at 11, 325 S.E.2d at 722.
141. See id. at 15, 325 S.E.2d at 724-25.
142. See id. at 22-24, 325 S.E.2d at 729-31.
143. Id. at 39-40, 325 S.E.2d at 739-40.
concise statement of this problem was provided by Professor Anderson in his seminal article on negligence in defamation cases:

[F]ew would deny that negligence in the physical torts represents a very flexible mechanism for obtaining the judgment of both judge and jury on a specific fact situation. But negligence under *Gertz* serves an entirely different purpose—the preservation of a minimum area of “breathing space” for the press—which it attempts to accomplish by freeing publishers and broadcasters from liability for innocent misstatements. *Gertz* envisions a regime in which publishers who exercise reasonable care need not fear libel judgments, but the hope that this will prevent unnecessary self-censorship is illusory. No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict.144

The concerns expressed by Professor Anderson and other commentators145 appear also to be supported by much of the case law146 that has developed since the United States Supreme Court set negligence as the minimum degree of fault that would satisfy constitutional requirements.147 One example of this problem can be seen in a comparison of the Florida Supreme Court’s opinion in *Firestone v. Time, Inc.*,148 with the opinion of Florida’s intermediate court of appeals in the same case.149 The intermediate court was impressed with Time Magazine’s efforts to ensure accuracy: “There were checks and double checks, quite extensive in scope considering the obvious press of time forced by journalistic deadlines. Nowhere was there proof Time was even negligent.”150 Reviewing the same record, the Florida Supreme Court opined that


146. An excellent review of how lower courts have interpreted the negligence standard in defamation cases is set forth in Franklin, supra note 145.

147. *Gertz* did not require the adoption of any particular level of fault. Rather, the Court simply held that imposition of liability without fault in defamation cases was impermissible. See *Gertz* v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

148. 305 So. 2d 172 (Fla. 1974), cert. granted, 421 U.S. 909 (1975), vacated, 424 U.S. 448 (1976). On appeal, the United States Supreme Court held that the plaintiff was not a public figure. See *Time, Inc.* v. *Firestone*, 424 U.S. 448, 455 (1976).


150. Id. at 389-90.
"this erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news."\textsuperscript{161}

The question thus arises: will foreseeable results from application of the negligence standard in Virginia defamation cases be as unpredictable as has apparently been the case in other jurisdictions, or will a greater degree of certainty prevail? Unfortunately, a careful review of \textit{Harris} suggests the former.

Of the four cases before the court, only the decision involving \textit{The Gazette} contained an explicit discussion of what facts must be present in order to establish negligence, although the Court's discussion of the conduct of \textit{The Daily Progress} and \textit{The Port Packet} may also provide some insight into the new standard. In the \textit{Harris} case, the court found a number of the newspaper's actions to have been potentially negligent. First, the reporter admitted to not understanding the explanatory headings at the top of each page of the docket book, which the court perceived to be necessary for a complete understanding of the public record. Thus "[t]he jury was entitled to conclude that the reporter was negligent because of his ignorance."\textsuperscript{162} Second, the omission of the explanatory headings from the newspaper report was held to constitute evidence of negligence.\textsuperscript{163} This conclusion was buttressed by the reporter's testimony that the story "looked like an error," by the editor's testimony that the item was "not unclear," and by the testimony of the publisher who, when asked if he understood what the article meant, answered, "I think I do."\textsuperscript{164} Finally, the court found that never before in reporting on a public record like this had the newspaper named the complaining witnesses, and "the jury was entitled to determine whether, in reporting crimes of this magnitude, the long standing custom of \textit{The Gazette} should have been violated."\textsuperscript{165} The court's analysis of \textit{The Gazette}'s action is essentially


\textsuperscript{162} Harris, 229 Va. at 29, 325 S.E.2d at 730.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 24, 325 S.E.2d at 731.

\textsuperscript{165} Id. at 24-25, 325 S.E.2d at 731. In this respect, the court's analysis seems an undue intrusion into the editorial process, and ignores widely accepted first amendment doctrine, which recognizes that "[t]he choice of material to go into a newspaper, and the decisions made as to [the] . . . content of the paper . . . constitute the exercise of editorial control and judgment." \textit{Miami Herald Publishing Co. v. Tornillo}, 418 U.S. 241, 258 (1974); \textit{see, e.g.}, \textit{Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations}, 413 U.S. 376, 391 (1973).
unremarkable, and is generally consistent with the developing case
law on the subject. More troubling is its discussion of the Daily
Progress and Port Packet cases.

The Daily Progress had not argued at trial that there was insuf-
ficient evidence of negligence. Nevertheless, in its discussion of
qualified privilege to report on court proceedings, the court dis-
cussed certain facts which it suggested were relevant to the negli-
gence issue. They included the lack of experience and training pos-
sessed by the reporter, reliance on a preliminary hearing transcript
without knowing whether the same testimony was presented at
trial, failure to interview any of the trial participants, and testi-
mony by the reporter that use of the erroneous courtesy title was
"just a slip of my memory." While there is no question that
these factors may, in an appropriate case, be considered in the
fault equation, the court entirely ignored the powerful argument
that, notwithstanding evidence of an unreasonable mistake by the
reporter, the plaintiff could prove no causal link between her al-
leged injuries and the mistake.

In the Daily Progress case, the plaintiff was the complaining wit-
ness in a rape case that resulted in the defendant's conviction for
fornication. The necessary implication of such a finding by the jury
was that the plaintiff also was guilty of fornication, which was pre-
cisely the implication that she claimed arose when the fact of her
pregnancy was combined with the use of the mistaken courtesy ti-
tle of "Miss." In other words, even if the newspaper had reported
the courtesy title correctly, the story would still have carried the
implication that she had committed an act of fornication, and the
injury would be the same.

In the Port Packet case, the court failed to explain why it found

156. See generally B. Sanford, supra note 3, § 8.4.
157. Harris, 229 Va. at 30, 325 S.E.2d at 734.
158. However, with the exception of the reporter's apparent faulty memory, the factors
discussed by the court would seem to have little to do with causing the mistake sued on, as
the correct information was admittedly before the reporter.
159. To establish liability, a defendant's negligence must, of course, be the proximate
cause of the plaintiff's injuries. See, e.g., Farren v. Gilbert, 224 Va. 407, 297 S.E.2d 668
160. Indeed, had the newspaper reported that plaintiff was married, the arguably more
serious implication that she was guilty of adultery would have arisen, since the defendant
convicted of the crime was not plaintiff's husband. At common law, even though words are
capable of defamatory meaning, they are not actionable if their gist or sting is no worse than
the evidence sufficient to support the jury’s finding of negligence, but did discuss why there was insufficient evidence to support a finding of publication with reckless disregard for the truth, which had been necessary to support the award of punitive damages. While the concepts of reckless disregard and negligence are quite different, the court, in finding no recklessness, emphasized that the story had been “researched in depth” and “edited in a deliberate fashion with consideration given to accuracy.”161 One might think that, by following such procedures, the publisher of important news would be protected even under a negligence standard. The court’s failure to explain more fully its reasoning is unfortunate.

Two other aspects of Harris suggest further that negligence in Virginia will be a slippery doctrine indeed. In his article on defamation and the negligence standard, Professor Anderson suggested that certain procedural devices might be used to alleviate at least some of the problems of uncertainty surrounding negligence. These include a requirement that negligence be shown by clear and convincing evidence, and that appellate courts exercise independent review of jury verdicts finding that a defendant was at fault.162 Both of these requirements apply in cases where the plaintiff must prove New York Times malice to prevail,163 and although the court in Harris considered both possibilities, it declined to follow either. The court held that negligence need be proved only by a “preponderance of the evidence,”164 and then reasoned that since “[t]he negligence standard for compensatory damages that we have adopted is not a matter of governing federal constitutional law,” the standard of review set forth in section 8.01-680 of the Virginia Code—requiring that a judgment be “plainly wrong or without evidence to support it”—would govern such cases.165 Thus, the uncer-

161. Harris, 229 Va. at 42, 325 S.E.2d at 741.
162. Anderson, supra note 131, at 467-68.
163. New York Times malice must be proved where plaintiff is a public official or public figure or when punitive damages are sought. See, e.g., Gertz, 418 U.S. at 334-36.
164. Harris, 229 Va. at 15, 325 S.E.2d at 725.
165. Id. at 20, 325 S.E.2d at 725. The court’s conclusion that proof of negligence does not raise a question of constitutional dimension is unsound. Gertz clearly held that negligence, as a minimum level of fault, is constitutionally required. Gertz, 418 U.S. at 339-48; see also Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1985) (holding that placement of burden of proving falsity on plaintiff is constitutionally required). See generally R. Sack, supra note 3, at 207. Indeed, had negligence not been a constitutional requirement, the United States Supreme Court simply would have been without jurisdiction to require that Virginia change its common law rule, as no federal question would have been presented. See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and The Federal System 12-19 (2d ed. 1973).
tainty generally associated with a negligence standard is likely to be exacerbated by the absence of any meaningful procedural safeguards to ensure consistent results.\textsuperscript{168}

3. Limitations on the Application of the Negligence Standard

Although adopting a negligence standard, the court in \textit{Harris} placed what may be an important limitation on its use:

The application of this negligence standard is expressly limited, however, to circumstances where the defamatory statement makes substantial danger to reputation apparent. The trial judge shall make such determination as a matter of law. If, on the other hand, no substantial danger to reputation is apparent from the statement in issue, \textit{New York Times} malice must be established to recover compensatory damages.\textsuperscript{167}

The inquiry to be made by the trial court was likened to the inquiry traditionally made on the question whether a statement is libelous per se.\textsuperscript{168} The trial judge is to decide, “viewing the circumstances objectively, whether a reasonable and prudent editor should have anticipated that the words used contained an imputation necessarily harmful to reputation.”\textsuperscript{169}

The limitation is based on \textit{Gertz}, where the United States Supreme Court suggested that private figures who sue for defamation might be subject to the more exacting proof requirements when a publication on its face does not alert a reasonably prudent editor of its defamatory potential.\textsuperscript{170} The Virginia Supreme Court was correct when it noted that this limitation “has not been sufficiently emphasized in many of the decisions and comments based on \textit{Gertz};”\textsuperscript{171} only a few reported decisions have even mentioned that such a limitation might obtain,\textsuperscript{172} and even fewer have actually dis-
missed a case on that basis. 173

Although, in the three newspaper cases before the court in Harris, there was substantial doubt as to whether those responsible for publication actually appreciated the potentially defamatory content of the stories, the standard by which the limitation is to be judged is objective, not subjective, and the court had little difficulty requiring that the defendants exercise the reasonable care required by a negligence standard. Thus, in the case involving The Daily Progress, the court explained that "[m]anifestly, the content of a news item which states that an unmarried woman is pregnant creates a substantial danger to reputation and should warn a reasonably prudent editor of the item's defamatory potential." 174 Similarly, in The Goochland Gazette's case, the court declined to apply the limitation because it felt that the publication was so misleading that "[a] reader would probably conclude from the arrangement of the language that the plaintiffs were charged with crimes." 175 Although the court did not say so, it was obviously influenced by the fact that all of the articles at issue involved allegations of criminal conduct, a subject with obvious defamatory potential.

When then does the limitation apply? Two potential circumstances readily come to mind. First, there are those cases in which the defamatory potential of the offending words is not discernible from the face of the publication, but appears only when considered in light of extrinsic facts. Unlike Virginia, most jurisdictions have historically distinguished between libels that on their face are defamatory and those that become defamatory only when viewed in juxtaposition with certain extrinsic facts not contained in the publication. 176 The latter kind of libels, which are generally referred to as libel per quod, do not appear on their face to have defamatory meaning. In recognition of the reduced likelihood of injury by the publication of libels per quod, they were actionable at common law only upon proof of actual pecuniary loss. 177 Until Harris was decided, the distinction was not relevant in Virginia, where the


174. Harris, 229 Va. at 28-29, 325 S.E.2d at 733.

175. Id. at 23, 325 S.E.2d at 730 (emphasis added).

176. See infra note 245.

177. See generally R. Sack, supra note 3, at 94-100.
courts considered only the subject matter of the offending words and determined the extent to which they were actionable based on their content rather than on the obviousness of their defamatory potential.\textsuperscript{178} However, the limitation expressed in \textit{Harris} would certainly appear to encompass the traditional concept of libel \textit{per quod} as recognized by most other jurisdictions, and in such cases would require proof of \textit{New York Times} malice.\textsuperscript{179}

The limitation fashioned by the Virginia Supreme Court in \textit{Harris} appears also to be directed at a second form of defamatory publication which, although arguably defamatory on its face, is sufficiently ambiguous to allow for reasonable nondefamatory interpretations as well. The court emphasized that the higher burden of proof—\textit{New York Times} malice—would apply in a case where “[t]he publication was . . . merely confusing, unclear, and garbled (conditions which ordinarily would not create defamatory potential).”\textsuperscript{180} While it is unclear precisely what the court means by this statement, it is likely referring to situations where an ambiguity in wording, tone, or the like subjects a statement to more than one interpretation. While, at common law, such a publication was actionable (as plaintiff was entitled to argue that it was understood in its defamatory sense),\textsuperscript{181} after \textit{Harris}, that plaintiff may also have to prove publication with knowledge of falsity or reckless disregard for the truth.

One possible example of this kind of case is \textit{Cefalu v. Globe Newspaper Co.},\textsuperscript{182} where the Massachusetts intermediate appeals court dismissed a libel action on the grounds that the content of the publication did not sufficiently make the danger to reputation apparent. The case arose out of the publication of a series of articles on the Massachusetts economy. One such article was illustrated with a photograph of a group of individuals standing in lines at the unemployment office with the caption, “A few of the 185,000 persons out of work in Massachusetts line up at the unemployment office at the Hurley Building in Government Center.”\textsuperscript{183} The plaintiff, one of those pictured, was not unemployed and claimed that

\begin{footnotesize}
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\item[178.] See supra note 76.
\item[179.] See Sobel, 5 Media L. Rep. (BNA) at 2465 (dismissing case in part on grounds that offending words were libel \textit{per quod} and plaintiff could not prove \textit{New York Times} malice).
\item[180.] \textit{Harris}, 229 Va. at 23, 325 S.E.2d at 730.
\item[181.] See generally R. Sack, supra note 3, at 72-73.
\item[182.] 8 Mass. App. Ct. at ---, 391 N.E.2d at 935.
\item[183.] \textit{Id.} at ---, 391 N.E.2d at 936.
\end{enumerate}
\end{footnotesize}
the implication that he was out of work defamed him. In dismissing the case, the court explained that "there was no reason for an editor to suppose that the persons lined up at a desk to receive unemployment payments were there for any purpose other than that which one might expect would place them at such a scene."\(^{184}\)

In addition to this kind of case, it is not hard to imagine other candidates for application of the expressed limitation fashioned in *Harris*. Consider, for example, a slightly modified illustration provided by the Restatement: "A [writes] in a newspaper that B, a [doctor], . . . recommends to her patients the use of a certain brand of whiskey for medicinal purposes. If a substantial number of respectable persons in the community regard this use of whiskey as discreditable, A has defamed B."\(^{185}\) But, may B recover on a showing of mere negligence? The answer probably depends on the context in which the statement appears.\(^{186}\) If the article as a whole praises the revolutionary medical techniques of Doctor B, the court should require proof of recklessness, because the subject of the story would probably not alert most to the defamatory potential. On the other hand, if the subject of the story is quackery, a different result should obtain. The impact of this limitation on the negligence standard will become evident only upon future decisions, but in reading *Gertz* as carefully as it did, the court has put itself on the cutting edge of one aspect of the developing law of defamation.

B. *The Opinion Conundrum*

"When you read the cases, they are a mess." So said Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit during an en banc oral argument of a 1984 libel case considering the actionability of opinions.\(^{187}\) Judge Edwards is not alone in his view. Both courts and commentators alike have consistently bemoaned the state of defamation law regarding opinion.\(^{188}\)

The black letter rule of law applicable to statements of opinion

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184. Id. at ___, 391 N.E.2d at 938.
185. *Restatement* (Second) of *Torts* § 559 comment e, illustration 1 (1976).
186. Context is often the critical factor in assessing the defamatory potential of a publication. *See generally* R. Sack, *supra* note 3, at 82.
is easily stated: Under the first amendment, opinions may not serve as the basis for a defamation claim; the target of criticism that is characterized as opinion may not maintain an action no matter how vituperative or unjustified the comment may be.  Moreover, it is now clear that the determination of whether words constitute opinion presents a question of law. However, once one moves beyond simple black letter statements, clarity rapidly vanishes; defining what actually constitutes an opinion can be an extremely difficult and uncertain task.

Broadly categorized, one can discern four different views taken by the courts in defining what constitutes protected opinion. Some courts have taken what is best described as a result-oriented approach. Their decisions either provide no meaningful explanation of the courts’ rationale, or appear to eschew any consistent doctrine in favor of reaching a desired end. Such an approach is probably the least desirable because of its obvious lack of predictability, a factor of particular importance in defamation cases.

189. See, e.g., Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), cert. denied, 440 U.S. 960 (1979); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, cert. denied, 434 U.S. 969 (1977). The opinion privilege has generally been said to arise from dicta in Gertz where Justice Powell stated: “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). In the same term, the Court relied on this language to dismiss a defamation claim founded on a series of epithets because “[s]uch words were obviously used here in a loose, figurative sense.” Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin, 418 U.S. 264, 284 (1974). The existence of a privilege for opinion had been suggested four years before in Greenbelt Coop. Publishing Ass’n v. Bresler, 398 U.S. 6 (1970), when the Court dismissed a libel action on the grounds that the offending words constituted rhetorical hyperbole. See generally B. Sanford, supra note 3, at 107-58.


191. “No task undertaken under the law of defamation is any more elusive than distinguishing between . . . [fact and opinion].” R. Sack, supra note 3, at 155.


193. These cases generally involve publications implying some form of criminal conduct. See, e.g., Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980); Rinaldi, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943. See generally B. Sanford, supra note 3, at 122.

194. See Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984). The rationale for extending constitutional protection to false defamatory speech, which the Supreme Court has recognized to have no constitutional value, is that a degree of breathing space is necessary to ensure that protected expression is not chilled by the fear of a lawsuit. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974). In order for such a policy to be effective, a publisher, before publication, must be able to predict, with a reasonable degree of certainty,
A second group of cases focuses on whether the offending words are capable of objective verification. If they are not, the opinion privilege will be held to apply. One noted expert has gone so far as to argue that verifiability vel non should be the exclusive test for determining whether absolute first amendment protection will obtain. The principal drawback of this approach is that it focuses the court's inquiry on the wrong question. As the Virginia Supreme Court recognized in Chaves, opinions are protected, not because they are right or wrong, but rather because they will not be understood by the reader in the same sense as disparaging statements of fact. Opinions exist to be disagreed with and do not, so the courts have reasoned, have the same potential to injure reputation as do statements of fact. The problem with asking the wrong question, as does an approach that looks solely to the objective verifiability of the words, is that some statements that will be understood by the reader to be opinion—and should accordingly be protected—may in fact be capable of some objective verification.

The third and fourth approaches taken by some courts are quite similar, but have one important difference worth emphasizing. Under both approaches, courts determine whether a statement is opinion or fact by considering the totality of the circumstances.

197. See Chaves, 230 Va. at 119, 335 S.E.2d at 101-02.
198. In his first inaugural address, Thomas Jefferson explained: "[E]rror of opinion may be tolerated where reason is left free to combat it." Id. at 119, 335 S.E.2d at 102; see also Gertz, 418 U.S. at 340 n.8.
199. For example, a bald statement by A that his neighbor is an alcoholic clearly ought not to be protected, because most readers would understand it to be a statement of fact. See Restatement (Second) or Torrs § 566 comment c, illustration 3 (1976). However, according to the Restatement, the following should be protected:

A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.'

Id. § 566 comment c, illustration 4. This second example clearly should constitute opinion, because the reader is left to draw his or her own conclusion. Under a test that looks only at the verifiability of the words, this example is also arguably subject to objective proof.
However, only the third approach, which is championed by the Restatement, distinguishes between pure and mixed opinion. Pure opinion is absolutely protected by the first amendment, while mixed opinion is not. As explained in the Restatement, an opinion is "mixed" if it is based on undisclosed facts and implies the existence of unstated defamatory facts.

The principal drawback of this third approach is that the task of discerning what facts may be implied from an opinion is often more difficult than defining opinion itself. Strained attempts by courts to divine undefined factual implications often lead to results that seem explainable only by a court's apparent desire to reach a particular result, and not by any consistent application of first amendment doctrine. Thus, like the first approach, predictability—the touchstone of any effective rule of defamation law—is sacrificed, and first amendment rights are unavoidably chilled.

Criticism of the third approach is not meant to suggest that the factual implications of an opinion should have no bearing. On the contrary, they may be of critical importance in determining what degree of constitutional protection should apply. The vice in the Restatement's approach lies not in its objective, but rather in its application; it tends to emphasize one factor to the exclusion of others.

This pitfall was avoided by the United States Court of Appeals for the District of Columbia Circuit in what may prove to be a landmark decision. In Olman v. Evans the court attempted to set forth a coherent and comprehensive doctrine governing the law of opinion. The decision has great promise in the development of a

201. Restatement (Second) of Torts § 566.
203. See Restatement (Second) of Torts § 566 comment b.
204. See, e.g., Searer v. Wometco W. Michigan TV, Inc., 7 Media L. Rep. (BNA) 1639 (Mich. Cir. Ct. 1981) (comment that "[plaintiff] went down and started Channel 41... and then he didn't make it down there, I guess, whatever happened, and then he went away for a while," implied unstated defamatory facts regarding plaintiff's competence); Maule v. NYM Corp., 76 A.D.2d 58, 429 N.Y.S.2d 891 (1980), rev'd on other grounds, 54-N.Y.2d 880, 429 N.E.2d 416, 444 N.Y.S.2d 909 (1981) (comment by defendant that plaintiff, a writer for Sports Illustrated, was not a "graceful wordman" and was quite possibly the "worst writer" at the magazine implied defamatory facts).
205. See supra note 194.
206. 750 F.2d 970. The second and eighth circuits have also adopted the approach articulated in Judge Starr's majority opinion in Olman. See Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1986); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986) (also adopting portions of Judge Bork's concurring opinion).
consistent and reasonably predictable set of rules, and many elements of the approach taken in that case can be seen in the Virginia Supreme Court's recent opinion in \textit{Chaves}.

The analysis in \textit{Ollman} is focused on the impression that the offending statement will have on the average reader.\textsuperscript{207} To determine whether that reader will be likely to view the words used as fact or opinion, the \textit{Ollman} court identified four factors that should be considered: (1) the common usage and meaning of the specific language employed;\textsuperscript{208} (2) the statement's objective verifiability;\textsuperscript{209} (3) the context surrounding the statement;\textsuperscript{210} and (4) the broader social context in which the words were uttered.\textsuperscript{211}

Although the Virginia Supreme Court in \textit{Chaves} did not attempt to set forth a comprehensive doctrine that will govern the opinion privilege, it appears to have eschewed any overly rigid or dogmatic approach in favor of an analysis that takes into account the totality of the circumstances in each case. In holding that a statement made by one architect that a competitor was inexperienced and charged excessive fees was opinion, the court first emphasized the "relative" nature of such statements; according to the court, their impact was largely dependent on the speaker's "viewpoint."\textsuperscript{212} Implicit in this aspect of the decision is a consideration of both the precise words used and the related issue of their objective verifiability. The court continued by emphasizing that the relative nature of the statements would be "obvious to anyone who hears them," pointing out in particular that the competitive relationship

\begin{footnotesize}
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\item[207.] The court emphasized that it is the average reader's view that is important, not what the "most skeptical or most incredulous reader" might think. \textit{Ollman}, 750 F.2d at 979 n.16.
\item[208.] \textit{Id.} at 979-81. For example, statements that are only "loosely definable" or "variously interpretable" are, in most cases, opinion, while accusations of criminal conduct are generally so "laden with factual content" that they will be actionable. \textit{Id.} at 980.
\item[209.] \textit{Id.} at 979, 981-82. "[A] reader cannot rationally view an unverifiable statement as conveying . . . facts." \textit{Id.} at 981. Moreover, many value judgments, such as accusations of fascism or the like are not verifiable objectively and, if liability may attach on such a basis, "the trier of fact may improperly tend to render a decision based upon the approval or disapproval of the contents of the statement, its author, or its subject." \textit{Id.}
\item[210.] \textit{Id.} at 979, 982-83. Important to this consideration is the use of "cautionary language." \textit{Id.} at 982. In addition, where potentially factual statements are used in a "metaphorical, exaggerated, or even fantastic sense," they are not actionable. \textit{Id.} For example, in \textit{Greenbelt Coop. Publishing Ass'n}, 398 U.S. at 6, the United States Supreme Court held that an accusation of blackmail against a real estate developer was only rhetorical hyperbole suggesting unreasonable bargaining tactics, under the circumstances.
\item[211.] \textit{Ollman}, 750 F.2d at 979, 983-84. For example, words such as traitor, when used in a labor dispute, often cannot be taken literally. See \textit{id.} at 983.
\item[212.] \textit{Chaves}, 230 Va. at 119-19, 335 S.E.2d at 101.
\end{enumerate}
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between the speaker and his target further supported this conclusion.213 Thus, the court considered the context in which the statements were made, focusing on the effect that the statements would have on their recipient.

An additional aspect of the court’s opinion in Chaves suggests that it may follow a flexible Ollman-like approach to questions involving the opinion privilege. Although the court does not explicitly say so, the structure of the decision at least hints that the court may not favor the Restatement view. While the portion of the opinion relating to defamation does not mention the Restatement, the court drew heavily on the Restatement in the second half of its opinion, which discusses the plaintiff’s claim for tortious interference with contractual relationship.214 Moreover, in Harris the court accepted the Restatement’s analysis of other aspects of defamation law.215 Thus, it is at least reasonable to suggest that the absence of any mention of the Restatement in the court’s discussion of the opinion privilege may have significance.

C. What Remains of Special Damages?

A remaining area of uncertainty in Virginia defamation law revolves around the kind of damage that must be proved to support an action on words that are not defamatory per se. Based on two short sentences in Fleming I, which were repeated in Harris,216 one can now argue that the Virginia Supreme Court has washed away more than 200 years of defamation law and effected a radical change in the type of damages that will support a claim involving a non-per se defamation.

The issue arose in Fleming I when the court was presented with the question of whether an accusation that the plaintiff, Bedford Moore, was a racist was defamatory per se.217 If it were not defamatory per se, as the defendant James Fleming contended, the common law of Virginia required that Moore first prove special damages,218 a burden that Fleming maintained he could not satisfy.

213. Id. at 119, 335 S.E.2d at 101.
214. See id. at 120-21, 335 S.E.2d at 102-03.
217. The categories of words actionable per se are set forth supra note 76.
218. On the other hand, if words constituted a per se defamation, damage was presumed, and the plaintiff could recover without any proof of injury. See Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 149-51, 334 S.E.2d 846, 851 (1985). In Gertz the Supreme Court
Before *Fleming I*, the accepted rule was that special damages consisted of actual pecuniary loss suffered as a direct result of the offending publication.\(^{219}\)

After reviewing the categories of words that constitute a per se defamation, the court in *Fleming I* concluded that the accusation leveled against Moore did not fall into one of the recognized categories. Since Moore had not proved any pecuniary loss, one might logically have expected, based on past precedent, that his action would have been dismissed. This was not the case, however, as the court radically altered the meaning of the phrase “special damages” by writing:

“Special Damages”, which under the common law rule must be shown as a prerequisite to recovery where the defamatory words are not actionable per se, are not to be limited to pecuniary loss. To the extent that language in *Shupe* may be construed to indicate that emotional upset and embarrassment cannot constitute “special damages,” it is hereby modified.\(^{220}\)

Although Moore had failed to prove pecuniary loss, he had shown emotional upset, and his action was thus allowed to proceed on that basis.\(^{221}\)

Given the brevity of the court’s discussion of this issue and the absence of any explanation of why such a radical change was being effected, one must question whether this result was really intended, or was caused by a misunderstanding of the true nature of special damages. A careful analysis of the historical underpinnings of the requirement that special damages be proved, the structure of the court’s opinions in *Fleming I* and *Harris*, and recent inter-
pretations of the requirement, suggest that the latter may in fact be the case.

A historical review of the requirement that special damages be proved where words are not defamatory per se illustrates how dramatic a change is effected by a literal interpretation of the court's opinion in Fleming I, and its reiteration in Harris. The modern law of defamation in Virginia has its origin in three distinct forms of action for disparaging words. First, there was the action for slander, involving spoken words, which the common law courts initially accepted as an action on the case. Damage, not insult, was the gist of the action. During the first half of the seventeenth century, the common law judges relaxed the requirement that pecuniary loss be alleged and proved in all cases of slander, recognizing that certain words carried with them imputations that presumptively would cause such damage. These words were actionable per se. Thus, actions were permitted on words charging commission of certain crimes, words charging infection with certain diseases, words imputing unfitness to perform the duties of an office of employment for profit, and words prejudicing a person in his profession or trade. Unless words fell into one of the categories that were actionable per se, slander remained an action on the case requiring proof that the defamatory imputation in fact had caused specific pecuniary loss.

Unlike slander, the rules applicable to libel, that is, written defamation, originated in the Court of Star Chamber, which was concerned with maintaining the peace. Since dueling was a practice that endangered the peace, Star Chamber entertained certain private defamation actions to provide redress for insults. While truth was a defense in action for slander, "because a person ought not to be allowed to receive compensation for damage caused to a

223. See 5 W. Holdsworth, supra note 222, at 206; see also 8 W. Holdsworth, A History of English Law 346-47 (1926).
224. See 8 W. Holdsworth, supra note 223, at 347; Lovell, supra note 222, at 1065.
225. See 1 A. Hanson, Libel and Related Torts 2-3 (1969); Veeder, The History and Theory of the Law of Defamation, 3 Colum. L. Rev. 546, 558-59 (1903). These are precisely the categories of words recognized in Virginia which constitute defamation per se. See supra note 75.
226. See Prosser, supra note 104, at 760; Veeder, supra note 225, at 571.
227. See 5 W. Holdsworth, supra note 222, at 208; Lovell, supra note 222, at 1060-61; Veeder, supra note 225, at 567.
228. See 5 W. Holdsworth, supra note 222, at 209-10; Lovell, supra note 222, at 1059-61.
character which he did not possess," \textsuperscript{229} it was no defense to libel: 
"[T]he fact that it was true might make . . . [the defamation] more likely to result in a breach of the peace—'for as the woman said she would never grieve to have been told of her red nose if she had not one indeed.' " \textsuperscript{230} Thus, while damage was the sole basis of the common law action on the case for slander, insult and injury to feelings played some part in the evolution of actions for libel.

When the Court of Star Chamber was abolished in 1641, common law courts assumed some part of the jurisdiction over actions for libel. \textsuperscript{231} Rather than assimilate the two forms of action into one, a clear distinction was made between the tort of libel for written defamation and the tort of slander for oral defamation. \textsuperscript{232} Written words were treated as actionable, even though they would not be actionable if spoken. \textsuperscript{233}

These rules governing actions for libel and slander were a part of the common law of Virginia in the nineteenth century. \textsuperscript{234} In addition, as a part of the Act of January 26, 1810, to suppress dueling, the General Assembly provided a third remedy in damages for insulting words. \textsuperscript{235} Insult to the feelings of the offended party was the gravamen of this action. \textsuperscript{236} Therefore, as with Star Chamber policy, the truth of the charge was no defense to the action, \textsuperscript{237} although truth could be shown in certain circumstances to mitigate damages. \textsuperscript{238}

An action under the insulting words statute was such a distinct departure from common law defamation actions that the Virginia Supreme Court held that an action for insulting words could not be pleaded in the same count with common law slander. As for words actionable at common law, whether slander or libel, the

\textsuperscript{229} See 5 W. Holdsworth, supra note 222, at 210.
\textsuperscript{230} Id. (quoting W. Hudson, A Treatise of the Court of Star Chamber, reprinted in Collectanea Juridica 1, 103 (London ca. 1792) (undated, printed for W. Clarke and Sons, Law-Booksellers, Portugal Street, Lincolns Inn)).
\textsuperscript{231} See 8 W. Holdsworth, supra note 223, at 361; Lovell, supra note 222, at 1068-69.
\textsuperscript{232} See King v. Lake, 145 Eng. Rep. 552 (Ex. Ch. 1670); 8 W. Holdsworth, supra note 223, at 364-65; Lovell, supra note 222, at 1070; Veeder, supra note 225, at 569-70.
\textsuperscript{233} See Lovell, supra note 222, at 1070; Veeder, supra note 225, at 569-70.
\textsuperscript{234} See 4 J. Minor, Institutes of Common and Statute Law 411-16 (2d ed. 1883); 2 C. Robinson, The Practice in Courts of Justice in England and the United States 600-17 (1855); 2 H. Tucker, Commentaries on the Laws of Virginia 58-63 (1837).
\textsuperscript{235} See 4 J. Minor, supra note 234, at 417; 2 C. Robinson, supra note 234, at 616.
\textsuperscript{236} See Brooks v. Calloway, 39 Va. (12 Leigh) 947, 949-50 (1841).
\textsuperscript{237} Id.
\textsuperscript{238} Moseley v. Moss, 47 Va. (6 Gratt.) 534, 546 (1850).
The common law does not give reparation for all derogatory or disparaging words. To make such words actionable, unless special damage be shown, they must impute some offence against the law, punishable criminally; or the having a contagious disorder tending to exclude from society; or which may affect one injuriously in his office or trust, or in his trade, profession or occupation; or which, in the case of a libel or written slander, tend to make the party subject to disgrace, ridicule or contempt. Words spoken that are merely vituperative, or insulting, or imputing only disorderly or immoral conduct, or ignoble habits, propensities or inclinations, or the want of delicacy, refinement or good breeding, are not regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in damages. Thus it is not actionable to call a man a villain, cheat, rascal, liar, coward or ruffian; to accuse him of swearing falsely, unless in a judicial proceeding; to charge him with a base or fraudulent act, or with having been guilty of adultery, seduction, or debauchery; or a woman with vulgarity, obscenity or incontinence; where such defamation bears only on the feelings or general standing or reputation of the party implicated, and the misconduct imputed has not been made punishable by statute.\textsuperscript{239}

Little more than a hundred years after this statement, actions in Virginia for libel, slander, and insulting words had fused insofar as rules of actionability were concerned. Words sued on had to be actionable per se to support an action, or else those words had to have caused special damages.\textsuperscript{240} While, at the time, there may have been some disagreement among the commentators that this fusion of actions had occurred,\textsuperscript{241} there could be no doubt that this was the law of Virginia following the decision in \textit{Shupe v. Rose's Stores, Inc.}\textsuperscript{242} It is interesting to note that the Supreme Court of Virginia, in applying the common law rules of slander to all civil actions for defamation, had reached the result recognized by Lord Mansfield in 1812 as the logical direction the common law should have taken.\textsuperscript{243}

\textsuperscript{239} Id. at 538 (emphasis added).
Analysis of the court’s opinion in *Fleming I* reveals a careful recognition of the relatively unique nature of Virginia’s defamation law. For example, the court recognized that “[u]nlike most states, Virginia makes no distinction between actions for libel and those for slander,” and pointed out that “[b]ecause libel actions in Virginia are governed by common law rules applicable to slander actions, libel cases from other jurisdictions are not helpful.”

Nowhere in the court’s opinions in either *Fleming I* or *Harris* is there any discussion that this state of the law of Virginia should be changed. But if a case can go to the jury on the plaintiff’s testimony that he has been embarrassed and humiliated by written words that are not defamatory per se, what is the effect on the law of Virginia? Obviously, it means that the common law of libel—the law set forth in those unhelpful cases from other jurisdictions—has been reinstated, if it is sufficient for the plaintiff merely to plead that words tending to subject him “to disgrace, ridicule or contempt” have upset him emotionally. Beyond that, an entirely new law of slander has been established. Oral words which are not actionable per se nor the cause of pecuniary loss are actionable, if they nevertheless upset the plaintiff. The effect here is to restore the statutory doctrine of insulting words, and to change the gravamen of slander actions from damage to insult.

If the court really intended to abolish any meaningful distinction between special and general damages, why, one must wonder, did it spend so much time analyzing whether the offending words published by Fleming were defamatory per se or not? If, in fact, an action based on a non-per se defamation can proceed on the same proof of injury that will support a per se defamation case, the court’s effort to distinguish these two different types of defamatory words was simply unnecessary and a waste of time. However, *Fleming I* and *Harris* need not be read as intending this radical alteration of Virginia law. In context, the court’s reference to “special damages” as including damage to reputation and standing in the community, embarrassment, humiliation, and mental suffering, may have been meant as a reference to “actual damages,” which

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244. *Fleming I*, 221 Va. at 889, 275 S.E.2d at 635.
245. *Id.* at 890, 275 S.E.2d at 636. Most jurisdictions distinguish between libel and slander. Written words that on their face show a defamatory meaning are actionable per se while spoken words must fall into one of the four traditional per se categories to be actionable without proof of special damages. See generally R. Sack, *supra* note 3, § II.7.1, at 94.
246. See Moseley, 47 Va. (6 Gratt.) at 598.
are quite different from special damages, and the suggested fusion of these two distinct types of injury may in fact have been unintended.\textsuperscript{247}

The two sentences in Fleming I relating to the kind of damages that are recoverable for a non-per se defamation are preceded by a discussion of that portion of the United States Supreme Court’s opinion in Gertz, considering what proof of damages must be offered to satisfy constitutional requirements. In Gertz, the Court reversed the common law rule that damages could be presumed in per se defamation cases and held that, in all cases, as a constitutional minimum, defamation plaintiffs are required to prove “actual injury.”\textsuperscript{248} Actual injury was defined by the Court to include reputation and standing in the community, personal humiliation, and mental anguish.\textsuperscript{249} The Court did not, however, purport to change the common law governing non-per se defamation cases, but it is this discussion of injury in Gertz on which the Virginia Supreme Court appears to rely in its discussion of special damages.\textsuperscript{250}

The possibility that the Virginia Supreme Court did not intend to abolish the distinction between special and general damages is further supported by the general state of confusion that appears to exist over the effect of Gertz on the law of damages in defamation actions. At least one commentator\textsuperscript{251} and several courts\textsuperscript{252} have suggested that Gertz’s elimination of presumed damages has effectively abolished the distinction between per se and non-per se defamations.\textsuperscript{253} The requirement that special damages be pleaded

\textsuperscript{247} It is worth noting that a review of the briefs in Fleming I discloses that the issue was not raised by either party.

\textsuperscript{248} Gertz, 418 U.S. at 349-50. As explained in Part I of this article, Great Coastal reinstated the doctrine of presumed damages in defamation cases involving no issue of public concern. See supra text accompanying notes 79-90.

\textsuperscript{249} Gertz, 418 U.S. at 349-50.

\textsuperscript{250} Indeed, in Harris the court refers to its decision in Fleming I that “actual injury was not confined to pecuniary loss but included such elements as damage to reputation and standing in the community, embarrassment, humiliation, and mental suffering.” Harris, 229 Va. at 13, 325 S.E.2d at 723 (emphasis added).


\textsuperscript{253} Other courts have disagreed. See Fogel v. Forbes, Inc., 500 F. Supp. 1081 (E.D. Pa. 1980); Forsher v. Bugliosi, 26 Cal. 3d 792, 163 Cal. Rptr. 628, 608 P.2d 716 (1980); McCart v.
and proved in non-per se actions is, according to some, no more than an "antiquated survivor of a jurisdictional dispute between the ecclesiastical and common law courts and makes no contemporary sense."\textsuperscript{254}

It can be argued just as persuasively, however, that such reasoning is, in the words of one leading commentator, "unsound [because the] analysis seems to ignore the difference between 'actual injury' or 'actual damages' on the one hand and 'special damages' on the other."\textsuperscript{256} In Virginia, the "antiquated" vestiges of this distinction no longer exist, as this commonwealth has long recognized a consistent set of rules governing damages in all actions for defamation, regardless of whether the claim is for slander, libel, or insulting words. It is one thing to say, as did the Supreme Court in\textit{Gertz}, that damages may no longer be presumed, but it does not necessarily follow that all defamatory words ought to be equally actionable. Virginia has recognized four categories of words defamatory per se, which are thought to be generally more harmful than other defamatory words. Although, after\textit{Gertz}, damages resulting from such words generally may not be presumed, there is nothing illogical or unconstitutional in fashioning rules of actionability that at least take into account the long-recognized belief that certain kinds of words are more likely to cause harm and in providing more forgiving rules of pleading and proof in such cases. In effect, this is what Virginia’s law of special damages has done, and it is hard to believe that, in two short sentences of what is arguably dictum, the Supreme Court of Virginia intended to effect so radical a change as is suggested by the language in\textit{Fleming I} and\textit{Harris}.

\section*{IV. Conclusion}

By addressing a number of important questions in its recent wave of decisions, the Supreme Court of Virginia has clarified many areas of defamation law in the commonwealth. At the same time, those opinions have unsettled certain areas thought to be clear and have raised additional questions not previously considered in Virginia. Without doubt, the cases will provide grist for

\begin{itemize}
\item\textsuperscript{254}\textit{Eaton}, supra note 251, at 1435. The jurisdictional dispute to which Eaton refers resulted in most jurisdictions applying one set of rules to libel actions and a different set to actions for slander. See supra note 245.
\item\textsuperscript{255}R. S\textsuperscript{ACK}, supra note 3, § II.7.7.1, at 110; see also S.\textit{Metcalf}, supra note 219, § 1013, at 1-40.
\end{itemize}
lawyers' arguments for some time to come. That uncertainty re-
mains after the court's laudable effort to resolve so many open is-
sues is not surprising, however. After all, the common law of defa-
mation, with all of its considerable complexities, anomalies, and
vagueries, has been evolving for hundreds of years, while the courts
have had little more than twenty years to grapple with the constitu-
tional overlay that was imposed by the United States Supreme
Court in 1964. In Virginia, while a good beginning has been made,
much remains to be done.