

Attorneys Beware: The Publishing of Judicial Pleadings to the Press and on the Internet May Lose Their Previously Privileged Status and Provide Exposure for Defamation Far Beyond What is Contemplated

In today's world with the proliferation of social networking sites like Twitter and Facebook and twenty four hour news channels on television and the internet the expectation of the media and the public is that they will have unfiltered, instant access to newsworthy information. The non-biased publishing of judicial pleadings by the news media may enjoy certain public interest privileges, however, attorneys and others who assist in facilitating this exchange of information may not be so fortunate. Attorneys that accommodate this lust for information by providing judicial pleadings to the press and on the internet may find themselves and their firms named in claims for defamation by the very parties they originally sued. This especially applies if the attorney utilizes the pleadings as a litigation tool by transmitting them to the news source without solicitation, uploads the pleadings onto their firm's website without publishing the opposing parties' responsive pleadings, or interjects their own biased commentary regarding the judicial pleadings when interviewed by the press.

In *Sunstar Ventures, LLC. v. Tigani*¹, the Superior Court for Delaware, New Castle County, followed federal law in recognizing that the publishing of a judicial pleading to the press extinguishes the absolute litigation privilege.² In recognizing the privilege is waived when pleadings are published to parties like the press with no connection to the judicial proceeding the Superior Court followed the rule in Delaware set forth in *Barker v. Huang*³ that the absolute judicial privilege will not protect an attorney who wishes to litigate his case in the press.⁴ With this decision Delaware joins the overwhelming majority of states that have adopted such a position.⁵ Furthermore,

attorneys who decide to enlist the press or utilize the internet as a litigation tool should be aware that their potential exposure from defamation suits may come from parties that were not previously named in the underlying lawsuit and may extend to other attorneys in the firm besides the attorney who submitted the pleading to the press.

Defamation Actions

The common law tort of defamation comes from the recognition that “[r]eputation and honor are no less precious to good men than bodily safety and freedom. In some cases they are dearer than life itself. It is needful for the peace and welfare of a civilized commonwealth that the laws should protect the reputation as well as the person of the citizen.”⁶ A communication is defamatory “if it tends to so harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him.”⁷ Liability for written defamation known as libel is typically broader than oral communication known as slander.⁸

In Delaware, a prima facie claim for Defamation requires “1) a false and defamatory communication concerning the plaintiff; 2) publication of the communication to third parties; 3) understanding of the defamatory nature of the communication by the third party, 4) fault on the part of the publisher, and 5) injury to the plaintiff.”⁹ As long as the above elements are met a plaintiff has plead a prima facie case of defamation whether the defamatory conduct occurs in a boardroom or a courtroom.

Defamation typically is not actionable without a specific showing of monetary loss known as special damages.¹⁰ However, there are four types of defamation, known as defamation per se, where special damages are not required. These include statements

which: "(1) malign one in a trade, business or profession, (2) impute a crime, (3) imply that one has a loathsome disease, or (4) impute unchastity to a woman."¹¹ Accusing an attorney of any act that imputes dishonesty is defamatory per se.¹² Punitive damages may also be awarded in defamation actions if malice can be proven showing that the defendant knew, should have known, or proceeded recklessly that the defamatory language was false.¹³

Besides truth, there may be other defenses to an action for defamation.¹⁴ Absolute and qualified privileges are affirmative defenses to defamation that set forth interests which society recognizes as superior to that of one's own reputation. However, the application of these interests must be narrowly tailored to serve the purpose for which they were created. If the privilege no longer serves the purpose for which it was created, it is waived. When pleadings are drafted as part of a judicial proceeding any defamatory language within the pleadings is protected by the absolute judicial privilege, otherwise known as the absolute litigation privilege.¹⁵ The publishing of these pleadings to parties and on forums unconnected with the judicial proceeding typically extinguishes the absolute litigation privilege. However, the publishing of filed pleadings by non-litigant parties under certain conditions may still enjoy protection under the more limited, qualified fair report privilege.¹⁶

A. The Absolute Litigation Privilege.

The absolute litigation privilege is a common law privilege that has been embraced "uniformly by state and federal courts."¹⁷ The privilege protects judges, attorneys, witnesses, and parties from the threat of defamation suits as long as the

communication was made in the course of a judicial proceeding and was relevant to a matter at issue.¹⁸ The privilege serves the purpose of allowing the free flow of information between persons involved in a judicial proceeding.¹⁹ The privilege also extends to communications made outside the courtroom made in the course of discovery or settlement negotiations even though there is a greater potential for abuse.²⁰ The strength of the litigation privilege is that it is impenetrable as long as the communication in some way pertains to the subject litigation.

The privilege has even been extended to circumstances outside the litigation proceeding including pre-filing and post trial communications, and to quasi-judicial administrative proceedings.²¹ However, with such a broad application of the privilege, courts are vigilante to ensure that the communication was made as part of, or in furtherance of the underlying judicial or quasi-judicial proceeding and that adequate procedural safeguards are in place. Adequate procedural safeguards typically include that a legally cognizable tribunal was conducting the proceeding, that there was an opportunity to call and cross examine witnesses, and that the injured party was able to present their side of the story.²²

However, even with the broad application of the absolute privilege, there have been attempts to expand its scope. It has been argued in the courts that the absolute privilege should extend to providing pleadings to the press and on the internet. Some litigants have asserted that it is part of an attorney's ethical duty to zealously represent their client by engaging the press and using the internet as a litigation tool. Others have argued that the pleading is a public document and that providing the document to the press is only facilitating the exchange of information they are already entitled to.

However, with very limited exceptions, these arguments have been rejected since the press and the internet lack the proper connection to the underlying judicial proceeding and are at most only concerned citizens and forums.²³

The Resourceful Slanderer Argument

Early on the Courts recognized that extending the absolute litigation privilege to publishing judicial pleadings to the press provided too much opportunity for abuse.²⁴ The courts made it clear that attorneys were free to publish pleadings to the press, but they did so at their own risk.²⁵ The first cases addressing the publication of a judicial pleading to the press focused primarily on the motive of the publisher with an eye on the underlying purpose of the absolute litigation privilege. In *Bradley v. Hartford Acc. & Indem. Co.*,²⁶ the California Court of Appeals, addressed the issue of a plaintiff who apparently brought a fabricated lawsuit for the sole purpose of invoking a privilege to publish the underlying pleading to the press. The Court found that filing a judicial pleading did not provide a “full scale, blanket authorization to republish the [pleading] on a nonprivileged occasion to persons who the privilege is not applicable.”²⁷ In refusing to allow the “resourceful slanderer” from taking advantage of the litigation privilege the California court held that:

It is easily discernible what result would ensue should we condone such an apparent ruse by providing absolute litigation immunity to the resourceful slanderer. The privileged defamation, now a barely tolerated exception, would gain full-fledged legitimization. All that the slanderer would have to do to avoid the consequences of his evil act would be to file the defamatory matter with the court first, then republish its as an absolutely privileged matter to the news media or to the public at large, thereby converting the litigation in the court into litigation in the press or in the street.²⁸

In *Asay v. Hallmark Cards*,²⁹ the Eighth Circuit Court of Appeals refused to extend the absolute litigation privilege to the publishing of a complaint to the press. The Court initially examined the policy behind the absolute privilege and noted that

publishing a complaint to the press would not “generally inhibit parties or their attorneys from fully investigating their claims or completely detailing them for the court or other parties” and that “the important factor of judicial control is absent.”³⁰

The Court followed the reasoning in *Bradley* regarding the resourceful slanderer, but seemed to focus in its holding more upon to whom the pleading was published holding:

[W]hile a defamatory pleading is privileged, that pleading cannot be a predicate for dissemination of the defamatory matter to the public or third parties not connected with the judicial proceeding. Otherwise, to cause great harm and mischief a person need only file false and defamatory statements as judicial pleadings and then proceed to republish the defamation at will under the cloak of immunity.³¹

As the *Asay and Bradley* Courts found it defies logic to provide an absolute privilege to a party or attorney that has control over the content of the underlying complaint. Such an extension of the absolute privilege provides far too great an opportunity to engage in intentional offensive defamatory acts while utilizing the official filing of the complaint as a shield to any liability for such actions.

In *Green Acres Trust v. London*³², the Court addressed the pre-filing publication to the press of an underlying class action complaint by attorneys which alleged the plaintiff engaged in fraud. In following *Asay*, the Court moved away from looking at subjective intent of the publisher and began to apply a dual test regarding “both content and manner of the extra-judicial communications”. The court specifically examined the person who received the extra-judicial communication and found that “the recipient of the communications, the newspaper reporter, had no relation to the proposed class action” and was only “a concerned observer.”³³

An Attorney's Ethical Considerations

The *Asay* Court also addressed an argument that not extending the privilege to such communications would prevent attorneys from performing “their ethical duty to effectively represent their clients.”³⁴ In addressing and rejecting the argument that an attorney could not effectively represent their client if they could not make such extra-judicial publications the Court noted that there are other ethical considerations which take precedence. The Court found more compelling the Attorney’s ethical duty not to seek out publicity that would likely interfere with the fairness of the underlying litigation and the duty not to do unnecessary harm to an adversary.³⁵ The Court recognized that involving the press may be a litigation tactic, but that if that was a tactic it was undertaken by an attorney at his own risk.³⁶ Specifically, the Court held:

[W]e consider their conduct to be inconsistent with our rules of ethics. Two ethical tenets directly counsel against the publicity courted by lawyer defendants. First, lawyers must avoid causing injury to their opponents. An attorney has a duty to represent his or her clients zealously. But an attorney has as compelling an obligation to avoid unnecessary harm to an adversary...In addition, a lawyer may not make or participate in making an extra-judicial statement which he expects will be disseminated by means of public communication which will likely interfere with the fairness of an adjudicative proceeding...These two principles, avoiding unnecessary harm and extra-judicial communications, do not affect a lawyer’s ability to further his clients interest...Indeed, inflicting unnecessary harm and inflicting the adversary during a press conference cannot be considered as legitimately advancing a client’s interest...[A]n attorney who wishes to litigate his case in the press will do so at his own risk.³⁷

In *C.A.T. Scan Associates v. Ohio-Nuclear Inc.*,³⁸ the Federal District Court for New York reconciled the ethical issues regarding advocating client’s interests with complete zeal while protecting a person’s right to a good name. The Court found that:

The common law privilege offers a shield to one who publishes libelous statements in a pleading or in open court for the purpose of protecting litigants' zeal in furthering their causes. Parties' interest in furthering their causes may be protected

without clothing them with an absolute right to publicly distribute whatever malicious matter they may author.

These cases make it abundantly clear that an attorney who wishes to litigate their case in the press or on the internet as part of the zealous advocacy of their client will not be able to use the absolute litigation privilege as a shield against potential defamation suits. While they may choose this tactic they do so at their own risk. Any other holding would squarely conflict with the other ethical tenets regarding avoiding undue harm to an adversary and interfering with the fairness in a judicial proceeding.

The Public Document Argument

In *C.A.T. Scan Associates* the Court also addressed the novel argument that the publishing of a complaint to the press is privileged because a filed complaint is a public document. The Court used similar reasoning to its out of state's predecessors that publishing a complaint to the press does not further the policy behind the privilege. The Court then examined the difference between a plaintiff intentionally publishing a complaint to the press as a publicity seeking litigation tool and the press independently obtaining a copy of the pleading. The court specifically stated:

Once filed, the complaint is a public document with access to it available to the public and the news media. But for the plaintiff, purposely and maliciously, to stimulate press coverage and wide publicity of a complaint with its allegedly false and malicious statements is beyond the pale of protection.³⁹

In *Bender v. Smith Barney*⁴⁰ the New Jersey court recognized that publishing a previously filed public document to the press may be an acceptable litigation tactic, but that such a communication was not privileged.⁴¹ The Court recognized that “such distribution is not protected because it is foreign to the purposes of the privilege and serves only the interest of the distributor in getting one side of the story out first or most

vividly.”⁴²In summary the Court found that “under New Jersey law, the purposeful dissemination of defamatory allegations contained in a pleading, for purposes of obtaining publicity of the allegation, causes the otherwise privileged allegations to lose their protected status when published.”⁴³

While a filed complaint is a public document the fact remains that the complaint was drafted by an attorney advocate for one side of the litigation. While the press and public may be entitled to independently obtain a copy of the filed complaint from the Court Clerk they are also entitled to simultaneously view and obtain copies of any of the pleadings from the adverse party to the proceeding. Refusing to extend the absolute litigation privilege to filed court documents ensures that advocates on both sides of the litigation do not possess the ability to affect the court of public opinion without facing some type of control or repercussion for potentially influential and untrue utterances.

Recent Decisions and the Two Prong Test

In *Bochetto v. Gibson*⁴⁴, the Supreme Court of Pennsylvania addressed the specific issue of the republication of a previously privileged Complaint. In *Bochetto* an attorney faxed a copy of the complaint to a reporter at a daily legal publication who published an article detailing the allegations in the complaint. The trial court ruled that the publication of the Complaint was protected by the absolute judicial privilege “because the document had already been filed and was available to the public...[the court] could not ignore the chilling effect that could result from effectively precluding attorneys from forwarding copies of the pleadings they have filed to the press.”⁴⁵

In reversing the order of the trial court, which had been affirmed by the intermediate Pennsylvania Superior Court, the Supreme Court of Pennsylvania used a

two prong test to determine if the communication was privileged. The test inquired whether the republication of the pleadings “1) was issued during the regular course of the judicial proceedings; and 2) [if] it was pertinent and material to those proceedings.”⁴⁶ In applying the test the Court reviewed another Pennsylvania case, *Post v. Mendel*,⁴⁷ where an attorney drafted a letter detailing misconduct by opposing counsel and sent it to the attorney, judge, disciplinary board, and the attorney’s client. The Court found that the communication was issued during the regular course of the judicial proceeding, but was not pertinent and material to those proceedings, and therefore not “within the sphere of communications which judicial immunity was designed to protect.”⁴⁸

The court then applied the first prong of the test to the case at hand and found that even though a complaint was initially privileged “over publishing” or “republishing” of the complaint to “another audience outside of the proceeding” could extinguish the privilege.⁴⁹ The Court ultimately held that “[a]s [the attorney’s] act of sending the complaint to [the reporter] was an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings, it is plain that it was not protected by the judicial privilege.”⁵⁰

In *Pratt v. Nelson*⁵¹, the Utah Supreme Court reviewed the denial of a Motion to Dismiss in which the defendant and her attorneys held a press conference where they distributed copies of the underlying complaint to the press. The case gained national attention and even international attention due to the excessive publication of the complaint in newspapers, television, and on the internet. In a holding which remanded the case to District Court the Utah Supreme Court found that the excessive publication of the complaint to the press destroyed the absolute judicial privilege that the complaint

initially enjoyed. The Court used a similar two prong test to determine whether the publication of the complaint lost its underlying privilege:

1) [W]hether the recipients of the publication have a sufficient connection to the judicial proceeding; and 2) whether the purposes of the judicial proceeding privilege would be furthered by protecting the publication. If the recipients of the publication are not sufficiently connected to the judicial proceeding and the purpose of the privilege would not be furthered by protecting the publication then the statements in question lose their absolute immunity and privileged status.⁵²

In finding that the publication of the complaint to the press destroyed the absolute judicial privilege the Court held that:

[T]he press generally lack a connection to judicial proceedings sufficient to warrant an extension of the judicial privilege to statements made by parties to the press...Their statements were published to more persons than necessary to resolve the dispute or further the objectives of the proposed litigation. The press had neither any relation to the pending litigation nor any clear legal interest in the outcome of the case. At most, the reporters...were acting only in the capacity of concerned citizens...the reporters played no legitimate role in resolving the dispute between the parties. As a result, the press in this case clearly lacked a sufficient connection to the pending proceeding.⁵³

It appears that the recent decisions where two prong tests have been applied have focused on the original purpose of the privilege to ensure the free flow of communication in a judicial proceeding. In fact, the second prong of the test appears to ensure that communications between players to the litigation actually further the purpose of the underlying litigation. In any case, it is evident that the publishing of a complaint to the press or on the internet will fail both prongs of the test since the parties and forums are not part of the underlying litigation and the communication does nothing to further the underlying litigation.

Application to the Internet

Courts have not specifically addressed the issue of whether a defamatory complaint published on a law firm's website extinguishes the absolute litigation privilege.

However, in *Seidl v. Greentree Mortgage Company*⁵⁴, the Colorado Federal District Court relied upon the Maryland case of *Kennedy v. Cannon* to find that the publication of such material on the internet bears even less relation to the underlying proceeding than publication to the press.⁵⁵ The Court specifically found that while the internet audience may be concerned observers they are "even more removed from the proceeding than the newspaper reporters involved in the Kleier Advertising and Green Acres Trust cases because the audience chosen was wholly unconnected to the judicial process."⁵⁶ The Court went on to find that "an attorney who wishes to litigate her case in the press and via the Internet does so at her own risk."⁵⁷

Adverse Holdings

Texas appears to be the only state which has found the republication of a complaint to the press protected by the absolute litigation privilege. While still valid law, this holding appears to be based at least partially on questionable reasoning. In *Daystar Residential, Inc. v. Coomer*⁵⁸, the Court of Appeals of Texas held that:

[t]he judicial-proceeding privilege has also been applied to the delivery of pleadings in pending litigation to the news media after the suit is filed...[j]ust as the mere delivery of pleadings in pending litigation to the news media does not amount to publication outside the judicial pleadings that would result in waiver of the absolute privilege, a press release, advising the media that a lawsuit has been filed, including a basic description of the allegations, does not amount to publication outside of the judicial proceedings resulting in a waiver of the absolute privilege

In arriving at its decision the Texas court relied upon another Texas case *Hill v. Herald-Post Pub. Co., Inc.*,⁵⁹ for authority that the publishing of judicial pleadings to the press was privileged.

Hill examined and discounted the finding of *Green Acres Trust* that the absolute privilege was waived when a complaint was published to the press. The *Hill* Court also

rejected the reasoning in another Texas Court of Appeals case *Levingston Shipbuilding Co. v. Inland West Corp.*,⁶⁰ where the Court held that the publication of a complaint to the press “stepped out of the umbrella of privilege.” *Hill* concluded that in *Levingston* to come to such a “unique conclusion, the appellate court mistakenly relied” upon another Texas case which “has no support in the case law and is a deviation from the general rule of absolute privilege.”⁶¹ Finally, the Court in *Hill* found that:

[t]he harm resulting to the defamed party by delivering a copy of the suit or motion in a pending proceeding to the news media could demonstratively be no greater than it would be if the news media reporters got a tip from someone or found the pleadings on their own...the delivery of pleadings in pending litigation to members of the news media does not amount to a publication outside of the judicial proceedings, resulting in a waiver of the absolute privilege.⁶²

The decisions in *Daystar Residential* and *Hill* are erroneous because they focus on whether the recipient of the communication, the press, was independently entitled to obtain a copy of the pleading instead of on whether the interests of the underlying litigation were furthered. This position has been squarely rejected in other courts whether they applied the resourceful slander, ethical considerations, public document, or the two prong test since the press is not connected to the underlying litigation in any way. A closer look reveals that the Texas Courts appear to apply a qualified fair reporting privilege to the publication of the pleadings to the press. The fair report privilege, discussed below, is a qualified privilege created for an entirely different purpose than the absolute litigation privilege.

Summary of Absolute Privilege

The absolute litigation privilege is a broad judicial policy that extends to communications that are in furtherance of the judicial process. The publishing of a previously privileged judicial complaint to the press has overwhelmingly been found not

to further the interests of the underlying litigation. While an attorney is not prohibited from sending a copy of their complaint to the press they should understand the risks involved including potential exposure for defamation if the allegations in the underlying complaint are false. Additionally, as seen in *Seidl*, an attorney faces the same or greater risk of exposure if they upload judicial pleadings to their website since the internet is even further removed from the judicial process than the press. While it is clear that the absolute privilege will not shield an attorney who publishes a judicial pleading to the press under certain circumstances there may be other qualified privileges that may provide an affirmative defense to a defamation action.

B. Qualified or Conditional Privileges

A Qualified or conditional privileges is an exception to the general rule that one who re-publishes defamatory comments to another is equally liable for defamation.⁶³ These privileges apply when the defamatory communication “advances social policies of greater importance than the vindication of a plaintiff’s reputational interest.”⁶⁴ When applying the privilege courts examine whether the publisher had a duty to disclose the facts known to third persons or whether the communication was made in good faith to another with a common or corresponding interest in the matter, or a matter of interest to the public in general.⁶⁵ The primary difference between conditional privileges and absolute privileges is that conditional privileges may be overcome under certain circumstances.

Whether a conditional privilege exists is a question of law for the court to decide.⁶⁶ The burden of proving the privilege exists is initially upon the defendant, however, once a court finds the privilege exists the burden of proof is shifted to the

Plaintiff to show that the privilege was abused.⁶⁷ Abuse is determined: “1) by excessive or improper publication, 2) by the use of the occasion for a purpose not embraced within the privilege, or 3) by making a statement which the speaker knows is false.”⁶⁸ In other words the privilege must be “exercised in good faith and without malice.”⁶⁹ Whether a conditional privilege has been abused is typically a question for the jury unless after discovery on summary judgment with all evidence “considered in a light most favorable to plaintiff” it “is insufficient to raise a factual question upon which reasonable men might differ.”⁷⁰ The defense of qualified privilege is an affirmative defense that may not be raised on a motion to dismiss, but should be set forth in the answer.⁷¹

Statutorily conditional privileges can apply to an infinite set of circumstances it is typically recognized that there are four common law qualified privileges.⁷² These privileges include: “(1) The public interest privilege, to publish materials to public officials on matters within their public responsibility; (2) the privilege to publish to someone who shares a common interest, or, relatedly, to publish in defense of oneself or in the interest of others; (3) the fair comment privilege; and (4) the privilege to make a fair and accurate report of public proceedings.”⁷³ When a judicial pleading is published to the press or on the internet only the privilege concerning making a fair and accurate report of a public proceeding has the potential to apply. This privilege is widely known as the Fair Report Privilege.⁷⁴

The Fair Report Privilege

The conditional fair reporting privilege is based on the fact that “[a] trial is a public event [and] [w]hat transpires in the court room is public property...Those who see

and hear what transpired can report with impunity.”⁷⁵ There are three public policy theories behind this privilege: “(1) the agency rationale, by which the reporter acts as agent for an otherwise preoccupied public which could, if it possessed the time, energy or inclination, attend the proceeding; (2) the public supervision rationale, by which the report provides to the larger community data it needs to monitor government institutions; (3) or the public information rationale, by which the reporter provides information affecting the greater welfare.”⁷⁶

In order for the fair report privilege to apply the report of a public proceeding must be a fair and accurate recount of the public proceeding.⁷⁷ The privilege also applies to accounts “focusing more narrowly on important parts of such proceedings.”⁷⁸ The fair report is a conditional privilege that can be waived if not exercised “with good faith, without malice and absent any knowledge of falsity or desire to cause harm.”⁷⁹ It applies equally to media and non-media parties.⁸⁰ Once it has been decided that the report is fair and it is accurate there is one last hurdle that must be overcome known as the self-reporting exception to the fair report privilege.⁸¹

The Self Reporting Exception

The self reporting exception to the fair report privilege is intended to prevent the original defamer from advancing their defamatory remarks with impunity. The exception is outlined in the Restatement of Torts, §611, comment c, which states that “[a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not.”⁸² While on its face this exception seems to apply in all cases where someone self reports their previous utterance this is not

necessarily the case.

In *Rosenberg v. Helsinki*⁸³ the Maryland Court of Appeals addressed the situation where a witness was sued for defamation after being interviewed by the press on the courthouse steps immediately after testifying in court. The court found that the witness has provided the reporter with a fair and accurate report of his in court testimony. The court noted that “at first blush” the self reporting exception seemed to apply, but then noted that comment c of the Restatement had been interpreted by “commentators and cases...as conferring protection upon any persons who do not act maliciously by commencing judicial proceedings in bad faith and then later repeating their own defamatory statements under the aegis of privilege.”⁸⁴ Sensing an unjust outcome, the court declined to strictly enforce the provisions of the Restatement, but rather found that the better interpretation was that “the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place. That is the true danger against which the self-reported statement exception must guard.”⁸⁵

In its analysis the Rosenberg court recognized that the privilege would not extend to “a person who maliciously institutes a judicial proceeding alleging defamatory charges and then circulates a press release or other communication based thereon.”⁸⁶ However, in the case before it the Court did not find any of the so called situations of abuse noting that Rosenberg: 1) testified in open court as an expert witness; 2) he had no personal stake in the outcome of the hearing; 3) he was approached by a reporter and responded to her questions; and 4) he accurately and fairly recounted the substance of his testimony.⁸⁷ Finally the court noted that “[i]n these circumstances to deny the privilege to a witness

reporting his own testimony, while the privilege is available to any other court spectator later recounting that same testimony, would defy logic.”⁸⁸

Courts have recognized that “the privilege does not sanction self-serving re-publication” of the public proceeding.⁸⁹ In limited circumstances the privilege has been taken outside a public proceeding and “extended to reports which described the contents of pleadings which have been filed with the court.”⁹⁰ However, the privilege has not been extended to an attorney who provides the press a copy of the complaint without solicitation. Courts have recognized “the fact that the communication is made in response to a request is of particular importance” when applying the privilege.⁹¹ The privilege can also be lost if it is inaccurate, unfair, garbled, or “where comments or insinuations are added.”⁹²

The fair report privilege has not been extended to attorneys who publish a complaint to the press. In *Kurczaba v. Pollock*,⁹³ the Illinois Court of Appeals specifically addressed whether the dissemination of a complaint by the attorney who filed the complaint qualified for the fair reporting privilege. In finding that the complaint was a public record, but not privileged the Court applied the self reporting exception to the fair report rule to deny the privilege.⁹⁴ The court applied Restatement of Torts §611, comment c, holding “whether the original publication was privileged or not...In the instant case, defendant made the original defamatory publication [the complaint] and then ‘reported’ the same matter to others. Based on this alone, the fair report of judicial proceedings privilege is not available to defendant.”⁹⁵ The court also found that the privilege did not apply since the defendant had added comment “not solely contained in the public records or proceedings” and the complaint did not mirror the actual public

document and was not therefore, fair and accurate.⁹⁶

The fair report privilege has been extended to comments provided by an attorney when contacted by a reporter who had independently obtained a copy of the complaint.⁹⁷ In *The Savage is Loose Company v. United Artists*⁹⁸, the Court found that the attorney “did not seek out [the press] for the purpose of publicizing the allegations of the complaint.”⁹⁹ The analysis found the “remarks [by the attorney] were confined to repeating the substance of the complaint” and “were a fair and true report of the complaint.”¹⁰⁰ The Court recognized that the privilege was “subject to limitations” if a party “maliciously asserts false and defamatory charges in judicial proceedings for the purpose of publicizing them in the press is not entitled to claim immunity, statutory, or otherwise.”¹⁰¹ This position was clarified in the subsequent case of *Bridge C.A.T. Scan Associates v. Ohio-Nuclear Inc.*,¹⁰² which made clear that the intentional dissemination of a complaint “to stimulate press coverage and wide publicity...with its allegedly false and malicious statements is beyond the pale of protection.”¹⁰³

The Judicial Action Exception

Another exception to the fair report privilege that seems to be losing favor in the courts, but it still regarded as the majority view is the “judicial action” exception to the fair report privilege.¹⁰⁴ The exception is based on the Restatement (Second) of Torts, §611, comment (e), at 299, which states:

[a] report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings[,] such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action.

While still the majority view the requirement of some judicial action before the fair report privilege attaches has come under attack. The arguments against requiring judicial action are that: 1) the filing of a complaint is a public act; 2) the privilege serves the public's interest in the judicial system and this interest begins with the filing of the complaint; 3) the judicial action requirement is ineffective in preventing frivolous pleadings; and 4) the public is sophisticated enough to understand that a complaint is only one side of the story.¹⁰⁵ However, the refusal to extend the privilege has primarily been reviewed in light of media defendants who republish a filed complaint with no judicial action and has not been applied to attorneys.¹⁰⁶ Other Courts when faced with non-media defendants have relied upon Restatement (Second) of Torts, §611, comment c, self reporting exception to deny the fair report privilege to attorneys seeking its shield.¹⁰⁷

Summary of the Fair Report Privilege

It is doubtful that attorneys utilizing press releases and publishing previously filed pleadings to the press or on the internet will be able to take advantage of the fair report privilege. While there may be some narrow exceptions to this rule such as in *Savage* the fact that attorneys are advocates in the judicial process should make most courts hesitant in extending the fair report privilege to attorneys. This is especially true if the attorney initiated the contact with the press or controlled the website where the pleading were published on. In declining to extend the fair reporting privilege courts may use either the self-publishing exception, the judicial action exception, or find that the publication of the pleading abused the purpose the privilege was intended for.

C. Exposure Far Beyond What is Contemplated

In today's world when dealing with a newsworthy case, it is difficult to resist the

urge to get your side of the story out to the public. It is not debatable that the press and the internet can be extremely useful litigation tools that can provide an attorney with a competitive edge in presenting their case. The urge to use these tools must be coupled with an acute awareness of where your potential exposure for defamation arise. If false statements are alleged in the complaint that pertain to a criminal act or the opposing parties profession a defamation action could arise without the need to prove special damages. This is especially true if the parties being sued are attorneys and the allegations allege fraud or dishonesty.¹⁰⁸

Furthermore, this exposure could come from un-named parties that were never named in the pleadings, but only referred to, such as owners of small companies and members of identifiable groups. Additionally, the theory of vicarious liability may subject a firm to a defamation action including punitive damages for an attorney's overzealous representation of their client. Finally, attorney's and staff members who simply follow instructions, may find themselves liable for simply sending a fax, mailing a letter, sending an email, or uploading a document to their company website.

Parties Who May Sue for Defamation

There is no requirement in a suit for defamation that the plaintiff was personally named in the defamatory comments. Rather the inquiry the courts make is whether the allegedly defamatory remarks were "of or concerning" plaintiff. This is a common law doctrine and a constitutional requirement.¹⁰⁹ The "of or concerning" requirement is satisfied if the listener concludes the alleged comment refers to plaintiff "even if the plaintiff is never named or is misnamed."¹¹⁰ Whether the "complaint alleges facts sufficient to make reasonable the connection between the libel and the plaintiff is a

question for the court.”¹¹¹ The court should take into account whether it is reasonable for a listener to understand that the remark referred to Plaintiff as well as evidence presented that shows the comments actually were reasonably understood to pertain to the Plaintiff.¹¹² It is not required that the general public understand the defamatory remark referred to plaintiff, but only that those who know the plaintiff and are familiar with the circumstances understood that the comments were referring to the plaintiff.¹¹³

Extraneous evidence including innuendo and colloquium may be used to show “that the plaintiff was intended to be referred to by the maker and was understood to be referred to by the reader.”¹¹⁴ It is also widely recognized that hearsay is admissible to show the reaction of persons in response to hearing the defamatory comments under the state of mind exception to the hearsay rule.¹¹⁵ A motion to dismiss for lack of standing will fail unless the defendant can show “that there are no set of facts plaintiff can prove which would entitle [plaintiff] relief.”¹¹⁶ The ultimate decision about whether the defamation actually pertains to the plaintiff is one for the jury.¹¹⁷

Defamation of a Company

An attorney suing a business should always be aware of potential defamation suits from owners and officers of the business. There is no set rule that the defamation of a company is “of or concerning” its owners and “[c]ases from other jurisdictions give little aid because the results diverge greatly.”¹¹⁸ In reviewing the cases throughout the jurisdictions there are patterns that appear to arise. The courts will look at the name of the company for guidance. If the plaintiff’s surname is part of the business name it is likely that the defamatory remarks refer to the plaintiff.¹¹⁹ The size of the company is another important factor that courts examine. The smaller the size of the company in

terms of employees the more likely the Court will find that the defamation pertained to plaintiffs.¹²⁰

The Courts also give great weight to the Plaintiff's role in the company. The more active the plaintiff in operating the company the more likely it is that the "of or concerning" requirement will be met. This is especially true if the subject matter of the alleged defamatory comments is under the supervision or control of the plaintiff or when the plaintiff is an owner operator of the company.¹²¹ Where the plaintiffs allege that they are investors or stockholders the courts typically will not find the "of or concerning" standard to be met.¹²²

Courts have also examined the nature of the defamatory language to determine the connection required in order to find defamation. The more serious the allegations the less stringent the proof of clear reference required since any connection to the damaging remarks could affect plaintiff. In *Jankovic v. International Crisis Group*,¹²³ the court analyzed whether the defamation of a "global enterprise" for being connected to a potentially corrupt government was as severe as being associated with "connections to organized crime, an entity whose very existence is criminal."¹²⁴ The Court found that "[a]ny connection to 'organized crime connotes involvement with illegal activity, whereas a statement accusing a Serbian bank of ties to a Serbian government agency requires something more to even arouse suspicion of corruptive complicity and resultant defamatory implications."¹²⁵ The Court went on to find that the alleged defamatory remarks "do not carry the same sinister message as an accusation of connections to organized crime."¹²⁶

On motion to dismiss a court should make a two prong test to determine whether

the plaintiff has standing. The court should examine: 1) whether under the circumstances a reasonable person could make the connection between the business and plaintiff; and 2) whether there is evidence that persons actually did make the connection between the defamation of the company and plaintiff and whether this connection was reasonable..¹²⁷ If there are specific facts on the record alleging that a third party understood the reference to plaintiff then the court should review the comments for reasonableness “drawing favorable inferences for the non-moving party and viewing the alleged remarks from the perspective of the listeners.”¹²⁸ Hearsay is also typically admissible to show how a third party perceived the defamatory comments.¹²⁹ In *Caudle v. Thomason*,¹³⁰ the Court in reviewing a motion to dismiss that was granted accepted plaintiffs plead allegations (which did not include people who understood the language as referring to plaintiff) and stated:

Taking these allegations to be true, and resolving all ambiguities in favor of [plaintiff], the Court is unable to say that a reasonable listener, familiar with the [situation]...would not infer that [plaintiff] was responsible for or involved with the alleged wrongdoing of [the company]. Thus, the Court is unable to say that there are no set of facts plaintiff can prove which would entitle him to relief...That, of course, is sufficient to defeat a motion to dismiss.”

There are other considerations that Courts have taken into account when making the “of and concerning” determination. In *Murdaugh Volkswagen, Inc. v. First Nat. Bank of South Carolina*,¹³¹ the court affirmed a jury instruction that included “the recognition by the person uttering the defamation that the individual officer or shareholder is the person ultimately responsible for the business decisions and financial problems of the corporation.”¹³² The fact that plaintiff needs to show that defamatory comments were “of or concerning” plaintiff “does not convert the libel into one that requires the pleading

of special damages.”¹³³ The Court should also be aware that the “words cannot be read in isolation”, but must be “read as a whole” to determine what the implication of the defamatory language is.¹³⁴ Extrinsic facts can also be used to meet the “of or concerning” requirement, as long as “they were known to those who read or heard the publication.”¹³⁵

The Small Group Exception

Attorneys suing unions or other identifiable groups should also understand that if the group is small enough or if any individual members are singled out then they may face a potential defamation action from members of the group. Typically the defamation of a group does not defame an individual Plaintiff.¹³⁶ However, when the group is less than 20 or 30 members it fits the “small group” exception rule and naming the Plaintiff in the allegedly defamatory statement is not necessarily required.¹³⁷

In *Jankovic v. International Crisis Group*,¹³⁸ the Court found that “[w]hen a statement refers to a group, a member of that group may claim defamation if the group’s size or other circumstances are such that a reasonable listener could conclude the statement referred to each member... or ‘solely or especially’ to the plaintiff.”¹³⁹

In order to meet the small group exception “a member of the derogated group must demonstrate either that “(a) the group or class is so small that the matter can reasonably be understood to refer to the member [hereinafter the “small-group exception”], or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to the member.”¹⁴⁰ If the small group is named and “each and every member of the group or class is referred to, then any individual member can sue.”¹⁴¹ While there is no “bright line” clearly outlining when a group is too big to sue

for an unnamed individual generally un-named group members “are not permitted to sue for group defamation if the group has more than 25 members; they will almost invariably not be permitted to sue if the group has more than 100 members.”¹⁴²

Liability May Extend to Attorneys in the Firm who had Only Limited contact with the Pleading or the Firm Itself

Recently in *Missner v. Clifford*,¹⁴³ the Appellate Court of Illinois addressed the novel issue of regarding what degree of participation in a judicial action was required in order for a member of a firm to incur liability for defamation. As a preliminary matter, the court determined that “any act by which defamatory matter is communicated to someone other than the person defamed is a publication.”¹⁴⁴ The court then explored, but did not decide whether verification alone on a complaint constituted a defamatory communication. They found that this issue is best reserved for the jury unless it “presents with convincing clarity.”¹⁴⁵

The court then explored the issue of participation in the publication and relied upon Restatement (Second) of Torts §617, comment a, in holding that “[a]ll persons that cause or participate in the publication of defamatory matters are responsible for such publication.”¹⁴⁶ The Court found that this also was a question for the jury.¹⁴⁷ The court went on to speculate that certain factors including who signed and filed the complaint, who was listed as lead attorney, who issued press releases concerning the complaint, who had authority to amend filings, who planned and attended meetings concerning the action, and who was involved in strategy discussions were all factors that a jury could look to in making the decision regarding participation.¹⁴⁸

While all attorneys should be aware of their potential exposure to defamation, law

firms should also understand that they may be vicariously liable for actions of their employees.¹⁴⁹ Under the doctrine of respondent superior an employer may be liable for defamatory conduct of its employees if the defamatory remarks were made within the scope of their employment.¹⁵⁰ Liability based on respondent superior also includes liability for punitive damages.¹⁵¹ While this may on occasion cause an unjust result the risk of not allowing for punitive damages against an employer potentially presents an equally unacceptable outcome.¹⁵²

Summary

The court's opinion in *Missner* should act as a red flag to all law firms that engage the press or the internet as part of their litigation strategy. Whether these firms submit the filed complaint to the press or simply upload the complaint to their website these simple actions will extinguish the absolute litigation privilege and are outside the purview of any conditional privileges. The potentially devastating consequences of undertaking such tactics include potentially expensive and time consuming defamation actions that not only exhaust resources, but also adversely affect a firm's standing with insurance carriers and their existing clients. The best course of action is to make sure that all members of the firm are aware of the potentially devastating effects of publishing pleadings outside the confines of the judicial proceeding. Firms are also well advised to develop policies for addressing issues when they are requested to comment on pending litigation. While the internet and press are still potentially very useful litigation tools all attorneys should be well aware of the pitfalls and risks associated with their use.

¹ Consol C.A. No 08C-04-042 JAP (Del Super 4/30/2009); fn 31.

² *Hoover v. Van Stone*, 540 F. Supp. 1118, 1123 (D. Del 1982)(“ Dissemination of the contents of a

complaint to the public or to third parties unconnected with the underlying litigation, on the other hand, generally is not sufficiently related to the judicial proceeding to give rise to the privilege... Thus, distribution of the complaint to the news media... will not constitute a privileged occasion. This approach is consistent with the public policy underpinnings of the privilege itself. Allowing defamation suits for unqualified disclosure of defamatory statements to the news media... ordinarily will not inhibit the full exposition of facts necessary for an equitable adjudication.”)

³ 610 A. 2d 1341, 1347 (Del. Supr. 1991).

⁴ *Kennedy v. Cannon*, 229 Md. 92, 98-99 (1962) (“[t]hat aside from the question of ethics, an attorney who wishes to litigate his case in the press will do so at his own risk.”)

⁵ The cases have squarely come down on the side of losing the privilege with 8 states including Arizona, New Jersey, Pennsylvania, Oregon, Utah, New York, Delaware, and California finding the privilege is lost while only Texas found that the privilege was not waived. *See Asay v. Hallmark Cards*, 594 F.2d 692 (8th Circuit); *Pratt v. Nelson*, 164 P.3d 366 (Utah 2007); *Green Acres Trust v. London*, 688 P.2d 617 (Arizona 1984); *Bochetto v. Gibson*, (J-61-2004) (PA, 2004); *Block v. First Blood Associates*, 691 F. Supp. 685 (S.D.N.Y. 1988); *Bradley v. Hartford Acc. & Indem. Co.*, 106 Cal Rptr. 718, 30 Cal App. 3d 818 (Cal App 1 Dist., 1973); *Bender v. Smith Barney*, 901 F. Supp 863, 871 (N.J. 1994); *but see Daystar Residential, Inc. v. Coomer*, 176 S.W. 3d 24 (Tx 2004) (most likely applying the qualified fair report privilege.). *Devivo v. Ascher*, 228 N. J. Super 453, 550 A.2d 163 (N.J. Super A.D. 1988) (“[c]ommunications made to newspaper and other reports in press conferences or any other manner have been almost universally found to be excluded from the protection of absolute privilege.”)

⁶ *Goldborough v. Orem & Johnson*, 108 Md. 671 (Md. 1906).

⁷ *Sunstar Ventures* at 21-22.

⁸ *Id.*

⁹ *Bickling v. Kent Gen. Hosp.*, 872 F. Supp 1299, 1307 (1994).

¹⁰ *Spence v. Funk*, 396 A.2d 967, fn1 (Del. Supr., 1978)

¹¹ *Sunstar Ventures* at 22-23.

¹² *Shapiro v. Messengil*, 661 A. 2d 202, 105 Md. App. 743, 775-76 (Md. App. 1994).

¹³ *Jacron Sales Co. v. Sindorf*, 276 Md. 580 (1976).

¹⁴ Truth is always a defense to defamation that the defendant bears the burden of proving.

¹⁵ *Nix v. Sawyer*, 466 A. 2d 407, 411 (Del. Super. 1983) (“the interest in encouraging a litigant’s unqualified candor as it facilitates the search for truth is deemed so compelling that the privilege attaches even where the statements are offered maliciously or with knowledge of their falsity.”)

¹⁶ *Rosenberg v. Helsinki* 328 Md. 664 (Md. 1992).

¹⁷ *Id.*

¹⁸ *Barker v. Huang*, 610 A. 2d 1341, 1345 (Del. Supr. 1991).

¹⁹ *Sinex v. Bishop*, C.A. No. 04C-12-256 MMJ, 10 (DE 10/27/2005) (DE, 2005).

²⁰ Hoover at 1122-23 (“Admittedly, application of the absolute privilege in these contexts may conceivably allow a party to engage in malicious fabrication with impunity, neither the threat of a perjury indictment nor the specter of judicial sanctions being present. Confining the privilege to in-court proceedings in which the Court could impose sanctions for, or otherwise control, the dissemination of defamatory statements would have the salutary effect of curbing the frequency or blunting the impact of such improper conduct. Such safeguards, however, would also inhibit the dispatch with which a potential witness would likely come forward with relevant evidence, impede the ability of a litigant to engage in intelligent discovery and needlessly encumber settlement negotiations. Thus, although application of the privilege to events occurring outside of court may sometimes lead to harsh results, the potential for abuse is outweighed by the need for complete candor in these preliminary trial proceedings.”)

²¹ *See Adams v. Peck*, 288 Md. 1, (1980) (physician opinion prepared as litigation, but never introduced into evidence.); *Arundel Corp. v. Green*, 75 Md. App 77 (1988) (letters written in anticipation of filing litigation); *Keys v. Chrysler Corp.*, 303 MD. 397 (Post judgment proceedings); *Sodergren v. Johns Hopkins University Applied Physics Lab*, 773 A.2d 592 (Md. App. 2001) (defamatory remarks made in settlement agreement). The privilege has also been extended to quasi judicial proceedings where adequate procedural safeguards are in place to protect an individual’s right to not be defamed. *Odyniec v. Schneider*, 322 Md. 520 (1991.)

²² *Woodruff v. Trepel*, 125 Md. App. 381, 399, 725 A.2d 612, 621 (Md. App., 1998)

²³ *Pratt v. Nelson*, 164 P.3d 366, 377 (Utah 2007); *Seidl v. Greentree Mortgage Company*, 30 F.Supp2d 1292, 1316 (D. Colo. 1998)(finding that publication of such material on the internet is "even more removed from the proceeding than [to] newspaper reporters...")

²⁴ See *Bradley v. Hartford Acc. & Indem. Co.*, 106 Cal Rptr. 718, 30 Cal App. 3d 818 (Cal App 1 Dist., 1973); *Asay v. Hallmark Card*, 594 F.2d 692 (8th Circuit).

²⁵ *Kennedy v. Cannon*, 229 Md. 92, 98-99 (1962)("[t]hat aside from the question of ethics, an attorney who wishes to litigate his case in the press will do so at his own risk.")

²⁶ 106 Cal Rptr. 718, 30 Cal App. 3d 818 (Cal App 1 Dist., 1973)

²⁷ *Bradley* at 724.

²⁸ *Id.* at 723.

²⁹ 594 F.2d 692 (8th Circuit).

³⁰ *Id.* at 698.

³¹ *Id.*

³² 688 P.2d 617 (Arizona 1984).

³³ *Id.* at 622-623.

³⁴ *Id.* at 623

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 608 F.Supp. 1187 (S.D.N.Y., 1985); followed in *Block v. First Blood Associates*, 691 F. Supp. 685 (S.D.N.Y. 1988).

³⁹ *Id.* at 1195.

⁴⁰ 901 F. Supp 863, 871 (N.J. 1994).

⁴¹ Following the earlier New Jersey case of *Citizens State Bank of New Jersey v. Lebertelli*, 521 A. 2d 867, 215 N.J. Super 190, (N.J. Super A.D. 1987)("Distribution of court-filed documents to the press or other interested persons merely republishes material otherwise absolutely privileged. However, such distribution is not protected because it is foreign to the purposes of the privilege and serves only the interest of the distributor in *getting one side of the story out first or most vividly*. The argument is made that litigants ought to be able to furnish information of record to the press and public.... And so they can. But they cannot claim an absolute immunity created to safeguard the judicial process on the thesis that relations with the press and public are a part of it. *Distribution to the press and public of pleadings and other documents may be a tactic chosen by litigators, but it is not immunized as a part of the judicial process*").

⁴² *Id.* at 871.

⁴³ *Id.*

⁴⁴ (J-61-2004) (PA, 2004).

⁴⁵ *Id.* at 4.

⁴⁶ *Id.* at 7.

⁴⁷ 507 A.2d 351, 355 (Pa. 1986)

⁴⁸ *Id.* at 356.

⁴⁹ *Bochetto* at 7.

⁵⁰ *Id.* at 8

⁵¹ 164 P.3d 366 (Utah 2007)

⁵² *Id.* at 377

⁵³ *Id.* at 380.

⁵⁴ 30 F.Supp2d 1292 (D. Colo. 1998)

⁵⁵ *Id.* at 1313

⁵⁶ *Id.* at 1316.

⁵⁷ *Id.*

⁵⁸ 176 S.W. 3d 24 (Tx 2004).

⁵⁹ 877 S.W. 2d 774 (1994)

⁶⁰ 688 S.W. 2d 192, 196 (Tex App.-Beaumont 1985)

⁶¹ *Hill* at 783

⁶² *Id.*

⁶³ *Rosenberg v. Helsinki* 328 Md. 664 (Md. 1992).

⁶⁴ *Marchesi v. Franchino*, 283 Md. 131,135-136, 387 A.2d 1129 (1987)

⁶⁵ *Klein v. Sunbeam Corp.*, 47 Del. 526, 94 A.2d 385, 392 (Del. Supr., 1952); *Gohari v. Darvish*, 363 Md. 42, 56 (2001).

⁶⁶ Gilliland at 18-19.
⁶⁷ *Battista v. Chrysler Corp.*, 454 A.2d 286, 291 (Del. Super., 1982)
⁶⁸ *Id.*
⁶⁹ *Id.*
⁷⁰ *Eaton v. Miller Brewing Company Raven Transport, Inc.*, C.A. No. S07C-08 033 RFS, p.6 (Del. Super. 4/30/2009) (Del. Super., 2009).
⁷¹ Gilliland at 18.
⁷² Gohari.
⁷³ *Id.*
⁷⁴ *Kanaga v. Gannett Co., Inc.*, 687 A.2d 173, 182 (Del. Supr., 1996)
⁷⁵ *Id. at 679.*
⁷⁶ *Id.*
⁷⁷ Rosenberg at 680.
⁷⁸ *Id.* at 682.
⁷⁹ *Gilliland v. St. Joseph's at Providence Creek*, C.A. No. 04C-09-042, 18 (DE 1/27/2006) (DE 2006)
⁸⁰ Rosenberg at 680.
⁸¹ Rosenberg at 684.
⁸² *Id.*
⁸³ *Id.*
⁸⁴ *Id.* at 685. See also 2 Harper et al., *Law of Torts* at 207-08.
⁸⁵ *Id.*
⁸⁶ *Id. at 686*
⁸⁷ *Id.*
⁸⁸ *Id.*
⁸⁹ Green Acres at 626.
⁹⁰ *Id.* at 627.
⁹¹ *Gohari v. Darvish*, 767 A. 2d 321 (Md. 2000); see also *The Savage is Loose Company v. United Artists, et al*, 413 F. Supp. 555 (S.D.N.Y 1976)(newspaper reporter contacted attorney for comment after obtaining filed copy of the complaint independently.)
⁹² *Kurczaba v. Pollock*, 742 N.E.2d 425, 442 (Ill App. 1 Dist. 2000); see also 50 Am. Jur. 2d Libel & Slander, §318, at 628 (1995). See also Restatement (Second) of Torts, §611, comment a, at 298 (1977).
⁹³ *Id.* (reaffirmed in *Missner v. Clifford*, No. 1-08-0686 (Ill. App. 5/20/2009)(Ill. App., 2009).
⁹⁴ *Id. at 442-443*
⁹⁵ *Id.* at 443.
⁹⁶ *Id.*
⁹⁷ *The Savage is Loose Company v. United Artists, et al*, 413 F. Supp. 555 (S.D.N.Y 1976).
⁹⁸ *Id.*
⁹⁹ *Savage at 561.*
¹⁰⁰ *Id.*
¹⁰¹ *Id.*
¹⁰² 608 F.Supp. 1187, 1195 (S.D.N.Y., 1985)
¹⁰³ *Id.*
¹⁰⁴ *Solaia Technology, LLC v. Specialty Publishing Company*, 221 Ill. 2d 558, 588-589 (2006).
¹⁰⁵ *Id.*
¹⁰⁶ *First Lehigh Bank v. Cowen*, 700 A. 2d 498, 502 (Pa Super 1997) ("Pleadings are public records, maintained in government buildings, open for review by the general populace. We find no sense to the argument that newspapers, or other media groups, cannot report on pleadings prior to judicial action without opening themselves to a libel action. It is the media's job and business to keep the public informed of pending litigation and related matters conducted in taxpayer funded courthouses.")
¹⁰⁷ *Missner at 16.*
¹⁰⁸ *Shapiro v. Messengil*, 661 A. 2d 202, 105 Md. App. 743, 775-76 (Md. App. 1994).
¹⁰⁹ See *Law of Defamation, Second Edition, Rodney A. Smolla, §4:40.50 (Courts are increasingly inclined to recognize that the 'of and concerning' requirement in defamation*

law is not merely a venerable common-law doctrine, but a rule of constitutional dimension”)(referencing *Qsp, Inc. v. Aetna Cas. And Su. Co.*, 256 Conn. 343, 773 A. 2d 906 (2001)).

¹¹⁰ *Croixland Properties Ltd Partnership v. Corcoran*, 174 F. 3d 213, 216 (C.A.D.C., 1999).

¹¹¹ *Mullenmeister v. Snap-On Tools Corp.*, 587 F. Supp 868, 872-873 (S.D.N.Y 1984).

¹¹² *Shop Called East v. KYW-Channel 3*, 8 Med. L. Rptr. 1399 (D.N.J 1982)(finding small company owned and operated by two individuals met “of or pertaining” to test even without alleging special damages or that persons actually understood comments to be defamatory); *Marr v. Putnam*, 246 P. 2d 509 (Or., 1952)(“of and concerning” met by two owners of small business who set forth evidence that friends understood defamatory comments to refer to plaintiffs.).

¹¹³ *Caudle v. Thomason*, 942 F. Supp. 635 (D.D.C. 1996)(“the Court is unable to say that a reasonable listener, familiar with the [situation]... would not infer that [plaintiff] was responsible for or involved with the alleged wrong”).

¹¹⁴ Klein at 391.

¹¹⁵ *Embrey v. Holly*, 48 Md. App. 571, 599, 429 A. 2d 251 (Md. App., 1981).

¹¹⁶ Caudle at 638.

¹¹⁷ *Mullenmeister* at 872.

¹¹⁸ *SDV/ACCI, Inc. v. AT&T Corp.*, 522 F. 3d 955, 959 (9th Cir 2008).

¹¹⁹ See *Schiavone Constr. Co. v. Time, Inc.*, 619 F. Supp. 684 (D. N.J. 1985); *Patzer v. Liberty Communications, Inc.*, 650 P. 2d 141 (Or. App. 1982); *Peagler v. Phoenix Newspapers, Inc.* 560 P. 2d 1216, 1223; *Murdaugh Volkswagen, Inc. v. First Nat. Bank of South Carolina*, 801 F. 2d 719, 725 (C.A. 4 (S.C)).

¹²⁰ *Shop Called East v. KYW-Channel 3*, 8 Med. L. Rptr. 1399 (D.N.J 1982)(finding small company owned and operated by two individuals met “of or pertaining” to test even without alleging special damages or that persons actually understood comments to be defamatory); *Marr v. Putnam*, 246 P. 2d 509 (Or., 1952)(“of and concerning” met by two owners of small business who set forth evidence that friends understood defamatory comments to refer to plaintiffs.); compare with *Jankovic v. International Crisis Group*, 494 F. 3d 1080, 1089 (D.C. Cir 2007)(“of or pertaining to” not met since plaintiff was owner of a “global enterprise”).

¹²¹ *Caudle v. Thomason*, 942 F. Supp. 635, 638 (D.D.C. 1996).

¹²² See *Aids Counseling and Testing Centers v. Group W Television, Inc.*, 903 F. 2d 1000, 1005 (C.A. 4(Md.) 1990)(“the mere fact that a publication might injure the investors in a business does not give rise to a claim for defamation in those investors.”); *McBride v. Crowell-Collier Pub. Co.*, 196 F. 2d 187, 189 (5th Cir. 1952)(finding that sole owner of stock who was not general manager did not meet “of and concerning” standard); with *Jankovic v. International Crisis Group*, 494 F. 3d 1080, 1089 (D.C. Cir 2007).

¹²³ 429 F. Supp. 2d 165, 175 (D.D.C. 2006).

¹²⁴ Id.

¹²⁵ Id.

¹²⁶ Id.

¹²⁷ *Marr v. Putnam*, 246 P. 2d 509, 521 (Or., 1952)(The plaintiff is entitled to recover if he can show that the defamatory words were understood as referring to him by persons who knew him, or if the words are such that the world would apply them to the plaintiff.”); *Cunningham v. United Nat. Bank*, 710 F. Supp. 861, 863 (D.D.C.)(“While the published statements would not implicate her in the minds of layman readers, they probably would leave ‘no doubt’ in the minds of those familiar with the situation...”).

¹²⁸ *Croixland Properties Limited Partnership v. Corcoran*, 174 F.3d 213, 217 (C.A.D.C. 1999).

¹²⁹ *Embrey v. Holly*, 48 Md. App. 571, 599, 429 A. 2d 251 (Md. App., 1981)([i]t is well established that in libel and slander cases statements made by third persons in reaction to the alleged defamatory comment are admissible under the state-of-mind exception to the hearsay rule.”)

¹³⁰ 942 F. Supp. 635 (D.D.C. 1996).

¹³¹ 801 F. 2d 719, 725 (C.A. 4 (S.C)), 1986).

¹³² Id.

¹³³ *Mullenmeister* at 872

¹³⁴ *Shapiro v. Massengil*, 661 A. 2d 202, 105 Md. App. 743, 776 (Md. App. 1994)(court disallowed defendant’s attempt to look at letter “sentence by sentence, considering each line in a vacuum”).

¹³⁵ *Bee Publications, Inc. v. Cheektowaga Times, Inc.*, 485 N.Y.S. 2d 885, 888 (N.Y.A.D. 4 Dept., 1985) (allowing jury to determine "of and concerning" issue).

¹³⁶ *Fowler v. Curtis Pub. Co.*, 182 F.2d 377, 378 (D.C.Cir.1950); *Church of Scientology v. Time Warner, Inc.*, 806 F.Supp. 1157, 1160 (S.D.N.Y. 1992) ("Under the group libel doctrine, a plaintiff's claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group").

¹³⁷ *Alexis v. District of Columbia*, 77 F.Supp.2d 35 (D.D.C., 1999) *Ellis v. Kimball*, 33 Mass. 132, 135 (Mass. 1834); See *Restatement 2d of Torts*, § 564A comm. B (Identifying 25 as the threshold for small group defamation.)

¹³⁸ 494 F.3d 1080 (D.C. Cir., 2007).

¹³⁹ *Id.*

¹⁴⁰ *Restatement 2d of Torts* § 564A; see also *Alexis* at 40.

¹⁴¹ *Alexis* at 41.

¹⁴² *Id.*

¹⁴³ *Missner v. Clifford*, No. 1-08-0686 (Ill. App. 5/20/2009)(Ill. App., 2009).

¹⁴⁴ *Id.* at 17.

¹⁴⁵ *Id.* at 19.

¹⁴⁶ *Id.* at 18.

¹⁴⁷ *Id.* at 19.

¹⁴⁸ *Id.*

¹⁴⁹ *Moroni Feed Co. v. Mutual Service Cas. Ins. Co.*, 287 F.3d 1290, 1292 (10th Cir., 2002)

¹⁵⁰ *Id.*

¹⁵¹ *Embrey v. Holly*, 293 Md. 128,134-135, 442 A.2d 966 (Md., 1982)

¹⁵² *Id.*