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Brief for Respondent Fourth Annual Benton National Moot Court Competition Briefs, 19 J. Marshall L. Rev. 1165 (1986)

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No. 85-211

IN THE
SUPREME COURT OF THE STATE OF MARSHALL

DAVID GORDON,

Petitioner,

-against-

RICHARD DOUGLAS, D/B/A
EZ CONSTRUCTION COMPANY,

Respondent.

ON APPEAL FROM THE APPELLATE COURT
OF THE STATE OF MARSHALL

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. WHETHER THE PETITIONER, WHO OPERATED A COMPUTER BULLETIN BOARD PROGRAM, WAS THE "PUBLISHER" OF A DEFAMATORY MESSAGE APPEARING THEREON.

II. WHETHER, IN THE ABSENCE OF A SHOWING OF "ACTUAL MALICE," PRESUMED DAMAGES MAY CONSTITUTIONALLY BE AWARDED TO A PRIVATE INDIVIDUAL HARMED BY THE PUBLICATION OF A DEFAMATORY STATEMENT WHICH DID NOT INVOLVE A MATTER OF PUBLIC CONCERN.

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OPINIONS BELOW

The Order of the Circuit Court for the County of Plymouth, State of Marshall, and the Opinion of the Appellate Court of the State of Marshall are unreported. The opinion of the Appellate Court appears in the Transcript of the Record at (R.1-4).

STATEMENT OF JURISDICTION

A formal statement of jurisdiction has been rendered optional by Rule III(F), 1985 Rules of the Benton National Moot Court Competition.

STATEMENT OF THE CASE

This is an appeal from the reversal of an order granting Petitioner's motion for summary judgment. (R.1) The present controversy arose from a defamation action brought by the Respondent, Richard Douglas, owner of the EZ Construction Company, alleging that the Petitioner, David Gordon, published a defamatory statement impugning his reputation and the workmanship of his company. (R.2)

Petitioner, David Gordon, controls and operates an electronic bulletin board network called "Gordotalk". (R.2) Gordon advertises this computer program in several trade magazines inviting persons interested in home repairs and carpentry to communicate through his "host" computer. R.2) Anyone utilizing a computer equipped with a "modem", a device which connects the computer with telephone lines, may call Gordon's computer to read the messages. (R.2) In order to post messages on the electronic board, the users pay an annual fee of twenty dollars in exchange for a password which allows them access into the program. (R.2) Passwords are limited to two hundred in number. (R.2)

In most instances Gordon is unaware of the identities of his subscribers; subscribers may, and usually do, leave messages anonymously. (R.3) Although is computer system may be programmed to permit screening of the messages, Gordon refuses to perform that function. (R.3) Gordon, as the system operator, is the only person who is capable of manually removing the messages. (R.3) Ordinarily, messages are automatically deleted and replaced with newer ones when the computer memory is full. (R.3)

On March 17, 1984, a defamatory message appeared on Gordon's system. (R.2) The message warned readers against doing any business with EZ Construction Company because the owner was unlicensed and performed substandard work. (R.2) A friend called Douglas to inform him of the defamatory statement. (R.2) Respondent promptly attempted to contact Gordon, but was unable to reach him since Petitioner had left that day for a vacation. (R.2) Gordon did not return until the evening of March 25, 1984, having left "Gordotalk" unattended for eight days. (R.3) By that time the defamatory statement had been automatically deleted by the computer. (R.2)

Richard Douglas filed suit for defamation seeking presumed damages of $400,000. (R.1) Gordon filed a motion for summary judgment alleging that he was not the publisher of the statement and that presumed damages were inappropriate since Douglas did not allege that the statement was published with "actual malice." (R.4) The Appellate Court of the State of Marshall reversed and held that

Gordon was the publisher of the defamatory statement. (R.4) The Court also found that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), was inapplicable because Douglas was not a public figure nor was the defamatory statement a matter of public concern. (R.4)

SUMMARY OF ARGUMENT

The false message posted on "Gordotalk" was defamatory per se because it impugned the Respondent's reputation as a qualified and skillful construction contractor. Therefore, under the common law of the State of Marshall, the publisher of the statement is strictly liable for the presumed damages flowing from such defamation. Respondent is not required to plead or prove any fault on the part of the publisher, or to allege that he suffered actual injury.

Although he is not the author of the false and derogatory message, Petitioner Gordon is its "publisher," since his active participation in receiving, storing, and relaying the message through his computer bulletin board program was an indispensable step in the communication of the injurious statement to third parties.

The delineation of constitutional limitations upon the ability of public officials or public figures to recover in defamation absent a showing of "actual malice" does not preclude the Respondent, who is a private individual, from seeking relief in the form of presumed damages. Although the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), prohibited a private plaintiff from recovering presumed damages without proof of "actual malice" and actual injury, it did so only in the context of a defamation published by a media defendant. *Id.* at 350. *Gertz*, therefore, has no application to the present case, which involves a non-media defendant. The Supreme Court has recently reaffirmed the applicability of the common law rule of presumed damages to defamations of private plaintiffs which do not involve matters of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ____ U.S. ____, 105 S. Ct. 2939, 2948 (1985).

ARGUMENT

I. PETITIONER GORDON, WHO PUBLISHED A FALSE STATEMENT DAMAGING TO RESPONDENT'S BUSINESS REPUTATION ON HIS COMPUTER "BULLETIN BOARD", IS STRICTLY LIABLE ACCORDING TO THE COMMON LAW OF THE STATE OF MARSHALL FOR PRESUMED DAMAGES ARISING FROM

THE DEFAMATION.

The advent of modern computer technology has revolutionized the way our society amasses, stores, and disseminates valuable, and often volatile, information. Complex business computer systems store voluminous confidential records, sensitive financial information, and personal credit histories. At the same time, home computer operators can perform banking transactions without leaving their homes. The necessity of developing new bodies of law to regulate the use and abuse of these sophisticated data systems can be easily understood.

However, when personal home computers assume the more mundane function of electronic bulletin boards, where limited numbers of persons may post or read brief messages pertinent to their shared hobbies, there is clearly no need to fashion new laws or to rewrite existing ones to deal with their misuse. The traditional and flexible tort principles of the common law, which thus far accommodated numerous advances in communications technology, can easily be adapted to the home computer phenomenon as well.

A. The statement which appeared on "Gordotalk" was defamatory per se because it disparaged Respondent's qualifications and skills in his construction business.

The common law has long been a jealous guardian of the reputations of private individuals against the disparaging utterances of their fellow citizens. Vindicating society's "strong and pervasive interest in preventing and redressing attacks upon reputation," *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), the law of defamation has traditionally facilitated the plaintiff in recovering damages for the serious harms which almost inevitably flow from defamation, but often defy evidentiary proof. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ___ U.S. ___, ___, 105 S. Ct. 2939, 2946 (1985), citing Prosser, *The Law of Torts*, 765, §112 (4th ed. 1971).

A defamatory communication is one which "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts, §559 (1976). The message in question which appeared on "Gordotalk" informed its readers that the owner of EZ Construction Company was operating without a license and that his work failed to conform to building code requirements. (R.2) Plainly, assertions that a builder engages in unlawful or substandard construction practices tend to adversely impact upon his reputation not only among those who would contract

his services, but in the eye of the public at large, who might own or occupy such buildings. Moreover, where readers were admonished to "[a]void doing any business with EZ Construction Company" (R.2), it was precisely the intent of the message to deter people from dealing with Douglas.

Statements which disparage a person's ability or integrity in his occupation or calling have traditionally been viewed with utmost disfavor by the law. Prosser & Keeton, *The Law of Torts*, 790-92, §112 (5th ed. 1984). Consequently, utterances tending to harm the plaintiff's reputation in his business or profession are generally held to be defamatory. *Tavoulareas v. Piro*, 759 F.2d 90, 109-110 (D.C. Cir. 1985) (*Washington Post* article which stated that a corporate president had misused his position and influence to "set up" his son in business was false and defamatory). Furthermore, such statements are often deemed to be defamatory *per se*, that is, actionable without pleading or proving special damages. *Davis v. Ross*, 754 F.2d 80, 82 (2d Cir. 1985) (unsolicited statements in letter by former employer that plaintiff's personal and work habits were unacceptable and were susceptible of defamatory meaning.)

This principle has been applied to defamation actions brought by contractors for statements disparaging to their construction skills or ethics. The Superior Court of Pennsylvania held that a letter from an insurance adjuster informing claimants that a contractor was unreliable was actionable *per se*. *Miller v. Hubbard*, 205 Pa. Super. 111, ____, 207 A.2d 913, 916 (1965). Similarly, where a defendant wrote a letter to general contractors in which he stated that plaintiff's work on all projects was unsatisfactory, and that floors laid by them buckled and bulged and had to be relaid, it was held by the Supreme Court of Iowa to be libelous *per se*. *Plendl v. Beuttler*, 253 Iowa 259, ____, 111 N.W.2d 669, 671 (1961). The "Gordotalk" message concerning Douglas' unlicensed and substandard contracting was by its very nature defamatory, and is actionable by him although he has neither alleged nor proven actual damages.

As Chief Judge Mason stated in the opinion of the court below, the common law of the State of Marshall provides for strict liability for the publication of a defamation. (R.4) In their vigilance of reputation, English and American courts early imposed a rule of strict liability upon the utterer of a defamatory statement. *See generally* Prosser & Keeton, *The Law of Torts* §112 (5th ed. 1984). Generally, liability arose on the plaintiff's showing that the defendant published a statement to a third party, the contents of which tended to injure the plaintiff's reputation. The falsity of the defendant's assertions was presumed. Thus, one who cast aspersion upon the good name of another spoke entirely at his own risk; he must either prove

the truth of his statements or compensate the plaintiff for the resulting harm. *See* Eaton, *The American Law of Defamation Through Gertz. v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1351 (1975). The so-called "defense of truth" plays no role in the case at bar, since Petitioner Gordon has admitted the falsity of the accusations displayed on his computer bulletin board. (R.2)

Plaintiff is not required to prove the defendant's knowledge of the falsity of his assertions. Indeed, one may be liable in defamation though he acted in good faith and without the least intention to defame anyone. Thus, in the well-known case of *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 63, 126 N.E. 260, 262 (1920), a book publisher who reproduced a manuscript, purported by its author to be fictitious, was found liable where the book contained identifiable references to a living city magistrate. Because Marshall retains the common law rule of strict liability, it does not avail the defendant Gordon that he was unaware of the falsity of the message that was "posted" during his absence or that he possessed no intention to defame Douglas.

A second manifestation of the common law's traditional willingness to facilitate a defamed individual in his quest for relief is the doctrine of presumed damages. By this device, an aggrieved plaintiff may recover, without proof of actual harm, for whatever injuries would normally be expected to result from certain classes of defamation. The distinction between the "twin torts" of libel and slander is significant mainly with respect to the availability of presumed damages to the plaintiff. Where a defamation takes the form of libel, and the danger of reputational injury is apparent on its face, the plaintiff need not present any evidence that his reputation suffered impairment. Prosser & Keeton, *The Law of Torts*, 785-86, §112 (5th ed. 1984). Such injury is presumed to occur as a consequence of written or printed publication. Speaking ill of one's neighbor, however, was historically viewed as a spiritual transgression, requiring proof of special - "temporal" - injury. *Id.* When a plaintiff is slandered, therefore, he must allege "special damage" aside from mere reputational impairment or be foreclosed from recovery. *Hewlett-Woodmere Pub. Libr. v. Rothman*, 108 Misc.2d 715, 717, 438 N.Y.S.2d 730, 733 (1981); *Terwilliger v. Wands*, 17 N.Y. 54, 57 (1858).

As defined in the Restatement (Second) of Torts, §568(1) (1976), "libel" refers to the communication of defamatory matter "by written or printed words" or any other physical embodiment having the potentially harmful qualities of a writing. "Slander" is the publication of a defamation by "spoken words, transitory gestures" and other forms not constituting libel. Restatement (Second) of Torts, §568(2) (1976).

While the message "posted" on the "Gordotalk" network did not possess the same degree of permanence as material printed in a book or newspaper, the statement nevertheless took the form of libel. Although one equipped with a "modem" utilized a telephone connection to gain access to Gordon's computer bulletin board, the messages were not communicated through listening to sounds, but rather through reading words displayed upon a screen. Where a defamatory statement is conveyed to the recipient by means of the visual and not the auditory sense, the publication is generally termed a libel. Prosser & Keeton, *The Law of Torts*, 786 §112 (5th ed. 1984).

Moreover, Gordon's bulletin board network *stored* messages over a period of time to be displayed repeatedly whenever interested readers contacted "Gordotalk." This was no fleeting or transitory exchange of signals as in a spoken utterance, but a physical embodiment of the communication—albeit in letters of light electronically imprinted upon a computer screen rather than impressions of ink upon paper.

Because the defamatory message posted on "Gordotalk" remained stored in the computer's memory for more than a week before it was replaced by a new one and could be retrieved and read by unknown numbers of viewers at their convenience in that interval, this mode of communication clearly possessed the same potential for harm as written or printed matter. In fact, the likelihood of danger to Douglas' business reputation was heightened by the fact that Gordon advertised his computer bulletin board in various trade magazines, inviting those readers who were especially interested in home repairs and carpentry projects to communicate through his system. (R.2) In this way Gordon targeted a segment of the public particularly inclined to heed the messages posted on "Gordotalk."

For these reasons the defamatory publication constituted a libel, and is therefore actionable by Douglas without proof of actual damages. Even assuming, however, that the computer display of the disparaging message is deemed a slander, actual damages need not be shown where the subject matter of the defamation falls within one of the four categories of "slander per se." These consist of imputations to the plaintiff of: (1) a major criminal offense; (2) a loathsome disease; (3) facts incompatible with the proper conduct of his business; or (4) serious sexual misconduct. Restatement (Second) of Torts, §570 (1976). The "Gordotalk" message contained matter obviously inconsistent with the proper conduct of plaintiff's business; namely, that he lacked the requisite qualifications and skills to perform construction work. The likelihood of harm to Douglas' reputation being apparent on the face of the statement, consequent reputational injury may fairly be presumed to have occurred accord-

ing to the common law of the State of Marshall.

However, since defendant Gordon was not the original author of the libel, liability may not be imposed upon him unless he is a publisher of the message.

B. Petitioner, who controlled the entry and removal of messages on "Gordotalk", was the publisher of the libelous statement.

In order for a defamatory utterance to be actionable there must be publication of the derogatory matter. Prosser & Keeton, *The Law of Torts*, 797, §113 (5th ed. 1984). Since the substance of a defamation action is injury to the plaintiff's reputation, it is crucial that the statement be communicated to a third person, that is, to someone other than the subject of the disparaging comment. 73 A Corpus Juris Secundum, *Libel and Slander*, §79 (1983); *See Kelly v. General Telephone Co.*, 135 Cal. App. 3d 210, ____, 186 Cal. Rptr. 184, 187 (1982). An act of communication is deemed sufficient as a publication "if it gives notice to the public of any matter desired to be brought to its attention." *Estille County v. Noland*, 295 Ky. 753, ____, 175 S.W.2d 341, 346 (1943).

In the case at bar, the statement impugning the Respondent's reputation was retained in a computer memory bank to which an unknown number of persons had access. Although the record does not state how many viewers actually saw the message, it is evident that it was communicated to at least one third party; namely, the Respondent's friend who informed Douglas of the existence of the "Gordotalk" message. (R.2) This single communication was sufficient to constitute a publication.

The novel method of communication in the instant case should not obscure its status as a publication. Although the defamatory matter was conveyed from the "host" computer to the recipients' terminals via ordinary telephone connections, the electronic signals were ultimately deciphered in printed form upon computer screens. The printing of defamatory material is "regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that result actually follows." *Sorge v. Parade Publications*, 20 A.D.2d 338, 340, 247 N.Y.S.2d 317, 320 (1st Dep't 1964), quoting *Youmans v. Smith*, 153 N.Y. 214, 218, 47 N.E. 265, 266 (1897). Gordon, whose advertisements encouraged home improvement enthusiasts to exchange messages through his "host" program, not only expected but desired that the items posted would be read by third persons.

In similar instances, courts have found publication to have occurred where the utterer of defamatory material delivers it with the

expectation that it be read by others. *Id.* Thus, dictation to a typist stenographer has been held to constitute a publication for the purposes of a libel or slander action. *See Hanrahan v. Kelly*, 269 Md. 21, 305 A.2d 151 (1973); *Mueller v. Rayon Consultants, Inc.*, 271 F.2d 591 (D.C.N.Y. 1959). The filing of a false or misleading credit report with a credit organization has been deemed to constitute a publication. *Bracker v. Pecos Motors, Inc.*, 408 S.W.2d 722, 723 (Tx. Civ. App. 1966).

The closest analogy to the present case can be found in the actual posting of written messages upon standard bulletin boards. In *Fogg v. Boston & Lowell R.R. Co.*, 148 Mass. 513, 20 N.E. 109 (1889), a defamatory article clipped from a newspaper was posted in a railroad ticket office. The act of posting the libelous extract was a publication. *Id.* at ____, 20 N.E. at 110. The defendant railroad company was held liable in defamation since it should have been aware of the types of notices posted in its office. By allowing the message to remain on its bulletin board for forty days, the company was held to have ratified the act of posting it. *Id.* Likewise, in *Davis Co. v. United Furniture Workers, Etc.*, 674 F.2d 557 (6th Cir. 1982), a statement that an employer had cheated employers out of thousands of dollars, posted on a bulletin board in the context of a labor dispute, was assumed to have been published. *Id.* at 564.

In essence, "Gordotalk" differs from a traditional bulletin board only in that written messages are electronically programmed into the system, rather than attached with a thumbtack. Clearly then, the posting of a defamatory statement concerning respondent Richard Douglas on "Gordotalk" constituted a publication within the law of defamation. However, Gordon himself, who was neither the author nor originator of the message, must qualify as its "publisher", if liability is to be imposed upon him in the instant case.

As the Circuit Court of Plymouth County correctly determined, Gordon is a publisher of the material which appears on "Gordotalk" because he authorizes and controls the entry and removal of messages. (R.4) Gordon has voluntarily chosen to program his personal home computer to function as host for the electronic bulletin board network. (R.1-2) Without Gordon's host program, computerized messages concerning home repairs and carpentry could not be conveyed from the senders' to the recipients' personal computer terminals. Therefore, Gordon's active participation in relaying the defamatory statement was absolutely essential in its communication to third persons. While the author's act of typing the defamatory message on his own computer keyboard may or may not have been an act of publication in itself, it cannot be gainsaid that the storage and retrieval of the message through "Gordotalk" was an indispensable step in the communication, or publication, of the material to other

home computer operators. Therefore, Gordon is certainly not "innocent of all complicity" in the publication of the libel such that he may escape accountability. *See Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1094 (S.D.N.Y. 1984) ("deliberate decision to republish or active participation in implementing the republication resurrects the liability otherwise laid to rest by the statute of limitations").

One need not be the author or originator of a defamatory remark to be its publisher. *Windsor Lake, Inc. v. WROK*, 94 Ill. App. 2d 403, ____, 236 N.E.2d 913, 917 (1968) ("it is no defense to the publisher of a libel that he is merely reporting the statement of another person"). It is sufficient if he has simply repeated, delivered, or otherwise disseminated the defamation to third persons. Thus, publishing companies which merely reproduce articles or manuscripts written by others have routinely been held to be publishers of libelous material contained therein. *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1096 (S.D.N.Y. 1984). Similarly, radio and television broadcasting companies are publishers of the material which they place on the air even though it is supplied to them by others. *See Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976). Even a telephone or telegraph company which merely carries or transmits messages may be subject to liability as a publisher if it has reason to know of the defamatory content of a particular message. *Western Union Telegraph Co. v. Lesesne*, 182 F.2d 135, 136 (4th Cir. 1950).

Plainly, Gordon is neither a book publisher, broadcaster, nor telephone company. In fact, "Gordotalk" and other computer bulletin board networks are an entirely novel form of communication, a recent phenomenon of the burgeoning home computer technology. Despite its innovative nature, however, "Gordotalk" can fairly be compared to existing and well-established modes of communication.

Although communicating through "Gordotalk" requires a user to "call" the host program via connecting telephone lines, the computer bulletin board network differs from telephone or telegraph systems in several significant ways. First, "Gordotalk" is not a public utility or a common carrier, and is therefore not required by law to carry or deliver messages for the public. A public utility under a duty to transmit messages is privileged even to deliver a defamatory message unless it knows or has reason to know that the sender lacks privilege to publish it. Restatement (Second) of Torts §612(2) (1976). Gordon operates the program on his home computer as a hobby, and only for a limited purpose: namely, the exchange of messages relevant to home repairs and do-it-yourself carpentry. (R.2) Furthermore, Gordon limits access to his system for the entry of messages to only two hundred subscribers. (R.2)

Second, Gordon's computer bulletin board network can be

programmed to permit the screening of undesirable or defamatory messages before they are stored in the computer's memory bank. (R.3) Although it is inconvenient for him to do so and still operate "Gordotalk" as a hobby, Gordon could reasonably reduce the number of passwords sold, thereby restricting the traffic of messages to a manageable quantity. A public telegraph or telephone company, on the other hand, cannot restrict the number of customers, and the screening of the thousands of calls it is required to transmit each day is simply not feasible. *Western Union Telegraph Co.*, 182 F.2d at 137. For this reason, a telegraph company which merely transmits or delivers defamatory matter is not liable for its publication unless it knows or has reason to know of its defamatory character. Restatement (Second) of Torts, §581(1) (1976). A telephone company is not considered a "transmitter." It is merely a supplier of equipment or facilities necessary for general communication purposes, and is therefore not subject to liability. Restatement (Second) of Torts §581(1) (comment f) (1976).

In contrast, Gordon does much more than transmit or deliver messages posted in "Gordotalk." His computer program does not simply convey messages from a single sender to a single recipient; it stores them over a period of time, and keeps them available for the perusal of anyone who might later desire to read the messages.

Petitioner's computer bulletin board service is more closely analagous to radio or television broadcasting since broadcasters are generally under no duty to disseminate the material which they select to put on the air. Broadcasting companies are therefore considered primary publishers, subject to the same liability as the originator of the defamatory matter. Restatement (Second) of Torts §581(2) (1976). While broadcasting entities very often rely on programs pre-prepared by others, they often make their facilities available for the airing of live, unedited communications.

In *Snowdon v. Pearl River Broadcasting Corp.*, 251 So.2d 405 (La. App. 1971), a radio station invited listeners to call in and speak freely on its live program. A caller announced on the air that a certain doctor and pharmacist were illegally dispensing drugs. *Id.* Although the station broadcast the call without the use of any monitoring or delay device, the court held that the publication of the defamatory allegation was done by the station. *Id.* at 410.

As in the instant case, the radio station could have utilized a screening device, but could not bear the expense of a monitoring procedure. *Id.* The court found that by its failure to provide for the screening of calls, the radio station "encouraged the utterance of defamatory statements with utter disregard of their truth or falsity," and placed itself in a position "fraught with the imminent danger of broadcasting anonymous unverified, slanderous remarks based on

sheer rumor, speculation and hearsay." *Id.* at 411. In the same way, Gordon permitted his computer bulletin board network to be utilized for the communication of a defamatory statement prepared by another, without providing himself the opportunity to screen its contents to prevent inevitable harm to Respondent's reputation.

Gordon, who invited the public "into" his computer bulletin board program to write and to read the messages displayed, owed a duty to the public to prevent the program from being utilized in any manner likely to cause injury to others, just as those who invite the public onto their property may not permit their premises to be occupied with defamatory matter. *Heller v. Bianco*, 111 Cal. App. 2d 424, 244 P.2d 757 (1952) (bar owner liable for republication of a libelous remark written on a restroom wall when he failed to remove it within a reasonable time).

Since Gordon possessed exclusive control over the entry and removal of messages on "Gordotalk," he is liable for the publication of any defamatory statement appearing on the system. As the publisher of the injurious and false accusations concerning Respondent's conduct of his construction business, Petitioner is strictly liable for the presumed damages resulting from the defamation, providing such liability under the common law of the State of Marshall is consistent with the constitutional protections afforded to publishers under the first amendment.

II. BECAUSE THE FALSE AND DEFAMATORY STATEMENT PUBLISHED ON "GORDOTALK" DID NOT INVOLVE A PUBLIC FIGURE OR A COMMENT UPON A MATTER OF PUBLIC CONCERN, AND IS THEREFORE UNWORTHY OF FIRST AMENDMENT PROTECTION, LIABILITY MAY CONSTITUTIONALLY BE IMPOSED UPON PETITIONER ABSENT A SHOWING OF "ACTUAL MALICE."

Beginning with the landmark decision of *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court has struggled to define appropriate constitutional boundaries on the traditional laws of defamation, in keeping with our society's fundamental first amendment rights of free speech and press. Hence, where the individual's reputational interest has come into conflict with the right of the news media to gather and disseminate information vital to our self-governing society, the Court has justly and wisely placed paramount importance upon first amendment concerns. To this end, the Court's decisions in *New York Times* and its progeny have restricted the ability of an injured plaintiff to recover in defamation

against a media defendant. However, where the libel concerns no public figure nor matter of general public importance, and there is no media defendant involved, the traditional common law rules may be summoned to the aid of an otherwise powerless plaintiff in defense of his fragile reputation and good name.

A. Because Respondent is neither a public official nor a public figure, he is not required to prove "actual malice" as a prerequisite to the recovery of damages for defamation.

While the first amendment liberties afforded to free speech and press are undoubtedly broad, the Supreme Court has always been mindful that "there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend." *Bose Corp. v. Consumer's Union of the United States, Inc.*, ___ U.S. ___, ___, 104 S.Ct. 1949, 1961 (1984). Among the classes of speech which are outside the scope of constitutional protection are: obscenity, *Roth v. United States*, 354 U.S. 476 (1957); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); and incitement to riot, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Until *New York Times, Inc. v. Sullivan*, libelous utterances were likewise considered beyond the area of constitutionally protected speech. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). Even after *New York Times*, the Supreme Court continued to acknowledge that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

The dissemination of false and defamatory information itself "carries no First Amendment credentials." *Herbert v. Lando*, 441 U.S. 153, 171 (1979). However, such utterances are nonetheless inevitable in a democratic society, where the liberty of unrestrained debate of ideas is essential "in spite of the probability of excesses and abuses." *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 271 (1964), quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

The plaintiff in *New York Times*, an elected Commissioner of Montgomery, Alabama, alleged that he had been libeled by a full-page newspaper advertisement which inaccurately described various incidents in a " 'wave of terror' " by law enforcement against black civil rights protesters. 376 U.S. at 258. Because the contents of the advertisement commented upon an issue of vast social and political importance, and the alleged defamation concerned a public official's actions in his official capacity, the Supreme Court held that such a plaintiff must prove that the defendant acted with " 'actual malice' — that is, with knowledge that it was false or with reckless disre-

gard of whether it was false or not" in order to be entitled to any remedy for the defamation. *Id.* at 279. The Court recognized for the first time that "the Constitution delimits a state's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283.

The stringent "actual malice" showing of fault which the Supreme Court held to be a requisite to any recovery by a public official was later extended to all "public figures" in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154 (1967). *Curtis* involved defamatory statements about a former United States Army general who had achieved political prominence by engaging in debate on important public issues, and a former football coach who was nationally known in the field of sports. Both men were held to be public figures for the purpose of applying the *New York Times* actual malice standard. *Id.*

The plaintiff in the instant case, as the Appellate Court of Marshall correctly determined, is neither a public official nor a public figure. (R.4) Douglas, the owner of a construction company, does not hold any public office or position in government. As a contractor, Respondent provides building supplies and labor for those members of the community who desire his services. Performing such work for his customers does not render Douglas a public figure, for his activity does not amount to a "thrusting of his personality into the 'vortex' of an important public controversy." 388 U.S. at 154-155. Nor does Respondent, a licensed contractor, occupy a position of "such pervasive power and influence" that he has invited public attention or comment. *Gertz v. Robert Welch, Inc.*, 448 U.S. 323, 345 (1974).

Douglas is a "private" plaintiff; thus, he is not required under the *New York Times* rule to establish "actual malice" on the part of Gordon in publishing the defamatory message on "Gordotalk." Indeed, the *New York Times* decision left entirely undisturbed the common law rules of defamation as applied to private individuals. Under the State of Marshall's common law, in order to seek an award of presumed damages, Respondent need only allege that the message was published by the Petitioner and that it was defamatory.

However, in *Gertz v. Robert Welch, Inc.*, the Supreme Court questioned the constitutionality of awarding presumed damages even to a private defamation plaintiff in the absence of any showing of "actual malice." The decision severely curtailed the ability of private individuals to recover in defamation actions — at least from media defendants. 418 U.S. at 349.

B. The prohibition on strict liability established in Gertz v. Robert Welch, Inc. does not apply to the defamation of a private individual by a non-

media defendant.

In *Gertz v. Robert Welch, Inc.*, the Supreme Court considered the extent to which the first amendment restricts a media defendant's liability for the defamation of a private citizen, a question left unaddressed by *New York Times* and the cases which followed. The plaintiff, Elmer Gertz, was a reputable attorney who had represented the family of a youth slain by a Chicago police officer in civil litigation. *Id.* at 326. The defendant, in its monthly magazine, published an article entitled "Frame-Up," which claimed that the officer's subsequent criminal prosecution was the result of a Communist plot against the police. *Id.* The article described Gertz as a "Leninist" and "Communist-fronter" who had once led an organization of lawyers responsible for orchestrating the attack on police at the 1968 Democratic Convention. *Id.* The accusations were substantially false, and the plaintiff sued in libel.

The Supreme Court explained that the stringent "actual malice" standard enunciated in *New York Times* struck an appropriate balance between the competing concerns of the press and broadcast media in immunity from liability and the important state interest in compensating injuries to the reputations of public officials. Recognizing, however, that the state's interest in redressing reputational harms weighs more heavily in the balance where a private plaintiff is the target of the injurious remarks, the Court held that a different rule should apply to private defamation. 418 U.S. at 348. Accordingly, the Court declared that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood injurious to a private individual." *Id.*

Since the Supreme Court's holding was expressed in such broad language, the decision has been interpreted as a sweeping prohibition on strict liability in all defamation actions. Many states, in the wake of *Gertz*, abandoned their centuries-old common law rules in favor of more demanding fault standards. *See State Court Reactions to Gertz v. Robert Welch, Inc.: Inconsistent Results and Reasoning*, 29 Vand. L. Rev. 1431 (1976), and cases cited therein; 33 ALR 4th 212 (1984) and cases cited therein.

The majority of state courts which have revised their fault standards in light of *Gertz* have followed the Supreme Court's suggestion and required a showing by a private plaintiff of at least negligent conduct on the part of the defendant. *E.g., Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976). One state has determined that, where the defamation comments upon a matter of public concern, the evidence must establish that the defendant ac-

ted in a grossly irresponsible manner. *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 435 N.Y.S.2d 556, 446 N.E.2d 557 (1980). Still other states have required a showing of "actual malice" in cases brought by private individuals where the content of the defamation is within the sphere of public concern. *e.g., Diversified Management, Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976).

Significantly, in each of the above-cited cases, as in *Gertz*, a private plaintiff sued a *media defendant*. These courts appropriately heeded the constitutional limitations on strict liability and fashioned more stringent fault requirements for defamation actions against newspapers, broadcasters and like defendants. None of the decisions addressed the precise issue which is before the Supreme Court of Marshall today; namely, whether *Gertz v. Robert Welch, Inc.* applies to a private individual's defamation action against a non-media defendant.

The Supreme Court has never expressly determined that *Gertz v. Robert Welch, Inc.* applies to *all* defamation defendants, regardless of their status as media or non-media publishers. Yet, it is evident upon careful consideration of *Gertz* that the Court never intended to curtail or in any way alter the traditional common law rules of strict liability and presumed damages as applied to non-media defendants.

While the opinion speaks of the first amendment freedoms of both speech and press, it is the Court's emphasis on the liberty of the press, and the mass media in general, which transcends all other considerations in *Gertz v. Robert Welch, Inc.* Indeed, the Court framed its discussion precisely in terms of the traditional news media defendants. The principle issue facing the Court in *Gertz* was "whether a *newspaper* or *broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements." 418 U.S. at 332 (emphasis supplied).

The class of libel defendants upon which the Supreme Court focused its concern in *Gertz* is variously described as "publisher or broadcaster," 418 U.S. at 340; "the news media," *Id.* at 341; "the communications media," *Id.* at 345; and "the press and broadcast media," *Id.* at 343. The conscious choice of such precise language itself belies any intent on the part of the Court to sweep *all* utterers of defamatory statements within the scope of the *Gertz* holding.

Even aside from the Supreme Court's specific identification of the category of libel defendants to which *Gertz* pertains, is the re-

current theme of media self-censorship and the chilling effect of large defamation recoveries upon the exercise of free expression by the media. A rule of strict liability that "compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship," warned the Court, and does not afford the press suitable protection for the exercise of first amendment liberties. 418 U.S. at 340. Therefore, the *Gertz* Court recognized that the Constitution demands that even some false speech be tolerated "in order to protect speech that matters." *Id.* at 341.

While the Supreme Court did not expressly define in *Gertz* what types of expression qualify as "speech that matters," there is a wealth of guidance in *Gertz* and the cases which preceded it as to the fundamental nature of expression protected under the aegis of the first amendment. In *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964), a constitutional privilege was found to extend to debate on issues of public importance, particularly discussion of the qualifications and conduct of candidates and holders of public office. In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the *New York Times* privilege was held applicable to speech concerning public figures, who by their own design or by the unfolding of human events, are thrust to the forefront of important issues of their time. *Id.* at 155. The first amendment privilege was again expanded to encompass speech regarding all matters of public or general concern in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971).

In each instance in which the Supreme Court recognized a first amendment privilege, the speech in question concerned the discussion of persons, events or ideas essential to democratic dialogue. In contrast, "[p]urely private defamation has little to do with the political ends of a self-governing society." *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 301-302 (1964) (Goldberg, J., concurring).

In *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978), the Oregon Supreme Court held *Gertz* inapplicable to purely private defamation by non-media defendants. The court reasoned that where reputational interests of private individuals come into conflict with the need for an uninhibited press, it is the media which deserves the greater protection. *Id.* at ____, 579 P.2d at 84. However, the balance must be struck in favor of vindicating the reputations of private individuals who have been injured by non-media defendants in the context of a purely private matter. *Id.* at 426, 579 P.2d at 85.

A number of other state courts and commentators have likewise deemed *Gertz* inapplicable to defamation actions brought by private plaintiffs against non-media defendants. *See Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Fleming v. Moore*, 221 Va. 884, 275 S.E. 2d 632 (1981); *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982); Eaton, *The*

American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349 (1975). *Contra, Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (1978); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976).

In the instant case, as in *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977), "there is no public official or figure as plaintiff, there is no issue of public concern, and *there is no media defendant.*" *Id.* at 366, 568 P.2d at 1362 (emphasis in original). Petitioner Gordon, who provides the computer bulletin board medium through which his limited audience of "do-it-yourself" home repairmen may exchange messages, is certainly not a media defendant of the type involved in the Supreme Court defamation cases heretofore discussed. As the Court of Appeals acknowledged in *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir. 1971), there is a patent distinction "between a publication which disseminates news for consumption and one which provides specialized information to a selective, finite audience." Imposing liability on Petitioner involves

> no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the media.

Harley-Davidson, 279 Or. at 366, 568 P.2d at 1363. Rather, what is involved here is the utterly false and baseless accusation by an unidentified private individual that the owner of a construction company is operating without a license and in substandard fashion. Surely such anonymous and unsubstantiated allegations play no legitimate role in the meaningful discussion of important public issues and events. Blatant falsehoods regarding the practices of businessmen and tradesmen function only to hinder and deceive consumers in their quest for information about those with whom they must deal.

Untruthful speech, especially within the realm of commercial enterprise, has never been protected solely for its own sake. *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 771 (1976). On the scale of first amendment values, commercial speech has generally been afforded a lesser degree of constitutional protection than other classes of expression. *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 563 (1981).

Commercial speech has been defined as "expression relating solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric*, 447 U.S. at 561. It is evident that the messages published on "Gordotalk" fall within the category of commercial speech as they related to the economic interest of individuals interested in repairing their homes as well as the businesses

which thrive on the consumer home-improvement market. It is feasible that messages advertising the sale of low-cost building materials, innovative tools and machinery, and recently-opened hardware or lumber stores would be published on the Petitioner's unique service. in this way, posting messages on "Gordotalk" promoted commercial transactions. *See Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 70 (1983) (defining commercial speech as that which proposes a commercial transaction). Indeed, the twenty-dollar registration fee which Gordon collected on the sale of passwords constituted a commercial transaction in and of itself.

The defamatory message at issue in the present case was a direct warning to consumers not to do business with EZ Construction Company. (R.2) Because the accusations contained therein were entirely false, the message can only have been published for the purpose of discouraging commercial transactions between EZ Construction Company and prospective customers (perhaps indirectly enhancing the economic business of another construction enterprise). Thus, the message was not disseminated for the legitimate purpose of satisfying society's "strong interest in the free flow of commercial information." *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 771-72 (1976).

The Supreme Court was recently faced with an analagous situation in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ___ U.S. ___, 105 S. Ct. 2939 (1985). The defendant, a credit reporting agency, issued a false credit report to its subscribers indicating that the plaintiff, a construction company, had filed a voluntary petition in bankruptcy. ___ U.S. at ___, 105 S. Ct. at 2941. Citing *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557, 561 (1980), the Supreme Court found that the false report concerned solely the individual interest of the speaker and its specific business audience. Therefore, the statements were deserving of "no special protection when . . . the speech is wholly false and clearly damaging to the victim's business reputation." *Dun & Bradstreet*, ___ U.S. at ___, 105 S. Ct. at 2947. Being principally motivated by the agency's desire for profit, the report did not involve any " 'strong interest in the free flow of commercial information,' " and, like commercial advertising, was unlikely to be deterred or chilled by the imposition of presumed or punitive damages. *Id.* at ___, 105 S. Ct. at 2947, quoting *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 771-72 (1976).

C. Presumed damages may constitutionally be awarded absent a showing of "actual malice" where the contents of the defamation are not a

matter of public concern.

In *Dun & Bradstreet*, the Supreme Court also had occasion to reconsider its earlier decision in *Gertz v. Robert Welch, Inc.*, in which a divided court determined that "the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. 323, 349 (1974).

The Vermont Supreme Court had reversed the trial court's grant of a new trial and reinstated the jury's verdict against Dun & Bradstreet, Inc. for $50,000 in presumed damages and $300,000 in punitive damages. *Greenmoss Builders, Inc. v. Dun & Bradstreet*, 143 Vt. 66, 79, 461 A.2d 414, 421 (1983). While the Vermont court relied on the non-media status of the credit reporting agency in deciding that *Gertz* was not controlling, the United States Supreme Court affirmed for different reasons. *Dun & Bradstreet*, ____ U.S. at ____, 105 S. Ct. at 2942.

Noting that every other case in which it had imposed first amendment limitations upon state defamation laws had involved speech concerning a matter of important public interest, the Supreme Court observed that nothing in its earlier opinions indicated "that this same balance would be struck regardless of the type of speech involved." *Id.* at ____, 105 S. Ct. at 2944.

The Court in *Dun & Bradstreet* engaged in a traditional balancing of the conflicting interests at stake, and concluded that where the speech involves matters of purely private concern, "the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent." *Id.* at ____, 105 S. Ct. at 2946. Consequently, the Court reaffirmed the wisdom and experience of the common law courts, which permitted juries to presume those damages which almost certainly resulted from defamatory utterances and publications, although the plaintiff might be entirely at a loss to prove that actual injury had occurred. *Id.* The Supreme Court held that the common law rule of presumed damages

> furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing of 'actual malice'.

Id.

Thus, the Supreme Court has finally laid to rest any doubt lingering after *Gertz* that the stringent "actual malice" standard must be satisfied by a private defamation plaintiff when the content of the publication is a matter of purely private concern.

The defamatory message in the case at bar clearly involves no issue of general public concern. Arguably, if the allegations concerning Douglas' unlicensed operation and inferior construction techniques were true, the statements might excite legitimate public controversy regarding the soundness or safety of structures built by Douglas' company. *See Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433, 437 (3d Cir. 1979). Being wholly false, however, the accusations merit no public discussion or comment.

In *Snowdon v. Pearl River Broadcasting Co.*, 251 So.2d 405 (La. App. 1971), a caller on a radio broadcast falsely claimed that the plaintiff sold narcotics. The court found that although "the general subject of narcotics abuse is a matter of great public or general interest, [it] does not serve freedom of speech or freedom of discussion on such subject matter for one private citizen to accuse falsely another." *Id.* at 413. Thus, the defamatory statement did not involve an issue of public concern, since the plaintiff only became involved after the false accusation. *Id.*

Furthermore, the message was purposefully published only to a limited target audience, that is, members of the public whose hobbies included home repair and carpentry, who operated home computers, and who were equipped with a "modem" device necessary to enable them to gain access to "Gordotalk." Whether speech involves a matter of public concern " 'must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.' " *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ___ U.S. ___, ___, 105 S. Ct. 2939, 2947 (1985), quoting *Connick v. Myers*, 461 U.S., 138, 147 (1983).

The record in the instant case is devoid of any circumstance which might indicate that the publisher of the defamatory message conveyed it in the belief that he was commenting upon a legitimate matter of public concern. For these reasons, Respondent Douglas is entitled to seek presumed damages attributable to the defamatory publication, without pleading or proving actual injury, even in the absence of any allegation of "actual malice" on the part of Gordon.

Even assuming, however, that some showing of fault on behalf of the Petitioner must be established, Respondent's failure to allege in the pleading that Gordon acted negligently or with "actual malice" does not preclude this Court from adjudicating the existence of fault on appeal. For as the Supreme Court acknowledged in *Time, Inc. v. Firestone*, 424 U.S. 448, 461 (1976), the Constitution does not require that assessment of fault in a defamation case be made by a jury, "nor is there any prohibition against such a finding being made in the first instance by an appellate, rather than a trial, court." *See Time, Inc. v. Pape*, 401 U.S. 279 (1971) (on appeal of a directed verdict, the Supreme Court conducted an independent examination

of the evidence to determine whether the facts would support a finding of "actual malice").

The allegations contained in the pleadings establish that Petitioner Gordon, who had exclusive control over the entry and removal of "Gordotalk" messages, utterly failed to screen the content of such statements before they were stored in its computer memory bank, to be disseminated at the touch of a button to unknown numbers of readers. Providing the passwords by which messages, however false and damaging to others, could be anonymously communicated, clearly constituted an open invitation to anyone who happened to be aware of Petitioner's system to post whatever gravely libelous and hurtful remarks should strike his fancy at the moment. *See Snowdon v. Pearl River Broadcasting Corp.*, 251 So.2d 405 (La. App. 1971).

Finally, permitting the computer bulletin board system to operate unattended during his week-long absence amounted to a complete abdication by Gordon of his duty to supervise and control the potentially harmful computer program which he created. Taken together, these allegations are sufficient to support a finding of negligence, or even reckless disregard on the Petitioner's part. *See Snowdon v. Pearl River Broadcasting Corp.*, 251 So.2d 405 (La. App. 1971) (radio talk-show acted with "utter disregard for the truth" when it aired anonymous callers' statements without the use of a monitoring device). At the very least, these allegations present an issue of fact as to whether Gordon's conduct was sufficiently irresponsible to warrant the imposition of liability for the publication on "Gordotalk" of defamatory falsehoods impugning Respondent's business reputation.

For the reasons set forth above, the Appellate Court of the State of Marshall correctly determined that Petitioner's motion for judgment on the pleadings should not have been granted. The Respondent, an innocent businessman, has been humiliated and has suffered unjustly. His good name and skill as a contractor has been damaged by the utterly baseless and unprovoked slurs of an anonymous individual.

Since Douglas is prevented from ascertaining the identity of the author, justice demands that Douglas seek a remedy for his injury against the Petitioner, who is equally responsible for the defamation of Respondent's business reputation. By having voluntarily chosen to store and disseminate such statements on his computer bulletin board without taking the necessary precautions against its being utilized in a manner harmful to others, Petitioner is clearly liable for the damages caused to Respondent by the publication of the defamatory "Gordotalk" message.

CONCLUSION

For the compelling reasons set forth above, the Respondent respectfully requests that the judgment of the Appellate Court of the State of Marshall be affirmed.

Respectfully submitted,

Attorneys for Respondent.

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(Signatures omitted pursuant to Rule III(G) of the 1985 Benton National Moot Court Competition.)

APPENDIX

U.S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RELEVANT PROVISIONS OF THE RESTATEMENT (SECOND) OF TORTS (1976)

§ 559 Defamatory Communication Defined

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

§ 568 Forms of Defamatory Communications

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).

(3) The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

§ 570 Liability Without Proof of Special Harm - Slander

One who publishes matter defamatory to another in such a manner as to make the publication a slander is subject to liability to the other although no special harm results if the publication imputes to the other

(a) a criminal offense, as stated in § 571, or

(b) a loathsome offense, as stated in § 572, or

(c) matter incompatible with his business, trade, profession, or office, as stated in Sec. 573, or

(d) serious sexual misconduct, as stated in Sec. 574.

§ 581 Transmission of Defamation Published by Third Persons

(1) Except as stated in Subsection (2), one who only delivers or transmits defamatory matter published by a third person

is subject to liability if, but only if, he knows or has reason to know of its defamatory character.

(2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.

CERTIFICATE OF SERVICE

Counsel for Respondent hereby certify that this brief has been served on all participating teams in accordance with Rule IV(B) of the Benton National Moot Court Competition.

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