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Opinion No. 09-112

"Fair Campaign Practices Act" (HB891/SB1060)

QUESTIONS

1. Does HB891 (SB1060), as amended, raise any constitutional issues under the guarantees of freedom of speech and press of the First and Fourteenth Amendments?

2. Would newspapers and other news media which carry political advertising be included under HB891, and if so, would the retraction provisions of Tenn. Code Ann. § 29-24-103(b)(1) or the retraction provisions of Section 2(b)(4) of HB891 apply?

3. Does HB891 repeal the retraction provisions of Tenn. Code Ann. § 29-24-103(b)(1)?

4. What would be the constitutional implications of a prosecution against a newspaper or other medium under Tenn. Code Ann. § 2-19-142, which makes it a Class C misdemeanor "for any person to publish or distribute or cause to be published or distributed any campaign literature" that he or she knows is false or contains false statements?

5. Could a party who takes "steps to correct and to retract such false and defamatory campaign literature or political advertisement" in accordance with the provisions of Section 2(b)(4) of HB891 subsequently be prosecuted under Tenn. Code Ann. § 2-19-142?

6. Would a decision by a party to correct and retract material in campaign literature or a political advertisement prejudice his defense to a criminal prosecution brought under Tenn. Code Ann. § 2-19-142, and if so, would that be a disincentive to publishing a correction or retraction?

7. Would passage of HB891 and, in particular, the retraction provisions of Section 2(b)(4), shift the burden of proving falsity of a political advertisement to the publisher of such advertisement, and if so, would such shifting be constitutional under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986)?

8. Can a party who "publishes, broadcasts, or distributes or causes to be published, broadcast, or distributed any false and defamatory campaign literature or political advertisement" be held liable under current law?

OPINIONS

1. The standard for liability contained in HB891 (and SB1060) incorporates the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments under the *New York Times* test and, therefore, is constitutional. Additionally, HB891's provisions allowing for the award of punitive damages do not raise any constitutional concerns.

2. If a newspaper or other news media carries political advertising that is false and defamatory with knowledge of the falsity or with reckless disregard of the truth or falsehood of the political advertising, then such newspaper or other news media would be subject to the provisions of HB891. Moreover, under such circumstances, the retraction provisions of Tenn. Code Ann. § 29-24-103(b)(1) would not be applicable, as that section requires a showing that the political advertisement was published in good faith, that any falsity was due to an honest mistake of facts, and that there were reasonable grounds for believing the statements to be true, in addition to making an appropriate retraction within the time period set forth in that statute.

3. The retraction provisions of Tenn. Code Ann. § 29-24-103(b)(1) related to punitive damages have been superseded by the decisions of the United States Supreme Court relative to awarding punitive damages in defamation cases. The passage of HB891 would not repeal those provisions.

4. Tenn. Code Ann. § 2-19-142 requires a showing that a party published or distributed or caused to be published or distributed campaign literature that he or she knows is false in order for there to be criminal liability. This requirement is consistent with the *New York Times* standard of "actual malice." Accordingly, a prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142 would not raise any constitutional objections.

5. We are not aware of anything that would preclude prosecution under Tenn. Code Ann. § 2-19-142 of a party who retracted a false statement, whether the retraction was issued pursuant to Section 2(b)(4) of HB891 or for some other reason.

6. Tenn. Code Ann. § 2-19-142 requires a showing that a party published or distributed or caused to be published or distributed campaign literature that he or she knows is false in order for there to be criminal liability. The general rule in defamation cases is that a defendant's conduct after publication is not probative evidence of a defendant's state of mind at the time of publication, although some courts have held to the contrary. Consequently, while the issuance of a retraction is unlikely to be probative evidence of the existence of knowledge of falsity prior to publication, whether or not Section 2(b)(4) is enacted into law, the possibility of such an outcome might be considered by a publisher in deciding whether to issue a retraction.

7. Liability under the provisions of Section 2(b)(1) of HB891 is premised upon a showing "by clear and convincing evidence" that a party had knowledge of the falsity or acted with reckless disregard of the truth or falsehood of the campaign literature or political advertisement. This provision is consistent with the constitutional requirements that the plaintiff must bear the burden of showing falsity, as well as fault. We find nothing in the language of

Section 2(b)(4) with respect to the retraction provisions that would contradict the provisions of Section 2(b)(1) placing the burden of proof of falsity on the plaintiff.

8. Yes.

ANALYSIS

You have raised a number of questions concerning House Bill 891 ("HB891") and the corresponding Senate Bill 1060 ("SB1060), as amended.[1] HB891 states that it is to be known as the "Fair Campaign Practices Act" and would add the following new subsection to Tenn. Code Ann. § 2-19-142:

> (b) Notwithstanding the provisions of any other law to the contrary:
>
> (1) If a person, corporation, organization, entity or committee publishes, broadcasts, or distributes, or causes to be published, broadcast or distributed any false and defamatory campaign literature or political advertisement relating to the conduct, fitness or record of any candidate for public office with knowledge of the falsity or with reckless disregard of the truth or falsehood, then such person, corporation, organization, entity or committee shall be liable upon proof by clear and convincing evidence for damages in a defamation action brought by such candidate.
>
> (2) Such damages shall include compensatory damages and punitive damages in such amount as the court may allow.
>
> (3) In any action brought pursuant to this subsection (b), the court may award reasonable attorney's fees and costs to the prevailing party.
>
> (4)(A) A person, corporation, organization, entity, or committee that publishes, broadcasts, distributes, or causes to be published, broadcast or distributed any false and defamatory campaign literature or political advertisement relating to the conduct, fitness, or record of any candidate for public office, upon being given written notice by such candidate that such campaign literature or political advertisement is false and is considered defamatory, shall have forty-eight (48) hours to take reasonable steps to correct and to retract such false and defamatory campaign literature or political advertisement. Such notice shall identify

[1] HB891 was passed by the House of Representatives on April 27, 2009. The analysis in this opinion is based upon the text of the bill adopted by the House.

> with specificity the false and defamatory content in the campaign literature or political advertisement and shall provide a reasonable basis-in-fact demonstrating such falsity and defamation.
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> (B) The notification requirements of subdivision (4)(A) shall be deemed to be met if the notice is sent by certified mail.
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> (C) Evidence that a person, corporation, organization, entity, or committee failed to correct and retract such false and defamatory campaign literature or political advertisements after being given notice in accordance with this subdivision (4) shall be considered upon the awarding of punitive damages.

While common law causes of action currently exist under Tennessee law for defamation of a public figure and defamation of a private person, *see Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978) (adopting standards 580A and 580B, *Restatement (Second) of Torts* (1977)), HB891 would create a statutory cause of action specifically addressing defamatory statements relating to the conduct, fitness or record of candidates for political office contained in campaign literature and/or political advertising.

CONTROLLING CONSTITUTIONAL LAW

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court held that the First and Fourteenth Amendments protect good-faith critics of the official conduct of public officials from defamation suits:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 279, 84 S.Ct. at 726. In subsequent cases, the Court expanded the First Amendment protections established in *New York Times* to encompass statements concerning any public figure, not just public officials. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); *Associated Press v. Walker*, 388 U.S. 130, 162, 87 S.Ct. 1975, 1995, 18 L.Ed.2d 1094 (1967).

A "public figure" is defined as one who "may have attained that status by position alone . . . [or] by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Curtis Publishing Co.*, 388 U.S. at 155, 87 S.Ct. at 1991. The Supreme Court has further defined a public figure as follows:

> For the most part those who attain this status have assumed roles of an especial prominence in the affairs of society. Some occupy

> positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event they invite attention and comment.

Gertz v. Welch, 418 U.S. 323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974). Under either definition, candidates for political office who are not already public officials are public figures.

Under the standard established in *New York Times* and refined in subsequent cases, if a plaintiff is a public figure, a state law allowing a public figure to recover for injury to reputation in a defamation suit is constitutional only if it requires a showing on clear and convincing evidence that the defamatory statement was made with actual malice, *i.e*., knowledge of its falsity or with reckless disregard of whether it was false or not. *Trigg v. Lakeway Publishers, Inc*., 720 S.W.2d 69, 73 (Tenn. Ct. App.), *p.t.a. denied* (Tenn. 1986). In *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Supreme Court further expounded on this standard and equated "reckless disregard of the truth" with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id*. at 731, 88 S.Ct. at 1325. In *Beckley Newspapers Corp. v. Hank*, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248 (1967), the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and "malice" in the traditional common-law sense of ill will, personal spite or bad motive.

In *Gertz*, the Supreme Court addressed the issue of punitive damages in a defamation case. While noting that punitive damages are not compensation for injury but are instead private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence, the Court found that there was no justification for allowing awards of punitive damages against defendants under state-defined standards of liability for defamation. 417 U.S. at 350, 94 S.Ct. at 3012. Accordingly, the Court held that a defamation plaintiff who fails to establish liability under the *New York Times* standard of actual malice cannot recover punitive damages. *Id*.[2]

TENNESSEE LAW

As discussed, *supra*, Tennessee has recognized common-law causes of action for defamation against both public and private figures. The Tennessee Supreme Court has stated:

> We are impressed with Standards 580A and 580B, Restatement (Second) of Torts (1977). They read as follows:
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> § 580A. Defamation of Public Official of Public Figure. One who publishes a false and defamatory communication concerning a

[2] The Court also held that a private defamation plaintiff who established liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury. *Gertz*, 417 U.S. at 350, 94 S.Ct. at 3012.

> public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) Knows that the statement is false and that it defames the other person, or
>
> (b) Acts in reckless disregard of these matters.
>
> §580B. Defamation of Private Person. One who publishes a false and defamatory communication concerning a private person or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he
>
> (a) Knows that the statement is false and that it defames the other,
>
> (b) Acts in reckless disregard of these matters, or
>
> (c) Acts negligently in failing to ascertain them.
>
> We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction.

Press, Inc. v. Verran, 569 S.W.2d 435, 442 (Tenn. 1978).

Whether a communication is capable of being understood as defamatory is a question of law for the court. *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978). Furthermore, Tennessee courts have held that

> [f]or a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element "of disgrace."

McWhorter v. Barre, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003) (quoting *Stones River Motors, Inc. v. Mid-South Publishing Co.*, 651 S.W.2d 713, 719 (Tenn. Ct. App. 1983)); *see also Davis v. The Tennessean*, 83 S.W.3d 125, 128 (Tenn. Ct. App. 2001) ("The basis for an action for defamation, whether it be slander or libel, is that the defamation has resulted in an injury to the person's character and reputation.").

The Tennessee legislature has also enacted a number of statutes with respect to both civil and criminal defamation cases. In Tenn. Code Ann. § 29-24-101 it established a statutory cause of action for a particular type of defamation, *i.e.*, defamation involving charges of sexual impropriety, and provided that "[a]ny words written, spoken, or printed of a person, wrongfully and maliciously imputing to such person the commission of adultery or fornication, are

actionable, without special damage . . .." The legislature has also established a criminal cause of action for defamation involving campaign literature. Tenn. Code Ann. § 2-19-142 provides that it is a "Class C misdemeanor for any person to publish or distribute or cause to be published or distributed any campaign literature in opposition to any candidate in any election if such person knows that any such statement, charge, allegation, or other matter contained therein with respect to such candidate is false."

The legislature has further enacted statutory provisions limiting the liability of commercial printers and printing establishments for libel under certain conditions, as well as the liability of newspapers and periodicals for punitive damages. Under Tenn. Code Ann. § 29-24-105(b) and (c)(2), a cause of action for libel against a commercial printer or commercial printing establishment is "abolished" if the libelous statement was furnished to the printer or printing establishment and no part of the libelous statement was written, edited or otherwise authored by the printer or printing establishment, or their agents or employees, and if the printer or printing establishment requires the person furnishing the statement to also provide his true name, address and organization represented, if any. However, such limitation on liability does not exist where the statement is libelous per se or where the printer or printing establishment knew, or in the exercise of ordinary care should have known, the falsity of the statement. Tenn. Code Ann. § 29-24-105(c)(1).

With respect to newspapers and periodicals, Tenn. Code Ann. § 29-24-103(a) requires that before a civil action for libel is brought against such a publication, the plaintiff must give at least five (5) days written notice of the article and statements therein which the plaintiff alleges to be false and defamatory. Subsection (b)(1) further provides that a plaintiff's damages may be limited to actual damages under certain circumstances:

> If it appears upon the trial that the article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in the article were true, and that within ten (10) days after the service of such notice, or in the next regular edition of such newspaper or periodical, if more than ten (10) days from date of notice, a full and fair correction, apology, or retraction was published in the same editions, and in the case of a daily newspaper, in all editions of the day of such publication, or corresponding issues of the newspaper or periodical in which the article appeared; and in the case of newspapers on the front page thereof, and in the case of other periodicals in as conspicuous a place as that of the original defamatory article, and in either case, in as conspicuous a plat or type as was the original article, then the plaintiff shall recover only actual, and not punitive damages.

Thus, in order for this exemption from punitive damages to be applicable, not only must an appropriate retraction have been issued within the requisite time period, but it must also be shown that the article was published in good faith, that any falsity was due to an honest mistake of facts, and that there were reasonable grounds for believing the statements to be true.

Moreover, this exemption from punitive damages does not apply to any article about or affecting a candidate for political office that is published within ten days before any election for the office for which the person is a candidate. Tenn. Code Ann. § 29-24-103(b)(2).

FAIR CAMPAIGN PRACTICES ACT (HB891/SB1060)

The Fair Campaign Practices Act, as proposed in HB891, does several things. First, it creates a statutory cause of action for the publication, broadcast or distribution of false and defamatory campaign literature or political advertisement relating to the conduct, fitness or record of any candidate for public office. It further provides for the recovery of both compensatory and punitive damages, as well as an award of reasonable attorney's fees and costs to the prevailing party.[3] Finally, it establishes a procedure for seeking the retraction of alleged false and defamatory campaign literature or political advertisement and the effect of the failure to retract with respect to any punitive damage award.

1. Constitutionality of the Act

You have asked what, if any, constitutional issues involving freedom of speech and press are raised by this bill. With respect to the statutory cause of action established for false and defamatory campaign literature or political advertisement about a candidate, the language of HB891 specifically provides that a party is liable only upon "proof by clear and convincing evidence" that such defamatory campaign literature or political advertisement was made with "knowledge of the falsity or with reckless disregard of the truth or falsehood," *i.e.*, "actual malice." This standard for liability required by HB891 (and SB1060) complies with the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments under *New York Times* test and, therefore, is constitutional.

Additionally, HB891's provision allowing for the award of punitive damages once liability is established does not raise any constitutional concerns. The United States Supreme Court has held that a plaintiff must demonstrate "actual malice" in order to recover punitive damages in a defamation case. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50, 94 S.Ct. 2997, 3011, 41 L.Ed.2d 789 (1974). Tennessee courts have adopted this same standard. *See Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 421 (Tenn. 1978) (unless "actual malice" is shown, punitive damages are not to be permitted). Here, since HB891 requires a finding of "actual malice" as defined in *New York Times* in order for there to be any liability, the bill meets the constitutional standards set forth in *Gertz* for the awarding of punitive damages.

[3] Senate Amendment No. 4 (SA493) to SB1060 would add the following language to subdivision (3) of subsection (b) of Section 2 of the bill: "Provided that reasonable attorney's fees and costs shall be awarded to the defendant if the defamation action is dismissed by the court or by the party bringing such defamation action, or if the defendant prevails in the defamation action." Thus, while the language of HB891 would make the award of attorney's fees and costs to the prevailing party within the discretion of the court, this amendment to SB1060 would make the award of attorney's fees and costs to the defendant mandatory if the defamation case is dismissed or if the defendant is the prevailing party.

The retraction provisions of the bill, set forth in Section 2(b)(4), provide that a party who has published, broadcast or distributed, or caused to be published, broadcast or distributed any false and defamatory campaign literature or political advertisement "shall have forty-eight (48) hours upon being given notice that such campaign literature or political advertisement is false and is considered defamatory to take reasonable steps to correct and to retract such falsehoods." The bill does not provide any resulting benefit from a timely retraction, such as the possibility of exemption from liability for punitive damages contained in Tenn. Code Ann. § 29-24-103(b)(1). Rather, it provides that a failure to retract within 48 hours after receiving appropriate notice "shall be considered upon the awarding of punitive damages." [4] Based on the generality of its language, Section 2(b)(4) appears to provide simply that a failure to retract shall be "considered" with respect to punitive damages and given whatever weight is due such evidence. As such would be the case even in the absence of Section 2(b)(4), the provision would seem to raise no constitutional concerns.

Courts generally have held that a failure to retract is not relevant evidence of *liability* for punitive damages. The United States Supreme Court's holding in *Gertz*, as well as the Tennessee Supreme Court's holding in *Memphis Publishing Co.*, both require a demonstration of "actual malice" in order to recover punitive damages. As the "actual malice" standard is based upon the publisher's state of mind at the time of publication, the majority of courts have held that actions occurring after publication of the contested communication, such as a failure to retract, are of little relevance. *See* Bruce W. Sanford, *Libel and Privacy* § 8.4.11, at 8-117, 8-120 (2d ed. 2009 supp.) ("The weight of authority indicates that a defendant's conduct after publication of the alleged defamation is largely irrelevant to the issue of fault…. In actual malice cases, however, the majority view is that post-publication conduct is not probative….[C]ircumstantial evidence of post-publication conduct ought to be inadmissible."). *But see* 1 *Sack on Defamation: Libel, Slander and Related Problems* § 11.1 (3d ed.) ("While a retraction does not necessarily establish the state of mind of the defendant at the time of making the defamatory statement, it has been held to be probative as evidence of lack of 'actual malice,'….Under certain circumstances, *failure* to retract may help establish 'actual malice.'"); *Myers v. Pickering Firm, Inc*., 959 S.W.2d 152, 165 (Tenn. Ct. App.), *p.t.a. denied* (Tenn. 1997) (without clearly distinguishing between actual and common-law malice, holding that failure to retract defamatory statements upon request was sufficient evidence of actual malice to support punitive damage award).

However, the proposition that a failure to retract is relevant to setting the amount of punitive damages (if any) is more widely accepted. There are a number of relevant facts that a plaintiff who has established liability by proving actual malice might seek to prove in order to buttress a claim for punitive damages. For example, the plaintiff might want to show that this is not the defendant's first offense (hence a heightened need to deter future misconduct), or that the defendant is wealthy (and, thus, that an award of compensatory damages alone would be

[4] The bill does not specify the nature of such consideration. The bill does not require that such failure should be given any particular evidentiary weight relative to punitive damages, that issuing a retraction will shield the defendant from punitive damages, or that the lack of a retraction will enhance the punitive damage award. The bill does not preclude consideration of a retraction published either before or after the 48-hour deadline in setting damages, nor does the bill preclude consideration of a retraction or lack thereof if the notice specified by the bill has not been delivered.

insufficient punishment), or that the defendant acted out of spite or ill will (and thus was guilty of reprehensible conduct). In fact, if a state does not require proof of these additional factors in addition to actual malice by a public official or public figure plaintiff, then the defendant can be held liable for the extraordinary remedy of punitive damages based on the same showing required simply to establish threshold liability for actual damages. *See* 1 Rodney A. Smolla, *Law of Defamation* § 9:44 at 9-29 (2d ed. 2008)

Accordingly, courts have held that a failure to apologize or to retract may be admissible to show common-law malice or bad faith and, therefore, could be relevant to the issue of setting the amount of punitive damages. *See, e.g., Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 164 (Tenn. Ct. App.), *p.t.a denied* (Tenn. 1997) (holding that a refusal to retract after a request is made is evidence of malice and relevant to the amount of damages); *Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473, 475 (Colo. App. 1985) (failure to apologize or to retract is relevant to issue of punitive damages). In fact, in order to recover punitive damages in a defamation suit, many states have imposed a common law malice requirement in addition to the constitutional "actual malice" requirement. For example, the court in *Prozeralik v. Capital Cities Communications, Inc.*, 82 N.Y.S.2d 466 (N.Y.App. 1993), held that, in addition to demonstrating actual malice as required by the First Amendment, a plaintiff, in order to recover punitive damages, must also demonstrate the type of common law malice that would give rise to punitive damages in other tort contexts, a showing of malice which focuses on the defendant's state of mind in relation to the plaintiff, the plaintiff's rights, and the motive for publication. Thus, the court explained that the common law standard is intended "to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." *Prozeralik*, 82 N.Y.S.2d at 482.

2. Effect of Retraction Provisions of the Act

You have raised a number of issues concerning the interplay of HB891 with the other defamation statutes discussed above, in particular, the retraction provisions of Tenn. Code Ann. § 29-24-103 and the criminal liability provisions of Tenn. Code Ann. § 2-19-142.

The first issue is whether HB891 would subject newspapers and other news media which carry political advertising to liability, and if so, whether the retraction provisions of Tenn. Code Ann. § 29-24-103 would apply in such cases or, instead, the retraction provisions of HB891. Section 2(b)(1) of HB891 specifically states:

> If a person, corporation, organization, entity or committee publishes, broadcasts, or distributes, or causes to be published, broadcast or distributed any false and defamatory campaign literature or political advertisement relating to the conduct, fitness, or record of any candidate for public office with knowledge of the falsity or with reckless disregard of the truth or falsehood, then such person, corporation, organization, entity, or committee shall be liable . . ..

Based upon the plain language of this section, if a newspaper or other news media carries political advertising that is false and defamatory *with knowledge of its falsity or with reckless*

disregard of whether or not it is false, then such newspaper or other news media would be subject to the provisions of HB891. Moreover, under such circumstances, the retraction provisions of Tenn. Code Ann. § 29-24-103(b)(1) would not be applicable. That section protects the publisher from liability for punitive damages only if the statements were published in good faith, any falsity was due to an honest mistake of fact, and the publisher had reasonable grounds to believe that the statements at issue were true. Under *New York Times* and its progeny, however, a plaintiff must prove actual malice, *i.e.*, that the publisher had knowledge of falsity or acted in reckless disregard of the truth, in order to receive punitive damages. If a plaintiff has made such a constitutionally required showing, then by its terms Tenn. Code Ann. § 29-24-103(b)(1) would not apply. Accordingly, the requirements imposed by the constitution (and incorporated into HB891) for any award of punitive damages for defamation have superseded the punitive damages protections contained in Tenn. Code Ann. § 29-24-103(b)(1).[5] *See generally* 1 *Sack on Defamation: Libel, Slander and Related Problems* § 11.2.1, at 11-4 (3d ed.) ("A media defendant who is not guilty of 'fault' in relation to knowledge of the falsity of the defamatory matter will in many instances be constitutionally protected from a judgment whether or not he or she has published a retraction, and such retraction statutes have therefore become largely superfluous from a substantive point of view."). Conversely, because the retraction provisions of Tenn. Code Ann. § 29-24-103(b)(1) only apply where a plaintiff cannot demonstrate "actual malice," enactment of HB891 would not result in a repeal of the provisions of Tenn. Code Ann. § 29-24-103(b)(1).

The next issue concerns the interplay between the retraction provisions of HB891 and the criminal provisions of Tenn. Code Ann. § 2-19-142. Your first question asks what would be the constitutional implication of any prosecution against a newspaper or other news medium under Tenn. Code Ann. § 2-19-142. The Supreme Court has held that

> [t]he constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since " . . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive" . . .," only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions.

Garrison v. Louisiana, 379 U.S. 64, 75, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 271-272, 84 S.Ct. at 721).[6]

Tenn. Code Ann. § 2-19-142 requires a showing that a party published or distributed or caused to be published or distributed campaign literature *that he or she knows is false* in order for there to be criminal liability. This requirement is consistent with the *New York Times*

[5] Tenn. Code Ann. § 29-24-103(b)(1) was enacted by the General Assembly in 1955, before the adoption of the "actual malice" standard by the United States Supreme Court in 1964.

[6] The *Garrison* case involved the appeal of a defamation conviction under a Louisiana criminal libel statute.

standard of "actual malice." In fact, the statute's requirement of knowledge of falsity actually establishes a stricter standard for criminal liability than "actual malice," which provides for liability upon a showing either of knowledge of falsity or of reckless disregard of the truth or falsehood. Accordingly, a prosecution against a newspaper or other news medium under Tenn. Code Ann.§ 2-19-142 would not be barred by the *New York Times* rule.

Your next questions asks whether a party who "takes steps to correct and to retract such false and defamatory campaign literature or political advertisement" could nevertheless be prosecuted under Tenn. Code Ann. § 2-19-142. We are not aware of anything that would preclude prosecution under Tenn. Code Ann. § 2-19-142 of a party who had retracted a false statement, whether the retraction was issued pursuant to Section 2(b)(4) of HB891 or for some other reason. In order to establish criminal liability under Tenn. Code Ann. § 2-19-142, the focus is on the defendant's subjective state of mind *at the time* he or she published or distributed or caused to be published or distributed the campaign literature, *i.e.*, whether he or she knew that such literature was false or contained false statements. This is of course part of the "actual malice" standard (knowledge of falsity or reckless disregard for the truth) constitutionally required to establish liability for defamation of public figures and to be awarded punitive damages. The general rule in defamation cases, as noted above, is that a defendant's conduct after publication of alleged false and defamatory material is not probative evidence of a defendant's state of mind at the time of publication, although some courts have held to the contrary. *See* Bruce W. Sanford, *Libel and Privacy*, § 8.4.11, at 8-118 – 8-119 & nn.486-487 (2d ed. 2009 supp.). *But see* 1 *Sack on Defamation: Libel, Slander and Related Problems* § 11.1 (3d ed.) ("While a retraction does not necessarily establish the state of mind of the defendant at the time of making the defamatory statement, it has been held to be probative as evidence of lack of 'actual malice,'….Under certain circumstances, *failure* to retract may help establish 'actual malice.'"). Consequently, the issuance of a retraction is unlikely to be probative evidence of the existence of knowledge of falsity prior to publication, whether or not Section 2(b)(4) is enacted into law, but the possibility of such an outcome might be considered by a publisher in deciding whether to issue a retraction.

Your last question asks whether the retraction provisions of Section 2(b)(4) of HB891 would result in a shifting of the burden of proving falsity of a political advertisement to the publisher of such advertisement, and if so, whether such shifting of the burden would be constitutional under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). In that case, the defendant had published a series of articles in its Philadelphia newspaper whose general theme was that the plaintiff had links to organized crime and had used some of those links to influence Pennslyvania's governmental processes. The plaintiff brought a defamation suit against the newspaper owner and the authors of the articles in question in state court. *Id*. at 769, 106 S.Ct. at 1560. Pennslyvania law at that time followed the common law's presumption that an individual's reputation is a good one. Accordingly, the law considered statements defaming a person to be presumptively false and placed the burden on the defendant of proving the truth of the statements. *Id*.

The Supreme Court first noted that it had already declared that a public figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation. *Id*. at 775, 106 S.Ct. at 1563 (citing *Garrison v. Louisiana*, *supra* (reading *New York Times* for the

proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false"); *Herbert v. Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 1648, 60 L.Ed.2d 115 (1979) ("[T]he plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability")). The Court went on to hold that where the plaintiff is a private figure, but the speech is of public concern, "the common law's rule on falsity – that the defendant must bear the burden of proving truth – must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id*. at 766, 106 S.Ct. at 1563.

Liability under the provisions of Section 2(b)(1) of HB891 is premised upon the plaintiff's showing "by clear and convincing evidence" that a party had knowledge of the falsity or acted with reckless disregard of the truth or falsehood of the campaign literature or political advertisement. This provision is consistent with the constitutional requirements that the plaintiff must bear the burden of showing falsity, as well as fault. Nothing in the language of Section 2(b)(4) with respect to retractions contradicts the provisions of Section 2(b)(1) placing the burden of proof of falsity squarely on the plaintiff.

3. Liability Under Current Law

Finally, you have asked whether a party who "publishes, broadcasts, or distributes, or causes to be published, broadcast, or distributed any false and defamatory campaign literature or political advertisement" can be held liable under current Tennessee law. As noted, Tennessee currently recognizes a common-law cause of action for defamation against a party who "*publishes* a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness or role in that capacity." *Press, Inc. v. Verran*, 569 S.W.2d at 442 (emphasis added). "Publication" is a term of art in defamation law and is an essential element of any defamation claim. *Sullivan v. Baptist Memorial Hosp*., 995 S.W. 569, 571 (Tenn. 1999); *Freeman v. Dayton Scale Co.*, 19 S.W.2d 255, 256 (Tenn. 1929) ("This being a civil and not a criminal suit for libel, it is essential that there be publication; that is, a communication of the defamatory matter to a third person."). Any act by which defamatory matter is communicated to someone other than the person defamed is a publication. *See Restatement (Second) of Torts* § 617, comment a, at 315 (1977); *Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 821 (Tenn. 1994). To "communicate" means to convey information to another. *Webster's Third New International Dictionary* 460 (1981). Publication, broadcast and distribution are all different forms of communication, and, therefore, a party who publishes, broadcasts, or distributes, or causes to be published, broadcast, or distributed false and defamatory campaign literature or political advertisement can be held liable under current Tennessee law as long as such publication, broadcast or distribution is to a third party.

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