THE ANTI-SLAPP KNOCKOUT: LITIGATION INCENTIVES, THE SEVENTH AMENDMENT, AND THE LOST TORT OF DEFAMATION

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Abstract

"SLAPP" suits are tort actions motivated by a desire to impose litigation costs on defendants who have made public criticisms of plaintiffs in exercise of their constitutional right to expression. Many states have passed "Anti-SLAPP" statutes that allow defendants to file early, dispositive motions to dismiss meritless suits. These statutes typically require tort plaintiffs to provide "clear and specific evidence" establishing a prima facie case as to each element of their claim, and to overcome any defenses or privileges raised by the defendant. Filing an anti-SLAPP motion stays or limits discovery; the plaintiff must survive the anti-SLAPP procedure with the evidence gathered pre-filing. Should the defendant's motion prevail, the plaintiff will be assessed defendant's costs and attorney's fees and could face sanctions for filing a non-meritorious claim.

This Article contests the common anti-SLAPP narrative. It argues that the anti-SLAPP statutes have done more to vanquish defamation actions than even the "actual malice" requirement of New York Times v. Sullivan. Because the defendant is typically in exclusive possession of much of the key evidence necessary to establish a defamation claim, particularly as to fault, requiring the plaintiff to provide immediate proof of each element in effect renders most plaintiffs with an impossible task. In addition, requiring the plaintiff to defeat all of the claimed defenses and privileges, most of which involve highly subjective standards of "good faith" and "substantial truth," or which involve opaque legal distinctions, such as "fact vs. opinion," imposes an even heavier burden. Should the plaintiff guess wrong, and not be able to prevail on every legal and factual issue a complex defamation case presents, then the plaintiff will be left to pay for defendant's expensive legal fees. If they are subject to anti-SLAPP liability, defamation claims are today advisable only for the wealthiest or the most reckless.

The anti-SLAPP statutes also generate a problem of constitutional dimension. Because of their facial similarity to summary judgment motions, anti-SLAPP statutes have been thought to not impinge on the Seventh Amendment's right to trial by jury. In fact, despite superficial appearances, along several key dimensions the new state anti-SLAPP statutes impinge on

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the plaintiff's jury trial rights to render them constitutionally problematic.

INTRODUCTION

In the historic battle between the First Amendment to the U.S. Constitution[1] and state defamation law, the most important development is no longer *New York Times v. Sullivan*,[2] with its famous "actual malice" standard of fault.[3] Instead, the rapid growth of state anti-SLAPP (AS) statutes[4] now presents the most formidable obstacle for plaintiffs suing under state defamation law.[5] Although these statutes vary in content along several dimensions,[6] in the main, these state AS laws require defamation plaintiffs to be able, immediately upon the filing of the complaint, to respond to defendant's special AS motion to dismiss by providing evidence that establishes a prima facie case as to each element of the claim.[7] In addition, many of the AS statutes also require that the plaintiff be able to defeat, again at the initial pleading stage and as a matter of law, all privileges and defenses that the defendant might raise.[8] These twin requirements, that the plaintiff plead and present proof of sufficient facts to establish the claim and that the plaintiff defeat all legal defenses, must be met without discovery:[9] most AS statutes impose an automatic stay on discovery,[10] although some allow for limited discovery upon motion.[11] If the defendant's AS motion succeeds, then the plaintiff is subject to a mandatory assessment of defendant's fees and

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[1] U.S. Const. amend. I.

[2] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[3] *Id*. at 279-80.

[4] For a current listing of state anti-SLAPP laws, see State *Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/your-states-free-speech-protection (last visited Feb. 2, 2023). To date, 31 states and the District of Columbia have passed anti-SLAPP statutes. Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression*, 44 HASTINGS COMM. & EN.T L. J. 133, 136 (2022). Another useful website is *Public Expression Protection Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1 (last visited Feb. 2, 2023).

[5] Despite their growing prevalence, anti-SLAPP statutes have received little attention in the scholarly literature. The original claims about the prevalence of SLAPP statutes, and the purported need for anti-SLAPP legislation, have gone mostly unexamined since they originated in Penelope Canan and George W. Pring's 1988 article. Penelope Canan & George W. Print, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC. REV. 385 (1988).

[6] For a useful and updated reference to the varieties of state anti-SLAPP statutes and relevant judicial decisions, *see* THOMAS R. BURKE, ANTI-SLAPP LITIGATION (2023).

[7] UNIF. PUB. EXPRESSION PROTECTION ACT § 7(A)(3) (A) (UNIF. LAW COMM'N 2020) [hereinafter UPEPA].

[8] *Id.* § 7(a)(3)(B).

[9] *Id.* § 4.

[10] *Id.* § 4.

[11] Some states allow for "limited discovery" if the plaintiff can show that "specific information is necessary to establish whether a party has satisfied a failed to satisfy a burden" under the AS statute "and the information is not reasonably available unless discovery is allowed." *Id.* § 4(d).

costs in defending the entire suit;[12] in some states, the plaintiff might also be assessed sanctions.[13]

The requirements imposed by AS statutes present nearly insuperable obstacles for defamation plaintiffs. The preclusion or limitation of discovery prior to the requirement of proof effectively places evidence for certain elements of defamation out of the plaintiff's reach. For instance, the constitutional standard of actual malice requires the plaintiff who qualifies as a "public figure"[14] or a "limited-purpose public figure"[15] to prove that the defendant knew the truth prior to publication yet chose to publish a falsehood or at least recklessly disregarded the truth in publishing a falsehood.[16] For private-figure plaintiffs, the plaintiff must allege and prove the defendant was negligent in its investigation prior to publishing falsehoods.[17] Whether in regard to actual malice or negligence, in most cases, it is the defendant-publisher who will have exclusive access to evidence about the defendant's pre-publication knowledge or conduct that might show fault. State AS laws require the plaintiff to have such proof prior to filing. A similar problem confronts a plaintiff regarding other elements of a defamation claim.[18] When constitutional and common-law pleading requirements are combined with the procedural mechanisms of AS statutes, the effect is to deter filing a defamation action even if discovery would result in a high probability of ultimate success.[19]

The additional requirement, found in some AS statutes and in the model act,[20] that plaintiffs also must prevail at the initial motion stage against any affirmative or other defenses in the AS stage, is particularly burdensome.[21] Defendants to defamation claims have available a wide range of common-law and constitutional defenses, including truth,[22] opinion, and

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[12] *Id.* § 10. The Model Act also will charge costs and fees to the defendant if the court finds the motion was frivolous or filed solely with the intent to delay the proceeding. *Id.*

[13] *E.g.*, *Texas Citizens Participation Act*, 2011 TEX. CIV. PRAC. & REM. CODE § 27.009(a)(2) [hereinafter TCPA]

[14] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162 (1967) (extending the actual malice rule for public officials to all public figures).

[15] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[16] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[17] *See Gertz*, 418 U.S. at 347 ("We hold 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 defamatory falsehood injurious to a private individual."). Under state law, the private plaintiff usually must show that the defendant was negligent, or at fault. *See., e.g.*, Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793 (Ky. 2004).

[18] *See infra* Section II.C.

[19] *See infra* Sections II.B-C.

[20] UPEPA § 7(a)(3)(A).

[21] *Id.* § 7.

[22] If a plaintiff is classified as a public figure or limited public figure, truth shifts from a common-law defense on which the defendant bears the burden of proof to an element on which the plaintiff bears the burden of proof to establish falsity. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967); Meiners v. Moriarity, 563 F.2d 343 (7th Cir. 1977). This burden can also be shifted even with a private-

various privileges.[23] Each of these defenses is remarkably amorphous. "Truth" can mean mere "substantial truth" and can thus include statements that are literally false.[24] "Opinion" has been held to apply to statements that are factual in nature but on which people can differ in their description.[25] The several privileges that protect speech in certain contexts also involve ambiguous elements, such as good faith.[26] All of these defenses and privileges were devised at common law and were intended to be resolved by juries. They were not developed at common law to be applied by judges as a matter of law. They especially were not made to be applied by a judge at the pleading stage before any discovery or other formal evidentiary investigation allows for the development of nuanced matters of proof. For the plaintiff, the risk is high, often unbearably so. Should the trial judge rule that the plaintiff cannot overcome any one of the defendant's multiple legal or constitutional defenses, the claim will be dismissed, and the plaintiff will have to pay the defendant's costs in defending the lawsuit. Given the highly expensive counsel typically retained in defamation cases by major media organizations, these costs, even at the early stages, can be significant.[27]

AS laws have an additional, if unforeseen, effect: they also change the basic pleading requirements for plaintiffs. For causes of action not subject to AS motions,[28] most states retain some form of the more relaxed notice

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figure plaintiff if the defendant's speech were on a matter of public concern. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[23] A wide variety of defenses and privileges are available to a defamation claim; the common-law ones vary by state and include both absolute and qualified privileges. Among the more popular are truth or substantial truth, statements made in governmental proceedings, fair report and fair comment, and neutral-report. The "substantial truth" defense protects a statement that is false, as long as the "gist" of the story is true. *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 497 (1991). The "fair report" privilege requires that the speaker have provided an accurate or fair description of what took place at a public governmental meeting or event. RESTATEMENT (SECOND) OF TORTS § 611 (AM. LAW INST. 1965). The neutral report privilege was recognized in *Edwards v. National Audubon Society*. Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113, 130 (2d Cir. 1977).

[24] *Masson*, 501 U.S. at 497 (1991) ("the common law of libel overlooks minor inaccuracies and concentrates upon substantial truth").

[25] Sandmann v. N.Y. Times Co., 617 F.Supp. 3d 683, 691, 691 n.10 (E.D. Ky. 2022) (statement describing plaintiff as "sliding left" and "sliding right" and "blocking" another person held to be statement of opinion, not statement of fact).

[26] Qualified privileges require that the defendant acted in good faith and without malice. Dent v. Constellation NewEnergy, Inc., 202 N.E.3d 248, 256 (Ill. 2022); Adler v. Va. Commonwealth Univ., 259 F.Supp. 3d 395, 409 (E.D. Va. 2017); Betz v. Fed. Home Loan Bank of Des Moines, 549 F.Supp. 3d 951, 93 (S.D. Iowa 2021); Alabsi v. City of Cleveland, No. 22-3375, 2023 WL 334893, at *9 (6th Cir. Jan. 20, 2023).

[27] The costs assessed pursuant to a successful AS motion can be substantial. Durkin v. City & Cty. of San Francisco, Cal.App. 5th 643, 651 (Ct. App. Cal. 2023) ($219,269; assessment reversed); Davis v. Cox, No. 11-2-01925-7, 2012 Wash. Super. LEXIS 188, at *3 (Sup. Ct. Wash. 2012) ($160,000 in damages, plus fees and costs to be determined). One expert reports that judges have rubber-stamped AS attorney fees in excess of $400,000. Aaron Morris, *SLAPP Law Explained*, MORRIS & STONE, LLP, https://californiaslapplaw.com/ (last visited August 3, 2023).

[28] Although they vary, most state AS statutes apply to a wide range of causes of action. The common test is that the complained-of conduct, to be susceptible to an AS motion, must be based on a person's "exercise of the right of freedom of speech or the press, the right to assemble or petition, or the right of association," among other

pleading requirements for civil complaints.[29] The federal standard contained in Federal Rule 8,[30] as fortified in *Twombly*[31] and *Iqbal*,[32] requires that the complaint allege enough facts to push the matter over the line from conceivable to plausible. Because they call for rapid procedures soon after the complaint is filed,[33] the AS statutes in essence go one step beyond the stringent federal standards; they require defamation plaintiffs to plead facts, and upon motion, substantiate those facts to a point that satisfies the prima facie case standard commonly used to assess motions for summary judgment.[34] In essence, the complaint filed by a defamation plaintiff must contain a recital of facts sufficient to survive summary judgment, a standard significantly beyond the plausibility requirement established under Federal Rule 8.[35] At the pleading stage, the plaintiff must prevail on all possible claims and defenses on a motion for summary judgment and must do so without the benefit of discovery. Failure can result in severe financial consequences.

The fee-shifting remedy embodied in most AS statutes is no simple "loser pays" scenario.[36] The legislative momentum that has led to the adoption of AS statutes arose from a distinct story in which powerful commercial and political interests file SLAPP suits to silence comparatively poor citizens who would dare criticize or complain.[37] Thus, according to the

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conduct. UPEPA § 2(b)(3). These words have been found to apply to a wide range of suits. *See* BURKE, *supra* note 6.

[29]Notice pleading remains the dominant requirement of state pleading. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 69 (2017) ("notice pleading requires a plaintiff to state a claim that is legally tenable on any set of facts, and to do so only in sufficient detail to give the defendant fair notice of what the claim is").

[30] FED. R. CIV. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief").

[31]Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' for his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

[32]Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). *Iqbal* establishes a two-part test to determine the sufficiency of a complaint under Rule 8. First, the court must "identify[] the allegations in the complaint that are not entitled to the assumption of truth," thus separating pleadings of fact from pleadings of conclusion. *Id.* at 680. Second, the court must evaluate the factual allegations to determine whether or not "they plausibly suggest an entitlement to relief." *Id.* at 681.

[33] State statutes vary on the deadlines for motions and responses. The uniform act suggests that states allow the defendant sixty days after service of the complaint. UPEPA § 3.

[34] *See* FED. R. CIV. P. 8(a)(2); UPEPA §§ 3, 7.

[35] *See* UPEPA §§ 3, 7; FED. R. CIV. P. 8(a)(2).

[36] *See infra* Part IV.

[37] "Citizen participation is the heart of our democracy. Whether petitioning the government, writing a traditional news article, or commenting on the quality of a business, involvement of citizens in the exchange of idea[s] benefits our society. Yet frivolous lawsuits aimed at silencing those involved in these activities are becoming more common, and are a threat to the growth of our democracy. . . . These lawsuits are called Strategic Lawsuits Against Public Participation, or 'SLAP[P] suits.'" SENATE RESEARCH CTR., BILL ANALYSIS ON C.S.H.B. 2973, 82R21739 CAE-D, 82nd Sess., at 1 (Tex. 2011). Ironically, even though the ostensible aim of AS statutes is to protect petitioning the government, it is the government that has, in some states, been deploying AS motions to deter and

narrative, the adoption of these statutes reflected a motivation to protect the relatively powerless. Tellingly, the financial support and political lobbying for AS statutes has not come from the comparatively powerless[38] seeking to protect their ability to complain about consumer products.[39] To the contrary, lobbying for AS statutes has been funded primarily by some of the largest media companies in the world.[40] Instead of protecting the little guy, these media companies correctly perceive AS statues as granting them *de facto* immunity from the little guy. The reality is that it is often the little guy, defamed by the media giant or other conglomerated enterprises, whose reputation is left in tatters and job prospects dimmed, who seeks redress for the defamatory tort. Yet the evident risk occasioned by the AS motion that

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punish citizen petitions, at least until at least one state put a stop to it. TCPA §27.003(a) ("a government entity, agency, or an official or employee acting in an official capacity" is precluded from filing an AS motion). For the standard account that anti-SLAPP statutes protect people who need protection, see Diego A. Zambrano, *Foreign Dictators in U.S. Court*, 89 U. CHI. L. REV. 157, 219-20 (2022) (asserting that a proliferation of SLAPP suits imposing multi-million dollar legal fees and other stresses on people who dare to speak out), citing George W. Pring, *SLAPP's: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 6 (1989).

[38] Stuborn Ltd. P'ship v. Bernstein, 245 F.Supp. 2d 312, 314 (D. Mass. 2003) (anti-SLAPP statutes designed to protect citizens from "David and Goliath power differences").

[39] Andrew L. Roth, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 B.Y.U.L. REV. 741, 744 (AS statues are based on "outdated empirical analysis and incomplete theoretical justification"). The origins of the SLAPP narrative lie in the study, taken from cases from mid-1970's to the mid-1980's, of 247 lawsuits. *Id.* at 741 (citing GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3 (1996)).

[40] Communications companies and interests are prominent in their advocacy for AS statutes. Public Participation Project, which advocates for a national AS statute, is supported by numerous major media organizations and businesses, including Yelp, Trip Advisor, Snapchat, National Association of Broadcasters, Newspaper Association of America, and Glassdoor. *Coalition of Supporters*, PUB. PARTICIPATION PROJECT, https://anti-slapp.org/coalition (last visited Feb. 4, 2024); Electronic Frontier Foundation's founding members include Steve Wozniak, co-founder of Apple, and Mitch Kapor, founder of Lotus Development. Lori Kendall, *Electronic Frontier Foundation*, BRITANNICA, https://www.britannica.com/topic/Electronic-Frontier-Foundation (last updated Jan. 28, 2024); *see* Joe Mullin, *It's Time for a Federal Anti-SLAPP Law to Protect Online Speakers*, ELEC. FRONTIER FOUND. DEEPLINKS BLOG (Sept. 15, 2022), https://www.eff.org/deeplinks/2022/09/its-time-federal-anti-slapp-law-protect-online-speakers. The Reporters Committee for Freedom of the Press's major funder is the Knight Foundation. *Financial Statements and Independent Auditor's Report*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2022), https://www.rcfp.org/wp-content/uploads/2022/11/2021-Audited-Financial-Statements-Reporters-Committee-for-Freedom-of-the-Press.pdf.. The California Newspaper Publishers Association has a staffed "Anti-SLAPP Project." CALIFORNIA ANTI-SLAPP PROJECT, https://www.casp.net/ (last visited Feb. 4, 2024). The Society of Professional Journalists basically admit their self-interest in deterring the "countless examples" of suits against their members and in couching their political self-interest as benefitting more sympathetic victims:

> Without a doubt, media entities and press organizations, as among the more well-heeled and well-respected advocates of these statutes, must use their influence with the public and the government to gain recognition and support of the legislation. However, to the extent it is still possible given the countless examples of anti-SLAPP statutes benefiting the media, these groups need to downplay any personal interest in the legislation and focus on its capacity for empowering the "little guy" and the First Amendment in general.

A Uniform Act Limiting Strategic Litigation Against Public Participation, SOC'Y OF PROF'L JOURNALISTS, BAKER & HOSTETLER LLP, https://www.spj.org/pdf/antislapp.pdf, (last visited Feb. 4, 2024).

these plaintiffs will be liable for the media defendant's fees provides strong deterrence against filing in court, regardless of the strength of the case. The law firms that typically represent media entities bill at the very highest rates and litigate matters thoroughly, with their clients accustomed to paying high attorney's fees. The threat to the plaintiff of an adverse ruling on an AS motion can be existential. Their plight is exacerbated because, for many plaintiffs, their only means of retaining counsel with the experience and acumen to prosecute defamation litigation is to offer generous contingency fees; they lack the resources to secure hourly counsel. Yet the prospect, should the plaintiff be dismissed by an AS motion, of having to pay the hourly rates for defendant's First Amendment specialists suffices to deter even highly meritorious plaintiffs from pursuing a matter. A law ostensibly designed to help the little guy speak truth to power has instead created a landscape in which the little guy dare not seek redress against the powerful.

Two windows, both slowly closing, offer the defamation plaintiff a chance to seek redress while minimizing the risks imposed by state AS statutes. The first strategy is to file the defamation action in federal court in one of the circuits that has ruled that state AS statutes conflict with the federal rules and thus refuses to apply them.[41] This strategy is not foolproof. First, state AS laws differ, and precedent in a federal circuit that holds that one particular AS statute conflicts with the federal rules does not insulate the plaintiff from a contrary decision with respect to an AS statute from another state.[42] Differences among state statutes can lead to a different result.[43] In addition, choice of law rules can result in a plaintiff's case being resolved under an unforeseen body of law.[44] Second, even within the circuits of federal appellate courts that have found a conflict between a particular AS statute and the federal rules, some courts have held that the AS statute from defendant's domicile creates a substantive right on which the defendant relied in making a public statement and thus have applied the AS statute of defendant's domiciliary to allow for the special motion to dismiss plaintiff's claim.[45] Third, assuming federal jurisdiction is founded on diversity, the defamation defendant may bring a motion to transfer venue.[46] For the plaintiff, this relatively innocuous motion presents an existential fight; the most compelling motivation the defendant seeks venue transfer may be to take advantage of the AS statute that will presumably be applied in the

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[41] *See* Jack B. Harrison, *Erie SLAPP Back*, 95 WASH. L. REV. 1253 (2020) (cataloguing the treatment of AS statutes in federal courts).

[42] *See infra* Section V.A.

[43] *See* Gundel v. AV Homes, Inc., 264 So.3d 304 (Fla. Dist. Ct. App. 2019).

[44] *See infra* note 47.

[45] *See infra* Section V.

[46] 28 U.S.C. § 1404 (transfer for convenience of the parties); 28 U.S.C. § 1406 (transfer when case filed in wrong venue).

transferee federal court.[47] Fourth, because the federal circuit courts have divided on the issue of the conflict between AS statutes and the federal rules, the matter is ripe for resolution by the Supreme Court.[48] An adverse ruling by the Supreme Court, even in unrelated litigation, could expose the plaintiff to liability the plaintiff thought had been avoided. Once the case is filed, this risk cannot be mitigated; under some AS statutes, even a voluntary dismissal of the case by the plaintiff does not moot the AS motion seeking fees and costs.[49] Fifth, the search for jurisdiction in the desired federal court often requires the plaintiff to expand the suit in an effort to establish diversity, bringing in parent companies or other foreign firms that bear only tangential relationship to the tort.[50] This stratagem relies on locating completely diverse defendants, navigating the obstacles of due process in asserting personal jurisdiction[51] and often relying on supplemental jurisdiction.[52] The added complexity in seeking to avoid AS liability only increases the plaintiff's costs of litigation.

The second strategy for defamation plaintiffs to avoid an AS motion is to file in state court in a jurisdiction without an AS statute. This approach requires that the plaintiff can obtain jurisdiction over the defendant and relies on the hope that the defendant will be unsuccessful in removing the case to federal court and then changing the venue. The transferee federal court could apply the AS statute from its forum state; because some federal courts have ruled that state AS statutes are substantive and not procedural, then the forum state AS statute does not conflict with the federal rules.[53]

Despite the risks inherent in these small windows, looming AS liability incentivizes defamation plaintiffs to manipulate their suits to avoid

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[47] Whether the transferee court would apply the law of the state of the transferor court, or would apply the law of the forum, is unresolved. If the transfer was made to correct an improper venue under § 1406, or for lack of jurisdiction, then the transferee court will apply the law of the forum, since the original venue was never a proper forum. Where the transfer is for convenience under § 1404, transferee courts are to apply the substantive law of the transferor state, but the procedural law of the transferee forum, including the choice of law rules of the state in which it sits. Gerena v. Korb, 617 F.3d 197 (2d Cir. 2010); *Organ v. Byron*, 435 F.Supp. 2d 388 (D. Del. 2006). As discussed below, federal courts differ on whether certain state AS statutes are "procedural," or instead confer substantive rights. *See infra* text accompanying notes 296-307.

[48] The federal circuit courts are fully divided on the "substance/procedure" issue surrounding state AS statutes. *See* Harrison, *supra* note 41.

[49] UPEPA § 7(b)-(c).

[50] Sandmann v. Gannett, No. 2:20-CV-0026, 2021 WL 78486, at *3 (E.D. Ky. 2021) (suing parent Gannett but not local newspaper that published the defamatory statement).

[51] Obtaining personal jurisdiction in defamation cases over commentators who broadcast nationally is difficult. Blessing v. Chandrasekhar, 988 F.3d 889, 906 (6th Cir. 2021) (no jurisdiction in Kentucky over comedian Kathy Griffin); Johnson v. Griffin, No. 3:22-cv-000295, 2023 WL 2354910, at *11 (M.D. Tenn. March 03, 2023) (no jurisdiction in Tennessee over comedian Kathy Griffin).

[52] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 722 (1966).

[53] *See, e.g.,* Bongino v. Daily Beast Co., LLC, 477 F.Supp. 3d 1310, 1323–24 (S.D. Fla. 2020) ("[The] Court finds that Florida's anti-SLAPP fee-shifting provision does not conflict with any Federal Rules of Civil Procedure and thus may apply in a federal court exercising diversity jurisdiction.").

the AS motion. These windows could close; some states have revised their AS laws in an attempt to comport with the federal rules,[54] and more might follow. Alternatively, a federal AS statute or an adverse decision by the U.S. Supreme Court could eliminate the federal option.[55] For all practical purposes, defamation actions would be limited to those minority of states without AS statutes. Even then, plaintiffs would have to plead their cases with care to minimize the chances of removal to federal court. At that point, the AS laws will have created a complete chokehold on defamation liability. The careful balance struck in *New York Times v. Sullivan* and its progeny between First Amendment rights and state tort law of defamation will have been lost, replaced by a legal regime in which only the wealthiest or most reckless plaintiff will run the risk of a defamation case. AS will have provided the final knockout punch to the state tort of defamation, probably not at the hands of the Supreme Court but ironically by the states' own doing.

I. THE ANTI-SLAPP STATUTES

The story does not begin in Texas, but it ends there. Texas did not enact the first anti-SLAPP[56] statute,[57] but it may have enacted the most burdensome on defamation plaintiffs. The Texas Citizens Participation Act (TCPA) has been described as "draconian" and "the broadest in the nation."[58] The TCPA applies to any complaint that is based on, or in response to the defendant's exercise of rights of association, free speech, or petition, or that arises from a party's "communication or conduct," including, among other things, "gathering . . . information for communication to the public."[59] The

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[54]Texas changed the TCPA's standard of proof in order to not require more than the burden at summary judgment. Amy Bresnen, Lisa Kaufman & Steve Bresnen, *Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to a Most Consequential Law*, 52 ST. MARY'S L.J. 53, 93 (2020).

[55]A bill was introduced in the 117th Congress to create a federal anti-SLAPP statute. *Chairman Raskin Introduces Legislation Establishing Federal Anti-SLAPP Statute to Protect First Amendment Rights*, JAMIE RASKIN (Sept. 15, 2022), https://raskin.house.gov/2022/9/chairman-raskin-introduces-legislation-establishing-federal-anti-slapp-statute-to-protect-first-amendment-rights.

[56]A "SLAPP" suit, denoted a "strategic lawsuit against public participation," describes lawsuits brought by wealthy business or political interests seeking to quell public statements with which they disagree or which voice negative reviews of their products or services. *See* Intercon Sols., Inc. v. Basel Action Network, 969 F.Supp.2d 1026, 1033 (N.D. Ill. 2013). "The motive for filing a SLAPP is not to win but rather to chill the defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction." *Id.*

[57]It appears the term "SLAPP" was coined in George W. Pring and Penelope Canan. George W. Print & Penelope Canan, *Strategic Lawsuits Against Public Participation*" ("SLAPPs"): *An Introduction for Bench, Bar, and Bystanders*, 12 BRIDGEPORT L. REV. 937, 939 (1992).

[58]Mark C. Walker, *The Essential Guide to the Texas Anti-SLAPP Law, The Texas Defamation Mitigation Act, and Rule 91A*, in STATE BAR OF TEXAS, 36TH ANNUAL LITIGATION UPDATE INSTITUTE ch. 4.1, 3 (2020) (estimating success rate of defendant's motion at 90%).

[59]TCPA §§ 27.003(a), 27.010(b) (2019). Prior to an amendment in 2019, this section included the phrase "related to," along with "based on" and "in response to"; by deleting the phrase "related to," the legislature aimed to narrow the reach of the statute. Amy Leila Saberian Prueger & Zakery L. Horton, *The Narrowed Texas Citizens*

TCPA defines these rights expansively.[60] The right of free speech means communication made in connection with a matter of public concern.[61] A matter of public concern encompasses statements about a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; a matter of political, social, or other interest to the community; or a subject of concern to the public.[62] Many statements fit within these broad parameters.[63] Prior to amendments to curtail its scope, the TCPA had been deployed to thwart actions involving trade secrets,[64] covenants not to compete,[65] non-disclosure agreements,[66] family law disputes,[67] applications for protective orders,[68] claims involving deceptive trade practices,[69] unfair competition,[70] medical peer reviews,[71] eviction suits,[72] attorney disciplinary proceedings,[73] invasions of privacy,[74] and common law fraud claims.[75] The breadth of the typical AS statute's application to communications involving free expression invites imaginative applications. Given the severe consequences to plaintiffs who fail to satisfy its proof requirements, an AS statute introduces a large measure of uncertainty to any plaintiff whose legal complaint is based on speech in some form or context.[76]

Although procedural mechanisms vary among states, in general AS

Participation Act: A Look at What It Means for SLAPP Suits, STATE BAR TEX. (Feb. 2022), https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=55765.

[60] Serafine v. Blunt, 466 S.W.3d 352, 365 (Tex. App. 2015) (Pemberton, J., concurring) (the "elephant in the room" is that, as written, the TCPA is, at best, a vastly overbroad 'anti-SLAPP' law"); HOUSE COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS ON C.S.H.B. 2730, 86th Sess. (Tex.2019), https://capitol.texas.gov/tlodocs/86R/analysis/html/HB02730H.htm ([C]ertain statutory provisions [of the TCPA] . . . lend themselves to unexpected applications because they are overly broad or unclear.").

[61] TCPA §27.001(3).

[62] *Id.* § 27.001(7).

[63] Youngkin v. Hines, 546 S.W.3d 675, 681 (Tex. 2018) (Just because "the TCPA professes to safeguard the exercise of certain First Amendment rights" does not mean "that it should only apply to constitutionally guaranteed activities.").

[64]Amy Bresnen et. al., *Targeting the Texas Citizen Participation Act: The 2019 Texas Legislature's Amendments to A Most Consequential Law*, 52 ST. MARY'S L.J. 53, 61 (2020).

[65] *Id.* at 67.

[66] S & S Emergency Training Sols., Inc. v. Elliott, 564 S.W.3d 843 (Tex. 2018).

[67] Bresnen et. al, *supra* note 64, at 61.

[68] *Id.* at 101–02.

[69] *Id.* at 103.

[70] Tobinick v. Novella, 108 F.Supp.3d 1299, 1306 (S.D. Fla. 2015).

[71] Bresnen, et. al, *supra* note 64, at 103.

[72] *Id.*

[73] *Id.* at 104–05.

[74] M.G. v. Time Warner, Inc., 89 Cal. App. 4th 623, 627 (Cal. Ct. App. 2001).

[75] Prueger & Horton, *supra* note 59.

[76] The TCPA, like the AS statutes in at least eleven states, is modeled after the California statute. Thomas R. Burke, *§8:1. State Anti-SLAPP Statutes*, *in* ANTI-SLAPP LITIGATION, *supra* note 6; Serafine v. Blunt, 466 S.W.3d 352, 386 (Tex. App. 2015).

motions must be filed by the defendant at the outset of a case, prior to or in conjunction with a responsive pleading.[77] The defendant bears the initial burden of showing, by a preponderance of the evidence, that the plaintiff's cause of action is based on an exercise of free speech.[78] The movant need not provide any evidence to satisfy this burden other than the plaintiff's complaint.[79] The court must dismiss the lawsuit if the defendant's motion shows that the legal action is based on, or in response to, protected activities,[80] unless the plaintiff establishes by "clear and specific evidence a prima facie case for each essential element of the claim."[81]

Upon the filing of a motion, most AS statutes halt discovery,[82] although some, like Texas' statute, allow for limited discovery for good cause shown.[83] The stay of discovery, a common aspect of AS statutes,[84] poses substantial problems for the defamation plaintiff, who must plead adequate facts to survive the motion. This factual review differs from the "adequacy of the pleadings" review that is conducted in federal court under Federal Rule

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[77] The Texas law gives defendants the ability to file a motion to dismiss claims that are based on, or arise from, the protected activities set forth in § 27.003(a). TCPA § 27.003(a). The court must hear the motion within sixty days of its filing, unless the docket is overbooked, there is good cause for a delay, or the parties agree otherwise. *Id.* § 27.004(a). The court must rule on the motion within thirty days of the hearing. *Id.* § 27.005(a).

[78] TCPA § 27.005. The defendant need not prove that the responding party has violated a constitutional right—only that the responding party's suit arises from the movant's constitutionally protected activity. BURKE, supra note 6, at § 3.2. Nor does the moving party need to show that the responding party intended to diminish the exercise of a constitutional right nor in fact frustrated that exercise. Navellier v. Sletten, 52 P.3d 695, 708-09 (Cal. 2002) ("[t]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail it [as] one arising from such."); City of Cotati v. Cashman, 52 P.3d 695, 701 (Cal. 2002) (defendant's burden is met if the conduct underlying the cause of action was "itself" an "act in furtherance" of the party's exercise of First Amendment rights on a matter of public concern). The Act's "definitional focus is not the form of the [non-movant's] cause of action but, rather, the [movant's] activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier*, 52 P.3d at 711. In many instances, the moving party will be able to carry its burden simply by using the responding party's pleadings. Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017) ("When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more.").

[79] *Hersh*, 526 S.W.3d at 467; UPEPA cmt. 2.

[80] Protected activities are defined in TCPA § 27.005(b). The defendant making the motion under the TCPA must show by a preponderance of the evidence that the defendant's conduct or statement is based on or in response to an exercise of the defendant's rights of free speech, petition, or association. Buzbee v. Clear Channel Outdoor, LLC, 616 S.W.3d 14 (Tex. App. 2020); ExxonMobil Pipeline Co. v. Coleman, 512 S.W.3d 895 (Tex. 2017); Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC, 591 S.W.3d 127, 132 (Tex. 2019).

[81] TCPA § 27.005(c).

[82] Discovery activities are automatically suspended from the time the motion is filed until the judge has ruled on it. TCPA § 27.003(c).

[83] A court may permit "specified and limited discovery" relevant to the motion, on a showing of good cause. TCPA § 27.006(b).

[84] Although state AS statutes vary, most feature at least the following: allowance of expedited motion to dismiss; stay (often automatic) of discovery while AS motion is pending; requirement for plaintiff to establish prima facie case for the claim; costs and attorney's fees, and sometimes damages, if defendant prevails on the AS motion; and interlocutory appeal if the motion is denied. Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression*, 44 HASTINGS COMM. & ENT L.J. 133, 137 (2022).

12 upon a motion to dismiss for failure to state a claim[85] or a motion for judgment on the pleadings.[86] For those Rule 12 motions, the trial court is to assume the facts pled are true.[87] This presumption of truth allows for a plaintiff to rely on subsequent discovery to substantiate and expand the bare factual allegations contained in a complaint. With an AS motion, however, the plaintiff must, in response to the preliminary motion, adduce "by clear and specific evidence a prima facie case for each essential element of the claim in question."[88] This standard is high.[89] The type of evidence required to meet this burden requires more than mere pleadings, although the pled allegations can form part of the proof.[90] Also necessary is "supporting and opposing affidavits stating the facts on which the liability or defense is based."[91] Circumstantial evidence is also relevant.[92] The requirement that the plaintiff provide clear evidence has been interpreted to mean evidence that is "unambiguous, sure, or free from doubt."[93] "Bare, baseless opinions" in an affidavit do not suffice.[94] Even damages must be pled and substantiated with clear evidence in a manner beyond the ordinary civil complaint.[95] Because factual allegations in an affidavit based on "information and belief" are not factual proof for purposes of summary judgment,[96] they do not constitute factual proof for a TCPA motion.[97]

The comparison to summary judgment is made often.[98] The prima facie case in the TCPA "refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted."[99] It is the "minimum quantity of

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[85] FED. R. CIV. P. 12(b).

[86] FED. R. CIV. P. 12(c); Karsten Mfg. Corp. v. Oshman's Sporting Goods, Inc. – Servs., 869 F.Supp. 778, 783 (D. Ariz. 1994) (for Rule 12(c) motion, non-movant's factual allegations must be taken as true).

[87] Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009).

[88] TCPA §27.0005(c).

[89] Western Marketing, Inc. v. AEG Petroleum, LLC, 616 S.W.3d 903, 918 (Tex. App. 2021).

[90] Pleadings are evidence that must be considered as part of the plaintiff's proof. Buzbee v. Clear Channel Outdoor, LLC, 616 S.W.3d 14, 28 (Tex. App. 2020) (but "allegations in a petition are not alone sufficient to defeat [a TCPA] motion).

[91] TCPA §27.006(a).

[92] The requirement of clear and specific evidence in the TCPA "does not impose an elevated evidentiary standard or categorically reject circumstantial evidence." *In re* Lipsky, 460 S.W.3d 579, 590 (Tex. 2015) (the TCPA "does not impose a higher burden of proof than that required of the plaintiff at trial").

[93] *Id.* at 590.

[94] *Id.* at 592.

[95] The statement from a company vice-president that a defamatory statement (trade libel) caused "direct pecuniary and economic losses" to the plaintiff lacked the specific facts that showed how the defendant's statements caused such losses, thus resulting in dismissal under the TCPA. *Id.* at 592.

[96] Wells Fargo Construction Co. v. Bank of Woodlake, 645 S.W.2d 913, 914 (Tex. App. 1983) (stating that affidavits based on information and belief are insufficient as verification by oath and their content are not factual proof in a summary judgment proceeding).

[97] RigUp, Inc. v. Sierra Hamilton, LLC, 613 S.W.3d 177, 189-190 (Tex. App. 2020) (noting the similarity between TCPA and summary judgment proceedings).

[98] Serafine v. Blunt, 466 S.W.3d 352, 370 (Tex. App. 2015).

[99] *In re* Lipsky, 460 S.W.3d 579, 590 (Tex. 2015); Dall. Morning News, Inc. v. Hall, 579 S.W.3d 370, 376-77 (Tex. 2019) (prima facie evidence is "'the minimum quantum of evidence necessary to support a rational inference

evidence necessary to support a rational inference that the allegation of fact is true."[100] A prima facie case is also the standard for a grant of summary judgment.[101] "Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue."[102] In other words, a prima facie case is one that will entitle a party to recover if no evidence to the contrary is offered by the opposite party.[103] In the setting of a TCPA motion, which follows on the heels of the complaint and is filed prior to discovery, meeting the burden of proof equivalent to summary judgment is formidable.[104]

The TCPA imposes another obstacle for the defamation plaintiff to overcome the motion to dismiss and proceed to the discovery phase. Even if the plaintiff had provided sufficient evidence of each element of the claim, the plaintiff will still lose the anti-SLAPP motion if the defendant can successfully establish "an affirmative defense to this claim or other grounds entitling the defendant to judgment as a matter of law."[105] These "affirmative defenses … [and] other grounds" can be comprised of specific defenses to defamation liability.[106] There are many, including truth,[107] opinion,[108] consent,[109] the fair report privilege,[110] and the neutral reportage defense,[111]

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that the allegation of fact is true'"); Wilson v. Parker, Covert & Chichester, 50 P.3d 733, 739 (Cal. 2002) (prima facie means "facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited").

[100] *Lipsky*, 460 S.W.3d at 590; *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 223 (Tex. 2004) (quoting Tex. Tech Univ. Health Science Ctr. v. Apodaca, 876 S.W.2d 402, 407 (Tex. App. 1994)).

[101] *See* Kerlin v. Arias, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam) (prima facie evidence needed to establish right to summary judgment unless nonmovants presented evidence raising fact in issue); AS procedure "operat[es] like an early summary judgment motion." BURKE, *supra* note 6, at § 5.2.

[102] *Alabsi v. City of Cleveland*, No. 22-3375, 2023 WL 334893, at *2 (6th Cir. Jan. 20, 2023) ("To establish a prima facie case of defamation, the injured party must establish '(1) a false and defamatory statement of fact; (2) about the plaintiff; (3) published without privilege; (4) with fault of at least negligence on the part of the defendant; and (5) which was either defamatory per se or caused special harm to the plaintiff.'") (citation omitted).

[103] Rehak Creative Servs., Inc. v. Witt, 404 S.W.3d 716, 726 (Tex. App. 2013) (citation omitted).

[104] The Uniform Public Expression Protection Act (UPEPA) embraces the summary judgment standard explicitly, requiring dismissal if the plaintiff fails to establish a prima facie case as to each essential element of the cause of action, or the defendant can establish that the complaint fails to state a cause of action on which relief can be granted, or there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. UPEPA § 7(a).

[105] TCPA § 27.005(d)(2023).

[106] *Id.*

[107] Dickson v. Afiya Ctr., 636 S.W.3d 247, 265–66 (Tex. App. 2021), *rev'd sub nom.* Lilith Fund for Reprod. Equity v. Dickson, 662 S.W.3d 355 (Tex. 2023).

[108] Dall. Morning News, Inc. v. Tatum, 554 S.W.3d 614, 639 (Tex. 2018).

[109] Diocese of Lubbock v. Guerrero, 591 S.W.3d 244 (Tex. App. 2019), *vacated,* 624 S.W.3d 563 (Tex. 2021).

[110] This privilege applies to "substantially accurate" reports of official proceedings, Karedes v. Ackerly Group, Inc., 423 F.3d 107, 119 (2d Cir. 2005); but not to reports of the matters that underlie those proceedings, Fine v. ESPN, Inc., 11 F.Supp.3d 209, 217 (N.D.N.Y. 2014 ("If context indicates that a challenged portion of a publication focuses exclusively on underlying events, rather than an official proceeding relating to those events, that portion is insufficiently connected to the proceeding to constitute a report of that proceeding."); Corp. Training Unlimited, Inc. v. NBC, 868 F.Supp. 501, 509 (E.D.N.Y. 1994).

[111] Among the notable defenses to tort claims based on speech, albeit available only in some states, is the "neutral reportage" privilege. Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113, 117 (2d Cir. 1977). The "fair report" privilege is another, but many courts have rejected this defense. *See, e.g.*, Dickey v. CBS, Inc., 583 F.2d 1221,

although some states have refused to recognize the latter.[112] In addition, "an affirmative defense or other grounds" would include the standard defenses to tort liability, such as failure to state a claim,[113] res judicata,[114] lack of personal jurisdiction,[115] and statute of limitations.[116]

Once the court rules on the motion,[117] the losing party is entitled to an expedited, interlocutory review in the appellate court.[118] If the trial court grants the defendant's motion to dismiss, it must impose attorney's fees and costs on the plaintiff.[119] In addition, the court may sanction the plaintiff "as the court determines sufficient to deter [the plaintiff] from bringing similar actions."[120] Conversely, if the court finds that the AS motion to dismiss was frivolous or brought solely to delay the proceedings, it may order the defendant to pay the plaintiff's attorney's fees and costs.[121]

II. ANTI-SLAPP AND DEFAMATION

Although state AS statutes potentially apply to numerous causes of action, it is the tort of defamation and similar speech-based torts[122] that

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1226 & n.5 (3d Cir. 1978); Norton v. Glenn, 860 A.2d 48, 57 (Pa. 2004) (neutral reportage doctrine conflicts with actual malice standard of fault).

[112] The Texas Supreme Court has not recognized the "neutral report" privilege, but lower state courts have discussed the defense. Klentzman v. Brady, 456 S.W.3d 239, 251 (Tex. App. 2014) (conflating neutral report privilege and fair report privilege). The defense of "merely republishing" or repeating another's defamatory statement is no defense at all in most states. Cianci v. New Times Publ'g Co., 639 F.2d 54, 60-61 (2d Cir. 1980) (it is a "black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally, even though he attributes the libelous statement to the original publisher, and even though he expressly disavows the truth of the statement); Zuckerbrot v. Lande, 167 N.Y.S.3d 313, 334 (N.Y. Sup. Ct. 2022) (substantial truth "refers to the content of an allegedly defamatory statement, not the act of republishing it"); Watson v. N.Y. Doe 1, 439 F.Supp.3d 152, 161 (S.D.N.Y. 2020) ("under New York law, a speaker who repeats another's defamatory statements is not made immune from liability for defamation merely because another person previously made the same demeaning claim"); Snowden v. Pearl River Broad. Corp., 251 So.2d 405, 408 (La. Ct. App. 1971) (defendant liable for defamatory statements made by live anonymous caller to program); RESTATEMENT (SECOND) OF TORTS §581 cmt. g (radio and television broadcasters responsible for material "prepared and controlled by others" because they, "[f]or their own business purposes . . . initiate, select and put upon the air their own programs").

[113] FED. R. CIV. P. 12(b)(6).

[114] Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2014 WL 1432012, at *12 (Tex. App. 2014) (applying res judicata and imposing sanctions of $75,000).

[115] FED. R. CIV. P. 12(b)(1).

[116] Statutes of limitation for defamation actions are typically short. In Texas, the limitations period is one year. Deaver v. Desai, 483 S.W.3d 668, 674 (Tex. App. 2015), with the cause of action accruing on the day of first publication. *Id.*

[117] Alternatively, the motion will fail if the court does not decide the motion within the requisite thirty days of the hearing. TCPA § 27.008(a).

[118] *Id.* § 27.008(b).

[119] *Id.* § 27.009(a)(1).

[120] *Id.* § 27.009(a)(2).

[121] *Id.* § 27.009(c).

[122] Torts based on speech include defamation, trade libel, all four invasion of privacy torts, especially false light, infliction of emotional distress, and various business torts, including false advertising, unfair competition, and

comprise the paradigmatic SLAPP actions that these statutes seek to regulate.[123] These speech-based torts are commonly classified as intentional torts that require intentional conduct.[124] They are characteristically ill-suited to summary resolution; the tort of defamation is particularly ill-suited to the procedures mandated by AS statutes. Defamation is an unusually complex area of tort law and features elements that amount to little more than standards. Predictions as to judicial or jury outcomes are highly indeterminate. The defamation plaintiff who would bet on correctly predicting the several relevant judicial outcomes in a particular suit is playing a long shot.[125] The AS statutes as a practical matter require plaintiffs to make these predictions and then place a sizable bet that they can get every prediction in a string of predictions exactly right. An error by the plaintiff in predicting the outcome of any single element or defense creates AS liability.

A. Statement of Fact or Opinion

A key issue in any defamation case is whether the statement at issue constitutes a "statement of fact" or instead is an "opinion" or similar statement[126] meriting constitutional protection.[127] The first issue is determining the burden of proof: is fact an element that the plaintiff must plead or is opinion an affirmative defense on which the defendant would carry the burden of proof? Historically, opinion, or "fair comment," was a defense.[128] Although not free from doubt, it is likely that opinion remains a defense in the case of a plaintiff who is considered a private figure, even if the defendant's speech involved a matter of public concern.[129] If the plaintiff's status is that of a public figure, or even a limited public figure, then the burden shifts to the plaintiff to establish that the statement is factual as an element of the claim.[130] In turn, whether the plaintiff is properly characterized

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tortious interference. *See generally* Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813 (2020).

[123] Pring & Canan, *supra* note 57, at 947.

[124] Pendleton v. Newsome, 290 Va. 162, 174 (2015).

[125] In addition, the trial judge in a defamation case carries a special burden. The Constitution "imposes a special responsibility on judges whenever it is claimed that a particular communication is [defamatory]." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984).

[126] The Supreme Court in *Milkovich v. Lorain Journal Co.* rejected the "opinion" defense in favor of "loose, figurative, or hyperbolic language"—statements that are opinion are actionable if they "imply an assertion" of false fact. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).

[127] Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974).

[128] *Milkovich*, 497 U.S. at 13 ("the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation . . . afford[ing] legal immunity for the honest expression of opinion on matters of legitimate public interest . …").

[129] *Gertz*, 418 U.S. at 323.

[130] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 775-776 (1986) (constitutional requirement that plaintiff bear the burden of showing falsity of statement by media defendant).

as a public-figure plaintiff, a limited-public-figure plaintiff, or private-figure plaintiff is often difficult to predict.[131] Yet it is this prediction as to the plaintiff's status that determines the assignment of the burden of proof.[132]

Assuming the worst for the plaintiff, that the plaintiff is a public figure who must carry the burden to establish that the defamatory statement constitutes a statement of fact, then the plaintiff must rely, as a practical matter, primarily on the allegations in the complaint. Little factual adornment is relevant;[133] the plaintiff must plead the defamatory words that were published, allege those words constitute a statement of fact, and not opinion, and hope that the court agrees with plaintiff's prediction.[134] For the plaintiff, this is dangerous ground. The question of fact versus opinion is a purely legal one,[135] not susceptible to objective proof.[136] Some courts resort to context to decide whether particular words in a publication constitute fact or opinion;[137] others make a judgment call,[138] considering the totality of the circumstances.[139]

The alleged defamatory statement stands in isolation, with little or no evidence possible to further the plaintiff's case.[140] In an attempt to prove that a statement is factual in nature, some plaintiffs have offered expert affidavits, as in a summary judgment proceeding, but such evidence is of doubtful admissibility both procedurally[141] and substantively.[142] At the end,

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[131] *See infra* 168-83.

[132] The determination of the plaintiff's status also determines the standard of fault and the burden of proof of fault. *See infra* Section II.B.

[133] The Supreme Court's opinions defining "opinion" suggest its indeterminacy. Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13 (1970) (determination of whether a statement is one of fact must be evaluated in its broader context; "blackmail" allegation made in the course of rancorous negotiations was "not libel" and mere "rhetorical hyperbole"); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 268 (1970) (terming a worker a "scab" constitutes protected opinion given its specific linguistic context, in a statement made by a labor union, and in its broader social setting, in which the word is used in a "loose, figurative sense" and that such "exaggerated rhetoric was commonplace in labor disputes").

[134] Croce v. Sanders, 843 F.App'x 710, 713 (6th Cir. 2021) (citation omitted).

[135] Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983).

[136] Towne v. Eisner, 245 U.S. 418, 425 (1918) ("[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used").

[137] The question of whether a statement constitutes fact or opinion is to be decided as a matter of federal constitutional law. Lewis v. Time, Inc., 710 F.2d 549, 552-53 (9th Cir. 1983).

[138] Shiver v. Apalachee Publ'g Co., 425 So.2d 1173, 1174 (Fla. Dis. Ct. App. 1983).

[139] Info. Control Corp. v. Genesis One Comput. Corp., 611 F.2d 781, 783 (9th Cir. 1980).

[140] Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984) ("[T]he Supreme Court provided little guidance . . . as to the manner in which the distinction between fact and opinion is to be discerned. That . . . is by no means as easy a question as might appear at first blush.").

[141] Although Federal Rule of Evidence 704 affords latitude to the introduction of expert testimony, courts generally refuse to allow an expert to opine on a "question of law." FED. R. EVID. 704; Ross v. Rothstein, 92 F.Supp.3d 1041, 1073-74 (D. Kan. 2014); Sparton Corp. V. United States, 77 Fed. Cl. 1, at *8 (2007); United States v. Scop, 846 F.2d 135, 139 (2d Cir. 1988).

[142] FED. R. EVID. 702. Courts have repeatedly held that linguistic testimony introduced to offer an opinion on the meaning of words does not meet the requirements of Federal Rule of Evidence 702. Tilton v. Capital

the offending statement constitutes the entirety of the record on this element, with the plaintiff arguing it is factual, the defendant arguing it is not, and the court left to consult legal precedent and the argument of counsel and decide. Should the plaintiff's counsel estimate incorrectly, the case will suffer immediate dismissal and the plaintiff will be assessed defendant's costs and fees in defending the entire lawsuit.

The distinction between fact and opinion is highly imprecise.[143] The current test for this distinction is a truism: a statement of fact is one that is "verifiable" if it is "capable of being proved true or false."[144] A statement is actionable if "the statement in question makes an assertion of fact – that is, an assertion that is capable of being proved objectively incorrect" or otherwise "connotes actual, objectively verifiable facts."[145] The four-part Ollman test,[146] often followed in resolving fact versus opinion issues, gives the trial judge wide discretion in deciding whether or not a particular statement constitutes fact or opinion, making predictions difficult. The other

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Cities/ABC, Inc., 938 F. Supp. 751, 752 (N.D. Okla. 1995); McCabe v. Rattiner, 814 F.2d 839, 843 (1st Cir. 1987); Brueggemeyer v. Am. Broad. Cos., 684 F.Supp. 452, 465-66 (N.D. Tex. 1988); World Boxing Council, Inc. v. Cosell, 715 F. Supp. 1259, 1265 (S.D.N.Y. 1989).

[143] "Because of the richness and diversity of language, as evidenced by the capacity of the same words to convey different meanings in different contexts, it is quite impossible to lay down a bright-line rule or mechanical distinction." *Ollman*, 750 F.2d 970, 977-78 (D.C. Cir. 1984).

[144] Milkovich v. Lorain Journal Co., 497 U.S. 1, 26 (1990). All that is constitutionally required is that the statement be "sufficiently factual" to be "susceptible of being proved true or false." *Milkovich*, at 21. The Milkovich standard recognizes that many statements might be seen as either factual or opinion; as long as a statement is "sufficiently factual," then it is without constitutional protection. *Id.* As Milkovich instructs, the trial court's role is to decide only if the statement is "sufficiently factual" to go to the jury to determine its truth or falsity; in other words, the trial court is to preclude liability on the grounds of "opinion" only if the statement is not "sufficiently factual." *Id.* The jury should be allowed to resolve the issue if a "reasonable factfinder could conclude that the challenged statement connotes actual, objectively verifiable facts." Compuware Corp. v. Moody's Inv'rs Servs., 499 F.3d 520, 529 (6th Cir. 2007). As long as a finding of "fact" would be reasonable, the trial court is obligated to allow the jury to make that decision. *Id.* Whether a statement constitutes protected opinion is a question of law for the court to decide; but if a statement is "sufficiently factual," then it is not constitutionally protected. *Id.* at 531. *Croce v. Sanders* illustrates the point. In *Croce*, the defendant biologist had accused a fellow researcher of using "falsified data and plagiarism" in his publications," which, in the view of the defendant, constituted "a reckless disregard for the truth." Croce v. Sanders, 843 F.App'x 710, 713-14 (6th Cir. 2021). Yet it was only the "reckless disregard" statement that served as the basis for defamation liability; the statements about "falsified data and plagiarism" constituted the disclosed facts that underlay the opinion. *Id.* at 714 ("[t]here is no clear point at which careless conduct becomes reckless, and the reasonable reader understands that"). Similarly, the defendant's statements that the plaintiff had committed "image fabrication, duplication and mishandling, and plagiarism" were factual; the defendant's characterization of those incidents as "routine" was a matter of opinion, and not actionable, as the opinion was based on the disclosed facts. *Id.* at 715 ("'In [the defendant's] observation,' the rate of image manipulation and plagiarism is high enough to be called routine. . . . That is an expression of opinion . .."). As the court noted in *Croce*, the relevant legal standard is the understanding of the "reasonable reader." *Id.* at 716.

[145] Clark v. Viacom Int'l, Inc., 617 F. App'x 495, 508 (6th Cir. 2015) (citing *Milkovich*, 497 U.S. at 20); *Compuware Corp.*, 499 F.3d at 529 (6th Cir. 2007).

[146] *Ollman,* 750 F.2d 970, 980-84 (D.C. Cir. 1984) (considering the "common usage or meaning of the words along the dimension of "precision-indefiniteness," the degree of verifiability, the "immediate context of the statement," and the "broader social context").

popular test for opinion,[147] that from the Restatement (Second) of Torts,[148] creates a third category of statements, what it calls "mixed opinions," that can provide the ground for defamation suits where statements of opinion imply undisclosed defamatory facts.[149] According to the Restatement, it is only "pure opinions" that enjoy absolute constitutional protection.[150]

The Supreme Court in *Milkovich v. Lorain Journal Co.* attempted to re-define the opinion defense, stating that even statements that are opinions can be actionable if they imply false facts.[151] If those facts are undisclosed, if the disclosed facts are incorrect or incomplete, or if the speaker's assessment of the facts is erroneous, then the statement is actionable as a statement of fact. Only statements that constitute rhetorical hyperbole cannot imply facts.[152]

Judicial efforts to dispel uncertainty have left outcomes substantially unpredictable.[153] Courts have tried to set some basic footings. That the statements describe "present or past conditions capable of being known through sense impressions," for example, provides "paradigm examples of statements of fact."[154] Yet even this proposition is dubious. One court has held that the mere commonplace observation that people can differ in their description about what they perceive suffices to render a statement describing objective reality as a protected opinion, even if the object of the description

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[147] Yancey v. Hamilton, 786 S.W.2d 854, 857 (Ky. 1989) ("[t]he drafters of developed a somewhat different approach to the fact-opinion distinction which we believe to be sound, and thus hereby adopt").

[148] RESTATEMENT (SECOND) OF TORTS §566.

[149] New York combines the various considerations into a single, three-factor test. Brian v. Richardson, 660 N.E.2d 1126, 1129 (N.Y.1995) (factors are "(1) whether the specific language in issue has a precise meaning that is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether the full context of the communication in which the statement appears . . . signals to readers or listeners that what is being read or heard [is] likely to [be] opinion or fact").

[150] RESTATEMENT (SECOND) OF TORTS § 566 cmt. c. Under the Restatement approach, the speaker can be liable in two situations: first, if the speaker conveys a factual defamatory statement, then the statement is actionable unless "it is clear from the context that the [speaker] is not intending to assert [an] objective fact." *Id.* § 566 cmt. b. Second, if the speaker states an opinion, but the opinion implies undisclosed defamatory facts, then the speaker is liable for those statements as well. *Id.*

[151] Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) ("If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").

[152] Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (ad parody constituted rhetorical hyperbole and "could not reasonably have been interpreted as stating actual facts about the public figures involved"); Choi v. Kyu Chul Lee, 312 Fed. Appx. 551, 553 (4th Cir. 2009) ("rhetorical hyperbole . . . is not actionable because such statements cannot reasonably be understood to convey a false representation of fact").

[153] Ollman v. Evans, 750 F.2d 970, 976 (D.C. Cir. 1984) ("It is a fitting illustration of the complexity of language and communication that many statements from which actions for defamation arise do not clearly fit into either category. These statements pose more subtle problems").

[154] *Ollman*, 750 F.2d at 978.

is entirely physical, observable, and nominally objective.[155] In *Sandmann*,[156] the federal court determined that descriptive statements such as he "slided [sic] left," he "slided [sic] right," and he "blocked me" constituted protected statements of opinion because eyewitnesses disagreed as to what they had seen.[157] Even video evidence of the event, taken from different angles and that showed every frame of movement, was not sufficient to create an issue of fact for the jury to resolve because the video and eyewitness evidence contained a measure of ambiguity.[158] Thus, even these descriptive observations about physical phenomena were opinions meriting constitutional protection.[159] A plaintiff who would fail to predict this judicial outcome would stand to lose a costly AS motion.[160]

B. Status of Plaintiff and Fault

The Supreme Court held in *Rosenbloom v. Metromedia* that constitutional protections for speech precluded defamation liability entirely concerning statements of general or public interest.[161] The Court subsequently re-focused that test, instead basing constitutional protections not on the newsworthy content of the speech, but on the status of the speaker.[162] "Status" comprises the key to the elements of the case and the plaintiff's burden of proof.[163] A defamation plaintiff can fit into one of three categories or statuses: a public figure, a limited public figure,[164] or a private plaintiff.[165] Each status carries different elements and different standards of proof. As with other defamation defenses and elements, the distinctions

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[155] Sandmann v. N.Y. Times, 78 F.4th 319, 331-32 (6th Cir. 2023).

[156] The author is a consultant on this litigation.

[157] Brief of Plaintiff-Appellant at 17-18, Sandmann v. N.Y. Times Co., 617 F. Supp. 3d 683 (E.D. Ky. 2022) (No. 2:20-cv-00023). The sibling cases against other media defendants are omitted.

[158] *Id.* at 10-16.

[159] *Id.* at 23.

[160] At the time the Sandmann suit was filed, Kentucky did not have an AS statute. It does now, being one of the first states to adopt the UPEPA model statute. *See* H.B. 222, 2022 Leg., 1st Reg. Sess. (Ky. 2022).

[161] Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

[162] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (a newsworthiness test would entail the "difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not – to determine, in the words of Mr. Justice Marshall, 'what information is relevant to self-government,'" quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)).

[163] The Supreme Court had for a time focused on whether or not the published statement related to a matter of public importance. *Rosenbloom*, 403 U.S. at 43 (1971). It moved away from that approach in subsequent cases. *Gertz*, 418 U.S. at 347; Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) ("this weakness in the *Rosenbloom* test [that would determine the constitutional protections for statements based on their content] led us in *Gertz* to eschew a subject-matter test for focusing upon the character of the defamation plaintiff").

[164] With respect to a limited-purpose public figure, the question is whether the plaintiff thrust oneself into a public controversy. Wolston v. Readers' Digest Ass'n, 443 U.S. 157, 164 (1979).

[165] *Gertz*, 418 U.S. at 341; *Time, Inc.*, 424 U.S. 448, 454 (1976). Involuntary public figure status has emerged in some lower court decisions. This phrase refers to someone involved in an event of overriding societal importance. Dameron v. Washington Magazine, Inc, 779 F.2d 736, 741 (D.C. Cir. 1985).

between these categories are fluid which makes it difficult for the plaintiff to predict the likely status prior to filing.

A plaintiff who is characterized as a public or limited public figure carries the burden of proof that the defamatory statement is one of fact not opinion.[166] For a plaintiff classified as a private figure, opinion is an affirmative defense, requiring the defendant to carry the burden of proof.[167] At the outset of litigation, it can be difficult in many borderline cases to predict the status of the plaintiff. Nonetheless, a failure at this prediction will doom the plaintiff's case and generate AS liability: a plaintiff who presumes to constitute a private plaintiff will fail to allege the proper standard of fault and will fail to amass the requisite evidence to carry the plaintiff's burden of proof at the AS stage.

The distinctions among the public, limited-purpose public, and private plaintiffs, introduced in *Sullivan*,[168] are best described abstractly. Public figure plaintiffs "occupy positions of such pervasive power and influence that they are deemed public figures for all purposes."[169] A plaintiff who holds a government office or who otherwise "has achieved a role of special prominence in the affairs of society by reason of notoriety of their achievements or vigor and success with which they seek the public's attention" is a public figure. Even a corporation can be a public figure for defamation purposes.[170] At the other end, a private-figure plaintiff is the individual who "has not voluntarily placed himself in the public spotlight."[171] Private plaintiffs are not subject to carry the burden of actual malice in proving liability, although they are usually obligated should they seek punitive damages.[172] They are required to establish fault by proof of negligence.[173] In the middle between public figures and private figures are those private plaintiffs who have "thrust [themselves] into the vortex of a public issue [or] engage the public's attention to affect the outcome."[174] These limited-purpose public figures are treated, for defamation purposes, as public figures obligated to prove actual malice. A possible fourth category of

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[166] N.Y. Times Co. v. Sullivan, 376 U.S. 271 (1964).

[167] *Gertz*, 418 U.S. at 340-41.

[168] *N.Y. Times*, 376 U.S. at 282.

[169] *Gertz*, 418 U.S. at 345.

[170] *See, e.g.*, Lundell Mfg. Co., Inc. v. ABC, Inc., 98 F.3d 351, 363 (8th Cir. 1996); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273-74 (3d Cir. 1980); Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 495 (Minn. 1985) (corporation per se a public figure).

[171] *Gertz*, 418 U.S. at 338-39, 352.

[172] Private-figure plaintiffs suing for defamatory speech not involving a matter of public concern are not subject to First Amendment restrictions, even in seeking punitive damages. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749 (1985). When such speech does involve a matter of public concern, then the plaintiff must prove actual malice. *Gertz*, 418 U.S. 323, 349 (1974); Via v. Commc'ns Corp. of Am., Inc. 311 F. Supp. 3d 812 (W.D. Va. 2018).

[173] *Gertz*, 418 U.S. at 350.

[174] *Id.* at 352.

plaintiff, the "involuntary public figure," denotes a private plaintiff who has been involved in an event of overriding societal importance.[175]

Ordinary, non-celebrity or non-political plaintiffs often find themselves in a difficult position. Private plaintiffs can at certain times get involved in local political or community controversies. Should the antagonisms in such matters result in public defamation of the private plaintiff, their status is at issue. Because private plaintiffs might fall into the middle category of limited public figure, the plaintiff in planning to survive an AS motion must assume the need to carry the public figure burden of proving falsehood. This approach is a practical necessity. Even if the more likely legal outcome is that the plaintiff is a private figure, the risk of planning on that outcome is pronounced: if the plaintiff planned on the lesser status yet is deemed a limited-purpose public figure, then the plaintiff's failure to plead and present evidence of the requisite actual malice will result in adverse AS remedies.[176]

The danger goes the other way as well. If the plaintiff hedges the bet and pled facts supporting actual malice on the assumption of public status, this proof will fail if the court determines that the plaintiff is a private figure. Private plaintiffs must allege negligence or common-law malice: which is a very different thing from actual malice. Common-law malice refers to malicious intent;[177] actual malice, or "constitutional malice," refers to a decision to publish a falsehood when knowing it to be false.[178] These two standards of fault do not differ along a shared dimension: actual malice is not a more intense level of common-law malice. They differ in kind. Actual malice requires that the plaintiff prove by clear and convincing evidence[179] that the defendant actually knew the truth of the matter yet chose to publish a falsehood or that the defendant was reckless in its publication.[180] Actual malice has nothing to do with personal animus or ill-will, despite what its name would imply. The plaintiff who fits into the private category must

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[175] Dameron v. Washington Magazine, Inc, 779 F.2d 736, 740-41 (D.C. Cir. 1985) (air traffic controller).

[176] DiBella v. Hopkins, 403 F.3d 102, 110-15 (2d Cir. 2005) (likely that falsehood must be proved by clear and convincing evidence for public figures).

[177] Thomas v. Telegraph Publ'g Co., 929 A.2d 993, 1007 (N.H. 2007) ("[c]ommon law malice . . . is ill will or intent to harm"); Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 251-52 (1974).

[178] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); *Gertz*, 418 U.S. at 334.

[179] Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186-87 (9th Cir. 2001) (the "clear and convincing" requirement presents "a heavy burden, far in excess of the preponderance sufficient for most civil litigation"); Copp v. Paxton, 52 Cal. Rptr. 2d 831, 846 (Cal. Ct. App. 1996) ("The burden of proof by clear and convincing evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind") (internal quotation marks omitted).

[180] *N.Y. Times*, 376 U.S. at 279-80 (1964) (actual malice requires that at least one individual who is responsible for the defamatory publication had knowledge of the truth prior to publication); Solano v. Playgirl, Inc., 292 F.3d 1078, 1084-85 (9th Cir. 2002); Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 476-77 (8th Cir. 1987).

allege that the defendant was negligent.[181] For a defamation action at common law, the plaintiff must also prove malice in the sense of ill-will or animus.[182] Thus, both the evidentiary burdens and the elements themselves differ depending on the plaintiff's status; in most cases, the plaintiff's status as a public or private figure is highly fact-dependent and thus comprises much guesswork at the pre-trial stage.[183]

In the ordinary tort case, an incorrect guess by the plaintiff as to the plaintiff's correct defamation status would matter little; the plaintiff could amend the complaint to comport with the court's determination. In the context of AS liability, however, no later amending, or even voluntary dismissal, will necessarily slow the AS motion; it will proceed based on the initial complaint.[184] Consequently, defamation plaintiffs as a practical necessity must always plead both common-law and constitutional malice, and must be ready with facts to support both theories. This literally doubles the burden of proving fault. Given the serious consequences from failing to meet it, this burden alone can suffice to deter plaintiffs from bringing even meritorious claims.

Prior to discovery, all or most of the facts that would support an allegation of fault, whether actual malice or negligence, lie in the hands of the defendant.[185] Proof of actual malice, for instance, can be accomplished "through the defendant's own actions or statements."[186] Yet the depositions and interrogatories that would reveal if the defendant had actual knowledge of the truth prior to publication or would uncover the extent and care to which the defendant went in conducting a pre-publication investigation are unavailable under AS procedures.[187] Actual malice can also be proved through inferences drawn from factual circumstances.[188] Yet the information necessary to form these inferences will rarely be evident from the defendant's publicly available statements.[189]

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[181] *See* RODNEY SMOLLA, 1 LAW OF DEFAMATION §3:30 (2d ed. 1999).

[182] Wiggins v. Mallard, 905 So.2d 776 (Ala. 2004).

[183] Although a plaintiff who voluntarily becomes involved in a public controversy can be a limited purpose public figure, if that plaintiff is "involuntarily" brought into a public controversy, the plaintiff usually remains a private figure, with its less stringent burdens of proof and different substantive elements. Hutchinson v. Proxmire, 443 U.S. 111, 134-35 (1979).

[184] Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc., 18 Cal Rptr. 3d 882, 885-86 (Cal. Ct. App. 2004).

[185] Herbert v. Lando, 441 U.S. 153, 165, 170 (1979).

[186] Celle v. Filipino Rep. Enters., Inc., 209 F.3d 163, 183 (2d Cir. 2000).

[187] Typically, the filing of an anti-SLAPP motion stays discovery or limits it. *See* CAL. CIV. PROC. CODE §425.16, sub. (g) (all discovery is stayed until the motion is decided, although permitting specified discovery for good cause, which exception is to be construed narrowly). Paterno v. Superior Court, 78 Cal. Rptr. 3d 244, 251 (Cal. Ct. App. 2008)).

[188] Solano v. Playgirl, Inc., 292 F.3d 1078, 1085 (9th Cir. 2002); Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 186, 196 (1st Cir. 1982).

[189] Herbert v. Lando, 441 U.S. 153, 170 (1979) ("plaintiffs will rarely be successful in proving awareness of

The courts have identified several methods to prove actual malice through circumstantial evidence. Yet even these examples of circumstantial proof require evidence that will likely lie within the exclusive control of the defendant. Circumstantial proof of actual malice can include the defendant's reliance on inherently unreliable sources,[190] the defendant's financial motivations to lie about the plaintiff,[191] the defendant's departure from journalistic standards prior to publication,[192] the defendant's pre-conception of a false narrative prior to publication,[193] the defendant's refusal to retract statements that had been adjudicated false,[194] or by the accumulation of such evidence.[195] The plaintiff must show that the defendant in fact entertained serious doubts as to the truth of the publication prior to publication.[196] Little to none of the evidence needed to establish the requisite knowledge or serious doubts through circumstantial proof will be available, without discovery, mere days after filing the complaint. The combination of the actual malice standard with the AS summary procedures results in a serious impediment to even meritorious claims.[197]

C. Other Defamation Proof Requirements

Similar to the pleading requirements for statement of fact and fault, defamation law includes other elements and defenses that create particular difficulty for the defamation plaintiff facing a potential AS motion.

1. Truth or Substantial Truth

In theory, whether a defendant's statement about a plaintiff is true or not is a conclusion that the plaintiff should ordinarily be well-positioned to anticipate. In most cases, the plaintiff will know the truth about the plaintiff's conduct and can generate factual evidence, such as by affidavit, to

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falsehood from the mouth of the defendant himself").

[190] St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (Inference of actual malice may be drawn "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation," or "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports").

[191] Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 668 (1989); Gilmore v. Jones, No. 3:18-cv-00017, 2021 WL 68684, at *8 (W.D. Va. Jan. 8, 2021).

[192] *Harte-Hanks*, 491 U.S. at 667-68; Eramo v. Rolling Stone, LLC, 209 F.Supp.3d 862, 872 (W.D. Va. 2016).

[193] Palin v. N.Y. Times Co., 940 F.3d 804, 813 (2d Cir. 2019); Harris v. City of Seattle, 152 F.App'x 565, 568 (9th Cir. 2005).

[194] Nunes v. Lizza, 12 F.4th 890, 900-901 (8th Cir. 2021); Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071-1072 (5th Cir. 1987).

[195] Stern v. Crosby, 645 F.Supp.2d 258, 278 (S.D.N.Y. 2009).

[196] Reader's Digest Ass'n v. Superior Court, 690 P.2d 610, 617-18 (Cal. 1984) ("Publishing with such [serious] doubts shows reckless disregard for truth or falsity and demonstrates actual malice.").

[197] One possible development might be defamation plaintiffs filing lawsuits for discovery, in those states that allow them. These actions would allow the plaintiff to take some depositions and should be immune to AS motions.

substantiate the claim. The legal definition of "truth," however, is far from straightforward. All factual statements can be either true or false axiomatically, yet courts have created a third category of statements that introduces significant uncertainty. The "substantial truth" doctrine[198] compares the alleged defamatory language with the actual truth to determine whether the truth would have had a different effect on the mind of the average reader than did the complained-of statement.[199] Like other standards of defamation law, the contours of substantial truth are difficult to discern, rendering prediction of a judicial outcome highly problematic.[200] The introduction of a middle ground between truth and falsehood creates a challenge for plaintiffs who have to decide whether nor not to file a claim and face an AS motion. Should the trial court rule that the alleged falsehood is substantially true, the plaintiff will suffer the potentially onerous AS remedy.

2. Defamatory Meaning

For defamation liability to attach, the statement of fact published by the defendant must be defamatory in character.[201] This element requires the plaintiff to plead that the statement was of a kind that would generate "contempt, ridicule, or obloquy."[202] Certain statements can even comprise "defamation per se,"[203] where damages are presumed. Whether or not a statement does generate this response must be assessed according to the

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[198] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 518 (1991).

[199] Franklin v. Daily Holdings, Inc., 135 A.D.3d 87, 94 (N.Y. App. Div. 2015).

[200] Nat'l College of Ky., Inc., v. Wave Holdings, LLC, 536 S.W.3d 218, 223-234 (Ky. Ct. App. 2017) (published statement that college is "under fire" for misleading students was "substantially true"; although the college was not literally on fire, it was in fact under investigation by the Attorney General); Tannerite Sports, LLC v. NBC Universal Media LLC, 135 F.Supp.3d 219, 235 (S.D. N.Y. 2015) (a news reporter characterizing an exploding rifle target as "basically a bomb" was using figurative language, not literal, as the target was not literally a bomb; gist of the statement was "substantially true"); Croce v. N.Y. Times Co., 345 F.Supp.3d 961, 983 (S.D. Ohio 2018), *aff'd*, 930 F.3d 787 (6th Cir. 2019) (to find "that the 'gist' or 'sting' of the statement is substantially true[, t]he court looks past even minor inaccuracies to find the 'gist'"); *Masson*, 501 U.S. at 517 (1991) (a "statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced") (internal quotation marks omitted).

[201] Statements are defamatory if they tend to "expose the plaintiff to public hatred, ridicule, contempt or disgrace, or to induce an evil opinion of him in the minds of right-thinking people." Gahafer v. Ford Motor Co., 328 F.3d 859, 861 (6th Cir. 2003) (quoting Digest Publ'g Co. v. Perry Publ'g Co., 284 S.W.2d 832, 834 (Ky. 1955)).

[202] Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) ("A defamatory statement may destroy an individual's livelihood, wreck his standing in the community, and seriously impair his sense of dignity and self-esteem.").

[203] Although states differ in their categorizations of statements that constitute defamation per se, in general a statement is defamatory per se if it charges plaintiff with a crime or tends to injure the plaintiff in the plaintiff's trade, business, or profession. Kasavana v. Vela, 172 A.D.3d 1042, 1044 (N.Y. App. Div. 2019); Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793-795 (Ky. 2004). In cases involving defamation per se, injury is presumed. Celle v. Filipino Rep. Enters. Inc., 209 F.3d 163, 179 (2d Cir. 2000); Disabled Am. Veterans, Dept. of Ky., Inc. v. Crabb, 182 S.W.3d 541, 547 (Ky. App. 2005) (with defamation per se, "damages are presumed and the defamed person may recover without allegation or proof of special damage").

standard of the "reasonable reader" who reflects the "judgment of the community."[204] Like all the elements of the common-law tort of defamation, this standard was developed on the presumption that the jury would make this assessment.[205] With the arrival of AS statutes, upon motion the judge is required to define the reasonable reader and impose this judgment of the community, maybe even a community of which the judge is not a part, given choice of law considerations.

3. Damages and Causation

Damages in defamation cases focus on the plaintiff's reputational harm.[206] This harm is measured by the plaintiff's loss of standing in the community, by adverse social reactions, and by the loss of esteem from friends and acquaintances.[207] Yet, under the heightened pleading requirements imposed by AS statutes, the usual conclusory statements in a complaint about injury are insufficient.[208] The plaintiff in a defamation case must, under threat from an AS motion, plead and present sufficient evidence of loss of reputation. As a result, a damages rule that explicitly refers to community norms and values must be defined and applied by the trial judge with no more evidence than the initial pleading. Unlike damages in commercial or personal injury cases, where the plaintiff can refer to lost sales, financial losses, or loss of life functions, with respect to reputational harm,[209] the loss of reputational standing or social capital is difficult to describe in any but conclusory terms. Yet conclusory pleadings do not suffice to satisfy AS requirements, rendering the satisfaction of this element under the AS

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[204] Defamatory words must be construed in their most natural meaning and in the sense in which they would be understood by those to whom they were addressed. *Digest Publ'g Co.*, 284 S.W.2d at 834 (Ky. App. 1955). Defamatory statements should be measured by the "natural and probable effect on the mind of the average reader." *Stringer*, 151 S.W.3d at 793.

[205] "It is for the jury to determine whether a defamatory meaning was attributed to it by those who received the communication." *Stringer*, 151 S.W.3d at 793.

[206] Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Gobin v. Globe Publ'g Co., 649 P.2d 1239, 1241 (Kan. 1982).

[207] *Gobin*, 649 P.2d at 1241.

[208] Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(A)(2). This pleading standard does not require 'detailed factual allegations.'" Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544. 555 (2007)). However, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do' . . . [n]or does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). Rather, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 677 (quoting *Twombly*, 550 U.S. at 556).

[209] The difficulty of proving reputational damages led to the unusual allowance of presumed damages in defamation cases. *See* SMOLLA, *supra* note 181, at § 9:17.

standard particularly problematic.

Some facts might indicate reputational injury, such as diminished job prospects, loss of friendships or acquaintances, or hostile messages on social media. Nonetheless, pleading causation is particularly challenging. Evidence of diminished job prospects would not be available with a plaintiff not seeking new employment; loss of friendships is difficult to specify, as friends seldom make clean breaks, preferring instead to end friendships gradually, without drama; not all plaintiffs participate in social media, and not all reputational losses are reflected there. Even the general loss of social standing, the quintessence of reputational harm, implies a chorus of negative statements not just that of the defendant.[210] When the defendant's defamation joins the chorus, pleading facts prior to discovery that link the defendant's false statement of fact with the subsequent reputational harm can be challenging. Defamation law has always referred such difficult causation questions to a jury, asking it to untangle the chaos surrounding the "cancelation" of an individual.[211] The AS statutes take this paradigmatic jury question and reassign it to the judge, with the burden of proof imposed on the plaintiff, who must summon facts that demonstrate reputational harm and causation even before the responsive pleading is filed.[212] The AS statutes convert what is typically a simple matter of pleading into an obstacle that, by itself, could result in dismissal of the case.

4. Of and Concerning Plaintiff

For defamation liability, the alleged defamatory statement must be "of and concerning" the plaintiff.[213] Although often this element is predictable, some defamation cases involve statements that do not directly name the plaintiff. These statements nonetheless can be actionable if they refer to the plaintiff indirectly or by implication either from the context of the statement or because the plaintiff is part of a group that is identified as the subject of the offending statement.[214] In the first situation, where the plaintiff

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[210] In contemporary settings, a victim's loss of reputation or social standing might result in part from a wide chorus of adverse commentary on social media from largely unknowable and anonymous sources. In the midst of such a deluge, identifying the single or predominant legal cause of the reputational harm can be daunting. *See generally* Sandmann v. N.Y. Times Co., 78 F.4th 319 (6th Cir. 2023); Blessing v. Chandrasekhar, 988 F.3d 889, 901-07 (6th Cir. 2021).

[211] SMOLLA, *supra* note 181, at §9:17.

[212] Anti-SLAPP laws typically require defendant's motion to be filed near in time to the service of the complaint. *See* TCPA §27.003 (b) (motion must be filed within 60 days after service of process).

[213] Seymour v. N.Y. State Elec. & Gas Corp, 215 A.D.2d 971, 972-73 (NY. App. Div. 1995).

[214] Defamatory statements about a group or class of people generally are not actionable by individual members of that group or class, unless the group or class is so small that the statements are reasonably understood to refer to the individual in question; or the circumstances make it reasonable to conclude that the statement refers particularly to the individual in question. RESTATEMENT (SECOND) OF TORTS § 564A;

argues that the statement was of and concerning the plaintiff indirectly or by implication, the plaintiff needs to prove that an individual familiar with the plaintiff would identify the plaintiff as the subject of the statement.[215] This determination includes the extrinsic facts and surrounding circumstances of the statement.[216] Where the statement identifies a group, courts have differed on whether or not the statement is of and concerning the plaintiff. The outcome depends on the identification of the group,[217] the size of the group,[218] and whether the plaintiff is part of the relevant group.[219] In either case, a plaintiff who fails to prevail on this element will be dismissed peremptorily by the AS motion and be compelled to pay the defendant's fees and costs.[220]

III. ANTI-SLAPP AND THE SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY

AS statutes have been compared favorably to summary judgment.[221] Both procedural mechanisms typically require the same or similar standard of proof;[222] both facilitate pre-trial resolution of cases in the hope of saving costs for the courts and the litigants;[223] and both aim to eliminate meritless cases.[224] Although not without its detractors,[225] the widened availability of

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Neiman-Marcus v. Lait, 13 F.R.D. 311, 313 (S.D.N.Y. 1952) (separating employees into two groups, using "25" as the line for group size).

[215] Palin v. N.Y. Times Co., 940 F.3d 804, 816 (2d Cir. 2019).

[216] Elias v. Rolling Stone LLC, 872 F.3d 97, 105, 110 (2d Cir. 2017).

[217] RESTATEMENT (SECOND) OF TORTS § 564A.

[218] *Neiman-Marcus*, 13 F.R.D. at 316-317.

[219] Quill Ink Books, Ltd. v. Soto, No. 1:19-cv-476, 2019 WL 5580222, at *3-5 (E.D. Va. Oct. 29, 2019).

[220] *See* TCPA §27.009.

[221] Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress, 890 F.3d 828, 833–34 (9th Cir.), *amended*, 897 F.3d 1224 (9th Cir. 2018) (quoting Z.F. v. Ripon Unified Sch. Dist., 482 F. App'x 239, 240 (9th Cir. 2012)) (If a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the analysis is made under Fed. R. Civ. P. 8 and 12 standards; if it is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted). With an AS motion, the court is to "evaluate[] the merits of the plaintiff's claims using a 'summary-judgment-like procedure.'" Wisner v. Dignity Health, 300 Cal. Rptr. 3d 359, 366 (Cal. Ct. App. 2022) (internal quotation marks omitted).

[222] *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(e) (to rebut AS motion, plaintiff must establish "a probability of prevailing" to succeed); *Kinsella v. Kinsella*, 45 Cal.App.5th 442, 450-53 (Cal. Ct. App. 2020) (plaintiff must demonstrate claim is "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the Plaintiff is credited"). The federal standard is similar. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. §56(a).

[223] Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1335 (2005) ("Because the very purpose of summary judgment is to avoid unnecessary trials, one need not be a trained logician to conclude that an increase in the availability of summary judgment will naturally have a corresponding negative impact on the number of trials.").

[224] Sweetwater Union High Sch. Dist. v. Gilbane Building Co., 434 P.3d 1152, 1157 (Cal. 2019) (AS statutes create "a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity") (emphasis in original).

[225] John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007); Suja A. Thomas, *Why*

summary judgment,[226] facilitated by the trilogy of cases that broadened its use,[227] has been lauded for its efficiency in easing docket congestion[228] and in delivering rapid dismissal of meritless cases.[229] Federal Rule 56 permits either side of the litigation to ask the court to grant summary judgment in its favor on the ground "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[230] Data suggest that the use of summary judgment is growing[231] with most rulings in favor of the defendant.[232] In similar fashion, the available evidence is strongly suggestive that AS motions are also increasing in popularity[233] with greater increases likely as more states adopt AS statutes[234] or expand existing ones.[235] Unlike summary judgment, AS statutes are asymmetrical: only the defendant may initiate a motion to take advantage of its summary procedures.[236]

The Seventh Amendment provides that, "[i]n suits at common law . . . the right of trial by jury shall be preserved."[237] Despite compelling academic criticism,[238] summary judgment has been repeatedly held to be

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Summary Judgment is Unconstitutional, 93 VA. L. REV. 139 (2007).

[226] Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004) ("[T]he rate of case termination by summary judgment in federal civil cases nationwide increased substantially in the period between 1960 and 2000 . . .."); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 705 (2004) ("a smaller percentage of cases were disposed of through settlement in 2000 than was the case in 1970, [and] that vanishing trials have been replaced not by settlements but by nontrial adjudication"); EDWARD J. BRUNET, JOHN PARRY & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 1:1(2023 ed.) (describing summary judgment as a "workhorse" in federal practice).

[227] Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[228] *E.g.*, George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993) ("Litigation is a negative-sum proposition for the litigants – the longer the process continues, the lower their aggregate wealth."); Burbank, *supra* note 226, at 600; Redish, *supra* note 223, at 1335 (2005).

[229] Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004).

[230] FED.R.CIV.P. 56(c). Parties may move for summary judgment at the beginning of the suit. FED.R.CIV.P. 56(a), (b). Judges have discretion to continue a motion until discovery has been taken. FED.R.CIV.P. 56(f).

[231] John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 523-4 (2007) ("Judges now grant these motions so often that summary judgment stands alongside trial and settlement as a pillar of our system").

[232] *Id.* at 523, n. 10.

[233] Prueger & Horton, *supra* note 59.

[234] The Uniform Law Commission reports that five states have in recent years adopted UPEPA, the model act, with several more states considering legislation. *Public Expression Protection Act*, *supra* note 4.

[235] *Id.*

[236] *See, e.g.*, UPEPA §3 (allowing defendant to claim, counterclaim, or crossclaim sixty days after service to file a special motion).

[237] U.S. Const. amend. VII. Although the federal right to trial by jury does not apply in state court trials, most state constitutions have their own provisions guaranteeing trial rights; some are more limited than others. *See* Minneapolis & St. Louis R.R. v. Bombolis 241 U.S. 211, 222 (1919). Three states (Louisiana, Colorado, and Wyoming) do not have a constitutional right to a civil jury trial but provide for that right in statutes or rules of court. COLO. REV. STAT. §18-1-406; WYO. R. PRAC. & P. 38; LA. CODE CIV. PROC. ANN. art. 1733.

[238] *See* Thomas, *supra* note 225.

consistent with the Seventh Amendment.[239] The arguments that have found summary judgment constitutional, however, do not comfortably apply to shield AS from Seventh Amendment scrutiny. Although their procedures, burdens of proof, and timing have much in common,[240] AS motions differ from summary judgment motions in fundamental aspects. Alone and in combination, these differences impinge on the plaintiff's right to jury trial to a degree significantly beyond summary judgment.

The text of the Seventh Amendment has been interpreted ahistorically: summary judgment did not exist at the time of the amendment's adoption. As a result, judicial opinions about the meaning of preserving the jury trial right have taken a pragmatic approach, asking if particular procedural mechanisms extend unduly into the province of the jury.[241] Along that dimension, AS motions, at least when they are asserted in federal court in a defamation case founded on diversity jurisdiction, cannot easily be reconciled with the constitutional right to jury trial. AS motions differ from summary judgment procedures in several key details.

A. Lack of Factual Development

The most significant difference between summary judgment and AS motions is the factual development that precedes them. Although summary judgment motions can be brought prior to or in the midst of discovery, in common practice courts will delay ruling on early motions until sufficient discovery, if not all of it, has been completed.[242] Early summary judgment motions are the exception; most summary judgment motions are brought after discovery is complete.[243] Consequently, even though the party losing a motion for summary judgment is precluded from a jury trial on the merits, at least the party's case has been heard on the merits, albeit by a judge, with

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[239] *Id.* at 176.

[240] Federal courts are obligated to apply federal rules of procedure in diversity cases. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 410 (2010) ("In sum, it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. . . .[T] he validity of a Federal Rule depends entirely upon whether it regulates procedure.").

[241] *See Bronsteen*, *supra* note 225, at 537; *Thomas*, *supra* note 225, at 175.

[242] Federal Rule of Civil Procedure 56(d) provides a mechanism for the trial judge to ensure an adequate factual basis for resolving the motion. "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." FED. R. CIV. P. 56 (d). Most state AS statutes and the Model Act allow for limited discovery pursuant to the motion. *See* UPEPA §4(d).

[243] Unlike a motion to dismiss, which assumes the facts pled to be true and determines whether or not those facts suffice to articulate a valid claim, a motion for summary judgment requires the judge to review the evidence found in discovery to determine whether sufficient evidence supports the non-moving party's case. Thomas, *supra* note 225, at 158; Klocke v. Watson, 936 F.3d 240 (5th Cir. 2019) ("Summary judgment motions are normally resolved after the discovery process has concluded or sufficiently progressed.").

consideration of the factual record.[244] Although not unimportant, the loss of the jury trial from summary judgment might be analogized to "harmless error" on the supposition that the presentation of the evidence to the jury would have resulted in the same outcome as did its presentation to the judge.

This feature of summary judgment, specifically that it does not deprive the losing party entirely of the party's day in court, is notably absent with AS motions. AS motions generally stay all discovery; some allow for its continuance but only upon petition and for limited purposes or only on non-related claims.[245] The plaintiff's obligation to establish each element of the claim with clear and specific proof means the plaintiff cannot rely on the court assuming the pled facts are true, as with a motion to dismiss. Instead, the plaintiff must offer proof consisting of a combination of the pleadings, other circumstances, and affidavits, to establish each element, including the defendant's fault, and must do so prior to the first instance of discovery, before the defendant can be deposed and compelled to produce documents. This deficit is particularly acute with respect to proof of fault, all or most of which relevant evidence will typically be within the sole control of the defendant. For those public figure or limited-purpose public plaintiffs, meeting the actual malice standard of fault without the benefit of discovery appears especially daunting, as what the defendant actually knew prior to publication will rarely be determined without comprehensive interrogatories, requests for production, and depositions. This need for discovery would be especially necessary where the defendant is a large media corporation with many editors, researchers, and writers all working on the same offending article, any one or several of whom could constitute the "person responsible."[246] Thus, as a practical matter, the combination of the AS rapid-resolution procedure coupled with the actual malice fault standard leaves the defamed plaintiff with a meritorious claim without practical access to a jury trial.

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[244] Federal Rule 56 requires that the movant support the motion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56.

[245] The automatic stay coves only the causes of action targeted by the defendant's anti-SLAPP motion; no stay of trial court proceedings on other joined claims unless the claims factually overlap. Varian Med. Sys., Inc. v. Delfino, 106 P.3d 958, 962 (Cal. 2005); Chui v. Chui, 291 Cal. Rptr. 3d 213, 223-24 (2d Dist. 2022) (anti-SLAPP order did not preclude trial court from ruling on motion to enforce settlement agreement and petition to approve agreement in probate proceedings).

[246] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (limiting liability to person responsible for the defamatory publication).

B. Asymmetry

The statutory right to bring an AS motion is limited to the defendant. With few exceptions, the assessment of fees and costs, or additional sanctions, can be made only against the losing plaintiff.[247] These two features create stark asymmetrical effects on the incentives and consequences of AS practice that are absent from summary judgment. With summary judgment, both parties may bring the motion, and both sides face similar consequences, in terms of the outcome of the litigation.[248]

This asymmetry means that the AS motion is, for the defendant, essentially a free swing. The defendant need only establish, usually by a preponderance, that the complained-of statements or conduct involved the exercise of a First-Amendment freedom; courts may look no further than the plaintiff's complaint to resolve this issue.[249] After this minimal test is satisfied, all the burdens, and nearly all the costs, shift to the plaintiff, who must produce evidence to support the complaint, and must fashion arguments and evidence to defeat every one of the defendant's plausible defenses.[250] Courts have concluded that summary judgment is consistent with the right to jury trial in part because summary judgment enhances judicial efficiency.[251] This argument is not applicable to AS practice; the incentives created by the defendant's free swing produce exactly the opposite effect. The free swing available to defendants means they will take it, even where plaintiff's claim is meritorious and even in lawsuits alleging theories of liability quite different from the paradigmatic defamation case that represents the aim of anti-SLAPP legislation. The consequence is that federal courts will hear more dispositive motions, not fewer; that these motions will be more difficult to resolve, given their meager evidentiary presentation; and that, because an unsuccessful AS

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[247] TCPA § 27.009(a) requires the court to award the successful movant its fees and costs in defending not just the motion, but the entire legal action. TCPA § 27.009(a). Subsection (b) allows the court to add sanctions "sufficient to deter" the plaintiff from bringing similar actions. *Id.* § 27.009(b). Only if the motion to dismiss is frivolous may the court choose to award fees and costs to the plaintiff. *Id.*

[248] Federal Rule 56 allows either party to file a motion for summary judgment, allows the court to stay its decision on the motion to allow for additional discovery, and allows the court to award fees and costs against either party for filing a supporting affidavit in bad faith. FED. R. CIV. P. 56. The court is to grant the motion if the movant shows there is "no genuine dispute as to any material fact." *Id.*

[249] In resolving this issue, the trial court need only consider the pleadings and supporting affidavits; the plaintiff's subjective motivation in filing the complaint is irrelevant. Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 692-93 (Cal. 2002); Navellier v. Sletten, 52 P.3d 703, 709 (Cal. 2002).

[250] TCPA § 27.005 (c) (requiring dismissal if plaintiff cannot establish by clear and convincing evidence a prima facie case for each essential element of the claim); *Id.* § 27.005 (d) (requiring dismissal if the moving party establishes an affirmative defense or other grounds).

[251] Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (summary judgment helps secure the "just, speedy and inexpensive determination of every action"); Redish, *supra* note 223, at 1339 (summary judgment protects against unnecessary trials).

motion does not preclude subsequent motions for summary judgment,[252] they will do little to diminish motion practice overall. In addition, because defendants who lose AS motions are allowed to file an immediate appeal, appellate courts can also see the same case twice.[253] Defendants are incentivized to file even the barely plausible AS motions. They do not appear likely to diminish judicial involvement and litigation costs. To the extent that AS motions impact the right to trial by jury, they do so only for the plaintiff, in most cases the party more interested in having a jury resolution of the dispute.

This stark asymmetry embedded in AS statutes poses another problem for the plaintiff's right to a jury trial: it puts a steep, and in many cases dispositive, price on the exercise of the constitutional right. Given the high fees of defendants' specialized counsel, who typically bill by the hour at the highest rates, the expected cost to the plaintiff can effectively preclude access to the courts for redress of reputational harms. Few defamation plaintiffs can afford an hourly attorney, in particular not one who specializes in this relatively complex area of tort law; instead, many defamation plaintiffs compensate their attorneys through a contingent fee based on the outcome of the case. For these plaintiffs, the AS motion is a game-changer. First, given the patent difficulty of even a strong case surviving the AS process, skilled attorneys will be reluctant to take on the risk of contingent fee representation: the likelihood of prevailing on all of the defendant's possible defenses, such as opinion and truth, amounts to little more than guesswork, given the amorphousness of the relevant judicial standards. Plaintiffs may end up defending pro se against multiple-thousand-dollar AS verdicts.[254] Second, the plaintiff also is deterred. Losing an AS motion means the plaintiff must pay for all the defendant's fees and costs, not just in presenting the motion, but in the entire litigation.[255] The plaintiff also faces the threat of sanctions for filings deemed meritless.[256] These sanctions are directed against the plaintiff and not, unlike Rule 11, the plaintiff's attorney.[257] The prospect of facing a judgment for what would be at least six figures in fees and costs, and possibly more in sanctions, portends financial ruin for people at most income levels. This price alone is sufficient to put an exercise of the constitutional right to

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[252] "Although [the model AS statute] uses traditional summary judgment and [Rule 12(b)(6)] language, it does not serve as a replacement for those vehicles. On the contrary, summary judgment and other dismissal mechanisms remain options for defendants who cannot establish that they have been sued for protected activity." UPEPA cmt. 5..

[253] TCPA § 27.008 (allowing for expedited appeal of decision on AS motion).

[254] Wisner v. Dignity Health, 300 Cal. Rptr. 3d 359, 363 (Cal. Ct. App. 2022) (pro se plaintiff fails to establish prima facie case as to each element).

[255] TCPA § 27.009(1).

[256] *Id.* § 27.009(2).

[257] *Id.* § 27.009 (2).

seek judicial redress beyond an affordable price.[258]

Practical concerns about overloading the jury system appear to have been part of the reason courts have refused to cite the Seventh Amendment to overrule or limit the availability of summary judgment. AS statutes do not share several of the attributes that have rescued summary judgment from Seventh Amendment scrutiny. These differences mean that the standard Seventh Amendment arguments in favor of summary judgment, such as litigation efficiency and case resolution on the merits, do not readily apply to AS motions. In addition, the severe repercussions to the plaintiff from losing an AS motion, including loser pays and possible sanctions, put a price on a citizen's decision to exercise constitutional rights that prohibits their invocation. AS statutes impair the plaintiff's enjoyment of the right to trial by jury to a substantial degree.

C. Error Preferences

The widespread adoption of AS statutes indicates a broad preference to avoid false positives: the type I error of failing to reject the null hypothesis that a particular case is non-meritorious. Failing to dismiss meritless cases would impose unjustified litigation costs on defendants; such failure even risks faulty damages awards, should the jury, in accepting inadequate proof, make the same mistake. The opposite error, a type II error or false negative, would be the failure to reject a null hypothesis that is actually false and that should be rejected. The AS statutes thus reflect the implicit desire to minimize type I errors; in effect, to err in favor of protecting the defendant's right to free speech. Yet type I and type II errors are inversely correlated.[259] The only way to reduce the one is to increase the other. By seeking to minimize type I errors, the AS statutes increase the likelihood of type II errors, in which the judge will reject a meritorious claim by mistake.[260]

As between minimizing type I or type II errors, there is no right answer, although generally minimizing type I errors is preferred. Avoiding losses from wrongful positives is thought preferable than maximizing gains

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[258] In theory, the availability of litigation funding could help correct this asymmetry. Funders, however, are becoming savvy to the risk of AS motions and are pricing their loans accordingly, demanding percentages so high as to leave plaintiffs with a possibility of only a small residual, and even squeezing lawyers' fees to the extent that lawyers are undercompensated as compared to their other representations.

[259] R.S. Radford, *Statistical Error and Legal Error – Type One and Type Two Errors and the Law*, 21 LOY. OF LOS ANGELES L. REV. 843, 851 (1988).

[260] The classic example of a type I error involves a defendant accused of a crime. The null hypothesis is that the defendant is innocent. Most people would think that sentencing an innocent person to harsh punishment is worse than letting a guilty person go unpunished. Thus, the fear of sentencing the innocent means that the type I error, in which the null hypothesis (that the defendant is innocent) is incorrectly rejected, is worse than the type II error, in which the null hypothesis is by mistake not rejected.

through incorrect negatives.[261] In the defamation context, the fear of incorrect negatives animates the stringent burdens placed on plaintiffs.[262]

Even given the overall preference to avoid type I errors at the cost of increasing type II errors, type II errors can be minimized by increasing the power of the test. The power of the test can be improved by the acquisition of more robust data.[263] In short, even within a system that minimizes the risk of false positives, the incidence of false negatives can be reduced with better data and can be accomplished without impacting the preference to avoid type I errors. By imposing a stay on discovery, AS statutes diminish the data that might allow the judge to detect cases with merit. Summary judgment has been held consistent with the Seventh Amendment because, in part, it likely produces the same ultimate result as would a jury trial on the merits.[264] The same cannot be said with respect to AS motions.

Despite their facial similarity, summary judgment and AS motions differ significantly in their impact on the right to a jury trial. AS motions exacerbate the problem of type II errors needlessly without a corresponding improvement in reducing type I errors.[265] AS motions also provide no reason to think that their resolution mirrors that of a jury trial; indeed, the paucity of factual development actually is suggestive of the opposite, and that any correspondence between the outcome of AS motions and hypothetical jury trials would be low. By their pointedly one-sided availability, AS motions do nothing to reduce litigation costs, and instead most likely increase them, as defendants are allowed what is essentially a free swing, able to file an additional motion without foregoing any other dispositive motion. The availability of an interlocutory and immediate appeal for the losing defendant only adds to the cost of litigation. Summary judgments are controversial precisely because of their obvious impact on a party's Seventh Amendment rights. Yet even the slim arguments that have sustained the constitutionality of summary judgment practice do not apply with equal persuasiveness to AS motions. AS statutes create serious impingements on the plaintiff's right to a trial by jury.

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[261] An incorrect negative is to accept the null hypothesis when it is false.

[262] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (An incorrect negative in this context would effectuate a limitation on free speech. Allowing "breathing room" for speech was the animating principle behind the Court's deployment of the First Amendment to limit the reach and scope of state defamation liability).

[263] In statistics, increasing the power or the "beta" requires making sure the sample size is large enough to detect real differences. *See, e.g.*, JACOB SHREFFLER & MARTIN R. HUECKER, TYPE I AND TYPE II ERRORS AND STATISTICAL POWER (2023), available at https://www.ncbi.nlm.nih.gov/books/NBK557530/.

[264] Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) ("[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses").

[265] The only way to reduce the overall risk of error is through employment of large samples. *See supra* note 263. Although each legal case is somewhat unique and thus presents a sample size of one, arguably a highly experienced judge could mitigate risk after presiding over multiple jury trials that result in verdicts.

IV. LITIGATION INCENTIVES

Because the chief remedy embedded in AS statutes is the re-assignment of attorney fees and costs, courts and commentators have characterized AS statutes as mere fee-shifting provisions, no different in kind or effect than the many other statutes that award fees to the prevailing party.[266] Yet the comparison is faulty; fee shifting under AS procedures differs from other situations. These differences carry significant adverse consequences to the ability of plaintiffs to bring meritorious cases and to the continued existence of torts based on reputational harm and other causes of action based on speech.

Generally, the award of fees serves several purposes: it incentivizes plaintiffs to bring meritorious claims, enlists private litigants in the task of enforcing public laws and social values, and compensates attorneys to specialize in areas of law that would likely not produce clients capable of paying high hourly rates.[267] On first glance, these considerations appear to apply to the AS context as well: the award of fees and costs in the wake of successful AS motions incentivizes plaintiffs to bring only meritorious claims, encourages defendants to expend private litigation resources to promote the enforcement of public policy, and compensates attorneys who prevail on AS motions.[268] This comparison of AS with other fee-shifting provisions, however, misses several key points of distinction. Instead of being comparable to other fee-shifting provisions, AS statutes militate against the usual fee-shifting goals.

A. Asymmetry Again

Fee-shifting statutes fulfill their goals because it is the loser who pays. In order to incentivize meritorious claims, promote public policy, and encourage attorney specialization, it is necessary that the person who is assigned fees be the loser on the merits of the case. The goal is to incentivize the meritorious claims, not faulty ones. The desire to promote policy goals requires successful litigation, as does the aim to reward attorneys who recognize those meritorious cases and see them through to successful completion. This key aspect of fee-shifting statutes is necessarily present in the AS context. Even where the plaintiff has lost the AS motion and has been assigned the defendant's fees and costs, it is not at all clear, even after the completion of the matter, that in fact the plaintiff filed a non-meritorious case.

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[266] Bongino v. Daily Beast Co., LLC, 477 F.Supp.3d 1310, 1322-23 (S.D. Fla. 2020); Reed v. Chamblee, No. 3:22-cv-1059-TJC-PDB, No. 3:22-cv-1181-TJC-PDB, 2024 WL 69570 (M.D. Fla. Jan. 5, 2024).

[267] City of Riverside v. Rivera, 477 U.S. 561, 568 (1986).

[268] *See id.*

The fact that the plaintiff was unable to provide clear and specific evidence of each element of the claim prior to the first instance of discovery, and concomitantly defeat all plausible defenses, does not mean that the claim itself was not meritorious. The nexus between a decision on the AS motion and a hypothetical decision after trial on the merits is tenuous. Even a modicum of discovery may have revealed evidence that the claim was entirely meritorious, especially where, as with the element of fault, the evidence lies exclusively in the defendant's hands. In addition, the requirement that the plaintiff defeat all defenses would require significant discovery and subsequent factfinding into determining what is true or not, or whether the requisite good faith pertinent to one of the qualified privileges informed defendant's speech.[269] None of this factual development happens in an AS proceeding; an AS motion invites the most summary factual judgment known to law. Error rates would be high.

The bottom line with successful AS motions is that it is unclear whether courts are dismissing the right cases. Without that assurance, the goals of fee-shifting will not be met. Meritless claims are not discouraged; instead, all claims are discouraged, for fear of judicial error and the onerous imposition of defendant's fees. Public policy in promoting free speech while also vindicating reputational injuries or other damages is not necessarily accomplished either. The lesson to be learned by a defendant who, having published malicious and defamatory statements but who dodges liability because the victim was unable to muster sufficient evidence pre-filing, is not one that promotes good social policy. As for rewarding successful lawyering, AS motions require little of it on the part of the defendant, who carries an easy burden to trigger the AS motion and has little to do from an evidentiary standpoint.[270] All the work, in fact, is carried on by plaintiff's counsel, who can labor at great length to assemble facts, without the aid of adverse discovery, to try to support the plaintiff's case. The plaintiff's lawyer must defeat any defenses or privileges raised by the defendant. Because the defendant's burden to raise those defenses and privileges is minimal,[271] the plaintiff is left to defeat them all, even though many of the usual defenses and privileges are fact intensive. The plaintiff must succeed on every argument; the stakes are high – for the plaintiff. The defendant has nothing at stake; no

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[269] Qualified privileges require that the defendant acted in good faith. Smith v. Wal-Mart Stores, Inc., 980 F.3d 1060, 1063 (5th Cir. 2020) ("To be entitled to the qualified privilege, the person making the statement must make it in good faith on a subject matter in which the speaker has a common interest with the other person, or with reference to which the speaker has a duty to communicate to the other.") (internal citations and quotes omitted).

[270] Hersh v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017) ("When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more.").

[271] The defendant's burden in raising any defenses or privileges is unclear. The comments to the uniform act describe the burden as "make[] a showing." UPEPA cmt. 5. Texas' AS statute requires defendants to establish a defenses or privilege. TCPA § 27.005(c).

rights are waived and subsequent motions are not precluded by the AS motion should it fail.[272] Successful AS motions do not compensate defense attorneys for their development of specialized skill nor for their successful promotion of the social good.

B. Adverse Selection

AS statutes create an asymmetry not just in terms of one-way fee-shifting, but also in terms of information. This information asymmetry will, in this new era of AS liability, likely lead to problems of adverse selection, on both sides. Plaintiffs will be inclined to bring defamation suits where the news of the suit itself, rather than its merits, has the greatest benefit to the plaintiff in terms of possible repair to reputation. Likewise, in considering settlement offers, the defendant will be inclined to not settle where it alone knows that the plaintiff's case is weak.

Respecting the plaintiff's decision to file, in a modern defamation action, the most significant information concerns the defendant's fault: the actual malice standard looms over any suit brought by a public-figure plaintiff.[273] It also is of paramount concern to plaintiffs who are not public figures in a general sense, but who are deemed to be limited public figures who engaged in or thrust themselves into a public controversy that resulted in defamatory statements.[274] It is public figure plaintiffs who are more likely to suffer severe enough reputational harm to justify bringing a defamation suit.[275] Because AS motions stay all or nearly all discovery, the plaintiff cannot learn much about the defendant's fault prior to resolution of the case on the AS motion.[276] Nor will the defendant be likely to share it: unlike the

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[272] *See supra* note 271.

[273] In *New York Times v. Sullivan*, the court required the plaintiff to show actual malice with "convincing clarity," a standard that surpasses the normal preponderance of the evidence standard. N.Y. Times v. Sullivan, 376 U.S. 254, 285-86 (1964). This standard of convincing clarity has also been described as requiring "clear and convincing" evidence of actual malice. Desmond v. News & Observer Publ'g Co., 846 S.E.2d 647, 674 (N.C. 2020); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986) (clear and convincing proof of actual malice required for federal summary judgment motions).

[274] Most defamation plaintiffs fit into one of those two categories; even a private person who is defamed publicly can be deemed a limited purpose public figure. Wolston v. Readers' Digest Ass'n, 443 U.S. 157, 166-69 (1979); Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982); Eramo v. Rolling Stone, LLC, 209 F.Supp.3d 862, 869 (W.D. Va. 2016) (listing factors to determine limited-purpose public plaintiff).

[275] Should the defamatory statement constitute "defamation per se," then in most states proof of actual reputational damages is not needed; damages are "presumed" and the jury is tasked with devising a reasonable award. Nonetheless, most defamation counsel feel the need to put on proof of substantial actual damages in order to generate a sizable jury award. Some states preclude plaintiffs who qualify as public or limited-public figures from using the category of defamation per se to have access to presumed damages in cases brought against media defendants. Mid-Florida Television Co. v. Boyles, 467 So.2d 282, 283 (Fla. 1985); Corsi v. Newsmax Media, Inc., 519 F. Supp. 3d 1110, 1119 (S.D. Fla. 2021) ("a plaintiff suing a media defendant must . . . plead malice and damages").

[276] *See supra* note 82-83, 254.

plaintiff's version of the truth, which version plaintiff must include in the complaint, the defendant is under no such compulsion prior to discovery.[277]

This asymmetry regarding key information about fault generates litigation incentives that can lead to bad prosecution decisions. At the outset of the matter, all the plaintiff can plausibly be sure of is the falsity of defendant's statements: that plaintiff's own conduct or behavior is different from its description in the defamatory statement. What the plaintiff can be least sure about is the defendant's fault.[278] As the Supreme Court has stated, the definition of actual malice requires "case-by-case adjudication."[279] As a result, even where the plaintiff has a strong case on the merits in terms of every other element and defense pertinent to defamation, the plaintiff has little idea, pre-discovery, if the key element of fault can be alleged sufficiently to survive various dispositive motions, including an AS motion, a motion to dismiss, and a motion for summary judgment.[280] Just knowing that a statement is false and is of defamatory character is insufficient; as long as the defendant conducted a reasonable investigation prior to publication or acted in good faith in not avoiding the truth,[281] the defendant will not be liable, even for publishing defamatory falsehoods.

An AS motion precludes the plaintiff's early opportunity, through normal discovery devices, to investigate evidence of fault to find out about the true strength of the case. Consequently, the plaintiff, in deciding whether to sue, cannot plausibly determine the strength of the case and if it merits a substantial investment of funds and warrants a substantial risk of an adverse AS determination. Instead, plaintiffs will have to make the decision to sue based on factors other than the merits of the case, including their risk-averseness, vulnerability to bankruptcy, ability to pay large attorneys' fees, and desire for reputational restoration. While not exactly causing adverse selections, the presence of AS statutes with their preliminary dispositions will lead plaintiffs to make prosecution decisions on non-merits grounds. Rather than promoting only the most meritorious of defamation claims, as is the putative aim of AS statutes,[282] their effect is relatively unrelated to the ultimate merits of the matter. This outcome is exacerbated by the rule,

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[277] The special motion to dismiss on AS grounds can be filed before the defendant is obligated to answer the complaint on the merits. TCPA § 27.003.

[278] One underutilized device might be to file a suit against the defendant for discovery, an action allowed in some states to preserve evidence. Such suits, however, are probably subject to an AS motion, as they are based on conduct or statements protected by the AS statutes.

[279] St. Amant v. Thompson, 390 U.S. 727, 730-32 (1968) (describing "reckless disregard" test for actual malice).

[280] *See id.* at 730.

[281] *Id.*

[282] TCPA § 27.002 ("The purpose of this chapter is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and other participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury").

featured in many AS statutes or in judicial opinions interpreting those statutes, that mandates that a claim for fees and costs under AS survives even the plaintiff's decision to non-suit the case.[283] The plaintiff is stuck with the decision to file, even one that is soon regretted after discovery reveals the weakness of the case. The plaintiff cannot practically know, before filing, if evidence of fault will emerge sufficient to prevail on the merits.

More pronounced is the adverse selection by defendants concerning decisions to settle. Without discovery, and with the defendant in exclusive possession of key information about fault, the plaintiff will be unable to discern the value of a case. The defendant can take advantage of this ignorance, offering the same price for claims, without distinguishing between those it knows to be meritorious or non-meritorious. The defendant might even refuse all settlements in the weakest cases: where evidence of fault is weak, yet the AS motion fails, defendants will at the margin choose to proceed with discovery and summary judgment, confident in ultimate victory. In short, the defendants will take advantage of their informational advantage to engage in adverse selection, meaning that the cases more likely not to settle will be those with the least merit; conversely, the defendant will settle claims it knows to be meritorious. This adverse selection will also have a social cost: it will tend to produce a decided case, either by jury or summary judgment, where the defendant's position is strongest, thus providing new evidence that the filing of low-merit cases is prevalent, thus justifying additional or amplified anti-SLAPP statutes. In turn, plaintiffs, unaware of the true value of their case, will settle meritorious claims more cheaply, the price driven down by the defendants' informational advantage.

C. Change in Law

The threat of AS liability frustrates legal arguments that seek a change in law. For example, some states have, contrary to the national trend, refused to recognize the false light branch of the tort of invasion of privacy.[284] In the ordinary course of litigation, such decisions might be questioned, particularly as the passage of time and changing social conditions warrant reconsideration. A lawyer is allowed to argue for changes in the judicial precedent.[285] As far as state law goes, any such reversal would require litigation in the state supreme court; at the trial level, the state trial judge

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[283] UPEPA §7.

[284] Jews for Jesus, Inc. v. Rapp, 997 So.2d 1098, 1100 (Fla. 2008).

[285] MODEL RULES OF PRO'L CONDUCT r. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

would reflexively dismiss a claim that controverted valid and binding state supreme court precedent.

A plaintiff who argues in good faith for a change in law risks severe repercussions. Although not free from doubt, under the language of the AS statutes, the trial court's obligatory dismissal could trigger AS liability against the plaintiff. Even a plaintiff who accompanied the false light claim with other claims, such as defamation or defamation by implication, would risk possible AS liability for the dismissed claim, as a court could disaggregate the lawsuit to find AS liability.[286] Anti-SLAPP statutes are a relatively recent phenomenon, and this issue remains unresolved. Nonetheless, some relevant case law from California suggests that in "mixed cause of action" cases, where some of the allegations involve conduct protected by the anti-SLAPP statutes and some that is not, courts have treated each claim as a separate matter, awarding fees and costs where one of those claims is dismissed on anti-SLAPP grounds, even if other claims are not dismissed.[287]

The threat of costly AS liability for a single dismissed count would deter all but the most daring plaintiff from making a good faith argument to reverse existing precedent. Yet the failure to allege a count of false light, even in the face of adverse Supreme Court precedent, renders the argument unpreserved on appeal.[288] The AS statutes in effect render it highly improbable that any defamation plaintiff would argue for a change in the law, thus negating the sole mechanism to induce a state supreme court to reverse arguably unwise precedent.

V. AVOIDING ANTI-SLAPP LIABILITY

With the indeterminacy of the elements of defamation and given the onerous proof requirements posed by AS statutes, sensible plaintiffs will seek to structure their lawsuits to avoid potential AS liability. One option is to file in state courts in states without AS statutes. The other option is to file in a federal district court within a circuit that has deemed AS statutes to conflict with the federal rules.[289] Neither strategy is foolproof. Some state AS statutes arguably comport with the federal rules, and adverse decisions to borrow the AS statutes of other states can lead to an unwelcome surprise.[290] Filing in

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[286] The Florida AS statute, states that the anti-SLAPP provisions apply to "any lawsuit, cause of action, claim, crossclaim, or counterclaim," thus suggesting that a Florida court could disaggregate the suit to impose anti-SLAPP liability for a single dismissed count. FLA. STAT. § 768.295(2)(3) (2024).

[287] Baral v. Schnitt, 376 P.3d 604, 606-07 (Cal. 2016).

[288] A failure to raise an argument at the trial level waives one's right to raise that issue on appeal. Carrozza v. CVS Pharmacy, Inc., 992 F.3d 44, 59 (1st Cir. 2021).

[289] *See generally* Harrison, *supra* note 41.

[290] *See supra* notes 41-52 and accompanying text.

federal court is also no panacea: a successful motion to transfer venue, even in a state case that has been removed to federal court, might expose the plaintiff to an AS motion.[291] In addition, some federal courts have ruled that the AS statute from the defendant's home state confers a substantive right on the defendant and on which the defendant relied, thus allowing the defendant to assert AS rights even in a jurisdiction where otherwise precluded.[292] Finally, the incipient threat of Supreme Court review and reversal of the decision to decline the application of AS lies on the horizon. Nonetheless, despite these risks of AS exposure, the clever plaintiff will seek to file in a federal court unfriendly to AS motions. The consequence of this limited availability of safe jurisdictions is that plaintiffs will stretch legal boundaries on jurisdiction, parties, and joinder to seek favorable venues.

A. Federal Pre-emption

Erie requires federal courts in cases founded on diversity jurisdiction to apply federal law under the Federal Rules of Civil Procedure to matters of procedure, and to apply state law to substantive issues.[293] Rather than try to divide substance and procedure along semantical grounds, case law subsequent to *Erie* has focused on the extent to which application of a particular federal rule, if deemed procedural, would affect the outcome of the litigation[294] or would encourage forum shopping.[295]

The *Erie* analysis is notoriously difficult to apply to state AS statutes.[296] Federal circuits are divided over the proper characterization of state anti-SLAPP statutes.[297] If the state AS is procedural, a federal court will not apply it where it conflicts with a valid federal rule of procedure; the federal court will, however, apply state substantive law in diversity cases.[298]

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[291] Although in a diversity action the substantive law of the transferor state remains with the case even after transfer, federal courts apply the procedural law of the state in which they sit to diversity matters, depending on the state's approach to choice of law. Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp., 812 F.3d 824, 829 (11th Cir. 2016).

[292] *See supra* note 45 and accompanying text.

[293] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[294] Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (state statute of limitations is substantive because "[t]he outcome of the litigation in federal court should be substantially the same . . . as it would be if tried in a State court").

[295] Hanna v. Plumer, 380 U.S. 460, 464 (1965) (federal rules of service are procedural because the federal rule would not have affected the forum choice of the plaintiff).

[296] Colin Quinlan, *Erie and the First Amendment: State Anti-SLAPP Laws in Federal Court after Shady Grove*, 114 COLUM. L. REV. 367 (2014); Harrison, *supra* note 41 (cataloguing the treatment of AS statutes in federal courts); Caitlin E. Daday, *(Anti)-SLAPP Happy in Federal Court?: The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection Against SLAPPs*, 70 CATHOLIC U. L. REV. 441 (2021); Tyler J. Kimberly, *A SLAPP Back on Track: How Shady Grove Prevents the Application of Anti-SLAPP Laws in Federal Courts*, 65 CASE W. RES. L. REV. 1201 (2015).

[297] *See* Harrison, *supra* note 41.

[298] *See* Rosa & Raymond Parks Inst. for Self Dev. v. Target Corp., 812 F.3d 824 (11th Cir. 2016).

The federal rules with which state AS statutes arguably conflict are Rule 8, Rule 12, and Rule 56.[299] Rule 8 governs pleadings, and requires of the plaintiff "a short and plain statement of the claim showing the pleader is entitled to relief,"[300]and that "[e]ach allegation must be simple, concise, and direct."[301] Rule 12 provides rules for motions to dismiss[302] and judgment on the pleadings;[303] Rule 56 provides the rules for summary judgment motions.[304] The presumption is that federal courts will apply federal rules of procedure to cases arising under federal diversity jurisdiction if a federal rule "controls the issue."[305] If no federal rule answers the question in dispute, federal courts are to undertake an unguided *Erie* analysis that focuses on whether application of the federal rule would lead to different outcomes in state and federal court.[306] Some federal appellate courts have determined that state AS statutes are substantive and thus must be applied in federal court.[307]

The mixed jurisprudence in the federal courts of appeals has led to competing interpretations of similar statutes. The Eleventh Circuit Court of Appeals, for example, has held that Georgia's AS statute conflicts with the federal rules.[308] The Georgia statute requires the plaintiff to establish "a probability" that the plaintiff will prevail on the claim.[309] Federal Rules 8 and 12 require only that the plaintiff meet the "plausibility" standard, not Georgia's "probability" requirement.[310] Federal Rule 56 requires only that the plaintiff show "a genuine issue for trial,"[311] whereas the Georgia AS standard requires that the plaintiff show the plaintiff will "likely prevail," a "far more demanding" test.[312] Several federal appellate courts have reached the same conclusion as the Eleventh Circuit, finding a conflict between a state

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[299] *See* FED. R. CIV. P. 8(a)(2), (d)(1); 12(b)(6), (c); 56.

[300] *Id.* 8(a)(2).

[301] *Id.* 8(d)(1).

[302] *Id.* 12(b)(6).

[303] *Id.* 12(c).

[304] *Id.* 56.

[305] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (federal court exercising diversity jurisdiction will not apply a state statute if a Federal Rule of Civil Procedure "answers the question in dispute"); Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980) (federal rule "governs" if it is "sufficiently broad to control the issue before the Court").

[306] Hanna v. Plumer, 380 U.S. 460, 471 (1965); Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1358 (11th Cir. 2014).

[307] United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 973 (9th Cir. 1999) (California statute is substantive).

[308] Carbone v. CNN, Inc., 910 F.3d 1345, 1347 (11th Cir. 2018) (Georgia AS statute conflicts with the federal rules).

[309] GA. CODE ANN. § 9-11-11.1(b)(1) (2016).

[310] *Carbone*, 910 F.3d at 1350 (citing *Twombly*, 550 U.S. at 556 (the plausibility standard "does not impose a probability requirement at the pleading stage;" even "improbability" of actual proof of pled facts suffices to allow claim to proceed); *Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a probability requirement")).

[311] Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

[312] *Carbone*, 910 F.3d at 1531.

AS statute and the federal rules.[313]

In other circuits, however, the AS statutes of other states have been held not to conflict with the federal rules, thus allowing defendants to enjoy the benefit of these substantive state statutes.[314] In part, these decisions can be reconciled: some of the statutes that have been deemed not to conflict with the federal rules feature less invasive provisions. For instance, federal district courts in Florida have applied Florida's AS statute[315] despite controlling precedent from the circuit court to the contrary regarding Georgia's AS statute.[316] The Florida AS statute,[317] according to the district court, fuses with federal practice because, if a claim is dismissed under one of the federal rules and the court finds the claim to be "without merit," then the remedies of the AS statute are triggered.[318] The Florida statute constitutes little more than a "garden variety fee shifting provision" enacted pursuant to a "fundamental state policy" to deter SLAPP suits,[319] creating a "right not to be subject to meritless suits" filed to stifle free participation in public matters.[320] Lower federal courts in Florida have also allowed defendants to raise AS motions, applying the law of other states[321] or finding waiver, even against pro se plaintiffs.[322] Other federal courts have allowed AS motions in diversity cases, reasoning that the AS laws in certain foreign jurisdictions are substantive and

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[313] Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (District of Columbia's AS statute does not apply in federal court because statute requires plaintiff show "likelihood of success" on the merits); La Liberte v. Reid, 966 F.3d 79, 85-86 (2d Cir. 2020) (finding California's AS statute to be in conflict with the federal rules because it requires plaintiff to establish a "probability" of prevailing); Klocke v. Watson, 936 F.3d 240, 245 (5th Cir. 2019) (Texas AS statute requires "clear and specific evidence" of each element of the claim); Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 668-73 (10th Cir. 2018) (New Mexico AS statute provided nothing more than "expedited procedures" to resolve certain claims, and thus is procedural and, under Erie, not applicable in federal diversity cases).

[314] Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010); United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963 (9th Cir. 1999).

[315] Bongino v. Daily Beast Co*., LLC*, 477 F.Supp.3d 1310 (S.D. Fla. 2020); Gov't Emps. Ins. Co. v. Glassco Inc., No. 8:19-cv-1950-KK1VI-JSS, 2021 WL 4391717, at *8 (M.D. Fla. Sept. 24, 2021) (federal court must adhere to state appellate court determination that Florida AS statute creates substantive right, thus applying state law consistent with Erie doctrine).

[316] *Carbone*, 910 F.3d at 1347; *see also* Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1358 (11th Cir. 2014) (the "verification" requirement in Georgia's AS statute conflicts with federal Rule 11).

[317] FLA. STAT. § 768.295(4) (2024).

[318] *Bongino*, 477 F.Supp.3d at 1323.

[319] *Id.*; Mac Isaac v. Twitter, Inc., 557 F.Supp.3d 1251, 1261 (S.D. Fla. 2021); Ener v. Duckenfield, No. 20-cv-22886-UU, 2020 WL 6373419, at *13 (S.D. Fla. Sept. 28, 2020).

[320] Gundel v. AV Homes, Inc., 264 So. 3d 304, 310-11 (Fla. Dist. Ct. App.) (terming Florida's AS statute as creating a "substantive right").

[321] Tobinick v. Novella, 108 F.Supp.3d 1299, 1305 (S.D. Fla. 2015) (trial court engaging in choice-of-law analysis without first determining whether anti-SLAPP motion is procedural or substantive as plaintiff failed to raise the issue; holding that Florida's choice-of-law rules resulted in application of California substantive law, including its anti-SLAPP statute); aff'd 848 F.3d 935 (11th Cir. 2017) (plaintiff waived Erie issue); Sterling v. Doe, No. 6:21-cv-723-PGB-EJK, 2022 WL 2112091, at *13 (M.D. Fla. Feb. 2, 2022) (declining to apply California AS law because it conflicts with federal rules).

[322] Parekh v. CBS Corp., 820 Fed. Appx. 827, 836 (11th Cir. 2020) (pro se plaintiff held to have waived an otherwise valid Erie issue, and thus assessed defendant's fees and costs).

that the defendant's conduct should be assessed under the law of the defendant's domicile, in effect giving these AS statutes extraterritorial reach.[323] Consequently, even in those circuits that have ruled that an AS statute is procedural and in conflict with the federal rules, lower federal courts have allowed defendants to bring AS motions.[324]

The policy and lobbyist groups who have argued in favor of states adopting AS statutes have urged federal lawmakers to adopt a federal AS statute.[325] Were a federal statute to be adopted, an opening that is presently narrow would then be closed. Defamation plaintiffs would have no federal forum to avoid the threat of an AS motion. This development would, as a practical matter, signal the ultimate demise of defamation law, saving claims brought only in state courts against local defendants unable to remove the matter to federal court.

B. The Search for Venues

The diminishing number of putatively safe havens for defamation actions appears to be shaping the selection of forums. Those states without AS statutes have provided the forum for significant defamation claims.[326] This development is not without costs to the legal system. The search for venues raises correlated issues as plaintiffs stretch personal jurisdiction to hale defendants into non-obvious states.[327] It also induces plaintiffs to join or name parent defendants and omit local defendants in order to create federal diversity jurisdiction.[328] This search for safe venues also stretches defamation law, as parent companies who had little to no control over the publication find themselves answering in court for the defamatory statements of subsidiary media companies.[329]

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[323] Intercon Sols., Inc. v. Basel Action Network, 969 F.Supp.2d 1026, 1035 (N.D. Ill. 2013) (under doctrine of depecage, court will apply AS law of state of defendant's domicile, as domicile state has a "strong interest in having its own anti-SLAPP legislation applied to speech originating within its borders and made by its citizens"); Global Relief Found. v. N.Y. Times Co., No. 01 C 8821, 2002 WL 31045394, at *10 (N.D. Ill. Sept. 11, 2002) (applying Illinois law to defamation claim but California AS law to defenses, because "California has a great interest in determining how much protection to give to California speakers").

[324] Bongino v. Daily Beast Co*., LLC*, 477 F.Supp.3d 1310 (S.D. Fla. 2020).

[325] Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845 (2010) (arguing for federal AS statute).

[326] The state of Delaware, with but a narrow AS statute, has been the forum of choice for several recent major defamation suits, including most notably *US Dominion, Inc. v. Fox News Network*. US Dominion, Inc. v. Fox News Network, LLC, No.: N21C-03-257 EMD, 2021 WL 5984265 (Del. Super. Ct. 2021).

[327] Blessing v. Chandrasekhar, 988 F.3d 889 (6th Cir. 2021) (no personal jurisdiction in defamation action over nonresident defendant); Johnson v. Griffin, 85 F.4th 429 (6th Cir. 2023) (asserting personal jurisdiction).

[328] *See* Sandmann v. N.Y. Times Co., 78 F.4th 319, 342 (6th Cir. 2023) (local newspaper from Louisville not named, despite its publication of the defamatory statements; its inclusion would have destroyed diversity).

[329] *Id.*

C. Tort Suits as Speech

The adoption by states of AS laws reflects a profound mistrust of or hostility to defamation suits. Although the self-interest of the policy groups that lobby for their adoption is obvious, the goal of maintaining and expanding First Amendment freedoms is an important and bedrock constitutional principle. Nevertheless, it is not clear if AS statutes promote free speech, or instead reduce it. In one sense, by imposing heavy procedural burdens on defamation plaintiffs, the AS statutes promote speech by defendants, who can speak with a significantly lessened chance of liability. On the other hand, for those whose reputations are damaged or destroyed by false statements, resorting to judicial process may be their only practical means of answering that defamatory speech, especially in the case of private party plaintiffs, who have no plausible access to the massive media engines that might otherwise provide a sufficient forum for the victim to respond. The Supreme Court recognized this distinction, imposing heightened proof requirements only on public plaintiffs, not private ones.[330] If litigation is speech and provides an important forum for the relatively powerless, then the AS statutes in effect diminish speech at the same time they promote it, albeit by different people.

The standard SLAPP narrative claims that lawsuits have been used by wealthy commercial or political interests to combat and deter private citizens who speak out. The data on which that narrative is based is nearly fifty years old, and the scope of the study that produced those claims was narrow.[331] Replicating that study today, however, would be problematic: given the current prevalence of AS statutes in a majority of states,[332] it would be difficult to falsify the null hypothesis. The pitch is spoiled: AS statutes prevent most defamation suits, both the meritorious and non-meritorious, thus rendering any study that looks to assess the merits of a claim impossible.[333]

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[330] Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) (public officials and public figures "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy").

[331] *See* Roth, *supra* note 39, at 743 ("The push for federal anti-SLAPP legislation and expanded legislation at the state level is justified by . . . [a] narrow study and galvanized by stories of brave individuals speaking out against large corporate interests and being sued into silence.").

[332] The Reporters Committee for Freedom of the Press reports that, as of September 2023, thirty-three states have passed AS laws. *Anti-SLAPP Legal Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/anti-slapp-legal-guide/#:~:text=As%20of%20September%202023%2C%2033,New%20Jersey%2C%20New%20Mexico%2C%20New (last visited Feb. 18, 2024).

[333] An empirical researcher could compare SLAPP-style claims in states with AS statutes to those without to assess the impact of AS statutes in situations involving the classic SLAPP narrative. Even that approach would be flawed, however; defamation plaintiffs are creative in shaping lawsuits to avoid AS exposure, thus suggesting that the jurisdictions without AS statutes will be the venue for the lion's share of defamation claims. In addition,

Even on its own terms, the SLAPP narrative that fueled the creation of AS statutes, specifically that private citizens of modest means were frequently sued for million-dollar defamation damages by wealthy business interests, seems highly counterintuitive. Hourly attorneys are unlikely to be paid to sue non-collectible defendants. Also dubious is the story of commercial plaintiffs inflicting multi-million dollar legal fees on defendants of modest means; it is doubtful that any defense attorney would allow unpaid fees to accumulate for a client not paying the bills.

As importantly, the theory supporting AS statutes must be re-examined, for a very substantial change in the means of communication has taken place since the original data was collected: the internet has democratized speech and has created walls of anonymity to foster it.[334] The fear of speaking truth to power, a fear that animated the adoption of AS statutes, has likely dissipated: the widespread and inexpensive means of communication brought about by the internet, websites, and social media, have empowered ordinary citizens to voice their perspectives on politics, celebrities, entertainment shows, sports, products and services, and everything under the sun, including the sun.[335] The massive volume and often strident tone of online commentary is suggestive of a culture in which citizens feel emboldened to speak, with little regard to the consequences for themselves or for others. The SLAPP origin story about the need for AS statutes to protect the ordinary citizen who dares to offer public criticism seems quaint and outdated when considered in light of contemporary discourse.

It is possible that, in a world without AS statutes, that a new narrative would emerge, claiming that, without AS liability, victims of online insult would file suits against their fellow commentators, filling the court dockets with suits that would likely not be meritorious under defamation law.[336] Although possible, this result is highly unlikely. As they do with other torts,

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defamation plaintiffs will shop for federal jurisdictions that have refused or are likely to refuse to apply state AS laws in federal court, further clouding the data.

[334] For discussions of the changes in journalism brought about by the rise of the internet and social media, see BOB FRANKLIN, THE FUTURE OF JOURNALISM: DEVELOPMENTS AND DEBATES (2013); STEPHEN A. BANNING, JOURNALISM STANDARDS OF WORK TODAY: USING HISTORY TO CREATE A NEW CODE OF JOURNALISM ETHICS (2020); JEREMY IGGERS, GOOD NEWS, BAD NEWS: JOURNALISM ETHICS AND THE PUBLIC INTEREST (1998).

[335] Charles Q. Choi, *Earth's Sun: Facts About the Sun's Age, Size and History*, SPACE.COM (March 23, 2022), https://www.space.com/58-the-sun-formation-facts-and-characteristics.html.

[336] Online comments are often deemed performative, and thus do not constitute statements of fact that are actionable as defamation. SPX Corp. v. Doe, 253 F.Supp.2d 974, 981-82 (N.D. Ohio 2003) (statements posted on Internet message board that contained a large amount of figurative language and hyperbole, including poster's anonymous screen name "neutron," conveyed an unprofessional background); Media3 Techs., LLC v. Mail Abuse Prevention Sys., LLC, No. 00-CV-12524-MEL, 2001 WL 92389, at *24 (D. Mass. 2001) (labeling sites as spam friendly was opinion, not defamation); Rocker Management LLC v. John Does, No. MISC 03-003 3 CRB, 2003 WL 22149380, at *1 (N.D. Cal. 2003) (comments on message boards not libelous).

lawyers serve as the gatekeepers to the judicial system. Defamation law is notoriously complicated, its attendant is litigation expensive, and positive recoveries are difficult to achieve. The legal proof standards that plaintiffs must meet, particularly actual malice, are among the most challenging known to law.[337] Few lawyers would take a contingent fee on any but the most meritorious cases that carry a substantial likelihood of success. Litigation funding companies are disinclined to invest in defamation cases for precisely this reason. As for alternative fee arrangements, hourly compensation for defamation lawyers is high, given the complexity of the claims and the need for experience and creativity. These cases are not cheap, and clients and lawyers will weigh the matter carefully before filing a suit.

In place of the origin story of AS statutes, there is a compelling counter-narrative that more plausibly conforms to the ubiquity of contemporary internet communications. This is the narrative of the private citizen, caught up in one of the many flashpoints in contemporary politics, defamed by powerful media and political actors, subsequently hounded by relentless social media commentary, and left with one's reputation destroyed, one's standing among friends and in the community impaired, and one's future employment prospects diminished. These are today's little guys, defamed by the powerful and wealthy or the online "trollers," who face the daunting task of pleading their case under the evident threat of AS liability. The AS statutes do not empower them to speak; instead, they preclude them from answering the speech of the powerful and wealthy in the only forum practically available to them: a court of law.

VI. CONCLUSION: SUBSTANTIVE LAW OVER PROCEDURAL LAW

The AS statutes are overbroad. In the name of protecting speech and thwarting strategic lawsuits aimed at precluding public participation, they disincentivize all defamation actions, even the most meritorious. The statutes impose significant procedural roadblocks against just this one area of tort litigation and no other. The better solution to a perceived problem with SLAPP suits employs substantive law, not procedural obstacles. Suits that are motivated to preclude otherwise legitimate public speech could be dismissed under existing law as early as a motion to dismiss or a motion for summary judgment. The constitutionalization of several common-law defamation doctrines, such as truth and opinion, already provide a significant gate-keeping function to ward off meritless suits. In addition, the pleading requirements imposed by *Iqbal* and *Twombly*, when applied to the fault standards announced in *New York Times v. Sullivan*, present significant

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[337] *See supra* notes 177-83 and accompanying text.

impediments to any but the most solid claims. Reliance on existing standards would not deter claims to the same extent as AS statutes that require immediate factual proof of claim and the imposition of fees, costs, and sanctions. Nonetheless, the existing substantive standards, when combined with the several pre-trial opportunities to identify and dismiss meritless suits, results in a process that fairly balances the interests of meritorious victims and innocent defendants. State legislatures have it within their power to eliminate the tort of defamation if that is the goal. It would be better to do so honestly rather than, in the name of stopping frivolous litigation, do so inadvertently through daunting procedural requirements that few dare to attempt.