Prosecuting Business Defamation Claims: Where the Common Law and the Defamation Statute Intersect

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Introduction

In *Heritage Optical Center, Inc v Levine*, the Michigan Court of Appeals held that a corporation may be defamed, and, correspondingly, may bring an action for damages.[1] Of particular relevance to this article, the court in *Heritage Optical* also concluded that statements impugning a corporation's business, its ability to do business, and its methods of doing business constitute defamation per se.[2] Statements that are defamatory per se do not require either the allegation or proof of special damages.[3] A recent decision interpreting the Michigan defamation statute, however, seemingly undermines *Heritage Optical* and its progeny and suggests that only statements imputing a lack of chastity or the commission of a crime engender claims of defamation per se.[4] This article seeks to reconcile this apparent conflict and assist practitioners in litigating business defamation claims.[5] Further, while there remains little question that a corporation may recover damages in the form of lost profits, this article explores a business entity's ability to obtain other damages arising from injury to its business reputation.

Defamation Overview

As a general matter, a plaintiff must establish the following to prove defamation:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[6]

Actual damages in business defamation cases often arise from specific claims of lost profits, but, as will be discussed, damages lie whenever an entity establishes that a third party declined to deal with it as a result of defamatory statements.[7]

Michigan's defamation statute, codified at MCL 600.2911 and last amended in 1988, contemplates recovery of damages other than lost profits. Specifically, MCL 600.2911(2)(a) authorizes recovery of all damages proximately caused by the defamatory statement(s).[8] Further, MCL 600.2911(2)(b) provides for recovery of exemplary damages where, before commencement of the defamation action, the plaintiff "gives notice to the defendant to publish a retraction and allows a reasonable time to do so …."[9]

Presumed Damages in Business Defamation Cases—Defamation Per Se

In *Heritage Optical*, the plaintiff-corporation brought a defamation claim against the defendant, an ophthalmologist who formerly shared space with the plaintiff, alleging that the defendant telephoned the plaintiff's clients and falsely informed them that the plaintiff moved its office and/or discontinued its business.[10] The complaint also averred that the defendant's statements were false and were made with actual malice.[11] In granting the defendant's motion for summary disposition respecting the plaintiff's "slander" claim, the trial court adopted the defendant's argument that the allegedly actionable statements "'lack[ed] the element of personal disgrace necessary for defamation.'"[12] The Michigan Court of Appeals reversed the trial court's grant of summary disposition, unambiguously articulating the basis for a claim of defamation per se of a corporation:

> A corporation's reputation in a personal sense cannot be defamed. Rather, "language which casts an aspersion upon its honesty, credit, efficiency or other business character may be actionable…[W]here a libel

> contains an imputation upon a corporation in respect to its business, *its ability to do business*, and its methods of doing business, the same becomes libelous per se."[13]

In so holding, the court observed that "[a] statement that a corporation is no longer in business or is incapable of doing business affects that corporation's business reputation and its ability to do business[ ]" and may constitute the basis for a defamation per se claim.[14] Curiously, the court in *Heritage Optical* made no mention of the Michigan defamation statute, which stated in relevant part that "… in actions based on libel or slander the plaintiff is entitled to recovery only for the *actual damages* which he has suffered in respect to his property, business, trade, profession, occupation, or feelings."[15] Conversely, the then-applicable statute provided that words imputing a lack of chastity of a female and the commission of a criminal offense "*are actionable in themselves* …."[16]

Actual damages… often arise from specific claims of lost profits, but, as will be discussed, damages lie whenever an entity establishes that a third party declined to deal with it as a result of defamatory statements.

During the two decades following the issuance of the opinion in *Heritage Optical*, defamation per se in a business defamation context received scant judicial treatment. A handful of courts have, however, affirmatively cited *Heritage Optical* and its holding that presumed damages are recoverable in business defamation claims. Though not central to its decision, the Michigan Court of Appeals in *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, relied on *Heritage Optical* for the proposition that where a defamatory statement impugns a corporation "in respect to its business, its ability to do business, and its methods of doing business, the same becomes libelous per se."[17] Similarly, in *Savage v Lincoln Benefit Life Company*, a federal district court expressly invoked the principles articulated in *Heritage Optical* in finding that defamation per se "is a 'false and malicious statement[ ] injurious to a person in his or her business … and special damages need not be alleged or proved.'"[18] Like their predecessor *Heritage Optical*, *Northland Wheels* and *Savage* omit any discussion of MCL 600.2911 as it relates to damages, presumed or actual.[19] Unfortunately, the analysis of business defamation per se extends beyond *Heritage Optical* and its progeny and must necessarily attempt to reconcile subsequent decisions that adopt a narrow view of defamation per se in a nonbusiness context.

Burden v Elias Brothers Big Boy Restaurants and Its Interpretation of MCL 600.2911

Although not a business defamation case, the Michigan Court of Appeals decision in *Burden v Elias Brothers Big Boy Restaurants* is instructive in resolving the uncertainty extant in the law. In *Burden*, decided in 2000, a Big Boy restaurant assistant manager accused the plaintiffs of having dined in that restaurant the previous day "without paying for their meals."[20] Following commencement of the plaintiffs' action against the defendant-restaurant, the defendant moved for summary disposition, arguing that the plaintiffs' defamation claim required either a showing of actual malice or proof of economic damages under MCL 600.2911(2)(a) and (7). In response, the plaintiffs insisted that MCL 600.2911(7) did not repeal MCL 600.2911(1) (pertaining to words imputing a lack of chastity or the commission of a crime) "or override prior case law permitting an action for slander per se wherein damages are presumed."[21] The trial court endorsed the defendant's argument and concluded that the plaintiffs failed to present evidence that would have raised a question of fact with respect to either the presence of economic damages or the actual malice required to obtain noneconomic damages.[22]

On appeal, the *Burden* Court initially stated that the "primary goal of judicial interpretation is to ascertain and give effect to the intent of the Legislature[,]"[23] and added that the "first step" in such a "determination is to review the specific language of the statute."[24] It acknowledged that where the statute is unambiguous, the Michigan Legislature is presumed to have intended the plainly expressed meaning, and that interpretation by the court is "neither required nor permissible."[25] However, cautioned *Burden*, "the language of a statute should be read in light of previously established rules of the common law[ ]"[26] and that "[w]ell-settled common-law principles are not to be abolished by implication, and when an ambiguous statute contravenes common law, it must be interpreted so that it makes the least change in the common law."[27]

Applying this analytical framework, the *Burden* Court examined the pertinent sections of MCL 600.2911, which provide:

> (1) Words imputing a lack of chastity to any female or male are actionable in themselves and subject the person who uttered or published them to

> a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.
>
> (2)(a) Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.
>
> ….
>
> (7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.[28]

It then observed that words charging the commission of a crime were defamatory per se at common law, and that the injury to the person subject to such a statement was "presumed to the extent that the failure to prove damages [was] not a ground for dismissal."[29] The court restated the familiar proposition of law that "[w]here defamation per se has occurred, the person defamed is entitled to recover general damages in at least a nominal amount."[30] Interestingly, the court then added that where the defamatory statement is "'maliciously published,' the person defamed may recover 'substantial damages' even where no special damages could be shown."[31] Phrased differently, where per se defamation exists, "the presumption of general damages is well settled[ ]"—irrespective of whether such damages are nominal or substantial.[32]

Burden literally applies MCL 600.2911(1), and in its discussion of defamation per se ignores other forms of defamation per se cognizable under the common law, including the type of business defamation addressed in *Heritage Optical*. Its analysis of MCL 600.2911(1) theoretically undermines *Heritage Optical* and eliminates presumed damages in business defamation claims. As a consequence, *Burden* would require business entities to establish actual damages under subsection (2)(a) of the Michigan defamation statute.

Unraveling the Presumed Damages Quagmire: Do *Heritage Optical* and Its Progeny Exist Post-*Burden*?

Several unpublished decisions of the Michigan Court of Appeals and at least one federal court decision applying Michigan law have, to some degree, clarified the state of the law in this regard. In *Action Auto Glass v Auto Glass Specialists*, a 2001 decision, the plaintiffs and the defendant competed against one another in the glass components business.[33] To attract business, the plaintiffs offered their customers coupons that could be used to offset part or all of insurance deductibles. The defendant attempted to undermine the plaintiff's coupon promotionals by placing advertisements in several newspapers that read:

> If the glass company is to make a profit on a couponed job it must do one of three things: 1) Inflate the price to cover the coupon amount, 2) Cut corners on materials & installation, or 3) Overbill the insurance company (also known as fraud).[34]

Among other counts, the plaintiffs alleged that the defendant defamed them by representing to the public that they were "members of a narrowly-defined class of businesses which engage in insurance fraud."[35] The plaintiffs argued that the defendant's advertisement was false and misleading because it implied that their business practices were criminal, even though the defendant's advertisements did not mention the plaintiffs by name.

In its analysis, the United States District Court for the Western District of Michigan reiterated the common law precept that certain statements constitute defamation per se, using as an example words imputing criminality, and noted that the failure to prove damages is not grounds for summary dismissal.[36] In so ruling, the *Action Auto* Court cited *Burden*.[37] But in the very next sentence, the court cited *Heritage Optical* for the proposition that, "[s]imilarly, statements which denigrate the business reputation of another are defamatory per se."[38] Thus, the *Action Auto* Court simultaneously cited to both *Heritage Optical* and *Burden* with approval, and impliedly concluded that presumed damages exist in the context of business defamation under *Heritage Optical*, even in the post-*Burden* world.

Michigan's defamation statute (MCL 600.2911) contemplates recovery of damages other than lost profits.

Likewise, in *Friday v Van Horn*, a decision of the Michigan Court of Appeals issued in 2004, an individual—and not corporate—plaintiff brought an action for damages based upon the allegation that the defendant falsely stated that the plaintiff could not perform any work.[39] After dismissing the plaintiff's defamation claim, the court evaluated the plaintiff's claim for tortious interference with business relations.[40] Following its conclusion that the first two elements of the tortious interference claim had been met, the court examined the third element, which required the plaintiff to allege the commission of an intentional, lawful act with malice, which was unjustified under the law, for purposes of invading the plaintiff's business relationships.[41]

The lack of clarity regarding defamation per se claims in the business defamation context should be addressed by the Michigan Legislature or Michigan courts.

In support of her argument, the plaintiff claimed that the alleged defamatory statements satisfied the third element of her tortious interference claim. The *Friday* Court disagreed, noting that "in the cases cited by plaintiff, the alleged defamatory statements were defamatory per se because they made accusations of criminal conduct or were injurious to a person in his or her business."[42] Not surprisingly, the court relied on *Heritage Optical* in asserting this statement of law.[43] But because the statements at issue in *Friday* were "not defamatory per se because they did not involve accusations of criminal activity, did not defame plaintiff in her professional capacity, and did not question [the plaintiff's] chastity," the court concluded that the plaintiff failed to establish the third element of her tortious interference claim, citing *Burden*.[44] While in dicta only, *Friday*, like *Action Auto*, intimates that *Heritage Optical*'s holding survives *Burden*.

Subsequently, in *George v Senate Democratic Fund*, the Michigan Court of Appeals examined MCL 600.2911 and *Burden*.[45] In *George*, the plaintiff argued that, despite the absence of actual damages, he could maintain his defamation claim because the statements at issue concerned his profession or employment. The court rejected this argument, finding that MCL 600.2911(1) authorized defamation per se claim only if the defendant published statements imputing lack of chastity or criminality.[46] It further stated that because defamatory statements concerning a person's business or profession are not made "specifically actionable" by MCL 600.2911(1), such claims are governed by the remainder of the Michigan defamation statute, specifically MCL 600.2911(2)(a) and (b), which limit recovery to actual damages (and other damages if a retraction is requested and it allows a reasonable time in which to so retract).[47] For this reason, and in light of *Burden*, the *George* Court affirmed the dismissal of the plaintiff's claim. Therefore, while *Burden*, by itself, may innocuously stand for the proposition that statements imputing a lack of chastity or the commission of a crime are not subject to the damage provisions of MCL 600.2911(2)(a) and (7), its subsequent interpretation has the potential to subvert *Heritage Optical*.[48]

None of these post-*Burden* opinions constitute binding precedent because they are unpublished.[49] Nevertheless, the lack of clarity regarding defamation per se claims in a business defamation context should be addressed by the Michigan Legislature or Michigan courts in view of *Burden* and MCL 600.2911(1). It does, however, appear logical to assume that, even without clarification, where a corporation's reputation is impugned through a statement concerning the commission of a crime, a corporation could maintain an action alleging defamation per se under MCL 600.2911(1).[50]

Damages to Reputation As Part of the Actual Damages Calculation—*Michigan Microtech v Federated Publications, Inc*

The Michigan Court of Appeals' 1991 decision in *Michigan Microtech v Federated Publications, Inc* offers insight into the composition of actual damages in a business defamation context. There, the plaintiff, a satellite antenna service, alleged that the defendant published a news story that the plaintiff was discontinuing sales of its satellite dishes due to "scrambling" problems and marginal or nonexistent profits.[51]

Significantly, the court first articulated the fundamental premise that while a corporation does not have a reputation in the personal sense, it does have a business reputation that can be defamed.[52] It then cited *Heritage Optical* for the proposition that a for-profit corporation may be defamed where a statement tends to prejudice the corporation or deters others from dealing with it.[53] The Court of Appeals favorably compared the defendant's statement to the actionable statements complained of in *Heritage Optical* because it "had the potential of adversely affecting Microtech's business reputation and its ability to sell satellite dishes."[54]

Michigan Microtech's discussion of damages provides a roadmap for litigating a business defamation claim. It initially brings *Heritage Optical*'s defamation per se/presumed damages holding in line with the United States Supreme Court's decision in *Gertz v Robert Welch, Inc*.[55] In *Gertz*, the Supreme Court held that a plaintiff cannot obtain presumed damages unless it establishes that the defamatory statements are made with actual malice,[56] which Michigan courts define as:

> [K]nowledge that the published statement was false or as reckless disregard as to whether the statement was false or not. Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. "Reckless disregard" is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published.[57]

Under *Gertz* then, presumed damages are available only if the defamatory statements were made with actual malice. *Michigan Microtech* confirms as much in its citation to *Gertz* as support for its conclusion that "[p]resumed damages are recoverable where malice is shown. Otherwise, actual damages must be proven."[58]

At trial, the plaintiff established that its sales diminished after publication of the defamatory article, and its proofs evidenced the dollar value of those lost sales.[59] In its opinion, the court emphasized the interrelationship between injury to reputation and business losses: "[L]oss of reputation and loss of profits are intertwined[in that t]he loss of both is shown by a diminished number of customers."[60] Harm to the plaintiff's reputation, thus, constituted actual damages. This result is not surprising given that all defamation concerning a business entity necessarily affects its reputation and its ability to conduct business and will invariably deter others from transacting business with it.

Framed in the context of the foregoing cases, while lost profits represent the traditional form of damages recovered by entities in business defamation claims, *Gertz* and *Michigan Microtech* appear to hold that damage to an entity's reputation falls within the ambit of actual damages sustained by the entity. In *Gertz*, the Supreme Court held that "actual injury is not limited to out-of-pocket loss."[61] Rather, actual damages can include other types of actual harm inflicted by the defamatory statement, including "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[62] Of course, *Gertz* counsels, "juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."[63] Thus, *Gertz* stands firmly behind the proposition that actual damages encompass damages arising from impairment of reputation, and *Michigan Microtech* appears to graft this notion into Michigan law.[64] It is completely logical to assume that where a statement, made with malice, impugns the reputation of a business entity, the entity has been damaged, irrespective of whether lost profits can be proved with great specificity.[65] Although there exists a relatively liberal standard for proving damages in a business defamation lawsuit, damages must be based on the evidence and not on speculation, guess, or conjecture.[66]

Conclusion and Practice Points

Heritage Optical's recognition of defamation per se arguably remains intact in the context of business defamation.[67] But presumed damages are available only if the actionable statements are made with actual malice.[68] Ultimately, the courts or the Michigan Legislature must resolve the uncertainty clouding the application of MCL 600.2911, particularly as it pertains to statements defaming business entities.

In any event, it is appropriate to question the utility of presumed damages and the benefit that inures to the client. After all, assuming that a claim for business defamation finds its way to a jury, no client or practitioner wants to merely receive a token verdict of $1 in presumed damages. Accordingly, in addition to alleging that the client-entity is entitled to presumed damages under *Heritage Optical*, the practitioner should plead and establish injury to the entity's business reputation in the form of actual damages, in accord with *Gertz* and *Michigan Micro-*

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tech.[69] Indeed, *Michigan Microtech* expressly acknowledges that corporations enjoy business reputations that can be defamed, and MCL 600.2911(2)(a) contemplates an award of actual damages to compensate for injuries resulting from defamation. Further, because *Michigan Microtech* adopts a liberal methodology for proving actual damages to establish injury to reputation, the practitioner may exercise greater creativity in demonstrating such damages.[70]

MCL 600.2911(7), last amended in 1988, limits a "private individual" to "economic damages" if the defamatory statements were "published negligently."[71] Subsection (7) facially applies only to "private individual[s]" and not business entities. In this respect, MCL 600.2911 leaves intact the pre-amendment principle that business entities may obtain actual damages, including damages to reputation, as contemplated by the broadly-drafted actual damages provision in subsection (2)(a).

In addition to alleging that the client-entity is entitled to presumed damages, the practitioner should plead and establish injury to the entity's business reputation in the form of actual damages.

Perhaps the ultimate lesson to be learned is highlighted by *The Rink, Inc v Sosnoski*, an unpublished decision of the Michigan Court of Appeals.[72] In *The Rink*, the plaintiff-corporation alleged $1,000,000 in damages for defamation and tortious interference with business relations. When the plaintiff failed to respond to a request to admit that it had not suffered any economic damages, the trial court entered an order directing it to substantiate its claim for pecuniary harm. The plaintiff failed to comply with the trial court's order, and the trial court deemed the requested matters admitted and dismissed the complaint.

On appeal, the plaintiff argued that it stated a claim for defamation, that such a claim is actionable "irrespective of damages when the defamation pertains to one's business," and that the trial court should have not dismissed the complaint due to a failure to provide evidence of economic damages.[73] In one respect, the court agreed, acknowledging that "[i]t is true that one element of a defamation claim is actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod), and that defamation per se exists where the false statement injures a person in his profession or employment."[74] As a consequence, the plaintiff was not required to plead or prove special damages.[75] However, in *The Rink*, the plaintiff *did* plead special damages, as it alleged that the defendants' statements caused damage to its reputation in excess of $1,000,000.

The Rink Court explained that a complaint must include a demand for judgment:

> If the demand is for money damages, a specific amount may not be stated unless "the claim is for a sum certain or a sum that can by computation be made certain, or if the amount sought is $25,000 or less." [ ] By alleging and demanding specific damages of $1,000,000, the plaintiff implied that it could support its demand for that sum with evidence.[76]

Therefore, instead of finding that the plaintiff had not suffered any special damages when it failed to respond to the requests for admissions, the trial court appropriately ordered the plaintiff to file an amended response to the request to admit disclosing the basis for its specified money damages.[77] Ultimately, the Court of Appeals affirmed the dismissal of the complaint due to the plaintiff's failure to substantiate its claim for damages, but the import of *The Rink* is this: While a business entity may be defamed irrespective of proof of pecuniary damages, the entity should avoid pleading a specific amount of damages to escape the fate suffered by the plaintiff in *The Rink*.

NOTES

1. 137 Mich App 793, 359 NW2d 210 (1984).

2. *Id.* at 798.

3. *Id.* at 797. "Special damages, a part of actual damages, are losses having economic or pecuniary value." *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 182-83, 466 NW2d 717 (1991), *lv denied*, 438 Mich 873 (1991) (citing Smolla, Defamation, secs 7.02[1], 9.06[1], pp 7-2, 7-3, 9-10).

4. *See Burden v Elias Bros Big Boy Restaurants*, 240 Mich App 723, 613 NW2d 378 (2000), *lv denied*, 463 Mich 989, 624 NW2d 189 (2001).

5. For purposes of this article, the term "defamation" generically refers to both libel and slander. Further, when applicable, the term "corporation" is inclusive of all business entities.

6. *Michigan Microtech*, 187 Mich App at 182 (citing *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 173-74, 398 NW2d 245 (1986)).

7. *See Michigan Microtech*, 187 Mich App at 187-88.

8. Specifically, MCL 600.2911(2)(a) provides: "Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings." Note, however, that where a defamatory statement is negligently published against a "private individual," damages are "limited to economic damages including attorney fees." MCL 600.2911(7). In *In re Thompson*, the court observed that "'damages to reputation or feelings' are not within the scope of

economic damages, as that term is defined in [MCL] 600.2911(7)." 162 BR 748, 773 (Bankr ED Mich 1993) (quoting *Glazer v Lamkin*, 201 Mich App 432, 437, 506 NW2d 570 (1993)).

9. MCL 600.2911(2)(b).

10. *Heritage Optical*, 137 Mich App at 795.

11. *Id.* at 796.

12. *Id.* (citation omitted in original).

13. *Id.* at 798 (citing *Diplomat Electric, Inc v Westinghouse Electric Supply Co*, 378 F2d 377, 383 (5th Cir 1967); *Maytag Co v Meadows Mfg Co*, 45 F2d 299, 302 (7th Cir 1930)) (internal quotations withdrawn).

14. *Id.*

15. 1961 PA 236, sec 2911(2)(a) (emphasis added). *See also Peisner v Detroit Free Press, Inc*, 421 Mich 125, 130, 364 NW2d 600 (1984).

16. *Id.* at sec 2911(1) (emphasis added).

17. 213 Mich App 317, 328, 539 NW2d 774 (1995) (quoting *Heritage Optical*, 137 Mich App at 798) (emphasis withdrawn).

18. 49 F Supp 2d 536, 541 (ED Mich 1999) (quoting *Heritage Optical*, 137 Mich App at 797).

19. In *Northland Wheels*, the court gave considerable treatment to the fair reporting privilege codified in MCL 600.2911(3). 213 Mich App at 324-30. However, the court did not make any reference to damages available under MCL 600.2911 in its discussion of *Heritage Optical*. *Id.* at 328-29.

20. 240 Mich App at 724-25.

21. *Id.* at 725.

22. *Id.*

23. *Id.* at 726 (citing *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515, 573 NW2d 611 (1998)).

24. *Id.* (citing *In re MCI Telecommunications Complaint*, 460 Mich 396, 411, 596 NW2d 164 (1999)).

25. *Id.* at 726-27 (citing *In re MCI*, 460 Mich at 411).

26. *Id.* at 727 (citing *B & B Investment Group v Gitler*, 229 Mich App 1, 7, 581 NW2d 17 (1998)).

27. *Id.* (citing *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652-53, 513 NW2d 799 (1994)).

28. MCL 600.2911.

29. *Burden*, 240 Mich App at 727-28 (citing *Sias v General Motors Corp*, 372 Mich 542, 551, 127 NW2d 357 (1964); *Peoples v Detroit Post & Tribune Co*, 54 Mich 457, 20 NW 528 (1884); *Wilkerson v Carlo*, 101 Mich App 629, 632, 300 NW2d 658 (1980)).

30. *Id.* at 728 (citing *Slater v Walter*, 148 Mich 650, 652-53, 112 NW 682 (1907); *Scougale v Sweet*, 124 Mich 311, 323-25, 82 NW 1061 (1900); *Sias*, 372 Mich at 551-52.

31. *Id.* (quoting *Whittemore v Weiss*, 33 Mich 348, 353 (1876)).

32. *Id.* (citing *McCormick v Hawkins*, 169 Mich 641, 650, 135 NW 1066 (1912); *Clair v Battle Creek Journal Co*, 168 Mich 467, 473-74, 134 NW 443 (1912); *Simons v Burnham*, 102 Mich 189, 204, 60 NW 476 (1894); *In re Thompson*, 162 BR at 772).

33. No 00-756, 2001 WL 1699205 (WD Mich Aug 21, 2001) (unpublished).

34. *Id.* at *1.

35. *Id.*

36. *Id.* at *4 (citing *Burden*, 240 Mich App at 727-28).

37. *Id.* (citing *Burden*, 240 Mich App at 727-28).

38. *Id.* (citing *Heritage Optical*, 137 Mich App at 797-98).

39. No 244784, 2004 WL 1057786, *1 (Mich App May 11, 2004) (unpublished).

40. For the elements of a tortious interference claim, *see Lakeshore Community Hosp v Perry*, 212 Mich App 396, 401, 538 NW2d 24 (1995) (and cases cited).

41. *Friday*, 2004 WL 1057786 at *3 (citing *Feldman v Green*, 138 Mich App 360, 369, 360 NW2d 881 (1984)).

42. *Id.* (citing *Heritage Optical*, 137 Mich App at 797; *Wilkerson*, 101 Mich App at 632).

43. *Id.* (citing *Heritage Optical*, 137 Mich App at 797; *Wilkerson*, 101 Mich App at 632).

44. *Id.* (citing *Burden*, 240 Mich App at 728; MCL 600.2911(1)).

45. Nos 253202 and 254158, 2005 WL 1027107 (Mich App May 3, 2005) (unpublished).

46. *Id.* at *2.

47. *Id.*

48. *See id*.

49. *See* MCR 7.215(C)(1).

50. *See generally Action Auto*, 2001 WL 1699205; *see also Auto Enterprises Sales, Inc v General Motors Acceptance Corp of Canada*, No 248894, 2004 WL 2601247 (Mich App Nov 16, 2004) (unpublished).

51. *Michigan Microtech*, 187 Mich App at 181-82.

52. *Id.* at 182-83.

53. *Id.* at 183 (quoting *Heritage Optical*, 137 Mich App at 797-98).

54. *Id.* Interestingly, the defendant in *Michigan Microtech* did not argue that MCL 600.2911 trumped the decision in *Heritage Optical*, but rather, that *Heritage Optical* was distinguishable because the defendant in that case intended to harm the plaintiff.

55. 418 US 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974). While *Heritage Optical* made no express reference to *Gertz*, it implied that actual malice was a requirement for obtaining presumed damages. *Heritage Optical*, 137 Mich App at 797 ("[f]alse and malicious statements injurious to a person in his or her business are actionable per se, and special damages need not be alleged or proved[ ]").

56. *Id.* at 349.

57. *Ireland v Edwards*, 230 Mich App 607, 622, 584 NW2d 632 (1998) (quoting *Grebner v Runyon*, 132 Mich App 327, 332-33, 347 NW2d 741 (1984)).

58. *Michigan Microtech*, 187 Mich App at 187 (citing *Gertz*, 418 US at 349). *Michigan Microtech*'s actual malice requirement was acknowledged in *Chonich v Wayne Co Community College*, 973 F2d 1271, 176-77 (6th Cir 1992). *See also* M Civ JI 118.05.

59. *Id.* at 188.

60. *Id.* at 190.

61. *Gertz*, 418 US at 350.

62. *Id.* at 350 (emphasis added).

63. *Id.*

64. *Michigan Microtech*, 187 Mich App at 187-88. In the individual context, the Michigan Supreme Court recognized that, "'[i]ndeed, in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to a the person defamed.'" *Sias*, 372 Mich at 551 (quoting 3 Restatement, Torts, sec 621). Interestingly, the *Sias* Court made no mention of 1961 PA 236, sec 2911.

65. *Cf. Sias*, 372 Mich at 551 (quoting 3 Restatement, Torts, sec 621).

66. *Michigan Microtech*, 187 Mich App at 190. *See, e.g., Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511, 421 NW2d 213 (1988) ("[t]he type of uncertainly which will bar recovery of damages is 'uncertainty as to the fact of the damage and not as to its amount … [since] where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery"); *Montcalm Fibre Co, Inc v Advanced Organ-*

ics, No 249642, 2005 WL 957425, *11 (Mich App Apr 26, 2005) (unpublished).

67. *Northland Wheels*, 213 Mich App at 328 (quoting *Heritage Optical*, 137 Mich App at 798); *Savage*, 49 F Supp 2d at 541 (quoting *Heritage Optical*, 137 Mich App at 797). *See also* 15 Michigan Civil Jurisprudence, Libel and Slander, sec 10, p 508.

68. *Gertz*, 418 US at 349; *Michigan Microtech*, 187 Mich App at 187.

69. *Cf. Sias*, 372 Mich at 551 (quoting 3 Restatement, Torts, sec 621).

70. *Michigan Microtech*, 187 Mich App at 189-90.

71. The economic damages contemplated by MCL 600.2911(7) include attorney fees.

72. No 221279, 2001 WL 850115 (Mich App Jul 27, 2001) (unpublished).

73. *Id.* at *1.

74. *Id.* (citing *Ireland*, 230 Mich App at 614; *Glazer*, 201 Mich App at 438).

75. *Id.* (citing *Croton v Gillis*, 104 Mich App 104, 109, 307 NW2d 820 (1981). The *Heritage Optical* Court relied on *Croton* for the proposition that "[f]alse and malicious statements injurious to a person in his or her business are actionable per se, and special damages need not be alleged or proved." 137 Mich App at 797 (citing *inter alia*, *Croton*, 104 Mich App at 108).

76. *Id.* (quoting MCR 2.111(B)(2)).

77. *Id.* (citing MCR 2.312(C)).

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