Libel

“Sticks and stones can break your bones, but words can never hurt you.”

Ah, if only....
Libel: An Oversimplified Definition

Publication of a false statement of fact that seriously harms someone’s reputation
Libel: **Publication** of a false statement of fact that seriously harms someone’s reputation
Publication: broadly defined

- Articles
- Headlines
- Photo captions
- Blogs
- Ads
- Cartoons
- Freelance materials, guest columns, letters to the editor, quotes
- Promotional material
Libel: Publication of a false statement of fact that seriously harms someone’s reputation.
Libel: Publication of a *false* statement of fact that seriously harms someone’s reputation
Truth:

An Absolute Defense,

However:
Pilate said to him, “What is truth?”

Jn 18:38 (ESV)
Alternative Facts
“Truth is not truth”
So, the **Catch** is:

Knowing something is true, proving it’s true, and then convincing a judge or jury it’s true are different things.

To be continued.....
Hyperbole

- A statement so outrageous no reasonable reader would believe it is true
  - E.g. Rev. Jerry Falwell’s “first time” was with his mother in a drunken orgy in an outhouse.
    » Hustler v. Falwell
Libel: Publication of a false statement of fact that seriously harms someone’s reputation
Gertz v. Robert Welch, Inc.:

“[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.”
Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Opinion

• “Bill Clinton is the worst president in United States history.
  – So subjective it cannot be proved true or false.

• Photo caption: “Welcome to Our Hillbilly Hellhole.”
  – complete fact basis for opinion revealed in photo.
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Red Flag Statements

- Accusations of illegal conduct or involvement with criminal justice system
- Sexual misconduct
- Associated with “loathsome diseases”
- Lying
- Unfit for business
- Academic problems
- Racial/religious/ethnic bigotry
- Financial instability; lack of creditworthiness
Libel: Publication of a false statement of fact that seriously harms someone’s reputation
Fault Required

The First Amendment requires that in order for media defendants to be held responsible for libel, the person suing must show — at a minimum — that the reporter/editor acted unreasonably
The Lesson:

If you always do what a reasonable reporter should do (and don’t do what a reasonable reporter wouldn’t do), you will never be successfully sued for libel.
Acting Reasonably

- Use trustworthy sources — in quality and number
  - Evaluate your sources
  - Do not overstate or have blind faith in their credibility
- Take accurate notes (kept or destroyed on a consistent basis)
- Documents, documents, documents
- Report — don’t “sell”
- Talk to all sides — including the subject
- Be open-minded
- Do the work required — or don’t do the story
- Be rigorous in your choice of language
- Never publish a story if you doubt its truth
Invasion of Privacy

How far is too far when covering the “news”? 
Four kinds of invasion of privacy claims recognized

- Public Disclosure of Private and Embarrassing Facts
- Intrusion
- False Light (Not in Florida)
- Misappropriation
Public Disclosure of Private and Embarrassing Facts

- Certain details about people, even though true, may be "off limits" to the press and public

- Truth is not a defense
Public Disclosure of Private and Embarrassing Facts

- Examples: Publishing detailed information about a private person’s sexual conduct, medical/mental condition, educational records

- Look for facts that are:
  - Sufficiently Private
  - Sufficiently Intimate
  - Disclosure would be highly offensive to reasonable person (shocking!)
The ‘Cheerios Test’

Terry Bollea’s (Hulk Hogan’s) expert witness UF Professor Mike Foley’s shorthand for content that makes the reader/viewer want to barf into their breakfast cereal. Formerly known as the ‘Wheaties Test.’
Defenses:

• Newsworthiness

• Consent
Intrusion

- Generally based on the act of newsgathering
- Publication not required
- Three most common types of intrusion:
  - Trespass: Going onto private property without the owner's consent
  - Secret Surveillance: Using bugging equipment, hidden cameras, other electronic aids
  - Misrepresentation: Invalid or exceeded consent (often in the context of undercover reporting)

- Defenses: Newsworthiness; consent
Misappropriation

• Unauthorized use of a person's name, photograph, likeness, voice or endorsement to promote the sale of a commercial product or service

• Defenses:
  - Consent
  - Newsworthiness

• Publications should routinely have subjects sign a model release form when using their name or likeness in a commercial context
Pre-Publication Review
Plaintiff?
Plaintiff?

Accuracy?

I

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Plaintiff?
Accuracy?
Intrusion?
D
Plaintiff?
Accuracy?
Intrusion?
Defenses?
Truth

Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. . . . In all civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

- Fla. Const. art. I, § 4
U.S. Supreme Court: Philadelphia Newspapers, Inc. v. Hepps:

“We believe that the common law's rule on falsity--that the defendant must bear the burden of proving truth--must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity . . . before recovering damages.”
Florida Standard Jury Instructions

The issues you must decide on the claim of (claimant) against (defendant) are:

b. whether (defendant's) statement concerning (claimant) was in some significant respect a false statement of fact
A statement is in some significant respect false if its substance or gist conveys a materially different meaning than the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect the substance of the statement.
It's the

'GIST'*

that matters

*the essential fact communicated
“...[L]iterally true statements can be defamatory where they create a false impression.”

-Jews for Jesus, Inc. v. Rapp, Florida Supreme Court (2006)
Let me speak briefly about witnesses. In evaluating the believability of any witness and the weight you will give the testimony of any witness, you may properly consider the demeanor of the witness while testifying; the frankness or lack of frankness of the witness; the intelligence of the witness; any interest the witness may have in the outcome of the case; the means and opportunity the witness had to know the facts about which the witness testified; the ability of the witness to remember the matters about which the witness testified; and the reasonableness of the testimony of the witness, considered in the light of all the evidence in the case and in the light of your own experience and common sense.
How can you tear out my liver?

Before you accuse me of something so serious, you'd better have proof.

I see you doing it!

Studies have shown eyewitness testimony to be shockingly unreliable.
“If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.”

I TOLD YOU TO GET A SIGN-OFF FROM MARKETING BEFORE YOU SENT THIS AROUND.

HOW VIVID IS YOUR FALSE MEMORY OF THAT CONVERSATION?

IT'S PLenty VIVID. WERE UNICORNS INVOLVED?
**The Jury**

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Findings of fact:

We have studied the evidence adduced by the respective parties and conclude that it presented a jury question and was solely within the province of the jury to settle the disputed issues of facts under appropriate charges or instructions from the trial court. This [Florida Supreme] Court has repeatedly held that where there is conflicting evidence on the issues made, and the verdict is not manifestly against the weight of the evidence, the court should not interfere and set aside the verdict of the jury.

– Tampa Electric v. Lyons (1939)
Questions?