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A Public Official May Be Granted Punitive Damages without Seeking or Recovering Actual Damages if the Statement is Libelous Per Se.

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LIBEL—DAMAGES—A Public Official May Be Granted Punitive Damages Without Seeking or Recovering Actual Damages if the Statement Is Libelous Per Se.

Rogers v. Doubleday & Co.,
644 S.W.2d 833 (Tex. App.—Beaumont 1982, writ granted).

Dr. N.J. Rogers, a member of the Texas Board of Optometry, sued Doubleday & Company for libel because a book published by Doubleday stated falsely that Dr. Rogers had been indicted three times for practicing without a license.[1] Dr. Rogers sought only punitive damages in his petition.[2] The jury awarded 2.5 million dollars in punitive damages.[3] The trial court set aside those damages and entered a take-nothing judgment for the defendant.[4] Dr. Rogers perfected an appeal to the Beaumont Court of Appeals.[5] Held—*Reversed*.[6] A public official[7] may be granted punitive damages without seeking or recovering actual damages if the statement is libelous per se.[8]

Prior to the United States Supreme Court's 1964 decision in *New York Times v. Sullivan*,[9] libelous statements were regarded as outside the protection of the first amendment.[10] Unfettered by constitutional restraint in dealing with libel,[11] states usually adhered to defamation statutes which

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1. *See* Rogers v. Doubleday & Co., 644 S.W.2d 833, 834 (Tex. App.—Beaumont 1982, no writ).

2. *See id.* at 834.

3. *See id.* at 834.

4. *See id.* at 834.

5. *See id.* at 834.

6. *See id.* at 834.

7. *See id.* at 834. The court recognized Rogers as a public official under New York Times v. Sullivan, 376 U.S. 254 (1964). *See* Rogers v. Doubleday & Co., 644 S.W.2d 833, 834 (Tex. App.—Beaumont 1982, no writ).

8. *See id.* at 835.

9. 376 U.S. 254 (1964). This case involved a city commissioner who sued for libelous statements published in a New York Times advertisement falsely accusing police of mistreating black student protestors. *See id.* at 256-57.

10. *See* U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." *Id.; see also* Roth v. United States, 354 U.S. 476, 483 (1957) (libelous statements not protected by first amendment); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (Constitution does not warrant attack on libel law); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (right of free speech does not protect libelous words).

11. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 370-75 (1974) (White, J., dissenting). Justice White presented a concise analysis of the role of libel law in the United States before

often did not require proof of malice.[12] In *Sullivan*, however, the Supreme Court held that public officials could only recover damages for libel by proving that a false statement was made with "actual malice."[13] The Court based this decision on the rationale that the first amendment required "uninhibited, robust, and wide open" debate on public issues.[14] The reasoning behind this decision soon led to a dramatic reformation of libel law in the United States.[15]

The Court in *Sullivan* created the actual malice standard in order to prevent "self-censorship"[16] of the media stemming from a fear of unlimited civil damages[17] but failed to state expressly the role of punitive damages once malice was established.[18] In *Curtis Publishing Co. v. Butts*,[19] the

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Sullivan. *See id.* at 369-75. Generally, state libel law required an injured party to prove only the falsity of a publication that would subject him to "hatred, contempt, or ridicule." Once proven, damages to reputation were presumed but punitive damages required proof of additional culpability, such as malicious intent. *See id.* at 370-71.

12. *See, e.g.,* Advertiser Co. v. Jones, 53 So. 759, 763 (Ala. 1910) (malice may be implied in libel); Scheman v. Schlein, 231 N.Y.S.2d 554, 556 (N.Y. Sup. Ct. 1962) (law infers malice from libel); Farrar v. Tribune Publishing Co., 358 P.2d 792, 798 (Wash. 1961) (law presumes malice). *But see* Coleman v. MacLennan, 98 P. 281, 282 (Kan. 1908) (libel of public official requires proof of malice).

13. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). Actual malice was defined as "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279.

14. *See id.* at 270. The Supreme Court had expressed this concept in an earlier case. *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (ordinances forbidding speech which may "breach the peace" unconstitutional).

15. *See* Herbert v. Lando, 441 U.S. 153, 169 (1979) (media defendant's editorial process not privileged in libel suit); Time, Inc. v. Firestone, 424 U.S. 448, 455-57 (1976) (plaintiff must have assumed role of public figure before malice required); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 270-73 (1974) (state libel law requires actual malice standard); Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) (private figures can recover libel damages only with proof of culpability); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (malice standard required in all libelous publications of general concern); Monitor Patriot Co. v. Roy, 401 U.S. 265, 270-71 (1971) (malice requirement applies to candidate for public office); Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967) (malice standard applies to "public figures"); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (malice standard applies to criminal liability).

16. *See* New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

17. *See id.* at 277. The Court stated that a fear of civil damages could be "markedly more inhibiting" than the fear of criminal penalities. *See id.* at 277. The Court pointed out that the civil damages of $500,000 were one thousand times greater than the maximum fine allowed under Alabama's criminal libel statute. *See id.* at 277.

18. *See id.* at 379. The Court merely stated that a malice standard was required before a public official could recover damages. *See id.* at 279-80.

19. 388 U.S. 130 (1967). This case involved a well-known coach suing a publisher for falsely stating he had "fixed" a game. *See id.* at 135-36. The Court defined Mr. Butts as a public figure and required a showing of culpability similar to *Sullivan* actual malice before damages could be awarded. *See id.* at 155. The Court held that an awarding of damages

Supreme Court raised the issue of punitive damages in relation to libel of a public figure. In that case, the media defendant contended that the allowance of punitive damages in an action for libel constituted prior restraint by giving a jury the power to destroy a publisher's business with severe judgments.[20] The Court, however, pointed out that judicial control over excessive jury verdicts was an adequate safeguard of the first amendment.[21] This rationale was questioned in a dissenting opinion by Justice Marshall in *Rosenbloom v. Metromedia, Inc.*,[22] wherein Justice Marshall expanded upon the "self-censorship" rationale of *Sullivan* and concluded that punitive damages which create a threat of huge judgments, were unconstitutional.[23] In the same case, Justice Harlan, who had delivered the

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required proof of "highly unreasonable conduct constituting an extreme departure from the standard . . . adhered to by responsible publishers." *Id.* at 154-55.

20. *See id.* at 160. The media defendant asserted that the punitive damages totalling $460,000 constituted an effective prior restraint of the press. *See id.* at 159; *see also* Near v. Minnesota, 283 U.S. 697, 716 (1931) (freedom of the press includes "immunity from previous restraints").

21. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 160 (1967); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (1974) (White, J., dissenting) (fear of excessive awards denigrates good sense of jury and ignores role of appellate courts in limiting excessive verdicts). The Supreme Court also stated in *Butts* that the first amendment was protected from excessive punitive damages under the general rule that verdicts coming from a prejudiced jury are not to be sustained even when punitive damages were reasonable. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); *see also* Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin, 283 U.S. 520, 521 (1931) (if verdict due to passion or prejudice, new trial must be granted). Texas courts protect against excessive punitive burdens by requiring that punitive damages be proportionate to actual damages. *See, e.g.,* Maxey v. Freightliner Corp., 665 F.2d 1367, 1377 (5th Cir. 1982) (punitive damages must reasonably correspond to actual damages but exact ratio not required); Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (punitive damages must be reasonably proportioned to actual damages but no precise ratio is or can be set as reasonable); Dial Finance & Thrift Co. v. Dennis, 403 S.W.2d 847, 848 (Tex. Civ. App.—Amarillo 1966, no writ) (punitive damages must be reasonable and proportioned to actual damages suffered in order to determine whether award was made with bias or passion).

22. 403 U.S. 29 (1971). The plaintiff, a distributor of nudist magazines, was falsely accused of being arrested for possession of obscene materials. *See id.* at 33. The Court held that even private figures must prove actual malice when a defamatory remark regards matters of public or general concern. *See id.* at 42.

23. *See id.* at 84 (Marshall, J., dissenting). Justice Marshall stated that the "unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments." *Id.* at 84 (Marshall, J., dissenting). Justice Marshall also expressed concern that the only limits to punitive damages are that they bear some relationship to the amount of compensatory damages. *See id.* at 84 (Marshall, J., dissenting); *see also* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 5.39, at 112-13 (1982) (different tests used among jurisdictions to determine reasonableness of punitive damages); Wright, *Defamation, Privacy And The Public's Right To Know: A National Problem And A New Approach,* 46 TEXAS L. REV. 630, 648 (1968) (damages should be limited to actual injury).

opinion in *Curtis Publishing Co.*, stated in his dissenting opinion that punitive damages could be awarded as long as they bore "a reasonable and purposeful relationship to the actual harm done."[24] Finally, in *Gertz v. Robert Welch, Inc.*,[25] the Court applied the actual malice standard to private figures and held that a showing of malice was required for recovery of either presumed[26] or punitive damages.[27]

Like most states, Texas underwent a great deal of change in its system of awarding damages following *Sullivan* and its progeny.[28] Prior to these landmark decisions, Texas courts did not require proof of injury or malice for libelous[29] statements presumed to be damaging by their very nature,[30] termed libel per se.[31] The amount of these presumed damages was left to

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24. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 77 (1971) (Harlan, J., dissenting). Justice Harlan further intimated that the jury should only be given authority to award reasonable damages proportionate to actual injury. *See id.* at 77 (Harlan, J., dissenting); *see also* Anderson, *Libel and Self-Censorship,* 53 TEXAS L. REV. 422, 478 (1975) (records each Justice's stance on punitive damages and libel of a public official). Anderson contends that Justice White is the only Justice who has expressly asserted the permissibility of punitive and presumed damages. *See id.* at 478.

25. 418 U.S. 323 (1974). A magazine implied falsely that an attorney was a Communist and had a criminal record. *See id.* at 326. The Court held that the states were free to establish an appropriate requirement of liability involving private-figure plaintiffs, as long as the standard was not liability without fault. *See id.* at 346-47. Furthermore, a showing of actual injury would be required in cases where malice was not the basis of liability. *See id.* at 349.

26. *See id.* at 329. The application of presumed damages in libel cases has been dealt with differently among jurisdictions. *Compare* First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (damages presumed in libel per se) *with* Embrey v. Holly, 429 A.2d 251, 259 (Md. Ct. Spec. App. 1981) (presumed damages no longer considered viable concept).

27. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

28. *See* Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 811-20 (Tex. 1976) (court based its decision on rationales of *Butts* and *Sullivan*).

29. *See* TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958). Texas defines libel as:

> defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury.

Id.

30. *See* West Tex. Utils. Co. v. Wills, 164 S.W.2d 405, 412 (Tex. Civ. App.—Austin 1942, no writ) (court recognized damages presumed from libel per se include harm to reputation, feelings, character, mental injury and other like injury).

31. *See* Providence-Washington Ins. Co. v. Owens, 207 S.W. 666, 671 (Tex. Civ. App.—Fort Worth 1918, no writ). The court defined libel per se as "words of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided." *Id.* at 671. Texas courts have found a variety of false statements libelous per se under this definition. *See, e.g.,* A.H. Belo & Co. v. Fuller, 84 Tex. 450, 453, 19 S.W. 616, 617

the discretion of the jury.[32] Statements which did not constitute libel per se necessitated a proof of injury to recover damages but did not require a showing of malice.[33] In the awarding of punitive damages, however, a showing of malice was required for both types of libel.[34] Punitive damages for libel, as for all damages, were limited to being reasonably proportioned to the actual damages awarded.[35] In addition, a recovery of actual damages was required before punitive damages could be awarded.[36]

Despite the changes brought on by the United States Supreme Court, Texas has retained its tradition of presuming damages from libel per se.[37] Once actual malice is established,[38] presumed damages may be awarded without proof of injury.[39] Therefore, since actual damages are presumed, a

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(1892) (false imputation of a crime); State Medical Ass'n v. Commission for Chiropractic Educ., 236 S.W.2d 632, 634 (Tex. Civ. App.—Galveston 1951, no writ) (dishonesty or rascality); Goodrich v. Reporter Publishing Co., 199 S.W.2d 228, 230 (Tex. Civ. App.—El Paso 1946, writ ref'd) (pro-Nazi tendencies).

32. *See, e.g.,* Reicheneder v. Skaggs Drug Center, 421 F.2d 307, 312 (5th Cir. 1970) (award of damages for libel within province of jury); First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (amount of damages in defamation suit involving libel per se left to discretion of jury); Freeman v. Schwenker, 73 S.W.2d 609, 610-11 (Tex. Civ. App.—Austin 1934, no writ) (amount of damages in libel per se suit stemming from false accusation of crime left to jury); *see also* Von Schoech v. Herald News Co., 237 S.W. 651, 652 (Tex. Civ. App.—El Paso 1922, writ dism'd) (within province of jury to allow nominal damages only for libel per se).

33. *See* Guisti v. Galveston Tribune, 105 Tex. 497, 150 S.W. 874, 876-77 (1912) (statute modified common law with respect to malice requirement for libel per quod); *see also* Express Publishing Co. v. Wilkins, 218 S.W. 614, 616 (Tex. Civ. App.—San Antonio 1920, no writ) (libel per quod defined as requiring proof of injury before actionable).

34. *See, e.g.,* United Press Int'l, Inc. v. Mohs, 381 S.W.2d 104, 110 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.) (malice needed for punitive damages in action for libel per se); Bernard's, Inc. v. Austin, 300 S.W. 256, 261 (Tex. Civ. App.—Dallas 1927, writ ref'd) (court stated malice required for punitive libel damages); Wortham-Carter Publishing Co. v. Littlepage, 223 S.W. 1043, 1045 (Tex Civ. App.—Fort Worth 1920, no writ) (malice required for exemplary damages for libel).

35. *See* First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (punitive damages for libel per se should be proportionate to actual damages).

36. *See* Anderson v. Alcus, 42 S.W.2d 294, 296 (Tex. Civ. App.—Beaumont 1931, no writ) (no punitive damages awarded for defamation per se in absence of actual damages); Flournoy v. Story, 37 S.W.2d 272, 273 (Tex. Civ. App.—Fort Worth 1930, no writ) (no punitive damages awarded in libel per se action where only nominal damages awarded by jury).

37. *See* First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) ($150,000 actual damages awarded for libel per se); *accord* McDowell v. Texas, 465 F.2d 1342, 1344 (5th Cir. 1971) (actual damages awarded for slander per se).

38. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (showing of actual malice required by private figures for recovery of presumed damages).

39. *See* First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (punitive and actual damages awarded without proof of actual injury

cause of action for libel per se seems to create an exception to the Texas rule that punitive damages require a showing of actual damages.[40] While proof of actual injury would not be required,[41] Texas courts have asserted that punitive damages must accompany a jury award or finding of actual damages.[42]

In *Rogers v. Doubleday & Co.*,[43] the Beaumont Court of Appeals used *New York Times v. Sullivan*[44] to guide its decision-making since Dr. Rogers was a public official.[45] The court held that the story had been written with actual malice since the plaintiff's failure to verify the story constituted a reckless disregard for the truth.[46] The court next focused its attention on whether libel per se of a public official justified an award of punitive dam-

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for action of libel per se); *accord* Bayoud v. Sigler, 555 S.W.2d 913, 916 (Tex. Civ. App.—Dallas 1977, writ dism'd) (proof of actual injury not necessary in awarding punitive and actual damages).

40. *See* Rogers v. Doubleday & Co., 644 S.W.2d 833, 834-35 (Tex. App.—Beaumont 1982, no writ). The court cited seven Texas Supreme Court cases spanning over 100 years which held that punitive damages could not be awarded without a finding of actual damages. *See id.* at 835. In cases ranging from wrongful death to assault and battery, the Texas Supreme Court has held that no punitive damages can be awarded without an awarding or finding of actual damages nor can punitive damages be awarded in conjunction with nominal damages. *See, e.g.,* City Prods. Corp. v. Berman, 610 S.W.2d 446, 450 (Tex. 1980) (plaintiff not allowed to recover punitive damages due to failure to recover for actual injury); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934) (plaintiff could not recover punitive damages for wrongful death action since jury awarded only nominal damages); Girard v. Moore, 86 Tex. 675, 676, 26 S.W. 945, 946 (1894) (court did not approve an award of punitive damages where only nominal damages awarded).

41. *See* A.H. Belo & Co. v. Fuller, 84 Tex. 450, 453, 19 S.W. 616, 617 (1869) (no proof of injury required for recovery of actual damage in libel per se).

42. *See* Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397, 409 (1934). This case involved the plaintiff's attempting to recover punitive damages based on the wrongful death of a spouse. *See id.* at 132, 70 S.W.2d at 399. The Texas Supreme Court held that the plaintiffs could not recover punitive damages because actual damages were not recovered. The court asserted that "there can be no recovery of exemplary damages in the absence of a recovery of actual damages." *Id.* at 150, 70 S.W.2d at 409. This holding was supported with the rule that punitive damages must be proportionate to actual damages. *See id.* at 150, 70 S.W.2d at 409. The court stated, "in this case the jury should have been asked to find whether or not the defendants in error sustained actual damages . . . and, if so, the amount thereof." *Id.* at 150, 70 S.W.2d at 409; *see also* Bell v. Ott, 606 S.W.2d 942, 954 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.) (no punitive damages without recovery of actual damages); Pyronauts, Inc. v. Associated Fire Extinguisher Co., 549 S.W.2d 460, 462 (Tex. Civ. App.—Fort Worth 1977, no writ) (no recovery of punitive damages where actual damages not properly awarded).

43. 644 S.W.2d 833, 834, (Tex. App.—Beaumont 1982, no writ).

44. 376 U.S. 254 (1964).

45. *See* Rogers v. Doubleday & Co., 644 S.W.2d 833 (Tex. App.—Beaumont 1982, no writ).

46. *See id.* at 834-35. The record indicated that a telephone call to the Secretary of the Senate of Texas could have verified the alleged indictment. *See id.* at 834-35.

ages without an award of actual damages.[47] The court noted the abundance of Texas Supreme Court cases which held that awards of punitive damages require a showing of actual damages.[48] Nevertheless, the court declared that since the Texas Supreme Court has also stated that damages are presumed in libel per se,[49] this requirement was satisfied.[50] Therefore, the court regarded the false charges in the case as libel per se and awarded the punitive damages without a showing, finding, or awarding of actual damages.[51]

In its decision in *Rogers* the court expressly recognized the profound national interest in an "uninhibited, robust" debate on public issues asserted in *Sullivan*.[52] The appellate court's awarding of 2.5 million dollars in punitive damages without an award or finding of actual damages, however, has stretched the state's power to inhibit the media to its constitutional limits.[53] The United States Supreme Court recognized the constitutionality of punitive libel damages based on its belief that state courts would control excessive verdicts.[54] Unfortunately, the decision in

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47. *See id.* at 835.

48. *See id.* at 835. The court cited the following Texas Supreme Court cases: City Prods. Corp. v. Berman, 610 S.W.2d 446 (Tex. 1980); Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934); Girard v. Moore, 86 Tex. 675, 26 S.W. 945 (1894); Trawick v. Martin-Brown Co., 79 Tex. 460, 14 S.W. 564 (1890); Jones v. Matthews, 75 Tex. 1, 12 S.W. 823 (1889); Flanagan v. Womack, 54 Tex. 45 (1880); Mickey v. McGehee, 27 Tex. 135 (1863).

49. *See* Christy v. Stauffer Publications, Inc., 437 S.W.2d 814, 815 (Tex. 1969) (charging one falsely with crime is libel per se); A.H. Belo & Co. v. Fuller, 84 Tex. 450, 453, 19 S.W. 616, 617 (1892) (false accusation of criminal acts libel per se and damages presumed).

50. *See* Rogers v. Doubleday & Co., 644 S.W.2d 833, 835 (Tex. App.—Beaumont 1982, no writ).

51. *See id.* at 835.

52. *See id.* at 834.

53. *Cf.* Curtis Publishing Co. v. Butts, 388 U.S. 130, 160-61 (1967) (excessive punitive damages are controlled by court under rule that punitive damages cannot be product of jury prejudice); Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin, 283 U.S. 520, 521 (1931) (damages cannot be a product of jury prejudice). Texas courts determine if punitive damages are a product of unconstitutional jury prejudice by ascertaining if they are reasonably proportioned to actual damages. *See, e.g.,* International & G.N.R.R. Co. v. Telephone & Tel. Co., 69 Tex. 277, 282, 5 S.W. 517, 519 (1887) (punitive damages disproportionate to actual damages excessive and evidence product of "passion, prejudice or partiality"); Cotton v. Cooper, 209 S.W. 135, 138 (Tex. Comm'n App. 1919, judgment adopted) (punitive damages unreasonably proportioned to actual damages can be considered result of jury passion); Advance Loan Serv. v. Mandik, 306 S.W.2d 754, 759-60 (Tex. Civ. App.—Dallas 1957, no writ) (court concerned verdict was excessive enough to constitute jury bias).

54. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 390 (1974) (White, J., dissenting) (concern for excessive verdict ignores role of trial and appellate courts in controlling verdicts); Curtis Publishing Co. v. Butts, 388 U.S. 130, 160-61 (1967) (freedom of speech protected by judicial control of punitive jury verdicts). Justice White also stated that "available information tends to confirm that American courts have ably discharged this responsibility."

Rogers has eliminated the state's traditional method of keeping punitive damages in check.[55] Since Texas courts control excessive punitive damages by requiring that they be proportionate to actual damages, the court's allowance of punitive damages without an award of actual damages has made this vital test impossible.[56]

This situation was created by the appellate court's reasoning that a "presumed" existence of actual injury would satisfy the Texas rule that punitive damages must accompany a showing of actual injury.[57] Texas law, however, has asserted that the requirement of a showing of actual damages is only satisfied by the jury's finding or awarding of actual damages.[58] In

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Gertz v. Robert Welch, Inc., 418 U.S. 323, 394-95 (White, J., dissenting). Courts have often controlled excessive damages. *See* Collins v. Retail Credit Co., 410 F. Supp. 924, 934 (E.D. Mich. 1976) ($300,000 punitive damages reduced to $50,000); Airlie Found., Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421, 431-32 (D.D.C. 1972) ($100,000 punitive damages reduced $50,000 punitive damages); *see also* Comment, *The Constitutionality Of Punitive Damages And The Present Role Of "Common Law Malice" In The Modern Law Of Libel And Slander,* 10 CUM. L. REV. 487, 492 (1979) (lists decisions which have reduced excessive punitive damages).

55. *See* Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981) (although actual ratio or formula not set, punitive damages must be reasonably proportioned to actual damages); Southwestern Inv. Co. v. Neeley, 452 S.W.2d 705, 707 (Tex. 1970) (punitive damages must be proportioned); Tynberg v. Cohen, 76 Tex. 409, 416, 13 S.W. 315, 316 (1890) (actual and punitive damages should be reasonably proportioned).

56. *Cf.* Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934) (punitive damages must be awarded in conjunction with actual damages because of state's requirement that punitive damages be proportionately awarded); Seegers v. Spradley, 522 S.W.2d 955, 957 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (punitive damages must be awarded in conjunction with actual damages in order to determine if punitive damages reasonably proportioned or excessive).

57. *See* Rogers v. Doubleday & Co., 644 S.W.2d 833, 835 (Tex. App.—Beaumont 1982, no writ). The court held that the rule that punitive damages be accompanied by actual damages was not applicable to libel per se since damages are presumed. It is important to note that of the two Texas Supreme Court decisions asserting presumption of damages that were cited by the appellate court, neither involved an awarding of punitive damages. *See* Christy v. Stauffer Publications, Inc., 437 S.W.2d 814 (Tex. 1969) (case makes no mention of damages); A.H. Belo & Co. v. Fuller, 84 Tex. 450, 453, 19 S.W. 616, 617 (1892) (false accusation of crime constituted libel per se from which actual injury presumed).

58. *See, e.g.,* Fort Worth Elevators Co. v. Russell, 123 Tex. 128, 150, 70 S.W.2d 397, 409 (1934) (no punitive damages without finding or awarding of actual damages); Prudential Corp. v. Bazaman, 512 S.W.2d 85, 94 (Tex. Civ. App.—Corpus Christi 1974, no writ) (no punitive damages allowed in absence of recovery of actual damages); Galloway v. Morris & Co., 249 S.W. 284, 285 (Tex. Civ. App.—Fort Worth 1923, no writ) ($1.00 punitive damages not awardable without actual damages awarded). Jurisdictions which recognize that a proving of actual injury satisfies the "showing of injury" requirement clearly articulate that a "showing" is enough. *Compare* Hughes v. Belman, 200 S.W.2d 431, 434 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.) (no punitive damages allowed in the "absence of the recovery" of actual damages) *with* Limehouse v. Southern Ry., 58 S.E.2d 685, 687 (S.C. 1950) (punitive damages are not awardable in absence of "proof of injury").

Rogers, actual damages were neither sought nor awarded.[59] Dr. Rogers' recovery of actual damages would not have required proof of injury but the amount would have been left to the discretion of the jury.[60] Since no actual damages were awarded, however, the appellate court in awarding punitive damages expanded the concept of presumed damages into an unprecedented application.[61]

By awarding punitive damages without a finding or awarding of actual damages, the Beaumont Court of Appeals has not only contradicted Texas law but has jeopardized the state's traditional method of protecting the first amendment against excessive punitive damages, a role which the Supreme Court expressly recognized in the state courts. The court of appeal's recognition of a "profound national commitment to the principal that debate on public issues be uninhibited, robust, and wide open" was severely undercut by its awarding of 2.5 million dollars in punitive damages without actual damages, a punishment which stands dangerously immune from traditional tests of excessiveness.

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59. Rogers v. Doubleday & Co., 644 S.W.2d 833, 835 (Tex. App.—Beaumont 1982, no writ).

60. *See* Reicheneder v. Skaggs Drug Center, 421 F.2d 307, 313 (5th Cir. 1970) (award of actual damages for libel within province of jury).

61. *See* Texas Plastics, Inc. v. Roto-Lith, Ltd., 250 F.2d 844, 846 (5th Cir. 1958) (in action based on defamation per se, court recognized punitive damages could not be awarded except where actual damages awarded); Anderson v. Alcus, 42 S.W.2d 294, 296 (Tex. Civ. App.—Beaumont 1931, no writ) (nominal damages did not satisfy actual damages requirement for award of punitive damages based on libel per se). It has been noted that of 69 final appeals in Texas courts since 1964, only four plaintiffs have been able to recover damages. *See* Comment, *Libel Litigation in Texas: The Plaintiff's Perspective,* 13 ST. MARY'S L.J. 978, 978 (1982); *see also* Denton Publishing Co. v. Boyd, 460 S.W.2d 881, 883 (Tex. 1970) (action not based on libel per se but on false accusation of bankruptcy); First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (action based on libel per se for false accusation of dishonest act); British Overseas Airways Corp. v. Tours & Travel of Houston, Inc., 568 S.W.2d 888, 894 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (false accusation of payment default arose in non-libelous per se action); Houston Belt & Terminal Ry. v. Wherry, 548 S.W.2d 743, 748 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (action based on ambiguous statement not considered libel per se), *cert. denied,* 434 U.S. 962 (1977). Of these four cases only the 1980 case of *First State Bank v. Ake* is based on libel per se. The Court of Appeals in assessing the appropriateness of the $300,000 award of punitive damages expressly recognized the rule that "exemplary damages must be reasonably apportioned to the actual damages sustained." *See* First State Bank v. Ake, 606 S.W.2d 696, 702 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).