Midlands Civil Code

Civil Practice and Remedies Code
Title 4. Liability in Tort
Chapter 73. Libel

73.001. Elements of Libel
In an action for defamation or libel, the plaintiff must prove the following elements:

(a) The defendant published a statement of fact of or concerning the plaintiff.

(b) The statement is false.

(c) The statement is defamatory in nature.

(d) The defendant is at fault for the publication.

(e) The plaintiff suffered harm or injury as a result of the publication.

73.002. Fault

In adjudging whether a defendant is "at fault" within the meaning of Midlands Civil Code § 73.001(d), the following standards shall apply:

(a) If a plaintiff is not a public figure, he or she must prove that the defendant negligently published the statement giving rise to the action. Negligence, for the purposes of defamation, is the failure to act as a reasonable person would in assessing whether the statement to be published was indeed truthful.

(b) If a plaintiff is a public figure, he or she must prove that the defendant acted with actual malice in publishing the statement.

73.003. Burden of proof
In cases brought pursuant to Midlands Civil Code § 73.001, the burden of proof depends on the status of the plaintiff. If the plaintiff is not a public figure, he or she must prove each element under section 73.001 by a preponderance of the evidence. If the plaintiff is a public figure, he or she must prove each element of section 73.001 by clear and convincing evidence.

73.004. Vicarious Liability
A corporation or employer will be held vicariously liable for any act of libel committed by an employee acting in the course of their employment, whether or not the corporation or employer had any knowledge of the statement's defamatory character at the time of its publication.

Midlands Case Law

Note that, in Midlands, the Superior Courts are the trial courts, the Courts of Appeal hear appeals from the Superior Courts, and the Supreme Court hears appeals from the Courts of Appeal. Thus, the Midlands Supreme Court is the state's highest court.

***Grundy v. Hampton*, 23 Mid. 688 (2004).**

In a defamation suit by a famous stick-figure artist against his ex-wife for statements that Plaintiff had become a "creepy stalker," the Midlands Supreme Court delineated how a public figure or public official plaintiff can satisfy the element of actual malice. "Actual malice may be demonstrated either by (i) the intentional publication of statements known by the defendant to be false, or (ii) the defendant's reckless disregard of the statements' possible falsity."

***Kramlen v. Michael*, 185 Mid. 341 (2001).**

Plaintiff, a noted scholar and all-purpose public figure, brought a defamation suit against defendant journalist for statements that plaintiff had plagiarized the treatise for which he won the Nobel Prize in Mathematics, Tiebreakers in the New Millennium: Volume Eleven. The Midlands Supreme Court affirmed the summary judgment dismissal, finding that a reporter does not act with reckless disregard of a statement's falsity merely because she does not corroborate information provided by a source. "A reporter's newsgathering tools are not limited to archival fact-checking and library research. Accordingly, when defendant has based his report on a source believed to have a history of truthful and honest statements, that defendant has not acted with 'actual malice.' Moreover, human sources need not be shining wonders of veracity in order for reporters to rely on them safely. Some of the most revealing journalism is made possible only through testimony by less than savory characters that might not traditionally be sources of first-rate news. However, "actual malice" may yet be found when the third-party source is of such dubious character that the journalist likely could not, in good faith, have actually believed him or her, or where the situation smacks of purposeful avoidance of the truth. Without making an exclusive list, one could readily surmise that this domain might be inhabited by anonymous tipsters, chronically inaccurate gossips, emotionally-charged individuals, nonprofessionals giving complex expert advice, or persons with a known grudge against the plaintiff. We urge that a totality of the circumstances test be used in making the above determination as to whether the journalist's reliance on the third party was reckless or inherently unreasonable."

***Sea v. Lao*, 612 Mid. 684 (2003)**

Plaintiff brought suit against defendant television network for reporting that plaintiff had erred in computing results of an intercollegiate scholastic competition. The Midlands State Supreme Court reversed the trial judge's verdict for the plaintiff, finding that plaintiff had failed to show that the communication was of "defamatory character." The Court explained that a statement is defamatory when it tends to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or (3) injure him in his business or occupation.

***Pataswathi v. De Smeth*, 604 Mid. 280 (2008)**

Plaintiff, a well-known television interviewer, brought suit against a defendant blog that criticized plaintiff for "kissing up" to guests. The trial court dismissed, and the Midlands Supreme Court affirmed, because the evidence showed that the statements were, in fact, true. "Truth is always a defense to defamation claims."

***Raja v. Midlands Gazette*, 564 Mid. 566 (1985)**
Plaintiff, a renowned food critic, brought suit against the defendant newspaper for an article criticizing plaintiff as having "the worst taste in food in all of the United States, possibly even North America." The jury returned a verdict in favor of the plaintiff, but ultimately the Midlands Supreme Court reversed, holding that the plaintiff had failed to establish that the statement was a statement of fact, rather than an opinion. "Only statements of fact are actionable in a defamation cause of action. Mere opinion does not give rise to liability for defamation." The Midlands Supreme Court did not state the standard for differentiating fact from opinion.

***Tygers v. Marriott*, 612 Mid. 584 (2005).**
Plaintiff, a lifelong candidate for political office, brought a libel suit against his preacher for allegedly defamatory statements during a Sunday sermon about plaintiff's supposed promiscuity. Defendant argued the publication element was not met because the congregation that heard the sermon was small in number, but the Court of Appeals rejected this argument. "It is well established that, in order to show publication for the purposes of a defamation claim, a plaintiff must only prove that defendant communicated the statement to someone other than the plaintiff."

***Sprinkles, Inc., v. Cheesecake Corp.*, 5 Mid. 213 (1996).**
Plaintiff candy company sued defendant dessert manufacturer for allegedly libelous statements about the addictiveness of plaintiff's products. Plaintiff conceded that the statements were literally true but argued that they were nonetheless misleading. The trial court dismissed the action because plaintiff failed to state a claim on which relief could be granted, but the Midlands Supreme Court reversed: "In some unusual instances, literally true statements may be actionable if they imply false and defamatory statements of fact. For example, if a journalist highlights only certain facts in a news report, perhaps by omitting other relevant facts, or perhaps by juxtaposing their presentation such that an image antagonistic to the actual occurrence is conjured in the recipient's mind, then that journalist may be liable for libel. Thus, in such a case, plaintiff is absolved of any burden of proof as to the traditional element of falsity related to defendant's actual utterances; rather, she must prove merely that the defamatory <u>implication</u> itself is false."

***Sour v. Bacon*, 12 Mid. 668 (1994).**
After the defendant spread rumors that plaintiff was HIV-positive, plaintiff brought suit for defamation. The trial court dismissed the complaint because plaintiff had no proof of special harm. The Court of Appeals affirmed. But the Midlands Supreme Court reversed and remanded. "Generally, a plaintiff in a defamation case must prove harm (synonymous with special damages) by a preponderance of the evidence. But where the statements in question constitute defamation per se, the statements are so obviously harmful that damages are presumed and plaintiff need not introduce evidence demonstrating harm or injury. There are four categories of defamation per se: (1) imputations of serious criminal conduct; (2) allegations injurious to someone in her trade, occupation, profession, or business; (3) imputations of infectious or loathsome disease; and (4) imputations that a woman has been unchaste."

***Acevedo v. Winnie*, 344 Mid. 345 (2001).**
Plaintiff, a former military general and current eyebrow model, brought suit against a tabloid journalist that described Plaintiff's driving as "so dangerous as to appear intoxicated." The

Midlands Supreme Court decided how the element of falsity should be evaluated in a defamation lawsuit. "The law of Midlands, in addressing whether a plaintiff has proven 'falsity' for the purposes of a defamation cause of action, overlooks minor inaccuracies and concentrates upon substantial truth. It is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details."

***Jaroscak v. Jaroscak*, 318 Mid. 662 (1986).**
The Midlands Supreme Court clarified the definition of "clear and convincing evidence"—the burden required to sustain the elements of falsity, defamatory character and actual malice in a suit for defamation. Plaintiff, a world-famous concert accordionist and all-purpose public figure, brought a defamation claim against her sister, also a concert accordionist, for allegedly libelous statements. The trial judge instructed the jury that "clear and convincing evidence" is evidence that "convinces the trier of fact that it is substantially more likely than not that the element in question is in fact true." After a jury verdict for plaintiff, defendant appealed on the grounds that the jury instruction was not sufficiently clear—in particular, that no specific percentage of certainty was assigned. The Midlands Court of Appeals and Midlands Supreme Court affirmed. "The trial court's definition of 'clear and convincing evidence' was proper. The quantum of proof necessary to satisfy this standard cannot be reduced to a mathematical figure. The clear and convincing standard is more rigorous than proof by a preponderance of the evidence but less rigorous than proof beyond a reasonable doubt. Other trial courts have described the standards as 'evidence that establishes a fact by a high probability' and this formulation is also acceptable."

***Bookin v. Ollman*, 965 Mid. App. 972 (2004).**
Plaintiff, the nationally celebrated author of the column *Romantic Liaisons in the Metropolis*, filed a suit for defamation against defendant journalist, whose publication stated that the plaintiff's columns "appeared strikingly (and perhaps problematically) similar" to those featured on a famous premium television program. The trial court granted defendant's motion for summary judgment and the Court of Appeals affirmed because the statement in question was non-actionable opinion. "In determining whether an allegedly defamatory statement is a fact or an opinion, the question is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact. We adopt the four-question test employed by the District of Columbia Court of Appeals for distinguishing fact from opinion. First, we ask does 'the allegedly defamatory statement have a precise meaning likely to give rise to clear factual implications'? Some statements—such as accusations of crime—tend to have well-defined meanings; some statements—such as calling someone a 'communist'—are more variously interpretable and may not give rise to liability for defamation because they do not convey fact. Second, 'is the statement objectively capable of proof or disproof?' If so, the statement is fact, not opinion. Third, does the context of the statement in the overall speech indicate that what would normally be a statement of fact is, in that context, more appropriately viewed as opinion? Fourth, does the broader social context of the speech indicate that the statement is fact or opinion? For example, information conveyed on an op-ed page comes across differently than information printed at the top of the front page."

***State v. Perry*, 972 Mid. App. 796 (2006).**
At trial, the Prosecution sought to introduce the testimony of a former FBI agent concerning the "criminal profile" of a kidnapper for ransom—that is, the general demographics and

characteristics of those who perpetrate crimes similar to the one that Defendant was accused of committing. The Defendant moved to exclude such testimony on the basis that it was irrelevant and unfairly prejudicial. The trial court admitted the testimony and the jury convicted the Defendant of kidnapping, but the Midlands Court of Appeals reversed the conviction because the expert testimony should not have been admitted. "Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officials in investigating criminal activity. Courts typically condemn the use of profiles as substantive evidence of guilt, while acknowledging that there is a fine line between potentially improper profile evidence and acceptable specialized testimony. Here, the jury should not have been allowed to hear testimony that the typical kidnapper for ransom is a white, middle-aged male with close ties to the family and an urgent financial need. Such testimony is of marginal relevance and is overly prejudicial."

***Falcon v. Shortens*, 612 Mid. App. 644 (2004).**
Defendant, a college professor, criticized plaintiff, a famous trial attorney, for using tactics and arguments that were no longer in vogue—specifically, defendant described plaintiff's trial performance as "old hat." Plaintiff brought suit for libel. The Midlands Court of Appeals affirmed the dismissal of plaintiff's claim on grounds that the statements were merely opinion. "An opinion is any broad, unfocused and wholly subjective comment. This does not turn on whether the publisher uses the expressions 'in my opinion,' 'as a matter of fact,' 'it seems to me,' etc. Instead, in deciding whether or not a statement is an opinion as a matter of law, the factfinder must place itself in the position of the hearer or reader, and determine the meaning of the statement according to its natural and popular construction. Midlands assesses whether statements are opinions or statements of fact by examining the totality of the circumstances with attention to the context of the statement."

***Cockatoo v. Grease Magazine*, 564 Mid. App. 514 (2004).**
Plaintiff, a celebrated professional poker player, brought a defamation suit against a periodical that stated that plaintiff "appeared high on some sort of drug or substance" during his appearance at the final table of a national poker tournament. The trial court dismissed the suit but the Midlands Court of Appeals reversed because "actual malice does not require ill will or hatred. Indeed, proof of such animosity could indicate the opposite, that the publisher possessed a genuine belief in the actionable statement. Of course, bias in combination with other factors, such as a departure from standard investigative techniques or an 'accidental' misrepresentation of gathered statements might be a strong step toward 'actual malice.' The public figure plaintiff, in many instances, will be able to compile compelling evidence that will cumulatively indicate the requisite degree of culpability on the defendant's part. Indeed, the defendant's bare assertions of belief in the truth of a publication cannot carry substantial weight unless they rest on similar direct or circumstantial evidence."

***Rastad v. Mariano*, 318 Mid. App. 319 (1989).**
The Midlands Court of Appeals affirmed a jury's verdict for plaintiff, a teacher who brought a defamation claim against defendant, a political activist. Defendant had published an article which paraphrased plaintiff's actual statements but nonetheless used quotation marks. "We conclude that a deliberate alteration of the words uttered by a plaintiff does not automatically equate with knowledge of falsity for purposes of establishing actual malice, unless the alteration

results in a material change in the meaning conveyed by the statement. The use of quotations to attribute words not in fact spoken is certainly relevant to the issues of falsity and actual malice, but is neither necessary nor sufficient for proof of either element."

***Davis v. Muscle Man Magzine*, 732 Mid. App. 12 (2008).**
Plaintiff bodybuilder brought a defamation claim against a fitness magazine that called Plaintiff's workout regimen "meek." Plaintiff hired an accomplished journalism professor to testify at trial that defendant's allegedly libelous conduct was preceded by violations of standard journalistic ethics and practices. Plaintiff argued that such evidence was probative as to whether defendant had acted with "actual malice" in reporting the crucial statement. The trial court excluded the proffered testimony, characterizing it as unfairly prejudicial. On appeal, the Midlands Court of Appeals reversed, holding that: "The 'actual malice' standard is a subjective one, in that the question which must be resolved is whether a particular defendant possessed a particular state of mind. 'Bad journalism' cannot be equated with 'actual malice.' Yet these standard practices exist for a reason, and that is because they are hallmarks of a thorough and honest news report. Parties are permitted to introduce expert journalistic evidence regarding accepted and preferred standards of journalism because deviation from such standards suggests a degree of carelessness. Extreme departure from general investigative standards can suffice for proof of reckless disregard. Of course, whether such carelessness reaches the level of recklessness is for the trier of fact to determine. In sum, while evidence of deviation or conformity to accepted journalism standards is never dispositive in a defamation lawsuit, it is always relevant."

***Liesunderoath.com v. Cucumber*, 338 Mid. App. 712 (2007).**
Plaintiff website brought claims against defendant for allegedly libelous statements made in an online forum. Defendant admitted at trial to having thought the statement was false at the time he made it, but introduced overwhelming evidence discovered after publication that the statement was, coincidentally, true. The trial court ruled in favor of defendant, and plaintiff appealed. The Midlands Supreme Court affirmed, stating: "Defendant may have had little or no evidence suggesting that his statement was true at the time of publication, but nonetheless, true it was. As a matter of common sense, there can be no action based on 'attempted libel.' The published statement must be false, and not just apparently false at the time of publication. It follows that truth discovered after the fact, even during the litigation itself, is just as valid a defense as truth known at the time of publication."

***Zakharov v. Siddique*, 12 Mid. App. 565 (2001).**
Plaintiff business owner brought a slander lawsuit against a journalist for accusations that plaintiff was a member of a Russian crime syndicate. The trial judge bifurcated the trial into separate phases for liability and damages. The trial court excluded all evidence related to the plaintiff's reputation, holding that such evidence was more appropriate for the damages phase of the trial but, on interlocutory appeal, the Midlands Court of Appeals reversed. "Where a trial has been bifurcated, then evidence offered may not be offered in the first phase for the sole purpose of establishing a fact or element at issue in the second phase. However, if evidence probative on an element at issue in the second phase also bears on an element at issue in the first, then such evidence is admissible in the first phase, as well. Here, evidence of the plaintiff's reputation is admissible in the liability phase to the extent that it can be used to establish the defamatory nature of the communication, actual malice, or that the statement concerned the plaintiff."

***State v. Beef*, 8 Mid. App. 24 (1978).**
In a prosecution for rape, the Defense cross-examined the alleged victim about her past sexual encounters and her bias towards the Defendant, implying that she may not have been raped at all. The Prosecution attempted to rebut this argument through the testimony of a special victims unit detective who had substantial experience with rape cases. The expert testified as to the typical behavior displayed by rape victims, and concluded that the alleged victim in this case acted consistently with such behavior. The Defense objected and the trial court overruled the objections and permitted the testimony in its entirety. On appeal, the Midlands Court of Appeals affirmed. "Jurors cannot be presumed to have knowledge of the behavior exhibited by rape victims. The expert's testimony might have shed light on critical issues in the case and helped the jury to determine the credibility of the alleged victim. Were the expert's testimony excluded, jurors might have assigned undue weight to certain facts, including the fact that the victim did not report her alleged assault for several days. The probative value of the testimony in assisting the jury with the determination of whether a rape actually occurred substantially outweighs the prejudicial effect of such profile evidence."

***Bryant v. Lion and Eagle Studios*, 564 Mid. App. 567 (1998).**
Plaintiff, an award-winning thespian, filed a libel claim against defendant theater company that, after interviewing several fellow cast members, published statements that plaintiff had forgotten lines in multiple stage performances. The falsity of defendant's statements was stipulated. At trial, defendant sought to introduce evidence that it believed the statements to be true. Plaintiff objected on grounds of relevance. The trial court sustained the objection and excluded the testimony. On appeal, the Midlands Court of Appeals reversed. "A defendant's honest belief that her statement is truthful is relevant whenever a public figure brings suit for defamation. It is probative on the issue of actual malice. Defendants in defamation suits should always be permitted to explain why they believed the statement to be true. Such testimony may be objectionable, but not on grounds of relevance."

***Howard v. Caspar*, 341 Mid. App. 189 (2005).**
Defendant journalist, ghost-writing, reported that a public figure plaintiff fled the country after being charged with serving alcohol to minors. Plaintiff sued for defamation. In assessing whether actual malice had been proved based on a theory of reckless disregard for the truth, the Court of Appeals was guided by three sets of questions: "(1) How urgent was the news story? Was there enough time to check the facts? (2) How reliable was the source of the story? (3) Was the story probable, or so unlikely it demanded further investigation?"

***Nguyen v. Midlands Gazette*, 298 Mid. App. 12 (2001).**
Defendant newspaper published a story that a certain world-famous movie actress was "late." In the context of the article, the newspaper implied that the actress was pregnant, which was not true. Plaintiff brought suit for libel. The newspaper defended on the ground that the article never explicitly mentioned the plaintiff by name, and that therefore the "of or concerning" requirement of Midlands Code section 73.001 had not been satisfied. The trial court dismissed but the Midlands Court of Appeal reversed. "A statement need not identify a plaintiff by name in order to be 'of or concerning the plaintiff.' If the statement identifies the plaintiff with such specificity that a reasonable reader of the statement's intended or likely audience would recognize the statement to refer to the plaintiff, then the plaintiff has satisfied the 'of or

concerning' requirement. In this case, the article identified several movies in which plaintiff had appeared and noted the prominent blonde streaks in plaintiff's black hair, which was sufficient."

***Bowden v. Johnson & Erickson LLP*, 18 Mid. App. 45 (2007).**
Plaintiff employee filed suit for defamation after Defendant employer made comments that Plaintiff's incompetence had caused the law firm severe losses. The trial court excluded evidence of the Defendant's past poor job performance as inadmissible character evidence under Rule 404. The Midlands Court of Appeals reserved. "Defendants in defamation cases have a wide right to challenge the elements of falsity and fault (fault either in the form of negligence or actual malice). The general preclusion of character evidence does not trump such a right. When a plaintiff brings a claim for defamation, he or she necessarily places her character at issue within the meaning of Rule 405."