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## Defamation in the Age of Social Media: Why North Carolina's "Micro-influencers" Should Be Classified as Limited Purpose Public Figures

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# **Defamation in the Age of Social Media: Why North Carolina's "Micro-influencers" Should be Classified as Limited Purpose Public Figures**

## ABSTRACT

*The advent of social media has changed the way society communicates and the way ideas are spread. These new platforms for speech have inevitably pushed the boundaries of the law, particularly in the area of defamation. Social media has created new types of speakers, new publication methods, and easier ways for people to defame each other. This Comment examines existing constitutional and North Carolina-specific defamation law, explains how defamation law has evolved in the 21<sup>st</sup> century, provides a focused description of two types of social media users in 2020, and proposes a way for North Carolina courts to adapt current standards to these new speakers in a way that continues to protect speech.*

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## INTRODUCTION

In the age of social media, new, innovative, and at times perplexing trends are always emerging. The ability to constantly post about every minute detail of life and interact with millions of people while remaining protected by the anonymity of a screen has created new jobs, marketing strategies, and social conventions.<sup>1</sup> Two such creations are influencers and their enemies, trolls.<sup>2</sup> Nowadays, people of all ages are being paid to promote various products—anything from clothing and restaurants to perfumes and medications.<sup>3</sup> Instagram, in particular, allows promotion to occur by simply posting a well-staged photo with a positive caption and tagging the business or product.<sup>4</sup>

That trend is certainly growing in North Carolina, particularly with micro-influencers, who have a lower number of followers than the big-name celebrities.<sup>5</sup> However, with a greater number of followers comes a greater chance of being trolled.<sup>6</sup> Trolling occurs when the troll visits a social media page, visible to all who view the page, and leaves negative comments.<sup>7</sup> These types of interactions have created a forum for defamation that have pushed the boundaries of defamation law's antiquated standards beyond the mega-famous and newspapers.<sup>8</sup> The rise of social media demands careful consideration of the labels afforded to social media users and the burdens created by those labels for the purposes of defamation claims. This Comment argues that North Carolina's growing number of social media micro-influencers should be considered limited public figures in the context of defamation litigation, and therefore be required to prove actual malice rather than mere negligence to support a defamation claim, because of their intentional presence in the public eye. By making it more difficult to hold online commenters and trolls legally liable for their statements, adopting the

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1. Alejandra Guzman & Farida Vis, *6 Ways Social Media is Changing the World*, WORLD ECON. F. (Apr. 7, 2016), <https://perma.cc/Q2G3-TAE5>.

2. *Trolls, Influencers and the Virtual Civilization*, CEU IAM: BLOG (July 3, 2017), <https://perma.cc/92F6-MEUX>.

3. Laura Brummett, *Wait, You Can Get Paid for Posting Instagram Photos? Influencer Industry Flourishes*, NEWS & OBSERVER (June 12, 2019), <https://perma.cc/P6WL-DHMF>.

4. *See Branded Content on Instagram*, INSTAGRAM, <https://perma.cc/G6BH-KWJ6>.

5. Brummett, *supra* note 3.

6. *Be Careful of Trolls on Your Instagram*, HELPWYZ, <https://perma.cc/R7DC-L2JU>.

7. *See id.*

8. *See generally* Cory Batza, Note, *Trending Now: The Role of Defamation Law in Remediating Harm from Social Media Backlash*, 44 PEPP. L. REV. 429 (2017).

actual malice standard would adapt old standards to contemporary developments and maintain important protections for free speech and opinions.

## I. A BRIEF HISTORY OF DEFAMATION

### A. Common Law Standards

Historically, a successful common law defamation suit required (1) a false defamatory statement, (2) concerning the plaintiff, (3) publication of the statement by the defendant to someone other than the plaintiff, (4) the defendant's fault in causing the publication, and (5) damage to the plaintiff.<sup>9</sup> Although the defendant must have been at fault for the publication of the statement, "a defendant was strictly liable" with respect to whether the defamatory statement was false at the time of publication.<sup>10</sup> Therefore, under this system, a defendant had to prove the statement was true as an affirmative defense in order to avoid liability.<sup>11</sup> The law centered around harm to reputation and whether people wanted to associate with the plaintiff after a defamatory comment was made.<sup>12</sup> However, constitutional standards eventually emerged and added new dimensions to defamation, which in turn influenced how North Carolina analyzes defamation.

#### 1. Constitutional Standards

In mid-twentieth century United States, constitutional protections complicated common law standards by creating different categories of plaintiffs and creating different burdens for those plaintiffs to meet. One such complication was the classification of different types of plaintiffs in defamation cases. *New York Times v. Sullivan* first created the public figure standard.<sup>13</sup> The case involved an Alabama elected official who sued the *New York Times* after it published an advertisement criticizing the official's role in the civil rights movement.<sup>14</sup> Ruling for the *New York Times*, the Court held that "public officials" must prove actual malice in order to

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9. *See id.* at 442.

10. John J. Watkins & Charles W. Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH. L. REV. 823, 825 (1984).

11. Batza, *supra* note 8, at 443.

12. *Id.*

13. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

14. *Id.* at 256–59.

recover in a defamation suit.<sup>15</sup> “Actual malice” requires proof the defendant made the statement knowing it was false or with reckless disregard as to its falsity.<sup>16</sup> The Court reasoned that requiring a defendant to prove his statements were true, a complete defense under the traditional common law standard, would have a chilling effect on speech and keep the public from voicing its concerns with those public officials.<sup>17</sup> If citizens are afraid of being sued or of not being able to prove that the statements were true, the Court reasoned, they will only make statements that “steer far wider of the unlawful zone.”<sup>18</sup> The resulting fear of reprisal for anything that is not completely and provably true “dampens the vigor and limits the variety of public debate” at the root of the First Amendment.<sup>19</sup> That root is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” that often involves speech that is critical of public officials.<sup>20</sup> In those open debates, people will exaggerate, vilify, or even lie in order to persuade others to agree with them, and erroneous statements are therefore unavoidable.<sup>21</sup> The Court ultimately concluded that imposing liability for incorrect statements about public officials “reflect[s] the obsolete doctrine that the governed must not criticize their governors.”<sup>22</sup>

*New York Times v. Sullivan* had a profound impact on defamation law. Supporters of the decision believe that the actual malice standard laid down in the case does what it was intended to do: create space for open and honest debate.<sup>23</sup> Some have even called it “the most important free speech ruling in the history of the U.S. Supreme Court” because it allowed media outlets to write and broadcast freely.<sup>24</sup> That result is not without consequences. Allowing a freer press means some publications will make completely false statements or make allegations that they should know are not true.<sup>25</sup> There

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15. *Id.* at 283–84.

16. *Id.* at 279–80.

17. *Id.* at 279.

18. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

19. *Id.* at 279.

20. *Id.* at 270; *see, e.g.*, *Roth v. United States*, 354 U.S. 476 (1957); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

21. *N.Y. Times Co.*, 376 U.S. at 271–72.

22. *Id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

23. *See, e.g.*, John Bruce Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides “Breathing Space” for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 28 (2014).

24. *Id.* at 29 (quoting Cass R. Sunstein, *The Dark Side of New York v. Sullivan*, BLOOMBERG (Mar. 25, 2014), <https://perma.cc/9FE4-5DYM>).

25. *Id.* at 29–30.

has also been an increase in defamation litigation since the decision.<sup>26</sup> Despite those drawbacks, the actual malice standard balances the importance of free speech and the need for those injured by speech to seek redress.<sup>27</sup>

Ten years after *New York Times v. Sullivan*, in *Gertz v. Welch*, the Court expanded the public figure doctrine.<sup>28</sup> Plaintiff, Gertz, an attorney in a high-profile civil rights case, was the talking point of a highly critical article in a magazine called *American Opinion*.<sup>29</sup> The article accused Gertz of being part of a “frame-up” to “discredit local law enforcement agencies and create . . . a national police force capable of supporting a Communist dictatorship.”<sup>30</sup> The Court held that Gertz was neither a public official nor a public figure. As in *New York Times v. Sullivan*, the Court began its analysis by confirming the idea that “[u]nder the First Amendment there is no such thing as a false idea. . . . [I]t is nevertheless inevitable in free debate.”<sup>31</sup> However, the Court noted that false ideas do not advance society’s interest in free debate.<sup>32</sup> Thus, the Court attempted to balance the tension between the need for free speech, including a free press, and the states’ legitimate interest in providing remedies for those wrongfully injured by false statements.<sup>33</sup> While *New York Times v. Sullivan* resolved that tension in favor of a free press, *Gertz* recognized that the interests at stake are different in suits involving private persons.<sup>34</sup> The Court explained that because public officials and public figures (1) have access to media and (2) assume the risk of injury by voluntarily inserting themselves into the public eye, they can more effectively refute any false statements made about them.<sup>35</sup> Importantly, the Court also held states are free to impose whatever standard of liability they choose for defamation involving a private individual, as long as it is not faultless liability.<sup>36</sup>

The distinctions between public and private individuals prompted the Court to create subsets of public figures and different standards of proof for

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26. *Id.* at 30.

27. *Id.*

28. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

29. *Id.* at 325.

30. *Id.*

31. *Id.* at 339–40.

32. *See id.* at 340.

33. *Id.* at 341–43.

34. *Id.* at 343.

35. *Id.* at 344–45; *see also* Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure? How to Apply the Gertz Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUTER & HIGH TECH. L.J. 199, 213 (2012).

36. *Gertz*, 418 U.S. at 347.

public figures and private individual plaintiffs.<sup>37</sup> The Court identified two relevant types of public figures: general public figures and limited purpose public figures.<sup>38</sup> General public figures “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>39</sup> In contrast, limited purpose public figures only gain notoriety if they “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.”<sup>40</sup> The Court later clarified that lower courts can determine on a case-by-case basis what a public controversy is “by looking at the ‘content, form, and context’ of the speech’s publication.”<sup>41</sup>

Despite the Court’s efforts in *Gertz*, it only left lower courts with a general outline of the public figure doctrine.<sup>42</sup> While subsequent Supreme Court cases emphasized the necessity of voluntary action by the plaintiff before classifying him or her as public figure,<sup>43</sup> lower courts have delved deeper into what exactly constitutes voluntary action for both general public figures and limited purpose public figures.<sup>44</sup> For example, some courts found household name individuals to be general public figures while other courts also found individuals who are only well-known in a geographic area to be general public figures.<sup>45</sup> Those discrepancies have made it difficult for lower courts to apply the public figure doctrine, and different tests inevitably create different results.<sup>46</sup>

After a court determines which type of public figure the plaintiff is, it must examine the specific statement at hand and its relation to the plaintiff.<sup>47</sup> If someone has become so famous that everyone knows him or her, even outside his or her chosen realm, (e.g., Kim Kardashian or Barack Obama), then anything said about virtually any aspect of their lives relates to their

37. *Id.* at 345–48.

38. Lafferman, *supra* note 35.

39. *Gertz*, 418 U.S. at 345.

40. *Id.*

41. Batza, *supra* note 8, at 451 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

42. Lafferman, *supra* note 35, at 214.

43. See *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 165–66 (1979).

44. Lafferman, *supra* note 35, at 216–20.

45. *Id.* at 217–18.

46. See *id.* at 216–20.

47. *Proving Fault: Actual Malice and Negligence*, DIGITAL MEDIA L. PROJECT, <https://perma.cc/97SX-TD3L>.

public-figure status.<sup>48</sup> Once the general public figure proves the statement is about them, they must then prove the statement was made with actual malice.<sup>49</sup> In contrast, if the plaintiff is a limited purpose public figure, they must show that the statement is “connected to the public controversy out of which the public figure status arises,”<sup>50</sup> meaning it must relate to the public controversy that sparked the plaintiff’s limited fame.<sup>51</sup> A limited purpose public figure must also then prove the statement was made with actual malice.<sup>52</sup>

The standard is much less burdensome for private individuals. Unless a controlling jurisdiction determines that a higher standard applies, private individuals, unlike public officials and public figures, need only prove defamatory statements were made negligently.<sup>53</sup> This means the defendant failed to exercise the “standard of care that a reasonably prudent person would have exercised in a similar situation.”<sup>54</sup> These constitutional guidelines revolutionized the way courts analyze defamation cases and imposed new standards for state courts to implement and mold as unique cases came before them.

## 2. North Carolina Standards

States have been largely left to fill in the gaps created by Supreme Court jurisprudence on defamation. North Carolina law recognizes three types of written defamation: (1) obviously defamatory words, termed libel per se, (2) written words capable of more than one meaning, one of which is defamatory, and (3) written words that are only defamatory when considered with context and explanatory circumstances, termed libel per quod.<sup>55</sup> In North Carolina, courts have cautioned that there are limited circumstances when an alleged defamatory statement is elevated from North Carolina common law to First Amendment protections outlined in *New York Times* and its progeny.<sup>56</sup> The factors for determining whether a defamation case rises to constitutional protection are (1) “the individual

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48. *See id.*

49. *See id.*

50. RODNEY A. SMOLLA, *LAW OF DEFAMATION* 2:78 (2d ed. 1986 & Supp. 2019).

51. *See Proving Fault: Actual Malice and Negligence*, *supra* note 47.

52. *See id.*

53. Batza, *supra* note 8, at 445.

54. *Id.* (quoting *Negligent*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

55. *Kingsdown, Inc. v. Hinshaw*, No. 14-CVS-1701, 2016 NCBC LEXIS 15, at \*54 (N.C. Super. Ct. Feb. 17, 2016).

56. *Mathis v. Daly*, 695 S.E.2d 807, 810 (N.C. Ct. App. 2010).



capacity of the plaintiff” and (2) “the content of the speech.”<sup>57</sup> Public officials and public figures can only recover damages on proof of actual malice.<sup>58</sup> Otherwise, North Carolina-specific common law standards apply.<sup>59</sup> This means that if the plaintiff is a private figure and the speech involved is on a private matter, a North Carolina court can look to its own common law standards, as noted in *Gertz*, without running afoul of First Amendment protections.<sup>60</sup>

In order to determine when an individual becomes a limited purpose public figure, North Carolina courts have largely fallen in line with Supreme Court requirements. Becoming a limited purpose public figure requires “purposeful activity amounting to a thrusting of his personality into the ‘vortex’ of an important public controversy.”<sup>61</sup> That test is satisfied by looking to the particular controversy that gave rise to the defamatory statement and examining whether the nature and extent of the plaintiff’s participation in that particular controversy is sufficient to justify public figure status.<sup>62</sup> In contrast, if a North Carolina court determines that a plaintiff is a private individual, the next consideration is whether the defamatory statement was about a matter of public concern.<sup>63</sup> A matter of public concern is determined by the content, form, and context of statement.<sup>64</sup>

Once an individual is classified as a limited purpose public figure, the next step is determining whether the statement in question was made with actual malice. Actual malice requires proof that defendants published the statement with knowledge of its falsity or with reckless disregard of whether it was false or not.<sup>65</sup> North Carolina courts emphasize the importance of examining defamation claims on a case-by-case basis rather than applying bright-line rules that produce inconsistent results.<sup>66</sup> The actual malice standard promotes “‘uninhibited, robust, and wide-open’ speech” in the

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57. *Id.* (quoting *Neill Grading & Constr. Co. v. Lingafelt*, 606 S.E.2d 734, 738 (N.C. Ct. App. 2005)).

58. *Id.*

59. *Id.*; see also *In re Duncan*, 822 S.E.2d 467, 472 (N.C. Ct. App. 2018).

60. *Mathis*, 695 S.E.2d at 810; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

61. *Gaunt v. Pittaway*, 534 S.E.2d 660, 665 (N.C. Ct. App. 2000) (quoting *Taylor v. Greensboro News Co.*, 291 S.E.2d 852, 857 (N.C. Ct. App. 1982)).

62. *Mathis*, 695 S.E.2d at 810.

63. *Id.* at 811.

64. *Id.*

65. *Desmond v. News & Observer Publ’g Co.*, 823 S.E.2d 412, 425 (N.C. Ct. App. 2018).

66. *Id.* at 424.

eyes of North Carolina courts.<sup>67</sup> Further, the falsity of the statement must be proven by a preponderance of the evidence, rather than the higher clear and convincing evidence standard.<sup>68</sup> Actual malice, which requires proof by clear and convincing evidence, remains exceedingly difficult for North Carolina plaintiffs to prove.<sup>69</sup>

While attacking actual malice is an option for defendants facing defamation suits, they can also assert a true opinion defense.<sup>70</sup> True opinion is a defense to defamation when the “statement ‘can[not] reasonably [be] interpreted as stating actual facts about an individual’ or is incapable of being proven or disproven.”<sup>71</sup> Courts will look to whether the language is “‘loose, figurative, or hyperbolic.’”<sup>72</sup> Prefacing a statement with “in my opinion,” however, does not automatically confer immunity on a defendant.<sup>73</sup> Similarly, hyperbole is a defense to defamation; it is successful when the defendant proves that no reasonable reader or viewer would believe the statement is literally true.<sup>74</sup> When considering whether a statement is opinion or hyperbole, North Carolina courts will consider “how the alleged defamatory publication would have been understood by an average reader.”<sup>75</sup> Courts will also only consider the statement in the context of where it is stated.<sup>76</sup>

These standards developed by North Carolina courts must be adapted to the unique context of social media. This may prove challenging, but it is entirely workable.

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67. Neill Grading & Constr. Co. v. Lingafelt, 606 S.E.2d 734, 742 (N.C. Ct. App. 2005) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

68. *Desmond*, 823 S.E.2d. at 437.

69. *Id.* at 438.

70. *See* Craven v. Cope, 656 S.E.2d 729, 732 (N.C. Ct. App. 2008).

71. *Daniels v. Metro Magazine Holding Co.*, 634 S.E.2d 586, 590–91 (N.C. Ct. App. 2006); *see also* *Kingsdown, Inc. v. Hinshaw*, No. 14-CVS-1701, 2016 NCBC LEXIS 15, \*57 (N.C. Super. Ct. Feb. 17, 2016).

72. *Daniels*, 634 S.E.2d at 590 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)).

73. *Id.*

74. *Craven*, 656 S.E.2d at 733.

75. *Nucor Corp. v. Prudential Equity Grp., LLC*, 659 S.E.2d 483, 487 (N.C. Ct. App. 2008).

76. *Id.*

## II. ANALYSIS OF DEFAMATION AS IT APPLIES TO MICRO-INFLUENCERS IN NORTH CAROLINA

### A. Evolution of Defamation in the 21<sup>st</sup> Century in North Carolina

The tremendous growth of social media platforms, such as Facebook, Instagram, and Twitter, has forced courts to wrestle with traditional defamation standards and apply them to an ever-evolving arena. While cases with celebrities like Courtney Love have garnered national attention,<sup>77</sup> smaller scale cases are also occurring across the country. Other states have faced the challenge of classifying the plaintiff, while North Carolina has pushed off the issue by dismissing internet defamation cases, often due to lack of personal jurisdiction.<sup>78</sup> Notably, “no meaningful Internet defamation cases have made it to the appeals process in North Carolina.”<sup>79</sup>

However, other courts have directly addressed the issue of classifying plaintiffs in internet defamation cases. For example, in *Mimedx Group, Inc. v. Sparrow Fund Management LP*, a federal district court<sup>80</sup> considered whether online statements of investors accusing the company of fraud were defamatory.<sup>81</sup> Before the court analyzed any part of the alleged defamatory statements, it classified the plaintiff as a public figure because it was a public company.<sup>82</sup> Ultimately, the court concluded the statements were opinions because they were made during a conversation between sophisticated investors and involved the speakers’ predictions about a lawsuit against the company.<sup>83</sup> In *Bajardi v. Pincus*, a New Jersey court analyzed both the content of online comments posted to a newspaper article

77. *Jury Rules in Favor of Courtney Love in “Twibel” Case*, ABC NEWS (Jan. 24, 2014), <https://perma.cc/7KJP-KVMY>. A lawyer sued Courtney Love over Love’s tweet alleging that the lawyer took a bribe to back out of one of Love’s legal battles. *Id.* The jury ruled in Love’s favor in one of the first “Twibel” cases, finding that there was not “clear and convincing evidence that she knew the statement was false.” *Id.*

78. *See, e.g.,* Crowell v. Davis, No. COA12–859, 2013 N.C. App. LEXIS 325 (N.C. Ct. App. 2013); Dailey v. Popma, 662 S.E.2d 12 (N.C. Ct. App. 2008); Kingsdown, Inc. v. Hinshaw, No. 14-CVS-1701, 2016 NCBC LEXIS 15 (N.C. Super. Ct. Feb. 17, 2016); *see generally* Aaron Minc, *The Minc Law Guide to North Carolina Defamation Law*, MINC (Nov. 9, 2018), <https://perma.cc/E2TJ-647E>.

79. Minc, *supra* note 78.

80. The federal district court applied New York common law in its analysis of whether the statement consisted of opinion or hyperbole. *Mimedx Grp., Inc. v. Sparrow Fund Mgmt. LP*, No. 17-CV-07568 (PGG) (KHP), 2018 U.S. Dist. LEXIS 28026, at \*15–19 (S.D.N.Y. Jan. 12, 2018).

81. *Id.* at \*15.

82. *Id.*

83. *Id.* at \*16–\*20.

and the content of other online posts.<sup>84</sup> The trial court judge specifically ruled that the plaintiff was a limited purpose public figure based on his involvement in local politics.<sup>85</sup> The court found the language in one of the alleged defamatory comments posed rhetorical questions rather than factual statements.<sup>86</sup> Therefore, the plaintiffs lacked an actionable claim for defamation.<sup>87</sup>

These cases are indicative of how state courts are adapting standards created almost half of a century ago, before the inception of social media, to twenty-first century cases. Their detailed analyses glimpse into exactly who the plaintiffs were and their involvement in the public eye.<sup>88</sup> Because internet defamation is a relatively new area of law, it is important for state courts to carefully and critically evaluate each case as those courts above did. Only through careful consideration of the unique aspects of internet defamation and social media can courts navigate their way to standards that adequately balance free speech and adequate remedies for those harmed by speech. North Carolina can look to these cases for guidance when similar scenarios inevitably arise in its courts.

#### *B. Types of Social Media Users in 2020<sup>89</sup>*

“[L]ike trolls . . . , the term *influencer* is one of those words that ubiquity has rendered meaningless. It is simultaneously an insult and an aspiration, the scourge of small business owners and the future of marketing . . . .”<sup>90</sup> Thus, to determine how a North Carolina court would analyze a social media defamation case, it is important to define social media users like influencers and trolls.

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84. *Bajardi v. Pincus*, Nos. A-5668-14T4, A5729-14T4, A5745-14T4, 2019 N.J. Super. Unpub. LEXIS 1728 (N.J. Super. Ct. App. Div. Aug. 2, 2019).

85. *Id.* at \*62–\*63.

86. *Id.* at \*51. The statements made by defendants spanned over thirty blog posts and included accusations that the plaintiff was a cooperating witness with the FBI in an investigation of the defendant, a photo with a convicted felon with the caption “Birds of a Feather,” and accusations that the plaintiff may face prison time for not paying his taxes. *Id.* at \*18–20.

87. *Id.* at \*51.

88. See *Mimedx Grp., Inc.*, 2018 U.S. Dist. LEXIS 28026, at \*1; *Bajardi*, 2019 N.J. Super. LEXIS 1728, at \*1.

89. This Comment analyzes defamation in the context of micro-influencers and trolls.

90. Paris Martineau, *The WIRED Guide to Influencers*, WIRED (Dec. 6, 2019), <https://perma.cc/FZ4D-ERU6>.

### 1. *Influencers*

In the last decade, influencers ranging from celebrities like Bella Hadid and Kendall Jenner to local residents have risen to influence what festivals internet users attend,<sup>91</sup> where they eat, where they shop, and where they live.<sup>92</sup> But what is an influencer exactly? “An influencer is someone who has[] the power to affect the purchasing decisions of others because of his or her authority, knowledge, position, or relationship with his or her audience.”<sup>93</sup> Alternatively, an influencer is an individual who has “a following in a distinct niche, with whom he or she actively engages. The size of the following depends on the size of his/her topic of the niche.”<sup>94</sup> With 3 billion people using social media (the equivalent of 40% of the world’s population), and with estimates of the social media influencer market already exceeding \$1 billion, the potential to influence is huge.<sup>95</sup>

The way influencers work is relatively simple. In order to become influential enough for a company to pay them to promote their products, influencers usually pick a specific niche or “corner of influence” and determine a target audience.<sup>96</sup> Next, influencers develop their content with an emphasis on finding “the right balance of informative content and personal content” in order to be relatable.<sup>97</sup> That relatability will hopefully lead to more followers, which is ultimately what defines an influencer.<sup>98</sup> Influencers will get paid by a company to post regularly about a specific topic or product on various social media platforms to their many followers once their follower base is established.<sup>99</sup> This “influencer marketing” allows influencers to establish credibility in an industry while promoting

91. Tom Huddleston, Jr., *Fyre Festival: How a 25-year-old Scammed Investors Out of \$26 Million*, CNBC: MAKE IT (Aug. 22, 2019), <https://perma.cc/33ES-964C>.

92. *20 Influencer Marketing Statistics that Will Surprise You*, DIGITAL MARKETING INST., <https://perma.cc/PBM4-FWAS>.

93. *What is an Influencer?*, INFLUENCER MARKETING HUB (Jan. 22, 2020), <https://perma.cc/HV85-L2YF>.

94. *Id.*

95. Simon Kemp, *Three Billion People Use Social Media*, WE ARE SOCIAL (Aug. 10, 2017), <https://perma.cc/6KU6-NCVJ>; Zameena Mejia, *Kylie Jenner Reportedly Makes \$1 Million Per Paid Instagram Post*, CNBC: MAKE IT (Aug. 1, 2018), <https://perma.cc/P99Z-Z3GQ>.

96. Kevin Payne, *How to Become an Influencer in Your Industry*, HUBSPOT (Nov. 12, 2019), <https://perma.cc/J6YK-3RLB>.

97. *Id.*

98. *See id.*

99. Tara Johnson, *How Much Do Influencers Charge?*, TINUITI (Jan. 24, 2020), <https://perma.cc/C592-BFDM>.

products and driving buyers to businesses.<sup>100</sup> However, “not all ‘influencers’ are created equal.”<sup>101</sup> Marketing firms worldwide have attempted to classify influencers into categories in order to best help their clients choose the right person to promote their products.<sup>102</sup> The types of influencers that stand out most are celebrities, industry experts and thought leaders, bloggers and content creators, journalists, and micro-influencers.<sup>103</sup>

Though each of these categories have their own benefits and pitfalls, they all share a common thread of ultimately being paid to connect with their already-established follower base, while pushing brands and products.<sup>104</sup>

In North Carolina, the prevalence of the micro-influencer is growing. Many North Carolina micro-influencers are “lifestyle bloggers.”<sup>105</sup> Lifestyle bloggers write and post to social media about everyday things like kids, school, haircuts, food, and saving money.<sup>106</sup> They live in all areas of the state from Raleigh to Charlotte to Fayetteville and everywhere in between.<sup>107</sup> These bloggers tend to stick to Instagram and have a limited following of less than 50,000 followers; that limited number of followers plus their advertisements about products they use make these bloggers micro-influencers.<sup>108</sup> However, it is important to note that being an influencer does not automatically mean getting paid to promote products; influencers are simply people with a large audience that they can persuade.<sup>109</sup> Their existence is centered around an authentic connection with their followers, which does not necessarily translate into making money.<sup>110</sup> Garnering a large enough fanbase to reach influencer status is a difficult challenge in and of itself; however, being paid to be an influencer is an even greater challenge.<sup>111</sup>

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100. *Id.*; *What is a Social Media Influencer?*, PIXLEE, <https://perma.cc/BDT6-BFYU>.

101. Kimberly A. Whitler, *6 Types of Influencers and How to Identify A ‘True’ Influencer*, FORBES (June 15, 2019), <https://perma.cc/GP6N-5BU7>.

102. *Id.*

103. *See id.*

104. *See id.*

105. *10 NC Lifestyle Bloggers You Need to Know*, THEMRSTEE, <https://perma.cc/Y9LD-ZCWN>.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See What is a Social Media Influencer?*, *supra* note 100.

110. *See* Shane Barker, *How to Become an Influencer: A Beginner’s Guide*, SHANE BARKER: BLOG (Feb. 12, 2019), <https://perma.cc/9BV9-PBZ8>.

111. *See* Chavie Lieber, *How and Why do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018), <https://perma.cc/7Q5X-9FG7>.

Even beyond the lifestyle blog trend, North Carolina businesses are taking notice of the impact influencers can have on their businesses.<sup>112</sup> For small businesses, micro-influencers are the perfect way to create authentic and more targeted advertisements at lower rates.<sup>113</sup> By paying micro-influencers, North Carolina businesses are creating brand-loyalty and exposure while helping local residents make a living.<sup>114</sup> In turn, North Carolina micro-influencers emphasize the importance of building consumer trust and being genuine in order to build a true following.<sup>115</sup> As far as making a living goes, Raleigh-based influencers typically get paid \$100 per 10,000 followers, but that number can be negotiated based on follower engagement, which includes “liking” and commenting on posts.<sup>116</sup> And it seems that trend will only continue in North Carolina.<sup>117</sup> One Charlotte-based public relations firm hosts pop-up classes every month for people who wish to build a business around advertising on social media.<sup>118</sup> Bakeries, restaurants, fashion boutiques, hair stylists, mixologists, fitness trainers, clothing designers, photographers, and every business and person in between harness the power of social media across the state, which includes using influencers.<sup>119</sup>

## 2. Trolls

Though the world of social media allows everyone to express their ideas and share their lives freely, it also creates a space for trolls to anonymously wreak havoc on feelings and inflame passions everywhere with little to no repercussion. A troll is someone who “creates a conflict on sites like Twitter, Facebook, and Reddit by posting messages that are particularly controversial or inflammatory with the sole intent of provoking an emotional (read: angry) response from other users.”<sup>120</sup> Trolls often use hateful language and ad hominem attacks to quickly and frequently attack

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112. See Brummett, *supra* note 3.

113. See *id.*

114. *Id.* Micro-influencer @unconventional\_southern\_belle promotes businesses like hotels and hair salons, and pubs, primarily in Burlington, North Carolina. *Id.*

115. *Id.*

116. *Id.* Influencers can increase rates by writing longer blogs or creating recipes. Some even charge to attend an event. Sarah Crosland, *Meet Charlotte’s Millennial #Influencers*, CHARLOTTE MAG. (July 23, 2018), <https://perma.cc/8RTK-4RXC>.

117. Brummett, *supra* note 3.

118. Crosland, *supra* note 116.

119. See *id.*; *10 NC Lifestyle Bloggers You Need to Know*, *supra* note 105.

120. Andre Bourque & Hayley Irvin, *Answering a Social Troll - What You Need to Know*, HUFFPOST (Dec. 6, 2017), <https://perma.cc/2U53-EQQX>.

whoever happens to spark their interest that day.<sup>121</sup> When a troll engages in this behavior, it is called “trolling,”<sup>122</sup> and there are several ways trolls do this. Whether they are insulting, debating, spell-checking, or explaining why they are perpetually offended, trolls affect social media users everywhere.<sup>123</sup>

While some view trolling as an entertaining or clever way to use social media,<sup>124</sup> trolling victims tend to disagree.<sup>125</sup> A cursory internet search reveals dozens of blogs on how to deal with trolls, most of which simply encourage trolling victims to not engage with their trolls.<sup>126</sup> But a particularly incensed victim can also respond by unmasking anonymous trolls,<sup>127</sup> using humor to lighten the situation,<sup>128</sup> blocking the troll,<sup>129</sup> or correcting the troll’s mistakes.<sup>130</sup>

North Carolina residents and businesses are not troll-immune, and stories revolving around trolls have garnered news-worthy attention.<sup>131</sup> Last year, a Cornelius, North Carolina, mother took on Twitter after a troll used a picture of her disabled daughter to promote abortion and got the site to take down the offensive tweet.<sup>132</sup> In Asheville, a troll used a fake profile to “disrupt, divide, engage and enrage” online communities centered around

121. *Id.*

122. *Definition—What Does Troll Mean?*, TECHOPEDIA (Feb. 5, 2019), <https://perma.cc/53G4-96YB>.

123. See Elise Moreau, *10 Types of Internet Trolls You’ll Meet Online*, LIFEWIRE (Jan. 20, 2020), <https://perma.cc/K2WG-SN22>.

124. See, e.g., Brad Dickson, *34 Hilarious Trolls That Left People Dumbfounded*, CHEEZBURGER: FAIL BLOG, <https://perma.cc/29D6-FN32>; Ann Smarty, *7 Most Awesome Internet Trolls of All Times*, INTERNET MARKETING NINJAS: BLOG (Oct. 8, 2012), <https://perma.cc/XGL7-GCBS>.

125. See, e.g., Todd Clarke, *Social Media Trolls: A Practical Guide for Dealing with Impossible People*, HOOTSUITE (Feb. 28, 2019), <https://perma.cc/24BL-STYB>; Paul Jun, *Don’t Feed the Haters: The Confessions of a Former Troll*, ADOBE: 99U (Apr. 21, 2014), <https://perma.cc/T9K8-YEB9>; John Rampton, *10 Tips for Dealing with Trolls*, FORBES (Apr. 9, 2015), <https://perma.cc/4TMC-B2Y7>.

126. See, e.g., Clarke, *supra* note 125; Jun, *supra* note 125; Rampton, *supra* note 125.

127. Rampton, *supra* note 125.

128. *Id.*

129. *Id.* Blocking is defined as a “technique used in social networking when one doesn’t want to communicate with a particular person anymore.” *Block*, URB. DICTIONARY, <https://perma.cc/2JJG-KMJ3>.

130. Rampton, *supra* note 125.

131. See, e.g., Michelle Boudin, *NC Mom Stands Up to Social Media Trolls for Disabled Daughter*, WFMY NEWS 2 (Apr. 4, 2018), <https://perma.cc/6ENB-7CV7>.

132. *Id.*



local politics and the black lives matter movement.<sup>133</sup> On the lighter side, North Carolina's well-known college basketball rivalries often provoke schools like the University of North Carolina at Chapel Hill and North Carolina State University to poke fun at each other online.<sup>134</sup> Overall, influencers and trolls are part of the everyday world of social media, and social media users in North Carolina are no exception.

*C. Classifying North Carolina Micro-influencers in Defamation Cases in 2019*<sup>135</sup>

To illustrate the point that micro-influencers should be classified as limited purpose public figures, consider the real-life example mentioned above of the mother who dealt with a troll commenting about her disabled daughter online.<sup>136</sup>

There, a Cornelius, North Carolina, mother often posted pictures of her daughter who had "Rett syndrome, a rare neurological disorder" that "affects the abilities to speak, walk, eat, and breathe."<sup>137</sup> The child's mother was an advocate for accepting children with disabilities; she is the co-founder of the nonprofit Advocates for Medically Fragile Kids NC.<sup>138</sup> The organization educates legislators and other government officials on the hardships and impact that having a "medically fragile child" has on parents and the child.<sup>139</sup> She also founded Sophia's Voice, a nonprofit dedicated to spreading her daughter's story and acceptance of people with disabilities.<sup>140</sup> A Twitter troll viciously used a picture of the little girl by tweeting she is "the poster child to abort bc [sic] she's disabled."<sup>141</sup> The child's mother,

133. Matt Peiken, *Russian Trolling, an Asheville Facebook Profile and an Amateur Sleuth to Connect the Dots*, BLUE RIDGE PUB. RADIO (June 6, 2019), <https://perma.cc/C373-KX52>.

134. Brad Crawford, *NC State Attempts to Troll UNC Ahead of Rivalry Game*, 247 SPORTS (Feb. 4, 2019), <https://perma.cc/JRC3-MY3P>; Evan Dyal, *NC State's Student Newspaper Trolls UNC with Awesome Cover After Upset*, 12UP (Jan. 30, 2018), <https://perma.cc/S4CP-9E2T>.

135. Due to North Carolina's micro-influencer-dominated social media community, this analysis will be limited to classifying micro-influencers.

136. See Boudin, *supra* note 131.

137. Bruce Henderson & Cristina Bolling, *Cornelius Girl Who Helped Public Accept the Disabled Dies After Living 'to the Fullest,'* CHARLOTTE OBSERVER (May 24, 2019), <https://perma.cc/2HHG-M8VH>.

138. *Id.*

139. *Who We Are*, ADVOCATES FOR MEDICALLY FRAGILE KIDS NC, <https://perma.cc/QVQ9-SG3W>.

140. SOPHIA'S VOICE, <https://perma.cc/3Z6X-KVPZ>.

141. Henderson & Bolling, *supra* note 137.

justifiably outraged, went to Twitter and fought for the company to take the picture down, which they did.<sup>142</sup>

Suppose, hypothetically, the mother sued the troll for defamation in a North Carolina state court over the tweet. The first step would be to determine what type of plaintiff the mother is. She is arguably a micro-influencer in the world of children's disability advocacy given the nonprofits she runs and her 50,000 followers on Instagram.<sup>143</sup> Her life revolves around bringing awareness to the issues surrounding that topic, so she is not a private person. In fact, a description on the Sophia's Voice website details how her work gained state-wide attention in 2016 and became global when she took on Twitter.<sup>144</sup> However, she is not well-known nationwide for anything outside of disability awareness, so she is not a general purpose public figure. That leaves limited purpose public figure as the only, and best, option.

North Carolina requires limited purpose public figures to thrust themselves into the vortex of an important public controversy.<sup>145</sup> As the Supreme Court noted in *Dun & Bradstreet Inc. v. Greenmoss Builders, Inc.*,<sup>146</sup> lower courts can look to the "content, form, and context" of the speech's publication" to decide when a statement addresses a public controversy.<sup>146</sup> Here, the mother has certainly inserted herself into a public controversy. Her mission is to raise awareness for her daughter and the millions of other children throughout the world that face stigma because of their disabilities.<sup>147</sup> In fact, the reason the mother became involved in public advocacy in 2016 was because North Carolina "threatened to reduce life-saving services for Sophia and thousands of medically complex kids."<sup>148</sup> That threat centered around a "North Carolina Medicaid program called Community Alternatives Program for Children (CAP/C), which allows families with medically fragile children to qualify for Medicaid" and other services.<sup>149</sup> Proposed changes would have reduced service hours and affected other benefits under the program, which launched a widespread backlash from North Carolina families.<sup>150</sup> North Carolina has classified

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142. Boudin, *supra* note 131.

143. Natalie Weaver (@nataliecweaver), INSTAGRAM, <https://perma.cc/Y3GK-JM4s>.

144. See SOPHIA'S VOICE, *supra* note 140.

145. Gaunt v. Pittaway, 534 S.E.2d 660, 665 (N.C. Ct. App. 2000).

146. Batza, *supra* note 8, at 451 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

147. SOPHIA'S VOICE, *supra* note 140.

148. *Closing Keynote Speaker: Natalie Weaver*, ARCNC, <https://perma.cc/3SG8-2CLY>.

149. Rose Hoban, *Parents of Disabled Kids Weigh in on Proposed Medicaid Changes*, N.C. HEALTH NEWS (July 28, 2016), <https://perma.cc/SGH8-W38S>.

150. *Id.*

other medical controversies to be of public importance, so similar logic should apply to this issue.<sup>151</sup> The controversy over disabled-children acceptance also played out in the mother's battle against Twitter.<sup>152</sup>

Once the public controversy is established, it will be simple to prove that the mother thrust herself into the controversy. She states explicitly on her website that as her support grew, "she was thrust into the public eye and inundated with hundreds of hateful messages toward her daughter."<sup>153</sup> Consistent with the standard laid out in *Gertz*, the mother intentionally inserted herself into a public controversy over disabled-children "in order to influence the resolution of the issues involved."<sup>154</sup> She successfully fought to keep a bill from passing, she created nonprofits surrounding the issue that continue to this day to promote the interest of disabled children and their families in the legislature, and she successfully took on Twitter over comments ultimately relating to the issue of disabled-children acceptance.<sup>155</sup> Opposing and advocating for legislation while also taking on a social media giant in court "voluntarily" exposed the mother to "increased risk of injury" that ultimately came in the form of negative comments on social media.<sup>156</sup>

Since the mother should be classified as a limited purpose public figure, she has the burden of proving that the troll wrote the tweet with actual malice.<sup>157</sup> Though the tweet is certainly hateful, the troll would have a strong case that the tweet was an opinion or hyperbole. Again, an opinion is proven by a showing that the statement is incapable of being proven or disproven.<sup>158</sup> Here, the troll could win on that theory. There is no such thing as a "poster child" for abortion.<sup>159</sup> That statement is a subjective, and admittedly extremely offensive, belief of the troll, and many people may have different definitions or opinions on the subject. Further, the average reader would likely understand the tweet as an opinion or even a hyperbole

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151. See, e.g., *Gaunt v Pittaway*, 534 S.E.2d 660, 665 (N.C. Ct. App. 2000) (stating that important public controversy surrounded *in vitro* fertilization at the time of publication of an allegedly defamatory newspaper article).

152. Boudin, *supra* note 131.

153. *Closing Keynote Speaker*, *supra* note 148.

154. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

155. Hoban, *supra* note 149; SOPHIA'S VOICE, *supra* note 140; *Who We Are*, *supra* note 139.

156. *Gertz*, 418 U.S. at 345.

157. See *Desmond v. News & Observer Publ'g Co.*, 823 S.E.2d 412, 425 (N.C. Ct. App. 2018).

158. *Daniels v. Metro Magazine Holding Co.*, 634 S.E.2d 586, 591 (N.C. Ct. App. 2006).

159. Henderson & Bolling, *supra* note 137.

due to the extremely inflammatory language used. It is therefore likely incapable of being proven or disproven.

The next step is determining whether the troll's tweet relates to the reason the mother is a limited public figure. In contrast to general public figures who are universally known, limited public figures are only known for a particular reason.<sup>160</sup> The mother is known specifically for her advocacy in the child disability area. Because she posts pictures of her daughter and makes disability acceptance a forward-facing issue, any statements relating to those issues relate to the public controversy that caused her to be a micro-influencer.<sup>161</sup> It would be difficult to distinguish what statements relate to why a micro-influencer is known in her sphere, but the opinionated nature of the tweet would prevent the mother from successfully suing the troll in defamation.

Requiring the mother in this example and other micro-influencers to prove actual malice also promotes "'uninhibited, robust, and wide-open' speech."<sup>162</sup> Influencers receive payment to post about businesses, products, and locations in order to get their followers to also use them.<sup>163</sup> Additionally, other micro-influencers, like the mother, use their influence to effect social change and policy.<sup>164</sup> If social media users are held liable for comments they make on posts concerning actual products that real people use, speech will be chilled and potential real problems and controversies may go unheard.<sup>165</sup> Further, if social media users are punished for posting their opinions on other's advocacy, only those who are doing the advocating will have their voice heard. It is important that influencers and figures trusted by the public to provide information are held accountable when they do not. Insisting that influencers be held accountable by the debate of the public, including trolls, may lead to some trolls not being held accountable for their own statements. However, the troll is not the public figure, the influencer is.

The mother is an excellent example of how influencers, in a public role, are more equipped to deal with trolls than other social media users.

160. *Gertz*, 418 U.S. at 345.

161. *See* SMOLLA, *supra* note 50.

162. *Neill Grading & Constr. Co. v. Lingafelt*, 606 S.E.2d 734, 742 (N.C. Ct. App. 2005) (internal quotation marks omitted).

163. *See* Martineau, *supra* note 90.

164. *See, e.g., Top 10 U.S. Social Media Influencers in Politics*, AGILITY PR SOLUTIONS, <https://perma.cc/U3HG-4N3A>.

165. *See* Elijah O'Kelley, Comment, *State Constitutions as a Check on the New Governors: Using State Free Speech Clauses to Protect Social Media Users from Arbitrary Political Censorship by Social Media Platforms*, 69 EMORY L.J. 111, 116 (2019).

She did not “lack effective opportunities for rebuttal.”<sup>166</sup> The mother received an outpouring of support after the troll’s tweet, including an editorial from an entire town across the country.<sup>167</sup> She also used “self-help,” as recommended in *Gertz*,<sup>168</sup> by using her influence and defending herself by taking the issue directly to Twitter, who eventually took the post down and created a “people with disabilities” protected category.<sup>169</sup> Dealing with critics and trolls is one of the costs of projecting one’s life on social media, just as other public figures “voluntarily expose[] themselves to increased risk of injury.”<sup>170</sup> Fortunately for the mother in this example, she was able to turn the troll’s hateful comment into part of her advocacy and deal with it on her own.

### *1. How North Carolina Courts Have Previously Determined Limited Purpose Public Figures*

To predict how a North Carolina court would classify the mother, it is helpful to analyze how courts have classified parties in the past. In North Carolina, courts considered an Associate Dean of the University of North Carolina at Chapel Hill to be a limited purpose public figure.<sup>171</sup> The dean was in charge of the minority admissions program and the case revolved around a *Raleigh Times* editorial that discussed the dean’s role in the controversy surrounding UNC’s minority admissions.<sup>172</sup> Conceding that the dean was a limited purpose public figure without explanation, the court went on to hold that the lower court improperly dismissed the dean’s complaint.<sup>173</sup>

Though the court did not articulate why it considered the dean a limited purpose public figure, an understanding of what deans do and what this dean in particular did sheds light on potential reasons. A dean at a public university is analogous to micro-influencers because both publicly represent something, whether it be a school, a program, or a product.<sup>174</sup> A dean

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166. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

167. News Tribune Editorial Bd., *One Cold-Hearted Facebook Troll Does Not Define Tacoma*, NEWS TRIBUNE (Dec. 12, 2018), <https://perma.cc/3Y6E-MEJS>.

168. *Gertz*, 418 U.S. at 344.

169. Boudin, *supra* note 131.

170. *Gertz*, 418 U.S. at 345.

171. *Renwick v. News & Observer Publ’g. Co.*, 304 S.E.2d 593 (N.C. Ct. App. 1983), *rev’d*, 312 S.E.2d 405 (N.C. 1984).

172. *Id.* at 595.

173. *Id.* at 618.

174. See Bianca Bumpres, *Associate Dean Job Description*, CAREER TREND (Oct. 23, 2019), <https://perma.cc/SDE4-UNUB>.

influences how schools are represented to the public and often plays a role in outward-facing projects like student recruitment and program-building.<sup>175</sup> This dean in particular helped create minority mentoring and tutoring programs at UNC that were used to promote and increase minority enrollment.<sup>176</sup> The court was influenced by the public nature of his job.<sup>177</sup> That same logic applies to micro-influencers who are paid to publicly promote something and recruit purchasers. Just as the dean of a public university influences people to attend their school, a micro-influencer influences people to try a specific product. Because a micro-influencer has the same impact as a dean, a micro-influencer should also be classified as a limited purpose public figure.

Later, the North Carolina Court of Appeals also considered a doctor at a center for reproductive medicine a limited purpose public figure.<sup>178</sup> The doctor sued several other doctors at the center and a clinic after they made statements to a newspaper regarding his expertise as an infertility specialist.<sup>179</sup> The court reasoned that the doctor was a limited public figure because there were important public controversies surrounding *in vitro* fertilization at the time, including whether a doctor performing *in vitro* fertilization should have specified special training, as well as issues of consumer protection in *in vitro* clinics.<sup>180</sup> Additionally, the court reasoned that the doctor thrust himself into the public controversy by writing to politicians, hiring a lobbyist and public relations agent, and writing to newspapers.<sup>181</sup>

In *Gaunt*, the doctor was well-known in a specialized area and intentionally put himself in the controversy surrounding *in vitro* fertilization.<sup>182</sup> Micro-influencers often do the same. Just as the doctor in *Gaunt* intentionally inserted himself into the public sphere to influence opinions on an issue,<sup>183</sup> influencers insert themselves into the public sphere to influence opinions on issues, products, restaurants, etc. And just as the public cares deeply about medical issues like *in vitro* fertilization, it cares about other public issues such as which restaurants provide superior service,

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175. Patricia Ann Mabrouk, *The Indispensable Associate Dean*, INSIDE HIGHER ED (Feb. 21, 2018), <https://perma.cc/7BLH-YMDH>.

176. Hope Baptiste, *Hayden B. 'Benny' Renwick's Legacy: Mentor and be Mentored*, CAROLINA CONNECTIONS (Spring 2010), <https://perma.cc/ZJ7G-9K94>.

177. *Renwick*, 304 S.E.2d at 596.

178. *Gaunt v. Pittaway*, 534 S.E.2d 660 (N.C. Ct. App. 2000).

179. *Id.* at 661.

180. *Id.* at 665.

181. *Id.*

182. *See id.*

183. *Id.*

which grocery stores carry food that conforms to their diets, which stores carry products that are ethically made, or which hair salons are most on trend.<sup>184</sup> Influencers want public validation of the effect their recommendations and “opinions” have on their followers, and ultimately want to convince their followers to engage similarly, just like the doctor wanted to persuade people to his side.<sup>185</sup>

Conversely, in a 2010 case, the North Carolina Court of Appeals held that the CEO/Executive Director of the Haywood County Council on Aging (HCCA) was not a limited purpose public figure even though she was involved in a public controversy.<sup>186</sup> After severe flooding in 2004, the CEO distributed disaster relief funds that the HCCA received from several sources.<sup>187</sup> The CEO was later fired following allegations that she mismanaged the relief funds.<sup>188</sup> She sued several members of the Board of Directors who spoke to local newspapers about her alleged financial mismanagement.<sup>189</sup> Because the alleged defamatory statements did not relate to the actual public controversy surrounding flood relief, but rather involved the CEO’s private management of HCCA finances, the defendant failed to prove that the CEO warranted public figure status.<sup>190</sup>

Though again not explained in full detail, the court’s rationale is sound. The CEO attempted to do her job by distributing relief funds. But, the defamatory statements only related to her ability to manage the funds privately, not to her distribution of that money to help flood efforts. That fine line validates the court’s determination because there was no public controversy surrounding the CEO’s money management skills. If the statements were about the flood relief efforts, the actual issue of public concern, the result may have been different. A micro-influencer would not be a private figure like the CEO because what they do is not private, it is inherently public. What an influencer posts, how they post it, when they

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184. See, e.g., Erica Gonzales, *Kendall Jenner Responds to Her Fyre Festival Involvement for the First Time*, HARPER’S BAZAAR (Apr. 3, 2019), <https://perma.cc/8KDW-Y3W8>; Millie Moore, *5 Influencer Scandals That Exposed How Fake Instagram Is*, BETCHES (Mar. 28, 2019), <https://perma.cc/K7E2-YCPG>.

185. See Martineau, *supra* note 90. “[T]he value of the [influencer’s] content in question is derived from the perceived authority—and, most importantly, *authenticity*—of its creator. . . . Users consider influencers more akin to a close friend than an advertiser or paid endorser.” *Id.* This emphasis on authenticity implies that influencers want their followers to trust them and know that their followers can trust whatever it is they are recommending.

186. *Mathis v. Daly*, 695 S.E.2d 807, 809, 812 (N.C. Ct. App. 2010).

187. *Id.* at 809.

188. *Id.*

189. *Id.*

190. *Id.* at 811.

post it, and what is in the post, is publicly available to everyone who follows them. In contrast, the CEO's private money management was not public.

Even if a North Carolina court were not satisfied with comparisons between its previous cases and micro-influencers, because the mother and micro-influencers like her do not thrust themselves into the vortex of public controversies, the justifications the Supreme Court used in *Gertz* to create the public figure standard should persuade courts to designate micro-influencers as limited purpose public figures.<sup>191</sup> The mother and other micro-influencers have access to media to defend themselves or correct false statements made by trolls.<sup>192</sup> Given micro-influencers' arguably non-micro number of followers, it is easier for them to quickly refute misinformation spread about them on social media, even if Instagram and Twitter are not the type of media the Supreme Court had in mind in *Gertz*. Micro-influencers also have the benefit of having a large number of loyal followers come to their aid if necessary.<sup>193</sup> Even if those followers turn on them, whatever messages micro-influencers put on social media will be quickly received.

Additionally, micro-influencers embody public figure traits because they voluntarily insert themselves into the public eye.<sup>194</sup> Public attention is the pinnacle of being an influencer; without it, an influencer is not an influencer. Micro-influencers even go beyond inserting themselves into the public eye—many are paid to do so. Because micro-influencers, even with low followers, fit within the molds of Supreme Court guidance, North Carolina should adapt language to encompass micro-influencers as limited purpose public figures.

#### *D. Protecting Opinions on Social Media*

North Carolina has shown commitment to protecting First Amendment rights generally, specifically the right to express one's opinion, and should continue to do so. Statements such as "Nucor needs to wake up from its

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191. See *Gaunt v. Pittaway*, 534 S.E.2d 660, 665–66 (N.C. Ct. App. 2000).

192. See Lafferman, *supra* note 35, at 213.

193. A recent example of celebrities using social media to refute misinformation is the multi-year feud between Taylor Swift and Kayne West over lyrics in one of West's songs. Both artists turned to social media to explain their side of the story and defend themselves in the public eye. Abeni Tinubu, *Twitter Declares That 'Kayne West is Over' After His Unedited Phone Call with Taylor Swift Leaks*, SHOWBIZ CHEATSHEET (Mar. 21, 2020), <https://perma.cc/8S8W-N753>.

194. Lafferman, *supra* note 35, at 213.



monopoly dreams and get back to reality in our view,”<sup>195</sup> a plaintiff running for office “would raise your taxes to pay for new development” and “[is] against making development pay for itself,”<sup>196</sup> “[s]he spoke to me in a sinister voice,” “[s]he spoke to me in a Gestapo voice,” and “putting her tape recorder on suggested that she was on to me,”<sup>197</sup> have all been deemed opinions by North Carolina courts. Courts carefully examine the context of alleged defamatory statements before concluding whether a statement is an opinion or not.<sup>198</sup> The same is true of the State’s universities, who are abandoning policies that tend to lead to suppression of speech.<sup>199</sup> It is important that these trends continue both in verbal and written speech, particularly as more and more speech occurs on social media.

While the internet provides more opportunities for trolls to provoke fellow internet-users, micro-influencers are in a position to handle trolls better than the average social media user. By receiving payments for their personal recommendations on public platforms or intentionally inserting themselves into public controversies, they are inviting public comment, and there is no effective way to combat nasty comments without censorship. Protecting opinion is at the center of defamation law, and North Carolina courts should continue recognizing that as the ways we interact with each other continue to evolve.

### CONCLUSION

Social media is changing much of how settled law operates, and defamation jurisprudence should not be treated differently. Given its effects on free speech, it is vitally important that courts critically evaluate the antiquated standards of defamation law in new contexts before imposing standards that restrict speech. In North Carolina, the trend of micro-influencers being paid to promote businesses and products is growing and will likely continue to do so. When these influencers inevitably face attacks from trolls, they may sue for defamation, and courts will have to grapple with how to classify these plaintiffs. In order to best protect speech and adhere to the underlying principles laid out in Supreme Court cases, North

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195. *Nucor Corp. v. Prudential Equity Grp., LLC*, 659 S.E.2d 483, 487 (N.C. Ct. App. 2008) (internal quotation marks omitted).

196. *Craven v. Cope*, 656 S.E.2d 729, 733 (N.C. Ct. App. 2008) (internal quotation marks omitted).

197. *Daniels v. Metro Magazine Holding Co.*, 634 S.E.2d 586, 591 (N.C. Ct. App. 2006).

198. *See Daniels*, 634 S.E.2d at 591; *Nucor Corp.*, 659 S.E.2d at 487.

199. Daniel Burnett, *North Carolina’s Largest University Scraps Unconstitutional Speech Policies, Earns Top Free Speech Rating*, FIRE (Mar. 6, 2019), <https://perma.cc/8H9A-HGWZ>.

Carolina courts should designate micro-influencers as limited purpose public figures. This will prevent a chilling of speech and encourage members of the public to deal with trolls themselves rather than turning to the courts to silence them. Their voluntary insertion into the public eye, greater access to ways to redress any grievances thrust on them, and their greater ability to deal with injury all justify requiring micro-influencers to prove actual malice in defamation suits.

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