2010 NAA/NAB/MLRC MEDIA LAW CONFERENCE
LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL/PRIVACY JURY TRIALS

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PART I

CASE SURVEY

Introductory Note

This is my report of responses to a survey of defense counsel in jury trials of tort claims against the media arising from communication content or newsgathering activity. I also include selected blogging cases involving non-media defendants (*Albritton*, *Cretella*, *Tan*), one copyright case (*West v. Perry*), and an interesting employment case against the *Cleveland Plain Dealer* over the partial curtailment of the plaintiff reporter's beat due to a conflict of interest (Rosenberg). This report covers cases concluded on or after August 9, 2008 and on or before August 19, 2010.

The reports in paragraphs A through L below are survey responses prepared by defense counsel. I provided a light edit and some additions and clarifications based upon follow-up telephone interviews with respondents. The cases in sections L.1 through L.12 are presented in summary form either because defense counsel were unwilling or unable to participate in the survey or because the cases did not involve completed trials. The latter reports are based upon court documents, news reporting, and helpful contributions from MLRC's Eric Robinson and Katherine Vogele Griffin.

Because most of what follows comes from the pens of the lawyers who tried the cases, responding counsel – particularly those who did not prevail and were understandably less energized – deserve our sincere thanks.

Table of Trials Reported

A. *Eric Albritton v. Cisco Systems, Inc.*

Court: United States District Court, Eastern District of Texas – Tyler Division
Judge: Richard Schell
Case Number: 6:08-CV-89
Verdict rendered on: N/A. Case settled before closing arguments.

1. Name and Date of Publication:

"Troll Jumps the Gun, Sues Cisco Too Early" on the Patent Troll Tracker blog, dated October 17, 2007.

"ESN Convinces EDTX Court Clerk to Alter Documents to Try to Manufacture Subject Matter Jurisdiction Where None Existed" on the Patent Troll Tracker blog, dated October 18, 2007.

2. Profile:

a. Print _____; Broadcast _____; Internet ___X__; Other _____.
b. Plaintiff: public official _____; public figure ____; private __X___.
c. Newsgathering tort: _____; Publication tort __X___.
d. Standard applied: Actual Malice _X (on punitive damages and privilege)___; Negligence __X (fault)____; Other _____.

3. Case Summary:

Eric Albritton ("Albritton") was retained as local counsel to file a lawsuit on behalf of ESN against Cisco Systems, Inc. ESN planned to file the suit one minute after midnight on October 16, 2007, the date ESN's patent, which was the basis for the suit, issued. The midnight filing was designed to fix venue in the United States District Court for the Eastern District of Texas before Cisco could file a declaratory judgment suit in some other jurisdiction.

But from ESN's standpoint, something went wrong. The federal docket sheet for the case and the header affixed to the top of every page of ESN's complaint reflected a filing date of October 15, 2007. This was a significant problem for ESN because an October 15 filing would deprive the court of subject matter jurisdiction over the patent suit, since the patent had not yet issued, and allow Cisco's suit, filed in Connecticut on October 16, to proceed. Albritton's office set about to correct the problem not by filing a motion with the court but through private telephone conversations with several employees of the court clerk's office without notice to Cisco.

Albritton, through his legal assistant Amie Mathis ("Mathis"), admittedly spoke with the office of the District Clerk for the United States Court for the Eastern District of Texas four or five times on the telephone in an effort to alter the docket entry and header on the Complaint from October 15, 2007 to October 16, 2007 in the *ESN v. Cisco* litigation. These private telephone calls were made without notice to or participation by Albritton's litigation opponent, Cisco.

As Mathis attempted to convince the clerk to alter the docket entry, Albritton told her to "stay on top of it," and after learning that her efforts had been successful, Albritton wrote a congratulatory email to her which said "You've done good. I appreciate you."

Albritton's office succeeded in persuading the district clerk, David Maland, to alter the federal docket sheet and the stamps or headers, which are electronically affixed to court records to reflect a filing date of October 16, rather than October 15. In District Clerk David Maland's sixteen years of experience with the District Clerk's office, alteration of the docket at the request of counsel without notice to the other side had never happened before, and he later admitted that the alteration should have been done by motion and that he should not have altered the docket; it "should have been a judicial determination."

Plaintiff argued that the computer software had malfunctioned to give a date of October 15, and that Maland was merely correcting the error. However, the assistant systems manager for the Eastern District of Texas testified that the system did "exactly what it was supposed to do." Mathis had started uploading the lengthy complaint fifteen to thirty minutes **before** midnight, on October 15, 2007, and completed it shortly after midnight so as to win a potential "race to the courthouse." The ECF system is designed to give the earlier time as the filing date.

Richard Frenkel was employed in Cisco's legal department's intellectual property group. Beginning in May 2007, Frenkel also wrote a blog called "Patent Troll Tracker." The blog was anonymous, except to say that the author was "just a lawyer, interested in patent cases, but not interested in publicity." On October 15, 2007, Frenkel, who is based in San Jose, California, saw the *ESN v. Cisco* case open on the ECF system. Later that day (Pacific Time), Frenkel saw that the complaint had been electronically filed. The docket sheet, complaint and civil cover sheet all indicated that the complaint had been filed on October 15, 2007. The next day (October 16, 2007), Professor Dennis Crouch noted the ESN filing on his blog, Patently-O, pointing out that the case was filed too early. Another internet publication, IP Law 360, commented on the premature filing the same day. Following the Crouch and IP Law 360 articles, Frenkel decided to write his own article about ESN "jumping the gun." Frenkel's first article was posted on October 17, 2007 at 7:00 p.m. EST.

Then Frenkel saw that the docket changed. Instead of showing that the complaint was filed on the 15th, the docket indicated the 16th. So too did the stamp or header on the complaint. Whereas before it said "10/15/2007", now it said "10/16/2007". The complaint with the October 15th stamp on it had disappeared from the system.

Frenkel then learned that ESN's local counsel had convinced the clerk to change the date and decided to write another article on October 18, 2007 regarding the *ESN v. Cisco* litigation (the "Oct. 18 Article").

The Oct. 17 Article reported, as had Crouch and IP Law 360, that ESN had "jumped the gun" by suing Cisco "too early." It provided information about the Plaintiff ESN and described a federal circuit opinion holding that a patent lawsuit could not be filed before the patent issued because "later events may not create jurisdiction where none existed at the time of filing," citing *GAF Building Materials Corp. v. Elk Corp. of Texas*, 90 F.3d 479, 483 (Fed. Cir. 1996).

The Oct. 17 Article went on to note that Cisco had filed a declaratory judgment action in Connecticut. Frenkel predicted the Connecticut action would stick and speculated as to why ESN filed an amended complaint which changed "absolutely nothing at all."

The Oct. 18 Article recounted how Frenkel had received a couple of emails pointing out that the docket had been changed, and by then it had. Frenkel also learned, as he reported, that "ESN's local counsel called the Eastern District of Texas court clerk, and convinced him/her to change the docket to reflect an October 16 filing date, rather than the October 15 filing date."

Frenkel also reported that "only the Eastern District of Texas Court Clerk could have made such a change." Frenkel also noted that Albritton signed the civil cover sheet which bore the date of October 15, 2007 or had a stamp or header on it saying the case was filed on October 15, 2007. This is the only sentence where Albritton's name is mentioned in the Oct. 18 Article.

Frenkel then wrote that it's "outrageous" that the Eastern District of Texas "wittingly or unwittingly" "helped a non-practicing entity to try to manufacture subject matter jurisdiction." He concluded by stating that this was another example of the litigating in the "Banana Republic of East Texas."

Albritton sued Frenkel and Cisco, alleging that they had accused him of a crime and injured him in his professional reputation.

4. Verdict:

N/A. Case settled before verdict.

5. Length of Trial:

Five days.

6. Length of Deliberation:

N/A. Case settled before closing arguments.

7. Size of Jury:

Ten.

8. Significant Pre-Trial Rulings/Proceedings:

Judge Schell ruled that Albritton was a private figure.

In response to Defendants' Motion in Limine, Judge Schell ruled that Plaintiff could not seek damage to his reputation because his unamended initial disclosures explicitly limited recovery to damages for mental anguish and punitive damages. Judge Schell also ruled that Plaintiff could not present or argue for a particular formula or calculation model for mental anguish and punitive damages because Plaintiff had not disclosed any computation of damages.

Judge Schell ruled that although Albritton was claiming damage to his professional reputation, Cisco was not permitted to discover any information concerning Albritton's finances related to his profession.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

Judge Schell ruled that the internet article at issue was about a matter of public concern.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

The Court's charge would have submitted the case on special interrogatories.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

Pre-selection questionnaires were not permitted.

Defendants engaged in a full range of jury research.

12. Pretrial Evaluation:

Defense counsel believed that the case was dangerous at a jury level and worried as to how the "banana republic" statement would affect the Court.

13. Defense Juror Preference During Selection:

Defendants were looking for jurors who had internet experience, especially experience in blogging.

14. Actual Jury Makeup:

The jury had little to no internet experience and no experience in blogging. It was made up of more senior people. Three of the ten jurors had never owned a computer.

15. Issues Tried:

Whether the statements were false.

Whether the defendants acted with actual malice and negligence.

The existence of any damages.

The blog was anonymous. The Plaintiff's theme was that it was a stealth Cisco litigation tool.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Plaintiff did not seek a specific demand in disclosures or at trial.

17. Plaintiff's Theme(s):

Plaintiff's theme was that Cisco used its employee, Rick Frenkel, in an elaborate scheme to discredit patent-holders such as the plaintiff, and that Cisco purposefully targeted patent-holders who sued Cisco and did so anonymously.

18. Defendant's Theme(s):

Defendants' theme was that Plaintiff was not damaged and that what Rick Frenkel blogged about was true; the ECF system did compute the file date as October 15, which would deprive him of subject-matter jurisdiction, and Albritton's office did convince the court clerk to change the date. Moreover, Frenkel believed what he wrote was true and anonymous speech is protected by the Constitution.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

The venire was not familiar with the parties or particular issues. Most of the venire had little to no experience with the internet and no experience with blogging.

b. Sympathy for plaintiff during trial:

The jury appeared to be sympathetic for Mr. Albritton, who cried on the witness stand.

c. Proof of actual injury:

Mr. Albritton failed to produce any evidence of actual injury, other than his testimony concerning his emotional distress, though he admitted that it had not altered his daily routine. He argued that he was entitled to presumed damages because the articles injured him in his profession. The Judge's draft charge permitted the jury to determine whether the articles were defamatory *per se*.

d. Defendants' newsgathering/reporting:

Mr. Frenkel in large part relied on the changing of the docket and information from outside counsel that Mr. Albritton's office had convinced the court clerk to change the date on the docket.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence:

The key evidence was the docket entries in the case, which showed that the docket had been altered, and email correspondence between counsel at Cisco concerning the alteration of the docket. There were internal Cisco emails that were damaging to the Defense.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff was represented by four lawyers from three different firms. Lead counsel was Nick Patton (a Fellow of The American College of Trial Lawyers) and Jamie Holmes, an accomplished solo practitioner from East Texas. Also assisting was Patricia Peden, a California lawyer.

ii. Defendant's trial demeanor:

Frenkel's demeanor was calm and professional.

iii. Length of trial:

Five days.

iv. Judge:

Richard Schell.

h. Other factors:

20. Results of Jury Interviews, if any:

The Court did not permit jury interviews.

21. Assessment of Jury:

The jury appeared to be sympathetic to the plaintiff at times but also seemed interested in the testimony of the clerks, which demonstrated the truth of the statements at issue.

22. Lessons:

1. Anonymous speech is a hot issue with juries.

2. The internet scares jurors who are not familiar with it.

23. Post-Trial Disposition (motions, appeals):

None.

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B. ***Craig Elmer ("Owl") Chapman v. Journal Concepts Inc, d/b/a The Surfers Journal, et al.***

Court: United States District Court, District of Hawaii
Judge: J. Michael Seabright
Case Number: Civ. No. 07-0002 JMS/LEK
Verdict rendered on: March 5, 2009

1. Name and Date of Publication:

The Surfer's Journal.

2. Profile:

a. Print __X__; Broadcast _____; Internet _____; Other _____.
b. Plaintiff: public official _____; public figure __X_; private _____.
c. Newsgathering tort: _____; Publication tort __X___.
d. Standard applied: Actual Malice __X_; Negligence _____; Other _____.

3. Case Summary:

Plaintiff Craig Elmer ("Owl") Chapman, a legendary surfer in the 1970's and respected surfboard shaper, sued *The Surfer's Journal* for publishing an article and editorial commentary concerning him. The author of the article used his experience ordering a surfboard from Owl Chapman to convey a sense of Chapman's character. Chapman sued the author, *The Surfer's Journal*, its publishers, and its editorial staff for various defamation-related claims. The court determined that Chapman is a public figure. On summary judgment, the court dismissed the claims with respect to all but five categories of statements in the publication. After an eight-day trial, the jury returned a verdict in favor of Defendants on all counts.

4. Verdict:

For both Defendants. The jury found that the statements at issue were not false. Based on this finding, the jury did not need to proceed to the other elements of the defamation claim.

5. Length of Trial:

Eight trial days.

6. Length of Deliberation:

1.5 hours.

7. Size of Jury:

Eight.

8. Significant Pre-Trial Rulings/Proceedings:

In 2007, the court determined by summary judgment that the plaintiff is a public figure subject to the actual malice standard. *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081 (D. Haw. 2007).

In 2008, the court granted partial summary judgment to Defendants dismissing all claims except the defamation-related claims concerning five categories of statements in the publication. The court also dismissed all defendants except the author, publisher, and the corporation. *Chapman v. Journal Concepts, Inc.*, Civ. No. 07-00002 JSM/LEK, 2008 WL 5381353 (D. Haw. Dec. 24, 2008).

9. Significant Mid-Trial Rulings (including interlocutory appeals):

The court granted a Rule 50 motion for judgment as a matter of law as to two of the statements in dispute after the close of Plaintiff's case. Those claims were based on the argument that Defendants fabricated an audio recording of an interview between the author of the editorial commentary and individuals quoted in the commentary. The court found that, based on the evidence presented by Plaintiff, no reasonable juror could find that the recording was fabricated.

The court also granted the Rule 50 motion as to the corporation's liability for punitive damages for statements in the article.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Two special verdict forms were used.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

None.

12. Pretrial Evaluation:

Liability was very questionable, and the damages seemed limited.

13. Defense Juror Preference During Selection:

The Defendants preferred jurors with a high level of education, low media bias, and familiarity with the sport of surfing.

14. Actual Jury Makeup:

The composition of the jury was very "multi-ethnic." There was one juror who was a surfer.

15. Issues Tried:

Plaintiff's claim of libel was the only claim tried. The subject matter of the libel claim consisted of two publications in the same magazine. The first publication was an article concerning the author's experience of ordering a surfboard from the Plaintiff. The second publication was the publisher's editorial commentary on Plaintiff's persona, interlineated with quotes attributed to individuals who knew Plaintiff.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Plaintiff sought general, special, and punitive damages. The amount of damages were never fully specified.

17. Plaintiff's Theme(s):

Plaintiff argued that the events in the article were entirely fabricated, and that the publisher failed to investigate the facts stated in the article and editorial commentary.

18. Defendant's Theme(s):

Defendants argued that the events in the article happened, that the factual assertions in the publications were substantially true, and that Defendants' reputation prior to the publications was already questionable.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

b. Sympathy for plaintiff during trial:

Through juror interviews, we learned that the jury initially felt some sympathy for the plaintiff, but when they read the publications, they could not find anything false about them. Thus, following the court instructions, they could not award him any damages.

c. Proof of actual injury:

Plaintiff failed to prove actual injury.

d. Defendants' newsgathering/reporting:

Presented well.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel was adequate.

ii. Defendant's trial demeanor:

Excellent.

iii. Length of trial:

Seven trial days over a ten-day period. Because the trial was not very long, we believe the jurors had fairly fresh memories of the testimony.

iv. Judge:

The judge ran a very efficient courtroom.

h. Other factors:

20. Results of Jury Interviews, if any:

The foreperson of the jury reported that the jury found the Plaintiff's demeanor to be consistent with the portrayal of him in the publications. As a result, the jury did not find the statements in the publications to be false. Another juror indicated that the jury initially wanted to award damages to the Plaintiff, but after reading the article and comparing it to his demeanor, they could not find anything false in the article.

21. Assessment of Jury:

The jury seemed fairly attentive and efficient in their deliberations.

22. Lessons:

Sometimes cases need to be tried even if the costs associated at trial might outweigh the "settlement value."

23. Post-Trial Disposition (motions, appeals):

Appeal pending.

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C. ***Thomas S. Flippen vs. Gannett Co., Inc., et al.***

Court: Erie County Court of Common Pleas, Ohio
Judge: Roger E. Binette
Magistrate: Steven C. Bechtel
Case Number: 2006 CV 0944
Verdict rendered on: September 26, 2008

1. Name and Date of Publication:

"Richland County Indictments" August 22, 2006.

2. Profile:

a. Print _X_; Broadcast _____; Internet _X_;Other _____
b. Plaintiff: public official _____; public figure _____; private _X_
c. Newsgathering tort _____; Publication tort _X_
d. Standard applied: Actual Malice ____; Negligence _X_; Other ____

3. Case Summary:

Plaintiff, who lived in a distant town in a different county than the *News Journal*, was indicted in August 2006, on three felony charges for failure to pay his support obligation to his nine year old daughter. Plaintiff brought this libel suit for damage to his reputation because the *News Journal* incorrectly identified the specific felony charges for which Plaintiff was indicted as unlawful sexual conduct with a minor. The indictee listed directly beneath Plaintiff on a lengthy list issued by the Prosecutor's Office was in fact charged with "unlawful sexual conduct with a minor." Apparently the reporter confused the two when using the list to draft his article. Plaintiff learned of the publication approximately six weeks later and brought it to the defendants' attention. A correction clarifying the charges for which plaintiff was actually indicted was printed in the *News Journal* the following day. The article was permanently removed from the Internet archives approximately six months later.

4. Verdict:

For Defendants. The special verdict found that plaintiff did not show by clear and convincing evidence (required under Ohio law) that defendants acted negligently in causing the error. The jury did not consider damages.

5. Length of Trial:

Three and a half days.

6. Length of Deliberation:

Two hours and 45 minutes.

7. Size of Jury:

Eight jurors.

8. Significant Pre-Trial Rulings / Proceedings (include citations if reported):

During the summary judgment proceedings, defendants argued unsuccessfully that the publication was substantially accurate and, therefore, protected by the impartial report privilege. In denying defendants' motion for summary judgment, the court also determined that plaintiff was a private figure and the publication defamatory *per se*.

Defendants filed a Motion in *Limine* to exclude the testimony of Plaintiff's experts. The Court granted Defendants' Motion with respect to one of Plaintiff's experts, a licensed social worker, and excluded the testimony. The Court found that the individual was not qualified to render an opinion on the Plaintiff's feelings, perceptions and damages as a result of the publication of the article, since (s)he had never seen nor counseled the plaintiff. With respect to Plaintiff's second expert, the Court ruled that the expert, a computer technician with knowledge of scanning technology, could testify as to the state of the art regarding scanning technology; but the Court excluded any opinion testimony involving standard of care in the media industry.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

At the conclusion of Plaintiff's case in chief, Defendants moved for a directed verdict on the following issues: 1) the absence of any evidence of constitutional/actual malice; 2) the publication involved a public issue; 3) there was no evidence as to Gannett Co., Inc.; and 4) there was insufficient evidence to find by clear and convincing evidence that Defendants were negligent in publishing the false statement. The Court ruled that 1) there was no constitutional/actual malice; 2) the publication did involve a public issue; and 3) there was no evidence as to Defendant Gannett Co., Inc.; but the Court denied the Motion for Directed Verdict on the whole case, finding there was sufficient evidence as to negligence to get to the jury.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

The Court ruled that the publication constituted libel *per se*. However, the Court instructed that due to the fact that the publication involved a public issue, no punitive damages would be awarded absent actual malice and no damages would be presumed.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

Pre-selection jury questionnaires.

12. Pretrial Evaluation:

Plaintiff was willfully and chronically underemployed and suffered no economic damage. There was no evidence of mental anguish and was indicted for failure to pay child support. Settlement range: $50,000 - $100,000.

13. Defense Juror Preference During Selection:

Older men and women.

No college degree; preferably parents.

14. Actual Jury Makeup:

Two men and six women.

15. Issues Tried:

Whether Defendants were negligent in publishing the false statement.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Plaintiff demanded judgment against each Defendant, jointly and severally, in an amount in excess of $25,000.00, plus punitive damages, costs and attorneys' fees. Last demand, $3.5 million.

17. Plaintiff's Theme(s):

Defendants were careless and negligent. With available scanning technology, the error could have been avoided.

Plaintiff was traumatized, reputation ruined.

18. Defendant's Theme(s):

Defendants' reporter made an honest mistake in reproducing an official record, which does not rise to level of negligence. If perfection were the standard, we would all fail.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Plaintiff had less than stellar reputation before alleged defamation (3 DUIs, domestic violence, chronic non-payment of child support resulting in incarceration, all in plaintiff's home county) and showed no damage after publication. Jurors [in *voir dire*] expressed view that once reputation defamed, it could never be corrected.

b. Sympathy for plaintiff during trial:

None that could be determined. Chronic failure to support children made him an unsympathetic plaintiff. Defense counsel challenged the plaintiff's credibility in closing by observing that plaintiff seemed far more bothered by the obscure publication of a false charge against him buried in a list of 55 names on page 5A in a newspaper in a county in which the plaintiff neither lived nor regularly worked than the many legitimate convictions against him in his home county.

c. Proof of actual injury:

None, other than Plaintiff's testimony of anguish and loss of reputation.

d. Defendants' newsgathering/reporting:

Expert testified reporter met standard of care.

e. Experts:

Defense experts:

Andrew R. Young, Editor of The Chronicle-Telegram. Would recommend to other defense counsel. Young testified that reporters routinely receive police reports and other public information concerning alleged crimes in a community and create stories based upon that information. He also testified that, although mistakes are not acceptable and newspapers strive for 100% accuracy, humans are fallible and mistakes are inevitable. He gave specific examples of what he considered to be errors caused by reporters acting below the standard of care and opined that the article at issue was not such an instance. In that regard, the editor testified under cross-examination that if perfection were the standard of care, all newspapers would fail.

Plaintiff s experts:

Michael Marsinko — electronic scanning, would not recommend. This expert testified that scanning technology is readily available and minimizes transcription errors when an individual is attempting to reproduce a list such as that provided to the reporter, in this case, by the prosecutor's office. During cross-examination, however, defense counsel pointed out that the expert had no experience whatsoever in the media industry and, therefore, could not testify whether the use of scanning technology by newspapers was prevalent.

f. Other evidence:

Reporter and editor testified about care taken in reporting news.

The defense testimony also established that the reporter did not merely replicate the list received from the prosecutor's office, but selected two noteworthy crimes to write about and provided an altered listing of the remaining indictees (including the conversion of their dates of birth to ages) in the second part of his article.

Both the expert witness and the managing editor of the *News Journal* rebutted the testimony of plaintiff's expert that scanners should be utilized in the newsroom and stated that this technology was not mainstream. In fact, the defendants' managing editor testified that they had tried to implement scanners years ago but found that the reporters spent more time "cleaning up" material scanned in than they did inputting original information.

g. Trial dynamics:

i. Plaintiff's counsel:

Did little discovery. Did not depose anyone. He was not skilled in defamation litigation.

ii. Defendant's trial demeanor:

Professional, competent, caring.

iii. Length of trial:

Three and a half days.

iv. Judge:

Tried to a jury before an agreed upon magistrate.

h. Other factors:

Plaintiff's counsel failed to object to evidence of Plaintiff s prior bad reputation.

20. Results of Jury Interviews, if any:

Jury felt Plaintiff failed to prove reporter was negligent or that his mistake rose to the level of negligence.

21. Assessment of Jury:

The more sophisticated, educated the juror, the more he or she seemed to side with Plaintiff.

22. Lessons:

Regardless of how one tries to classify potential jurors, it is best to choose those who seem to like you.

23. Post-Trial Disposition (motions, appeals):

Plaintiff filed an Objection to Magistrate's Decision and Motion for New Trial.

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D. ***Leon A. Kendall v. The Daily News Publishing Co., Joy Blackburn, and Joseph Tsidulko***

Court: Virgin Islands Sup. Ct., St. Thomas Division
Judge: Edgar D. Ross
Case Number: Civil No. 517/2007
Verdict rendered on: March 16, 2010;
judgment entered in favor of defendants on: May 27, 2010

1. Name and Date of Publication:

Sixteen articles published in *The Virgin Islands Daily News* between November 21, 2006 and February 18, 2009, as well as an editorial published on April 17, 2007.

2. Profile:

a. Print __X__; Broadcast _____; Internet _____; Other _____.
b. Plaintiff: public official__X__; public figure ____; private _____.
c. Newsgathering tort: _____; Publication tort __X__.
d. Standard applied: Actual Malice __X__; Negligence _____**;** Other _____.

3. Case Summary:

Judge Kendall's case against the Daily News focused on sixteen articles and one editorial that the newspaper published while he was a judge on the Virgin Islands Superior Court. Those publications all addressed Judge Kendall's bail decisions and the fallout from those decisions.

Throughout his tenure on the bench, Judge Kendall's views on bail were controversial. He was an outspoken critic of many Virgin Islands judges' bail practices, arguing that their practices

were unlawful and denied defendants their basic rights. In contrast, Judge Kendall claimed to follow scrupulously the applicable bail law and, in doing so, routinely released criminal defendants on personal recognizance or unsecured bonds. Some of the defendants he released committed other, violent crimes while out on bail. The Daily News reported on those crimes, the controversy surrounding Judge Kendall, and the disciplinary complaints that were filed against him as a result of his bail rulings. Ultimately, after one of the men that Judge Kendall released killed a little girl, the newspaper published an editorial calling on him to resign.

In his lawsuit, Judge Kendall claimed that the various news reports and the editorial falsely reported on his decisions and implied that he was violating the law. Examples of the challenged news coverage included reports of the following:

> Judge Kendall's decision not to remand a convicted rapist into custody after a jury convicted him of sodomizing a homeless man, and the standoff with police that ensued when the defendant refused to report to prison and threatened to blow up his house in a residential neighborhood;
>
> Judge Kendall's decision to release another criminal defendant on an unsecured bond after he was charged with assault for stabbing a man in the eye and suspected of killing another man by stabbing him in the neck;
>
> Judge Kendall's decision to release a criminal defendant on his own recognizance following his arrest on domestic violence charges, and the horrific murder the defendant committed just a few weeks later when he killed a 12-year-old girl (the same defendant had previously pled guilty to felony assault after he had been charged with repeatedly raping a mentally challenged woman at gunpoint); and
>
> Various other decisions in which Judge Kendall released criminal defendants on their own recognizance or on unsecured bonds, including one case in which the defendant stole a car and struck a pedestrian the day after he was released.

Shortly after the murder of the little girl, three complaints were filed against Judge Kendall with the Commission on Judicial Disabilities seeking his removal from the Bench in light of his failure to weigh adequately when making his bail decisions the risk defendants posed to victims or the community. Judge Kendall filed suit in federal district court to block the Commission from proceeding against him.

The day after Judge Kendall filed his federal suit against the Judicial Commission, he sued The Daily News, claiming that its reporting on some of his rulings was false and defamatory. Plaintiff alleged that the newspaper inaccurately described his judicial rulings by providing shorthand descriptions of them in layman's terms. For example, Judge Kendall maintained that he was defamed because where defendants had been released on bail in the form of personal recognizance with conditions, the Daily News stated that the defendants had been released "without bail."

4. Verdict:

On March 16, 2010, the jury returned a verdict finding in favor of reporter Joseph Tsidulko and finding against reporter Joy Blackburn and The Virgin Islands Daily News. The jury awarded Judge Kendall $240,000 in compensatory damages.

5. Length of Trial:

The trial took two weeks (9 trial days).

6. Length of Deliberation:

The jury deliberated for three days.

7. Size of Jury:

The jury consisted of 8 members.

8. Significant Pre-Trial Rulings/Proceedings:

In rather cursory fashion, the Court denied a long-pending motion to dismiss in December 2009 and denied a motion for summary judgment on the eve of trial. Eighteen motions *in limine* were argued on the first day of trial.

The Court denied a defense motion to exclude a host of plaintiff's trial witnesses (including such luminaries as the former Governor, the former Attorney General and a popular radio talk show host) who were disclosed for the first time in the final pretrial order. The Court granted a defense motion to prohibit the plaintiff's witnesses from testifying about their own anguish and emotional distress. The court denied a defense motion to permit the jurors to review the challenged publications prior to opening statements; and the Court granted a defense motion to instruct the jurors on the essential elements of the defamation claims at the outset of the case.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

The Court granted defendants' motion to prohibit punitive damages on First Amendment grounds.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

As noted above, the Court instructed the jury on the basic elements of defamation before opening statements. The Court did not permit the jurors to have a set of the instructions during deliberations.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

Defendants moved at the final pretrial conference to have the Court require potential jurors to complete a detailed juror questionnaire and plaintiff objected. The Court subsequently granted the defense motion and required potential jurors to complete the questionnaire. The parties were not informed of the ruling or the availability of the completed questionnaires, however, until mid-way through the first day of the trial. Counsel were only able to review the completed questionnaires briefly during the luncheon recess prior to jury selection that afternoon.

12. Pretrial Evaluation:

This case should not have survived either the motion to dismiss or the motion for summary judgment. Despite recognition of the risks of trial, the Daily News defendants continued to believe they had strong defenses and that the plaintiff's claims were wholly without merit both factually and legally.

13. Defense Juror Preference During Selection:

Defendants strongly preferred persons who could read and who did not have personal experience with the criminal justice system.

14. Actual Jury Makeup:

A jury of eight persons, consisting of seven women and one man. The individual jurors were as follows:

52 year old woman born in Antigua; Food Service Worker, without a high school education; failed to fill out most of the juror questionnaire

64 year old woman born in Dominica; Housekeeper, without a high school education; failed to fill out most of the juror questionnaire

35 year old woman born in St. Kitts; Dept. of Education Food Program Supervisor, with a Bachelor's Degree in Business Administration

20 year old woman born in St. Thomas, USVI; Customer Service Representative, with no educational background disclosed; failed to fill out the juror questionnaire

30 year old woman born in St. Thomas, USVI; Executive Assistant, with a Bachelor of Science in Communications

25 year old man born in St. Thomas, USVI; Courier and Lead Singer in calypso band, with no educational background disclosed

24 year old woman born in Dominica; Unemployed/Homemaker with degree in Hotel Resort Management

41 year old woman born in Antigua; Customer Service Representative, with no educational background disclosed; failed to fill out the juror questionnaire

Many of the jurors in the USVI have a fair degree of experience with the jury system. For example, seven of the eight jurors had served on juries before, one had previously been a foreperson, and two had served on juries that were unable to reach a verdict. In addition, one juror had family experience with the criminal justice system: a spouse who testified before Judge Kendall as the alibi witness for a defendant charged with murder, and two or three cousins who had been convicted of murder or attempted murder.

15. Issues Tried:

Substantial Truth; Defamatory Meaning; Actual Malice; Defamatory Implication Not Intended; Opinion; Fair Report Privilege; Damages.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Throughout the case, Judge Kendall took the position that he was seeking damages for harm to his reputation similar to what had been awarded recently to other judges who had pursued defamation claims: $2.01 Million (*Murphy v. Boston Herald, Inc.*); $7 Million (*Thomas v. Page*).

17. Plaintiff's Theme(s):

Judge Kendall's overarching general theme was that the Daily News consistently targeted him in its coverage to inflame the public against him and ultimately drive him from the bench. He maintained that the sixteen news articles and one editorial falsely reported on his decisions and implied that he was violating the law.

For example, in March 2007, Daniel Castillo appeared before Judge Kendall at an advice of rights hearing after he was charged with beating his ex-girlfriend. Judge Kendall released Castillo on his own recognizance. The following month, Castillo, who previously pled guilty to felony assault after being charged with repeatedly raping a mentally challenged woman at gunpoint, killed a twelve-year-old girl. The public was horrified by the murder and outraged that Castillo was out on recognizance at the time. Judge Kendall argued that he was defamed by Ms. Blackburn's reporting on the case. He alleged that when Ms. Blackburn reported that Castillo was released "despite his history of violence," she falsely implied that Castillo's criminal history had been presented to Judge Kendall at the bail hearing in March and that he ignored it.

Similarly, after Ashley Williams was convicted by a jury for brutally raping and sodomizing a homeless man, Judge Kendall allowed him to go home for the weekend to get his affairs in order. Judge Kendall made this decision despite the prosecutor's strenuous objections that Williams was a danger to the community and had even said that he would "prefer to die than go to jail." When the weekend was over, Williams failed to report to prison. When the marshals came to arrest him, Williams barricaded himself inside his house, threatened to blow himself up with a propane tank, and started a five-hour standoff that caused the neighborhood to be evacuated and fifty emergency personnel to come to the scene. Judge Kendall claimed that the newspaper's

reporting on this stand-off was false because it stated that he had released Williams into the "community unsupervised." According to Judge Kendall, Williams was actually released on house arrest.

In another instance, Judge Kendall alleged that he was defamed by a headline stating "Man Released Without Bail by Kendall Fails to Appear in Court." According to plaintiff, this headline, and other Daily News headlines and articles that used the phrases "without bail" and "no bail," were false because personal recognizance is a form of bail. In Judge Kendall's view, the Daily News implied that he was violating the law by not imposing any form of bail.

18. <u>Defendant's Theme(s)</u>:

For their part, defendants employed several themes, including the following: (1) Nothing was ever Judge Kendall's fault. What the jury saw throughout the trial was an ever shifting, ever changing series of excuses from the plaintiff. (2) Judge Kendall failed to give the Daily News any notice: He spoke to the reporters about their stories, but never told them they had erred until his lawyer filed suit. (3) Judge Kendall's reputation was not harmed by the Daily News. He had been roundly criticized by other media in the USVI, victims' advocates and legislators. (4) Defendants stressed that protection of the right of free speech and of freedom of the press are intertwined throughout the history of the Virgin Islands.

With respect to the various challenged articles, for example the articles pertaining to the Castillo case, defendants demonstrated that the articles on their face are materially true and protected by the fair report privilege because it was indisputable that Castillo had a violent criminal record. Defendants also demonstrated that Judge Kendall's construction of the articles was not reasonable because nothing in them implied that Castillo's previous criminal record was presented to Judge Kendall at the bail hearing. Moreover, the phrase "despite a history of violence" – at the very heart of plaintiff's counsel's appeal to the jury – was protected opinion. Indeed, plaintiff himself admitted on cross examination that "whether someone has a 'history of violence' is an 'opinion.'" Finally, plaintiff failed to establish actual malice and failed to prove reporter Blackburn intended to convey the implication that Plaintiff claims defamed him.

With respect to the articles pertaining to the Williams case, the Daily News demonstrated that the newspaper's reporting was substantially true, noting that Judge Kendall himself admitted that no one was supervising Williams at the time of the standoff. Finally, defendants demonstrated that plaintiff had failed to meet his burden of proving actual malice, pointing out that, among other evidence, the newspaper had two sources for its report, its reporter was at the scene of the stand off, and Judge Kendall himself had not claimed that there was any error in the report during a lengthy interview with the newspaper on the day the challenged statement appeared.

As for Judge Kendall's challenge to various news headlines and articles that used the phrases "without bail" and "no bail," he claimed they were false because personal recognizance is a form of bail. Defendants contended that plaintiff's interpretation is not reasonable, noting that two of Judge Kendall's own witnesses – a former Virgin Islands Attorney General and plaintiff's own wife – admitted on cross examination that "bail" is commonly understood to mean "money bail" and is not commonly understood to include personal recognizance.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

The jurors appeared to come into the trial with a great deal of respect for the plaintiff, a former judge of the Virgin Islands Superior Court. This was not surprising given that the culture in the USVI is to grant a great deal of deference and respect to members of the community who have obtained some position or station in life.

Of those who completed the juror questionnaires, several jurors rated judges highest in terms of people they trust, and they rated newspapers and reporters lowest. As one juror put it: "Judges are here to serve the community and do right by the people." Another juror found that "newspapers and reporters tend not to verify their stories before sending them out." Still another juror rated newspapers and judges at the very top of the range in terms of trust, but rated reporters in the middle range on the same issue.

b. Sympathy for plaintiff during trial:

Judge Kendall did not appear to generate a great deal of juror sympathy. He was stiff and aloof through much of the trial and behaved in a rather high-handed fashion. At times he appeared to exempt himself from the normal rules of conduct for trial participants. For example, on a number of occasions he testified in a manner that he would have never permitted in his own courtroom when he was on the bench. The occasion when he broke down and cried on the witness stand appeared to do little to soften his hard-edged demeanor throughout the trial.

c. Proof of actual injury:

Judge Kendall put on little hard evidence of actual injury. His family and a few colleagues and friends spoke briefly about his emotional distress. There was little evidence of anyone who thought less of the plaintiff due to the Daily News articles.

For its part, the Daily News put on evidence of other publications (both print, broadcast and on-line) that disseminated similar damaging material about Judge Kendall's time on the bench and his rulings in the community.

In addition, the Daily News put on evidence that plaintiff's reputation was already rather poor before he took the bench. After he was nominated, the majority of respondents to a Bar Association poll rated him as unqualified and questioned whether he had the requisite judicial temperament.

d. Defendants' newsgathering/reporting:

The challenged news articles represented routine "cops and courts" reporting about criminal proceedings in the Superior Court. Defendant Joe Tsidulko was the regular criminal court beat reporter and his colleague Joy Blackburn filled in for him from time to time. The reporters routinely sought comment from Judge Kendall in connection with each article and the Daily

News printed his previously expressed views on the occasions when he refused to comment for a news story.

e. Experts:

None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Judge Kendall was represented by an experienced trial lawyer who has represented libel plaintiffs in previous cases.

ii. Defendant's trial demeanor:

Reporter Joe Tsidulko came off as a solid journalist who was knowledgeable about the criminal justice system and the workings of the courts. He also came across as hard-working and fair.

Reporter Joy Blackburn came off as a very quiet, reserved reporter, almost withdrawn at times. Her regular beat at the paper focused on health and welfare issues. For the most part she maintained her composure, but became agitated at plaintiff's counsel at one point during her cross-examination.

iii. Length of trial:

The case proceeded slowly for a civil case in the USVI. The trial judge did his part to keep the case moving along and did not entertain long side bar conferences.

iv. Judge:

The trial judge was a Senior Judge sitting by designation because all the other judges in the USVI had recused themselves. Judge Ross did not come to the case with a great depth of First Amendment experience, but he applied himself and picked up the key aspects of the law quickly as the case went along. Judge Ross also had a wealth of practical experience to draw on and a presence on the bench that commanded respect. He maintained control of his courtroom even when certain witnesses with high political connections sought to turn the proceedings into a political rally.

h. Other factors:

A number of social, cultural, and racial crosscurrents affected the trial. In light of the nature of the case (which largely dealt with reports on sexual assault crimes), the race of the parties (plaintiff is black, and defendants are white), and inter-island sentiments (plaintiff is originally from Guyana, a former British colony), there were many dynamics at play that could have affected the jury's consideration of the case.

20. Results of Jury Interviews, if any:

We were permitted to speak briefly with the jurors after they rendered their verdict. Among other things, they indicated that they had struggled to apply the actual malice standard. One juror explained that they had found for reporter Tsidulko because at one point during the trial he was asked about a mistake in a challenged article and readily admitted it. The juror explained that they had found against his colleague Ms. Blackburn on the actual malice issue, in contrast, because she insisted throughout the trial that she had not made a mistake in her reporting.

21. Assessment of Jury:

The jury appeared conscientious, and the jurors appeared to take their duties quite seriously. In a place where criminal defendants are convicted of first degree rape in a day and half (from jury selection through trial and verdict), the notion of a two week civil trial was somewhat unusual. The jury deliberated for three full days and requested to have the Court reread the actual malice portion of the jury charge during their deliberations.

22. Lessons:

Do not publish a newspaper in the USVI unless you are made of stern stuff and have a good media insurance carrier. The Virgin Islands Daily News is presently facing three other public official libel suits and another defamation case brought by a public figure.

Do not for a moment underestimate the appeal that a judge has as a defamation plaintiff before a local jury. Many of the jurors were naturally inclined to accord him great deference and respect even though his actions did not justify such treatment.

22. Post-Trial Disposition (motions, appeals):

On May 27, 2010, Judge Ross granted the defendants' motion for judgment as a matter of law. Plaintiff has filed a notice of appeal with the Virgin Islands Supreme Court.

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E. ***Harold L. Kennedy v. Times Publishing Company***

Court: Sixth Judicial Circuit, Pinellas County, Florida
Judge: Anthony Rondolino
Case Number: 05-8034-CI-11
Verdict rendered on: August 28, 2009

1 Name and Date of Publication:

St. Petersburg Times, main news story published December 4, 2003, folos published December 9 and 10, 2003.

2. Profile:

a. Print _X___; Broadcast _____; Internet _____; Other _____.
b. Plaintiff: public official __X___; public figure ____; private _____.
c. Newsgathering tort: _____; Publication tort __X___.
d. Standard applied: Actual Malice _X___; Negligence _____; Other _____.

3. Case Summary:

Plaintiff, a medical doctor specializing in cardiology, was hired as Chief of Medicine by the federal Veterans Administration's Medical Center at Bay Pines, in St. Petersburg, Florida, starting in January 2001. Almost immediately, Plaintiff, who began to make operational changes, became the subject of complaints by the incumbent physicians and staff. In August, 2003, Plaintiff was involuntarily removed from his position as Chief of Medicine by the Medical Center's Director and its Chief of Staff, and reassigned to his speciality department, cardiology. At that time, Plaintiff was the subject of an investigation by the VA Inspector General with

respect to whether he solicited money from pharmaceutical companies to fund one or more banquets at local beach resorts, which, if true, would have been a violation of VA ethics rules. Also at the time, Plaintiff was the subject of five complaints that he had violated equal employment opportunity laws. One of the complaints was from a staff member who contended he harassed her because of her sex by, among other things, making demeaning and degrading remarks about women and giving her an apron and a potholder as a Christmas gift (which she believed signaled Plaintiff's belief that she belonged in a kitchen and not in her professional position).

St. Petersburg Times reporter Paul de la Garza, a long-time journalist former AP bureau chief, began developing a new beat covering the Tampa Bay Area military and veterans facilities in 2003. In the Fall of 2003, he received information about Plaintiff's reassignment and investigations. As a result, on December 4, 2003, the *St. Petersburg Times* published a news story headlined "Bay Pines outs chief of medicine" with the subhead "The doctor is reassigned as he is under investigation for misuse of money and sexual harassment." The story contained the VA Medical Center Director's quotes confirming that Plaintiff was investigated for using money for things he shouldn't have been using it for and for several EEO complaints, some of which investigations had been completed with no findings of wrongdoing and others of which were still to be completed. The story also contained paraphrases of remarks by the Plaintiff to the effect that he knew about the investigations, hadn't done anything wrong, and that the sexual harassment complaint was based on having given a colleague an apron as a gift and having asked someone to make coffee.

Following this story, de la Garza received additional information about staff dissatisfaction with other aspects of Bay Pines' administration. The Chief of Staff was also the subject of a number of complaints. On December 9 and 10, 2003, de la Garza stories in the *Times* reported on these complaints, mentioning that Plaintiff was also under investigation for misuse of money and sexual harassment, but denied any wrongdoing. The Plaintiff and Bay Pines did not agree on a renewal or extension of his contract, and therefore it expired in January 2004 and Plaintiff departed the facility.

Ultimately, de la Garza authored a series of stories running through 2004 focusing on the VA central administration's forcing Bay Pines to test a new computer system, which by most accounts was an unmitigated disaster.

In early 2004, Plaintiff asked for a retraction of the *Times*' December 4 and 9 stories, stating that they were in error because they incorrectly implied he had been "fired," and that there were no findings that he had committed any misuse of money or sexual harassment. *The Times* did not correct or retract the story.

Plaintiff filed suit against the *Times* and de la Garza in December 2005, just before the statute of limitations expired. While the case was pending and before his deposition was taken, de la Garza, still in his 40s, died of a heart attack. He was dropped as a defendant.

4. Verdict:

For plaintiff, $10.3 million

Past economic damages: $1.6 million.

Future economic damages reduced to present value: $2.2 million.

Past non-economic damages: $1.5 million.

Future non-economic damages: $0.

Punitive Damages: $5 million.

5. Length of Trial:

Five days (Monday through Friday).

6. Length of Deliberation:

Approximately 2 hours 30 minutes.

7. Size of Jury:

Six.

8. Significant Pre-Trial Rulings / Proceedings:

On Defendant's Motion for Partial Summary Judgment in the summer of 2009, the court ruled that Plaintiff was a public official.

On the morning of the day set for trial, the court issued its orders denying the Defendant's Motion for Final Summary Judgment and granting the Plaintiff's motion for leave to seek punitive damages. (Special permission for such a claim is required under Florida Statutes section 768.72. The statute requires a plaintiff to submit evidence from which a reasonable jury might find punitive damages are warranted before plaintiff is permitted to assert a claim for them.)

None of these rulings were accompanied by opinions or citations and are therefore not reported.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

No interlocutory appeals are available under Florida rules.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

The defense requested and obtained an interrogatory verdict form asking the jury to render specific findings that the Times published a substantially false statement concerning the Plaintiff,

that it did so with actual malice, and that it did so intending to harm the Plaintiff or for the purpose of unreasonable financial gain (two findings required by Florida Statutes in the event of an award of punitive damages).

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

None other than informally conferring with publisher client constituents and non-expert others.

12. Pretrial Evaluation:

Government documents not available to the Times prior to publication of the news story showed subsequently that the central news story at issue in the case was true and accurate.

13. Defense Juror Preference During Selection:

Educated (college or beyond), employed, mid-life (40s-50s).

14. Actual Jury Makeup:

Six jury members deliberated: One mid-thirties non-white male; one forties+ white male; four white females ranging from 20ish to 60ish; two alternates, both white 40s+ females, were excused prior to deliberations. The alternates appeared to have the most formal education and professional accomplishment. Both males were educated beyond high school and employed in professional capacities. The youngest female worked at a grocery store. The other women worked in various capacities outside the home.

15. Issues Tried:

(1) Whether Defendant published any substantially false statement of fact of and concerning the Plaintiff; (2) Whether Defendant published any such statement with actual malice; (3) Whether Plaintiff suffered non-economic and/or past or future economic damages; (4) Whether the Defendant's conduct warranted punitive damages because (a) it was intended to and did injure the Plaintiff and/or (b) it was motivated by unreasonable desire for financial gain.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Pre-trial, Plaintiff demanded $5 million. Plaintiff approximated economic damages at trial at around $1 million. Plaintiff did not request a specific amount of punitive damages.

17. Plaintiff's Theme(s):

Reporter de la Garza was a loose cannon who fabricated most of the news story about the Plaintiff and mis-portrayed the relatively insignificant information in it that was provably true.

18. Defendant's Theme(s):

The *Times*' reporting was emblematic of the proper functioning of the news media in a democracy and consisted of the publication of truthful information lawfully obtained from public officials concerning the job performance of another high-ranking official charged with ensuring proper care of this nation's veterans.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

The venire appeared to contain a significant number of people who regularly watched FOX News. None of the venire expressed support for the role the news media plays as a government watchdog. Several expressed their distaste for television news.

b. Sympathy for plaintiff during trial:

Undiscerned.

c. Proof of actual injury:

Concededly, the Plaintiff's efforts to obtain faculty appointments at two universities were hampered by the fact that his tenure at the Bay Pines VA was not without controversy. A representative of one university testified that he did not hire Plaintiff because of information he obtained from sources other than the Times news story; a representative of the second university testified that he Googled Plaintiff, found the Times' December 4, 2003 article, and would have had any concerns dispelled had Plaintiff produced anything from the investigating authorities that the claims against him were without foundation. Of course, there never were any such findings.

d. Defendants' newsgathering/reporting:

Reporter de la Garza had taken roughly three legal pads worth of handwritten notes in connection with his 2003-04 stories about the Bay Pines VA. Approximately 40 pages total related in some way to the story about the Plaintiff and its immediate aftermath, including de la Garza's pre-story telephone interview with the Plaintiff and several post-story interviews with the Plaintiff. The notes were not admitted in evidence. The court did not believe the notes had been properly authenticated as business records or that there was a proper legal reason to admit them in light of their "hearsay within hearsay" nature.

Two *Times* editors with 30 and 20+ years of experience testified concerning their knowledge of de la Garza and the main story at issue. They were not permitted to testify directly as to anything de la Garza told them, but they were able to testify that they believed the key sources for the story were the Medical Center Director, the Medical Center Public Affairs officer, and the Plaintiff, and that the story accurately portrayed the information obtained from these individuals.

The *Times* did not have copies of the EEO complaints or other investigatory documents concerning the Plaintiff prior to publishing the stories. During discovery in the case, the *Times* obtained copies of all of the EEO complaints against the Plaintiff and also the final VA Inspector General reports, which were public and issued in February 2004 and August 2004, finding, among other things, that Plaintiff had improperly solicited money from pharmaceutical companies for VA programs (other than the resort banquets), had misused money obtained by the Bay Pines VA (by means of an education grant from a pharmaceutical company) for the benefit of himself and others, and had created a working environment hostile to his subordinates based on, among other things, their being perceived as "too old." These reports were admitted in evidence but apparently were given no particular weight by the jury.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Unremarkable.

ii. Defendant's trial demeanor:

Unremarkable.

iii. Length of trial:

Five consecutive days.

iv. Judge:

The trial judge, who has been on the bench for approximately 20 years, is generally an animated sort. One of the challenges in trying cases before him with a jury is to minimize occasions for him to address counsel with respect to evidentiary and other matters while the jury is in the courtroom. We were not successful in minimizing these occasions.

h. Other factors:

Nothing remarkable.

20. Results of Jury Interviews, if any:

None. Florida law does not permit contact with jurors except where a juror initiates the contact or where counsel has obtained a court order permitting formal inquiry into potential juror misconduct or similar issue.

21. Assessment of Jury:

Other than the two alternates who were excused prior to deliberations, the jury was unreadable by defense counsel and audience members. What little impression we were able to derive from their pre-verdict appearance and behavior in the jury box was that they were imminently bored by the proceedings.

We believe the jury members who deliberated did not give any weight to the kind of reporting and publication at issue, namely reporting about the job performance of a public official. We also believe that the jury did not focus on the evidence showing the December 4, 2003 news story was true in all material respects. The defense was certainly hampered by (1) the absence of the reporter, (2) the inability to produce someone who would admit to being the initial tipster for the story, and (3) plaintiff's ability to recount his communication with the reporter with no opposing evidence.

22. Lessons:

Public officials who have plausible deniability with respect to having been sources for a news story will deny same if called upon to admit it.

23. Post-Trial Disposition (motions, appeals):

On June 16, 2010, the court granted the Defendant's Motion for J.N.O.V., and set aside the verdict in favor of the Plaintiff in its entirety.

Appeals are likely.

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F. ***Charles Mazetis v. Enterprise Publishing Co.***

Court: Commonwealth of Massachusetts, Bristol County Superior Court
Judge: Patrick F. Brady
Case Number: Superior Court Civil Action No. 04-00326 (currently on appeal as Massachusetts Appeals Court Docket No. 2010-P-0330)
Verdict rendered on: December 9, 2008

1. Name and Date of Publication:

The Enterprise of Brockton, Inc., January 14, 2004.

2. Profile:

a. Print _x_; Broadcast _____; Internet _x__; Other _____.
b. Plaintiff: public official __x___; public figure ____; private _____.
c. Newsgathering tort: _____; Publication tort __x___.
d. Standard applied: Actual Malice __x__; Negligence _____; Other _____.

3. Case Summary:

Plaintiff, a Court Officer policeman in the Massachusetts Trial Court, complained that an article published in the Enterprise falsely implied that he had denied physical assistance to a disabled attorney.

The article described a press conference held on courthouse steps announcing the settlement of a law suit requiring the Commonwealth of Massachusetts to bring certain courthouses into compliance with the Americans with Disabilities Act. The press conference was held by two attorneys with disabilities who had brought the suit. The article, entitled "Disabled Lawyers Get Cool Reception," reported that the court officer had instructed the wife of one of the plaintiff-attorneys to move her vehicle from an HP parking space, despite having an HP placard visible in her front window. According to the article, the wife "tried to explain the situation to the officer, but the officer refused to listen, abruptly turned his back and walked away. The court officer then ignored [the attorney with a disability] when the lawyer tried to seek assistance from him.... [T]he court officer turned his back on the attorney and continued to walk." The reporter then described his own role in the incident, "telling [the court officer] that the lawyer was handicapped, but the officer again refused to acknowledge them, turned his back and went inside the building." The plaintiff admitted that he initially had told the wife to leave the handicapped parking space, but said that once he realized she had a handicap placard in her vehicle (which he claimed had been obscured by a dirty windshield), he allowed her to stay.

Prior to trial, the Superior Court denied the defendants' motion for summary judgment as to liability, but granted partial summary judgment declaring that the court officer was a public official for libel purposes.

At trial, the jury entered judgment for the plaintiff in the amount of $28,000. The jury's verdict was subsequently set aside by the trial court on the defendants' motion for judgment

notwithstanding the verdict on the grounds of insufficient evidence of actual malice. The case currently is on appeal.

4. Verdict:

The jury answered "Yes" to the question "Has the plaintiff proved that the defendants published an article containing one or more false and defamatory facts concerning him, with knowledge of its falsity or with reckless disregard of whether it was false or not, which caused him actual injury or harm?" and awarded plaintiff $28,000.

On motion of defendants, judgment notwithstanding the verdict subsequently entered.

5. Length of Trial:

Six days.

6. Length of Deliberation:

Approximately six hours.

7. Size of Jury:

Fourteen.

8. Significant Pre-Trial Rulings / Proceedings:

The trial court held that the plaintiff was a public official for purposes of his libel claim, but found that he had provided sufficient evidence of falsity and actual malice to withstand summary judgment. *Mazetis v. Enterprise Publishing Co.*, No. 04-00326-A, 2007 WL 1247134 (Mass. Super. March 29, 2007) (MacDonald, J.).

9. Significant Mid-Trial Rulings (including interlocutory appeals):

N/A.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

The trial court denied the plaintiff's request to instruct the jury on defamation by implication, and instead instructed the jury that five specific statements in the article were at issue.

The trial court nevertheless denied defendants' request for a special verdict form that would have (a) allowed the jury to return a defense verdict if it found that the plaintiff had failed to prove that the article was not substantially true; and (b) required the jury to specify which of the five statements at issue were actionable.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

None.

12. Pretrial Evaluation:

13. Defense Juror Preference During Selection:

Middle income, hardworking, bill-paying, taxpayers.

14. Actual Jury Makeup:

Mixture of blue collar and white collar, mostly middle-aged and male.

15. Issues Tried:

Whether plaintiff carried his burden of proving that five specific statements in the article were false, defamatory, published with actual malice and caused plaintiff actual damage. (The defense did not concede defamatory content, but did not argue the issue.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

N/A.

17. Plaintiff's Theme(s):

Plaintiff's theme at trial was that the defendants had sensationalized a story that should have been about the settlement of an ADA case by blowing out of proportion a minor incident to make it appear that the court officer had refused a request for physical assistance made by an attorney with a disability when in fact all that happened was that the court officer was attempting to do his job by ensuring that HP spaces were properly used and had refused to respond when the attorney and the reporter shouted at him because he believed he was being "set up" for a confrontation in front of the press. As the plaintiff's lawyer stated after the verdict, the newspaper was "intentionally trying to make the [plaintiff] look like an a-hole," in a "tabloid-style" attack.

18. Defendant's Theme(s):

The defense theme at trial was that the article was written by an honest reporter (who by the time of trial was local police officer) and was based on what the reporter saw with his own two eyes as well as on the accounts given by two reliable sources (the husband and wife) who were eyewitnesses and who testified at trial and confirmed that the article accurately reported what they had told the reporter.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

b. Sympathy for plaintiff during trial:

The plaintiff is very diminutive in stature, approximately five feet, six inches tall and about 140-150 pounds. Although the disabled attorney appeared at trial with the aid of a walker, he was a bit pugnacious on the stand. His wife also testified forcefully and did not appear to be someone easily cowed by an authority figure.

c. Proof of actual injury:

Limited to emotional distress and corroborated by co-workers.

d. Defendants' newsgathering/reporting:

Plaintiff's counsel stressed that the reporter had involved himself in the incident by asking the court officer to assist the lawyer and thus had attempted to "make the news" rather than just reporting the news. A reporter from a competing newspaper was called in the plaintiff's case and testified that he did not observe the court officer refusing any request for assistance.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel is an experienced lawyer who tried to paint a David v. Goliath picture of an ordinary man up against the powerful, sensationalistic media.

ii. Defendant's trial demeanor:

The reporter presented himself well, but has a very serious demeanor and may not have connected with the jury

iii. Length of trial:

Six days.

iv. Judge:

Patrick F. Brady.

h. Other factors:

20. Results of Jury Interviews, if any:

None allowed in Massachusetts.

21. Assessment of Jury:

The relatively modest award may indicate a compromise verdict. It is possible that the jury did not believe that the article fairly portrayed the incident, but also was not convinced that the plaintiff suffered any significant damage.

22. Lessons:

The judge's refusal to permit a special verdict targeted to the specific statements at issue may have made it easier for the jury to "do justice" with its verdict.

The reporter's personal participation in the event also was a wild card. It is possible that he appeared to have a stake in the matter. In addition, because he was relying on his own observations, if the jury credited the plaintiff's testimony the actual malice case arguably was stronger than in cases where a reporter relies exclusively on credible third party sources.

As always, fairness was an implicit issue. This was a case where each separate statement in the article may have been true as far as it went, but the overall tone of the article may have been unduly critical. For example, the jury may have viewed the court officer's conduct as more of a failure to communicate effectively than an act of deliberate insensitivity. In addition, because there was no dispute that at the end of the press conference the wife was permitted to drive her vehicle back to the front of the courthouse to pick up her husband, the jury may have questioned whether they truly were in "need of assistance" as reported in the article.

23. Post-Trial Disposition (motions, appeals):

The trial court granted judgment notwithstanding the verdict on the grounds of insufficient evidence of actual malice. The case is on appeal.

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G. ***Glenna M. Riley and Ronald Riley v Enterprise Publishing Company, Stephen Damish and Charles Hickey***

Court: Massachusetts Superior Court, Plymouth County
Judge: Jeffery A. Locke
Case Number: Civ. Action No. 05-00841-A
Verdict rendered on: February 9, 2010

1. Name and Date of Publication:

Enterprise (newspaper) on July 25, 2002, October 22, 2002, October 24, 2002 and October 25, 2002.

2. Profile:

a. Print __X__; Broadcast _____; Internet _____; Other _____.
b. Plaintiff: public official __X__; public figure ____; private _____.
c. Newsgathering tort: _____; Publication tort __X___.
d. Standard applied: Actual Malice __X__; Negligence _____; Other _____.

3. Case Summary:

The plaintiff Glenna Riley served four years as a school committee member in a school district in southeastern Massachusetts. During Riley's term in office, the Business Manager for the school district was investigated, indicted and, thereafter, convicted of stealing school funds. Over a four year period extending beyond Riley's term in office, the Enterprise reported extensively on the case. Several articles described Riley as a "strong supporter" of the disgraced Business Manager. In addition to news articles, Riley also was the subject of critical editorials and opinion columns. She was described as a "troubling official," who was the "chief aggressor" against those who tried to investigate the Business Manager and as someone who "abused her power" to mount a "campaign of disinformation" attempting to defend the Business Manager.

Riley alleged that the defendants falsely accused her of being in league with a criminal and of dereliction of her duties as a school committee member. Her complaint asserted claims for

defamation, negligent and intentional infliction of emotional distress and interference with advantageous business relations. Her husband also brought a claim for loss of consortium.

4. Verdict:

Verdict for the defendants. Jury found one article had a defamatory statement, but was not made with actual malice.

5. Length of Trial:

Seven days.

6. Length of Deliberation:

Five hours over two days.

7. Size of Jury:

Thirteen members (originally fourteen, but one was excused).

8. Significant Pre-Trial Rulings/Proceedings:

1. Motion to exclude articles not sued upon

Defendants filed a motion to exclude any reference to articles on which the plaintiff had not sued. The motion focused on articles published outside of the limitations period and on opinion columns published within the limitation period that contained harsh, hyperbolic language that might prejudice the jury. The plaintiff opposed the motion and, in addition, on the eve of trial sought to expand her claims to include the opinion columns.

Initially, the trial court ruled that although articles not referenced in the complaint could not form the basis for any damages claims by the plaintiff, articles published within the limitations period could be introduced as evidence that the defendants "pored salt on" the plaintiff's wounds. From the defendants' perspective, this ruling took away with one hand what it seemed to grant with the other. As the trial proceeded and the judge heard additional arguments on the issue, he altered his views somewhat, ultimately ruling that the articles were relevant only to the extent that they contained admissions as to the alleged falsity of the articles sued on. By the time the case went to the jury, the court emphatically instructed the jury that they were not entitled to consider these other articles in assessing damages.

2. Motion to exclude evidence of plaintiff's breast cancer

The plaintiff, who was in her mid-sixties by the time of trial, had been diagnosed with breast cancer approximately two years after the last article about her was published and had undergone a grueling treatment process. The defendants filed a pretrial motion to exclude any reference to the plaintiff's illness as irrelevant and unduly prejudicial. Although the trial court agreed that the plaintiff could not suggest that the defendants were in any way responsible for causing her breast

cancer, he refused to prohibit the plaintiff from comparing the experience of having breast cancer to the emotional distress she felt as a result of the articles (the plaintiff's lawyer had indicated that the plaintiff suffered far more distress from the articles than from her illness). Perhaps out of fear that the anticipated testimony would backfire, during trial the plaintiff made only general references to having recovered from a serious illness and did not make any specific reference to breast cancer.

3. Pre-Trial Actual Malice Motions

The defendants filed two pretrial motions addressing actual malice issues. The first motion, permitted under Massachusetts law, was for a directed verdict based on the plaintiff's opening. The theory of the motion was that the plaintiff had failed to depose or to name as trial witnesses the reporters or editors who directly worked on the articles at issue. The motion principally relied on the ruling in *New York Times v. Sullivan*, 376 U.S. 254, 287 (1964) that the "state of mind required for actual malice would have to be brought home to the persons in the [defendant's] organization having responsibility for the publication of the [articles at issue]." Absent the testimony of the reporters and editors who worked directly on the articles at issue, the defendants argued, the plaintiff could not meet her burden of proving actual malice by clear and convincing evidence. The trial court reserved ruling on the motion until the end of the case. The motion was helpful, however, in focusing the court on the requirements of the actual malice standard.

The defendants also moved to prohibit the use of the term "actual malice" in the jury's presence, suggesting instead the use of the term "knowledge of falsity requirement." The trial court denied the motion, despite suggestions by both the United States Supreme Court and the Massachusetts Supreme Judicial Court that the better practice is to avoid the use of the term "actual malice" in order to minimize the risk of juror confusion. *See generally Masson v. New Yorker*, 501 U.S. 406, 511 (1991); *Stone v. Essex County Newspapers*, Inc., 367 Mass. 849, 868 n.9 (1975). As the trial proceeded, however, the judge frequently bracketed the term "actual malice" with an explanation that it meant knowledge of falsity or reckless disregard of the truth, and his jury instructions were quite clear on the subject.

4. Witnesses' Subjective Interpretations of the Article

The defendants also filed a pretrial motion seeking to exclude the testimony of any witness as to their subjective interpretations of the article. The motion relied on case law holding that the interpretation of the articles is for the jury and is a function that may not be usurped by witnesses. *See generally Lambert v. Providence Journal Co.*, 508 F.2d 656, 658 (1st Cir. 1975); *Snell v. Snow*, 54 Mass. 278, 281 (1847); Fed. R. Evid. 701, Advisory Committee Notes (2000 Amendments). During trial, the judge did not permit any witness to offer their opinion as to the meaning of the articles.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

After the evidence closed, the trial court granted the defendants' motion for a directed verdict with respect to plaintiff's claim for negligent infliction of emotional distress and interference

with business relations. Because the plaintiff was a public official, the negligent infliction of emotional distress claim was dismissed on the basis of *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). The interference with business relations claim was dismissed based on the lack of any admissible evidence supporting the plaintiff's claim that the articles caused the Mayor of Brockton to decide against appointing her to a paid educational post.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

As is often the case, an important factor in considering the special verdict form was whether, in the long run, the defendants would benefit from specific findings with respect to all four of the articles at issue or whether a detailed verdict form would give the jury too many opportunities to make findings in favor of the plaintiff. The defendants tried to have it both ways by proposing a form that first asked the jury if the plaintiff had carried its burden of proving that the gist of the articles was not substantially true and only called for article-specific findings if the answer to the first question was "yes." The trial court judge denied the request and used a special verdict form that required the jury to answer up to four questions for each article on the issues of falsity, defamatory content, actual malice and damages. Consistent with the jury charge, the special verdict form also required that, under *Hustler*, a defense verdict on the libel claims required a defense verdict on plaintiff's claim for intentional infliction of emotional distress and on Mr. Riley's loss of consortium claim.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

N/A.

12. Pretrial Evaluation:

The principal concerns going into the trial were that the plaintiff would make a sympathetic witness. She is an elderly, outgoing woman who at times has considerable charm. Another concern was that the nature of her claims were somewhat convoluted and might cause jury confusion.

13. Defense Juror Preference During Selection:

Hard-working taxpayers.

14. Actual Jury Makeup:

The jury was composed of six women and seven men, all were white except one Hispanic male. Two jurors in their 20s, one was 39; five were in their 40s; two in their 50s; and two in their 60s. The foreman worked in a law office as the office director. Many of the men were in trade professions and two worked in banking. One woman was a server, one a cashier, one a clerk, one co-owned an automobile dealership and one was a social worker with the Department of Children, Youth and Families. Most had a high school degree.

15. Issues Tried:

Defamation, falsity, actual malice, damages, negligent and intentional infliction of emotional distress (dismissed mid-trial), interference with advantageous business relations (same), and loss of consortium (same).

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Prior to trial, plaintiff's demand was $100,000. Before the jury returned, counsel indicated that a settlement between $5,000-$10,000 would have been agreeable.

17. Plaintiff's Theme(s):

The plaintiff's theme was that she was falsely portrayed as supporting a criminal when in fact all she had done was suggest that people in this country are innocent until proven guilty. She claimed that the newspaper was an arrogant local power that had driven her from office, accused her of supporting a criminal, and prevented her from doing the only that that mattered to her – working on behalf of children.

18. Defendant's Theme(s):

The defense theme was that the articles were substantially true accounts of an important local controversy and that the defendants believed the articles were true. The jury in this blue collar community also seemed not to appreciate any level of support offered to a public employee who had stolen public funds.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

A number of potential jurors stated that they could not be impartial because of their negative views of the press. Approximately one half of the jury pool answered affirmatively the question of whether the fact that a member of the media was a party to the case would pose a problem for them. A far smaller number of people expressed reservations about personal injury plaintiffs.

b. Sympathy for plaintiff during trial:

The plaintiff was a talkative, rather charming elderly lady.

c. Proof of actual injury:

Evidence of emotional distress was offered by the plaintiff, her husband, a friend and by medical records of her treating psychiatrist.

d. Defendants' newsgathering/reporting:

Plaintiff called a reporter (not a defendant) who covered the school committee meetings who buttressed the defendants' position that the statement were true. Other school committee members and tape recordings of school committee meetings (not used in preparing the articles) also supported the truth of some of the statements at issue.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' counsel may have over-sold her case by claiming there was a conspiracy to injure her client.

ii. Defendant's trial demeanor:

Defendant was a small city newspaper active in the community. The editors called to testify did not disguise their level of upset at being accused of libel.

iii. Length of trial:

The plaintiff's presentation seemed to unnecessarily extend the case.

iv. Judge:

The judge was actively engaged throughout and seemed to enjoy trying his first libel case.

h. Other factors:

20. Results of Jury Interviews, if any:

Not permitted in Massachusetts.

21. Assessment of Jury:

Jury was attentive throughout and seemed to have a good rapport with one another.

22. Lessons:

Most of the defense's pretrial motions were not granted, but they were helpful in educating the judge.

The special verdict form was helpful in focusing the jury on the specific statements at issue.

A third party witness called by the defense appeared to have great credibility with the jury. She had served on the school committee with Riley and, in addition, was a life-long administrative assistant to the Brockton Chief of Police. She is a strikingly attractive woman in her mid-50s, bright and articulate, and she felt very strongly that Riley refused to accept responsibility for having supported the disgraced business manager and for having attacked the superintendent (the business manager's nemesis) by accusing him of conducting a witch hunt. Even though the defense called her and she obviously was in their corner, because she had no affiliation with the paper, the jury seemed to view her as more objective than other witnesses. Another interesting dynamic that arose out of trying a case in the rather small community of Brockton was that this witness is a prominent enough member of the community that the paper felt that settling the case after she testified was unthinkable.

Another significant witness was an outspoken elderly former reporter who was called by the plaintiff. His testimony was colorful. At one point he said to plaintiff's counsel that he had other information about the case but did not think she would like it. Counsel let the matter drop and sat down. Hoping for a lighter moment (and expecting an objection), on recross defense counsel asked "what were you going to say?" There being no objection, the witness blurted out that a third party had told him that the plaintiff and other officials likely received improper financial benefits from the disgraced former business manager. The judge called a recess and later instructed the jury to disregard the testimony as hearsay, an instruction that appeared to surprise and confuse the jury.

23. Post-Trial Disposition (motions, appeals):

The plaintiff did not appeal.

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H. ***Linda Stewart v. NYT Broadcast Holdings, LLC and Griffin Television OKC, LLC***

Court: District Court of Oklahoma County, Oklahoma City, Oklahoma
Judge: Noma Gurich
Case Number: CJ-2006-5464
Verdict rendered on: January 20, 2009

1. Name and Date of Publication:

NYT Broadcast Holdings, LLC (KFOR) broadcasts on July 27 and 28, 2005.

Griffin Television OKC, LLC (KWTV) broadcasts on July 27, 2005.

2. Profile:

a. Print _____; Broadcast __X___; Internet _____; Other _____.
b. Plaintiff: public official _____; public figure ____; private __X___.
c. Newsgathering tort: _____; Publication tort __X___.
d. Standard applied: Actual Malice ____; Negligence ___X__**;** Other ___Actual Malice on False Light Claim_____.

3. Case Summary:

In late July 2005, the Norman Police Department (the "NPD") issued a press release advising of the theft of a wallet and subsequent fraudulent use of a stolen debit card obtained in the theft. The press release advised that the police had surveillance video of the suspect (taken at an ATM inside an Indian casino) and requested the help of the media and the public to identify and locate her. That same day, television stations KFOR and KWTV, along with television station KOCO and *The Oklahoman* and *Norman Transcript* newspapers, interviewed the NPD's public information officer, obtained surveillance video or still pictures provided by the NPD, and broadcast or published the requested "Crimestopper" reports. The plaintiff, Linda Stewart, was one of six women identified to police by members of the public who had seen one or another of the reports, but the media never published the plaintiff's name.

Stewart was contacted by police and informed she was under investigation, but she was never arrested or charged in the crimes. Stewart admitted that she is the woman in the surveillance video but denied stealing any wallet or using anyone's stolen debit card.

Stewart claimed that the KFOR and KWTV news reports defamed her and invaded her privacy by placing her in a false light because they "embellished" what police had said by words other than "suspect" ("alleged thief," "wallet snatcher") to describe the person in the surveillance video). She did not sue the other media that published similar reports.

Both defendants claimed that their broadcasts as a whole were substantially true and privileged because they accurately reported the information provided to them by official sources and the theft victim. The defendants also contended that their reports were prepared and broadcast in accordance with accepted standards of broadcast journalism. In fact, in addition to the news

reports broadcast by KFOR and KWTV, substantially similar news reports on the same subject were broadcast by KOCO and published by two local newspapers. The defendants contended that the plaintiff did not suffer any compensable loss of reputation because she could not identify a single person who thought less of her as a direct result of any actionable statement in a news report, and that any emotional distress was caused by the privileged broadcast of surveillance video provided by police (and the plaintiff's recognition that she was the one suspected by police) or other factors, rather than the defendants' choice of words used in the broadcasts.

The suit was initially filed against KFOR, which removed the case to federal court. A year into the case, the plaintiff discovered that one of her fact witnesses had actually seen a broadcast on KWTV, not KFOR. Over KFOR's objection that joinder of KWTV would defeat diversity (and that was the sole purpose of adding KWTV as a defendant), the plaintiff was permitted to dismiss her federal suit and re-file against both defendants in state court. Because the case of each defendant had potential for confusion, the defendants believed that a joint trial could only enhance that potential. Both KFOR and KWTV moved for a severance of the cases against them, but their motions were denied by the trial court.

4. Verdict:

Defense verdict (for both KFOR and KWTV).

5. Length of Trial:

Six days.

6. Length of Deliberation:

Approximately two hours.

7. Size of Jury:

Thirteen jurors (one alternate was dismissed prior to deliberations).

8. Significant Pre-Trial Rulings/Proceedings:

The defendants' motion for separate trials was denied.

The defendants' motions for summary judgment were denied on grounds that fact issues remained whether the defendants accurately reported information supplied by police and whether the defendants were professionally negligent.

In denying summary judgment and in a pre-trial instructions conference, the judge ruled that plaintiff did not need to prove reputational harm in order to recover on her defamation claim.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

Denial of the defendants' motion for directed verdict.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Pre-instructions were given to the jury. Those pre-instructions outlined the elements of the claims and defenses. Based on the representation of the plaintiff's counsel that her client did not steal the wallet or use a stolen debit card, the court *sua sponte* instructed the jury that the plaintiff was not the person who stole or attempted to use the stolen ATM card. The jury was also pre-instructed that the defendants enjoyed a privilege to broadcast the surveillance video if the video reflected the substance of video made available by police and that the defendants had no duty to conduct any independent investigation to verify the truth of what they were told by police. The jury was told that while the defendants were entitled to report accurately the substance of that official information irrespective of whether the information provided by the police was itself true, it was the jury's job to determine whether the defendants did accurately report the information they received from the NPD. The jury was also instructed that the Plaintiff's claims against the two television stations were separate and that the acts or omissions of one station could not be held against the other.

The jurors were allowed to take notes during the trial.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

Jurors filled out pre-selection questionnaires.

12. Pretrial Evaluation:

The defendants felt confident that their reports were substantially accurate and privileged, and that their expert testimony that the defendants adhered to professional standards would be more persuasive than the testimony of the plaintiff's expert. Nevertheless, the defendants were concerned that the plaintiff would be a sympathetic figure, that the jury would not comprehend the fair-report privilege concept, and that the jury would be confused by being presented with news reports by two different television stations having to defend the plaintiff's claims in the same case.

13. Defense Juror Preference During Selection:

Educated, analytical, self-sufficient jurors.

14. Actual Jury Makeup:

Nine women and three men/ranging in age from 20 to mid-60s (average age was probably 35)/ several had college degrees; most had some college/fairly representative of community (eleven Caucasian/one African American; mix of professional and blue-collar).

15. Issues Tried:

Defamation and false light.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

The plaintiff asked the jury for actual compensatory damages for emotional distress and lost wages as well as punitive damages. The plaintiff never quantified her demand prior to trial and did not ask the jury for a specific amount of damages.

17. Plaintiff's Theme(s):

Broadcasts as a whole were not substantially true and the gist of the broadcasts was defamatory.

Broadcasts were defamatory *per se.*

Privilege did not apply because defendants used terms like "alleged thief" and "wallet snatcher" while the police used the term "suspect." The plaintiff claimed that the police considered her a suspect while the media "convicted" her by calling her a thief or wallet snatcher.

Broadcasts placed the plaintiff in a false light.

The false light in which the plaintiff was placed would be highly offensive to a reasonable person.

Actual malice or reckless disregard for the truth.

Negligent broadcasting.

18. Defendants' Theme(s):

Broadcasts were made as a public service, not to embarrass or otherwise cause harm to the plaintiff.

The defendants accurately reported what police said. In fact, the NPD public information officer told KFOR's reporter in a recorded interview that was included in KFOR's broadcast that, after the theft, the woman in the surveillance video used the victim's stolen card at the casino's ATM. The PIO's sound bite stated that the "unknown female suspect [shown in the surveillance video] was down at the Goldsby Gaming Center and had used his [the victim's] debit card to take cash out of an ATM." The defendants argued that the PIO used the term "suspect" as a noun to describe the woman in the video rather than as a verb to suggest that the police were unsure whether the woman in the surveillance video had committed the crime.

Any harm to reputation or emotional distress suffered by the plaintiff resulted from the fact that police suspected her of a crime and disseminated the surveillance video.

The defendants acted as reasonable, responsible, professional journalists.

19. Factors/Evidence:

- The plaintiff presented no witness who saw any report broadcast by KFOR and thought less of her.

- The plaintiff's best friend testified that she saw the KFOR broadcast and did not even recognize the woman in the video.

- One witness who saw the KWTV broadcast thought she might have committed a crime based on recognizing her in the surveillance video.

- Witnesses who saw a broadcast were affected by the surveillance video rather than word choice.

- The police officers testified that they appreciated and relied on the assistance they received from the media.

- The PIO's sound bite and the reports were played for the jury many times.

- Plaintiff's expert psychologist testified that the events surrounding the investigation and the news reports caused her to suffer significant depression, but he could not differentiate among those causes as to the amount of emotional discomfort they caused.

- Plaintiff's media expert (an attorney/journalism professor) took a word parsing and legalistic claim avoidance position as to the stories rather than testifying about journalistic standards.

- Defendants' media experts were both journalism professors, one of whom also has spent more than 25 years in television news and station management. Both of Defendants' experts testified that the defendant television stations complied with applicable journalistic standards in their reporting and broadcast of the stories.

a. <u>Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:</u>

None disclosed in *voir dire*.

b. <u>Sympathy for plaintiff during trial:</u>

The plaintiff cried often and tried to convince the jury that the broadcasts ruined her life. She and some of her witnesses testified that she had suicidal ideations due to the reports. During the trial, most jurors did not appear to be persuaded. Post-trial interviews of some of the jurors indicated that the plaintiff's testimony on the first day of trial generated some sympathy for the plaintiff, but that sympathy waned as all of the facts were brought out in testimony. Several jurors lost any sympathy for the plaintiff as she "oversold" her emotional distress and as she admitted that she had failed to take any steps to mitigate her damages, if she was innocent as she claimed, by contacting police (to try to clear her name) or the television stations (to demand a correction or follow-up story).

c. Proof of actual injury:

One witness said he saw a KWTV report and thought the plaintiff may have committed the crime. He admitted that he and the Plaintiff were only casual acquaintances and that he didn't even know her last name. He also admitted that his thought was corrected promptly by Plaintiff's best friend and that he didn't shun the Plaintiff. Several witnesses, including a psychologist, testified that the plaintiff was depressed. The plaintiff claimed that her depression caused her to lose focus which caused her to lose her job as a blackjack dealer, but the jury did not find her claim credible because she was dismissed from employment two years after the broadcast.

d. Defendants' newsgathering/reporting:

The defendants received a press release from police and in response interviewed the NPD's PIO and the theft victim.

e. Experts:

Defense experts:

Dr. Joe Foote (Dean of Gaylord School of Journalism and Mass Communication at University of Oklahoma) (would recommend).

Dow Smith (Long-time local television and network journalist and retired professor at Syracuse University) (would highly recommend).

Plaintiff's experts:

Dr. Curtis Grundy (psychologist).

Mark Hanebutt (attorney and associate journalism professor at University of Central Oklahoma).

f. Other evidence:

Demonstrative exhibit showing similarity in language among various news reports effective in defeating the plaintiff's claim that the defendants did not accurately report what police said. The plaintiff insisted that the police PIO always described the woman in the surveillance video as the "suspect" and did not tell reporters that she stole the wallet. The PIO testified that he could not remember the exact words he used, but that he likely used police jargon, including the term "suspect." The demonstrative exhibit (side-by-side excerpts from three television news reports and one newspaper article) showed that virtually identical language – to the effect that "police say the woman stole the wallet" – was used by four reporters talking with the PIO in separate interviews. The defendants were able to persuade the jury that police in fact said the woman stole the wallet, and therefore referring to the woman in the surveillance video, in the context of the whole news report, as the "suspected thief," or "accused thief," or "wallet snatcher" was accurate.

g. Trial dynamics:

i. Plaintiff's counsel:

Aggressive but disorganized; took liberties with the facts. Post-trial interviews with jurors indicated that she began to lose credibility with the jury about the third day of trial.

ii. Defendant's trial demeanor:

Professional. Sympathetic toward the plaintiff's situation, but not responsible for damages.

iii. Length of trial:

Six days.

iv. Judge:

Noma Gurich. The judge appeared skeptical of the defendants' case until after the plaintiff's testimony.

h. Other factors:

20. Results of Jury Interviews, if any:

Most did not feel overly sympathetic toward the plaintiff and felt she was overplaying her damages. Some felt the defendants had no intent to harm plaintiff. Most jurors believed the defendants did their job in presenting "Crimestopper" reports, although one juror did not like KFOR's use of the term "wallet snatcher." A majority of the jurors were in favor of a defendants' verdict as soon as deliberations began. One juror held out for a plaintiff's verdict against KFOR based entirely on sympathy for the plaintiff. Other jurors tried to persuade her to make the verdict unanimous, but she refused. The verdict in favor of KWTV, which was joined as a defendant a year into the litigation in order to defeat diversity and force remand from federal to state court, was unanimous.

21. Assessment of Jury:

Most jurors were very attentive throughout the trial. Several jurors took copious notes. The jury foreperson was a well-educated professional woman. According to the foreperson, the jury spent most of its time reviewing instructions to make sure they were properly applied to the facts.

22. Lessons:

Pre-instructions are very important in framing the issues, although some of the key elements of the instructions went over the jurors heads because they had no context yet for what the judge was telling them. It is very difficult to read juries, and presumptions about how a jury will approach a case are probably misleading. This jury was able quickly to determine that this plaintiff had no case (two jurors questioned the judge afterwards why the case had gotten as far

as a jury trial). However, the jury was not demonstrative during the trial and the defendants could not get a good "read" on how the jurors were reacting to the evidence.

23. Post-Trial Disposition (motions, appeals):

Plaintiff filed a motion for new trial which was denied on March 12, 2009. Plaintiff's appeal is briefed and submitted.

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I. *Vickie Stewart v. Haywood Smith*

Court: Hall County State Court, Gainesville, Georgia
Judge: Charles Wynne
Case Number: 04SV1137
Verdict rendered on: November 19, 2009

1. Name and Date of Publication:

The Red Hat Club, September 2003.

2. Profile:

a. Print _X_; Broadcast _____; Internet _____; Other _____.
b. Plaintiff: public official _____; public figure ____; private _X_.
c. Newsgathering tort: _____; Publication tort _X_.
d. Standard applied: Actual Malice ___; Negligence _____; Other of and concerning standard.

3. Case Summary:

The plaintiff Vickie Stewart asserted libel and invasion of privacy claims based on the depiction of a fictional character named SuSu in the novel, *The Red Hat Club*.

The Red Hat Club is a story of five, middle-aged, female characters who gather regularly in a lunch club, reminisce about growing up together in Atlanta, and ultimately execute a fanciful plot to take revenge on a philandering husband. The book's jacket describes it as author Haywood Smith's "tribute to the 'Jilted Generation' – women who, like her, emerged victorious through divorce, terrible teens, menopause, the Internet, tennis elbow, spreading waistlines, nothing but tacky clothes in stores and countless other modern tribulations."

The novel was published in hard cover in 2003 and reached position 15 on *The New York Times* fiction bestsellers list. On the last day of the one year statute of limitations period, Stewart filed a multi-count lawsuit against the author and her publisher St. Martin's Press.

Plaintiff claimed that readers would understand the novel's "SuSu" character as a factual rather than fictional depiction of her because of more than 30 distinct coincidences between plaintiff's life and the character's back-story. The coincidences included aspects of plaintiff and SuSu's upbringing in Atlanta, the death of their first husbands in South Carolina, the circumstances of their divorce from their second husbands in Atlanta, the fact that they both eventually became flight attendants late in their lives and both gave their daughters similar names – "Mindunn" (plaintiff's daughter) and "Mignon" (SuSu's daughter).

Because of the similarities, plaintiff claimed that she was defamed by certain dissimilarities between plaintiff and the character, specifically, the character's heavy drinking and casual sex with "stud puppies." She also claimed that the depiction of the character revealed certain true but private matters involving her childhood and the fact that she had undergone a facelift as a adult.

Prior to the lawsuit, the author and plaintiff were friends. In fact, the author and plaintiff had grown up together – the author's older sister and plaintiff had been best friends – in the same small Atlanta neighborhood and the author and plaintiff had remained in occasional touch ever since, including attending a seminar for aspiring authors together.

Prior to publication of the book, the author obtained plaintiff's verbal consent to make use in the book of events from plaintiff's high profile Atlanta divorce, including her newspaper publication of "Wanted" posters to try to hunt down her ex-husband in Florida and make him child support. However, at trial, plaintiff denied ever giving such consent and was dismissive of the author's statement in the novel's preface that the life experiences of the author's friends served merely as the "jumping off point" for her "overactive imagination."

Plaintiff complained to the author and her sister immediately after reading the book – she bought a copy directly from the author – but never sent a retraction demand prior to filing her lawsuit. St. Martin's Press published paperback editions of the novel – and a sequel, in which SuSu graduated first in her class from Emory Law School – after the lawsuit was filed.

4. Verdict:

On November 19, 2009, a jury of eight men and four women returned a verdict for plaintiff in the amount of $100,000 on her libel claim and for defendants on plaintiff's claims for invasion of privacy and for attorneys' fees.[1]

5. Length of Trial:

Eight days.

6. Length of Deliberation:

One day.

7. Size of Jury:

Started with a panel of twelve jurors and three alternates. Because three jurors were excused during the course of the trial, each of the alternates became a juror.

8. Significant Pre-Trial Rulings/Proceedings:

Plaintiff had an extensive history of depression, but the trial court refused to compel disclosure of medical records on her psychological condition until after the close of discovery, just prior to trial.

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[1] With respect to the attorney's fees claim, the jury was instructed that plaintiff was entitled to her fees if the jury found for plaintiff on the libel claim *and* found that the libel was committed in bad faith. Under O.C.G.A. § 13-6-11, a jury may award attorney fees if it finds that the "defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble or expense . . ." Just prior to returning its verdict, the jury asked for a definition of bad faith and was instructed that in libel cases bad faith can be found if there was an intention of defaming another but could not be found if there was not an intent of defaming another.

Similarly, despite plaintiff's claim that the novel depicted her as promiscuous, the trial court refused to compel disclosure of plaintiff's sexual history until just prior to trial and then prohibited any meaningful use of the information.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

In 2008, the Georgia Court of Appeals permitted an interlocutory appeal of the trial court's denial of summary judgment and dismissed a variety of plaintiff's claims, including for false light invasion of privacy and infliction of emotional distress, but allowed the case to proceed to a jury on plaintiff's claims for libel and public disclosure of embarrassing private facts. *Smith v. Stewart*, 291 Ga. App. 86 (2008).

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

The trial court denied the defense's request for a recess after jury selection to permit jurors to read the novel in its entirety before opening arguments but repeatedly encouraged the jury to read the novel during breaks as the trial progressed.

The trial court refused to submit to the jury plaintiff's claims for punitive damages. The court ruled that under Georgia's retraction statute, Plaintiff's failure to send a pre-lawsuit retraction demand was fatal to her libel-based punitive damages claim. Likewise, the court concluded that plaintiff's election to seek damages under a Georgia statute that authorizes recovery where a party's entire injury is to her "peace, happiness, and feelings" was fatal to her privacy-based punitive damages claim.

The verdict form required the jury to enter separate verdicts on plaintiff's claims for libel, private facts invasion of privacy and attorneys fees.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

A mock trial helped define the benefits – and risks – of particular evidentiary themes. The court refused to permit a pre-selection questionnaire but did allow extensive group and individual *voir dire*, including with respect to personal bouts with depression, which were remarkably prevalent among the panel.

12. Pretrial Evaluation:

The number and extent of similarities between plaintiff and the SuSu character presented challenges with respect to liability, but the fanciful nature of the novel provided strong evidence that the work was never intended and could not reasonably be read as describing actual facts about any real person.

Despite plaintiff's pretrial insistence on multiple millions, she faced high hurdles with respect to damages. Prior to the lawsuit, one had to know plaintiff to identify her with SuSu and, if one knew plaintiff, one presumably knew whether or not it was true that she was a conspicuous drunk

and sexually active. Plus plaintiff's long and deep prepublication bouts with depression, which plaintiff admitted were not known to the author, made her claims of emotional injury – at least with respect to causation and malice – suspect.

13. Defense Juror Preference During Selection:

Jurors who were well educated, well read and disinclined to transform small slights into major emotional issues.

14. Actual Jury Makeup:

Eight men and four women. The jurors' education levels varied widely. The jury included a truck driver and the retired president of a northeastern college. The jury seemed quite collegial throughout the trial and ultimately asked to retain their copies of the novel after they rendered their verdict.

15. Issues Tried:

As a practical matter, the primary issues at trial were: (1) was the depiction of the character SuSu reasonably understood as a factual description of plaintiff; (2) was plaintiff damaged by the depiction; (3) was that depiction published in "bad faith" by defendants.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

Prior to trial, plaintiff asked for damages in excess of $10 million. In closing arguments plaintiff's counsel asked the jury to "send a message" to publishers with their verdict and asked what plaintiff's "reputation was worth? $1 million, $3 million, $5 million?"

Plaintiff sought punitive damages in an unspecified amount, but these claims were dismissed on directed verdict.

17. Plaintiff's Theme(s):

At trial, plaintiff's counsel argued that defendants had published the worst kind of lie: one that was clothed in the truth. They asserted that the author and publisher had conspired to transform *The Red Hat Club* into a bestseller by stealing actual events from plaintiff's life and then maliciously transforming the resulting character into a drunk and a slut purely for entertainment value.

Plaintiff's counsel argued that the depiction of SuSu had done enormous damage to plaintiff's reputation and caused her permanent and severe emotional distress. They claimed that plaintiff was particularly vulnerable to harm because a series of emotional blows that she had previously incurred in her life left her in a fragile psychological state at the time of publication.

Plaintiff's attorneys called a succession of her friends to express outrage and frustration at the number of clearly recognizable similarities between the character SuSu's back-story and plaintiff's life. Although the friends testified that the novel had hurt plaintiff and changed her

from personable and outgoing to sullen and withdrawn, they also consistently testified that the novel did not lead them to believe that plaintiff was promiscuous or that she abused alcohol.

Plaintiff herself testified that she had been deeply hurt by the novel and that she believed it would taint how her friends and grandchildren perceived her. She testified that she had not wanted to bring a lawsuit, but felt that she had no choice. The latter claim permitted introduction of evidence of plaintiff's prior legal claims, including a frivolous EEOC complaint against an employer that had rescued her from an apparent suicide attempt and a claim against her sister in connection with the probate of her father's estate (he had essentially omitted plaintiff from the will).

Plaintiff's attorneys called the author during their case and cross-examined her at length concerning email and other records obtained from her computer through electronic discovery. For example, in one email, prepared prior to publication of the book, the author had encouraged aspiring writers to draw from real life when creating characters, but advised "disguising" the characters sufficiently "to avoid problems." In another, prepared following publication, the author referred to plaintiff as the model for her "fictional slut character."

18. <u>Defendant's Theme(s):</u>

Defendants contended repeatedly throughout the trial that plaintiff's claims of libel and invasion of privacy disregarded and did violence to the nature of novels in general and this novel in particular. The *Red Hat Club* tells a fantastic tale in which the "Red Hats" pull off an impossibly perfect plot to take revenge on a philandering husband. The plot includes use of high-tech video surveillance gear, hacking into a bank's computer system, a "Dunwoody dominatrix" who turns out to be a long lost high school friend, and one character amassing a fortune by investing her household budget in penny stocks and exotic securities. Numerous adventures in the novel are rendered with an "I Love Lucy"-type of slapstick comedy. The content of the novel itself conflicted with plaintiff's claim that the book could be reasonably read as a factual portrayal of any real person, including plaintiff.

Defendants also emphasized that there was no intent, much less a malicious motive, to portray plaintiff in a negative fashion. Prior to the lawsuit, the author and plaintiff were friends with a common interest in writing. The author did not believe that anyone would read the SuSu character as a literal description of a real person. The publisher had no knowledge of plaintiff at all until the lawsuit was filed on the last day of the statute of limitations.

With respect to damages, defendants attempted to highlight the fact that plaintiff could not identify any people who thought less of her as a result of the novel. Moreover, plaintiff had a history of serious depression that predated publication of the novel and arose from events in her life that defendants had no connection with whatsoever. Plaintiff's attempt to blame the novel for her psychological problems were consistent with past lawsuits that attempted to put blame on others.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

A surprisingly large number of prospective jurors answered in the affirmative that they had personally been the victims of false statements published about them. The increased role of email and social media may help account for the increased positive response to this question.

b. Sympathy for plaintiff during trial:

One juror – an alternate eventually seated on the jury proper – seemed particularly sympathetic to plaintiff and her claims of injury.

c. Proof of actual injury:

One of the weakest elements of plaintiff's case. Plaintiff had an expert psychologist testify on her behalf to try to establish emotional harm.

d. Defendants' newsgathering/reporting:

Not applicable.

e. Experts:

Defense experts:

(1) Daniel Menaker

Dan Menaker is an author and the former editor in chief of Random House. He explained that all authors are like magpies and that their attribution to their characters of traits observed in real people is not just common but inevitable and unavoidable. He further testified that he found SuSu the most sympathetic and compelling character in the book. He testified that St. Martin's Press' editor exceeded the standard of care in connection with her careful work on the novel. He was a very effective witness who quickly developed a visible connection with the jury.

(2) Hugh Ruppersburg

Hugh Ruppersburg is a professor of English and associate dean at the University of Georgia. He testified about how numerous acclaimed authors had used identifiable traits from real persons to develop characters, but those characters were nonetheless reasonably understood as fictional. He testified that the author had acted reasonably in believing this novel would be understood as a work of fiction. He also was a very effective witness.

Plaintiff's experts:

(1) William Buchanan

Dr. Buchanan is an Atlanta psychologist and professional expert witness who was engaged to present plaintiff's claim for emotional distress damages in the most favorable light and did so, testifying that just as plaintiff was recovering from a series of psychologically traumatizing blows in her life, the novel was published causing her further harm and reducing the upward trajectory of her recovery. On cross examination, he admitted that some of plaintiff's claims to him had been so self-interested and exaggerated that he did not believe them to be reliable and that in general his own testing of plaintiff indicated that she was characterized by dysfunctional thinking, significant persecution ideation, a tendency to be worry-prone and to engage in obsessive rumination and to adopt the role of a martyr, etc.

(2) Jonathan Kirsch

Jonathan Kirsch is a Los Angeles-based book publishing attorney. He testified that the author and editor overlooked or ignored numerous "red flags" that should have alerted them that they were violating plaintiff's rights. He relied on references to "red flags" detailed in his own texts on book publishing law. The court also permitted him to effectively testify that it was negligent not to have had the book lawyered as that would surely have resulted in changes in its content.

f. Other evidence:

Plaintiff made effective use of the author's email exchanges with friends and admirers recovered from the author's computer. Some of the email when taken out of context appeared to make light of plaintiff. E.g., "I have heard that the person who was the inspiration for my fictional SuSu has threatened to sue-sue if I make the sequel about 'her.'"

g. Trial dynamics:

i. Plaintiff's counsel:

Experienced and successful and in this case theatrical and hyperbolic. Opening and closing arguments involved multiple props, including a white swath of cloth – plaintiff's reputation – that counsel proceeded to tear and deface ("SLUT!") as the closing progressed and a complicated diagram that turned out at trial's end to be a representation of the snake in the "Don't Tread on Me" version of Old Glory, an apparent appeal to the venue's conservative political character (the venue gave John McCain his fifth largest margin of victory of any district in the country in 2008).

ii. Defendant's trial demeanor:

The author and the book's editor, Jennifer Enderlin, were present throughout the trial and their earnest and sympathetic demeanor as well as their testimony certainly helped convince the jury to reject the finding of bad faith necessary to plaintiff's claim for attorneys fees.

iii. Length of trial:

Eight days.

iv. Judge:

Kept the trial on schedule despite evident discomfort with the novelty of the legal issues (a pre-closing charge conference adjourned the trial for more than six hours) and a significant respiratory infection.

h. Other factors:

Plaintiff never presented a coherent invasion of privacy claim as the evidence at trial demonstrated that the alleged "private" facts revealed in the novel were already well known to her friends (plaintiff's plastic surgery, for example) or a matter of public record as a result of litigation she initiated with her sister.

20. Results of Jury Interviews, if any:

At the invitation of the court, about half the jury remained after the verdict to discuss the case with counsel and the court. These indicated that at the beginning of deliberations the jury was split down the middle. Most started the case skeptical of plaintiff's claims but were troubled by the number and specificity of similarities between plaintiff and SuSu; at the same time, jurors generally thought the plaintiff would have been better advised to have talked the issue through with the author rather than hiring a lawyer and resorting to litigation. The amount of the verdict appeared to be a compromise achieved by the jury because one juror – the last alternate – persisted in her belief that plaintiff was entitled to very large award while other jurors were in favor of a very small award.

21. Assessment of Jury:

It was a serious jury led by a foreperson, who apparently walked the jury page by page through the court's charge. The charge conflated the "actual facts" and "of and concerning" standard in a way that suggested that if the character was merely identifiable as plaintiff, then some award of damages was warranted. The charge as given read:

> The first element I have just read that must be proved in a claim of defamation is that the publication contains a false and defamatory statement concerning the plaintiff.

Regarding the element of Plaintiff's defamation claim that *The Red Hat Club* could be found to be a "false and defamatory statement concerning the plaintiff," the allegedly defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.

The "of and concerning" test for works of fiction is essentially the same as that for nonfiction.

The "of and concerning" test "is whether persons who know or know of the plaintiff could reasonably have understood that the fictional character was a portrayal of the plaintiff. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that she is the person meant.

Simply because a book is labeled 'fiction' does not mean that it many not be defamatory.

The test for libel is not whether the story is or is not characterized as 'fiction,' or 'humor,' but whether the charged portions, in context, could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated, so as to be considered "of and concerning plaintiff."

If the passages in question could not be reasonably understood as describing actual facts about plaintiff or actual events in which she participated, the publication would not be "of and concerning plaintiff" and could not be libelous.

Defense counsel believes the charge as given facilitated the apparent compromise verdict for the plaintiff. The defendants had submitted the following requests to charge:

DEFENDANTS' REQUEST TO CHARGE NO. 12
DEFAMATION: OF AND CONCERNING THE PLAINTIFF

In connection with her defamation claim, it is Plaintiff's burden to prove by a preponderance of the evidence that the statements that she challenges are, in the words of the law, "of and concerning" her.

To meet this burden, Plaintiff must show that the statements refer to a person and that person must be Plaintiff. A reader's decision to infer an implication that is not made by the statements themselves is not actionable as defamation.

In other words, the burden is on Plaintiff to prove by a preponderance of the evidence that the statements that Plaintiff has challenged in the novel as false and defamatory were not intended as descriptions of a fictional character, but instead were intended to portray Plaintiff.

Smith v. Stewart, 291 Ga. App. 86, 92-93 (2008) (finding jury issue on "whether the character of SuSu was a portrayal of "Stewart" and that a jury should be permitted to decide if "the character was intended to portray [plaintiff]")
Bollea v. World Championship Wrestling, 271 Ga. App. 555, 559 (2005)
Collins v. Creative Loafing Savannah, Inc., 264 Ga. App. 675 (2003)

DEFENDANTS' REQUEST TO CHARGE NO. 13
DEFAMATION: FALSITY

In connection with her defamation claim, it is Plaintiff's burden to prove by a preponderance of the evidence that the statements that she challenges are false.

A statement is not considered capable of being true or false in the eyes of the law if it is reasonably understood as nothing more than imaginative, fictitious speech that is not meant to state actual facts.

Rather, in order to be capable of being understood as true or false, the statements challenged by Plaintiff must be reasonably understood as describing actual facts about her or actual events in which she participated.

If a statement is capable of being understood as describing actual facts her or actual events in which she participated, then Plaintiff must demonstrate that the statement is false in a substantial way. A statement is not false unless "the substance, the gist, the sting" of the statement is false. Also, a statement is not false unless it would have a different effect on the mind of a reader than the truth would have produced.

Smith v. Stewart, 291 Ga. App. 86, 95 (2008) (finding jury issue on whether allegedly defamatory passage in *The Red Hat Club* are "reasonably understood as describing actual facts about Stewart or actual events in which she participated")
Bollea v. World Championship Wrestling, 271 Ga. App. 555, 558 (2005) (to be actionable as defamation, statement must be "reasonably understood as describing actual facts")
Swindall v. Cox Enterprises, Inc., 253 Ga. App. 235 (2002)

22. Lessons:

Even when reminded not to do so, authors find it difficult not to write about litigation in e-mails that they send to their professional friends and acquaintances. Predictably, such e-mail is not helpful at trial.

Proving damages in a libel-in-fiction case is a very difficult undertaking and defense counsel have considerable opportunities at trial to deflate a plaintiff's over-reaching damages claims.

23. Post-Trial Disposition (motions, appeals):

Neither plaintiff nor defendants pursued an appeal. The verdict was reduced to a judgment and paid in full on February 10, 2010. Several attorneys fees and costs motions asserted by both sides remain pending.

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J. *Duc Tan and Vietnamese Community of Thurston County v. Norman Lee and Committee Against the Public Display of VC Flag*

Court: Thurston County WA, Superior Court
Judge: Thomas McPhee
Case Number: 04-2-00424-9
Verdict rendered on: April 16, 2009

1. Name and Date of Publication:

Committee Against the Public Display of VC Flag (CAVCF) posted article on internet regarding the plaintiffs in Vietnamese. All CAVCF board members were sued individually. One defendant authored two additional articles published in Vietnamese newspaper and community newsletter.

2. Profile:

a. Print __x__; Broadcast _____; Internet _x__; Other _guest article submitted to Vietnamese newspaper_.
b. Plaintiff: public official _____; public figure _x__; private _____.
c. Newsgathering tort: _____; Publication tort _x___.
d. Standard applied: Actual Malice __x___; Negligence _____; Other ____.

3. Case Summary:

Plaintiffs Duc Tan ("DT") and the Vietnamese Community of Thurston County ("VCTC") owned and operated a Vietnamese food booth at Lakefair, a large, multicultural community event in Olympia, WA.

A cook employed by the plaintiffs found an apron in or on VCTC premises. The apron depicted Santa Claus but with a gold star on his cap instead of a snowflake or a bell. The front of the apron is red with bright gold stars. Santa is wearing mitts lined with blue and white, like a U.S. flag turned inside out.

The cook testified that he knew immediately the apron was communist propaganda and should not be used in public food booth. When asked to explain how he knew, the cook replied that he had served more than twenty years in the South Vietnamese Air Force and that he just knew.

The cook showed the apron to plaintiff DT who shrugged it off as a normal, American santa. Plaintiff said don't worry but if it bothers you that much just turn it inside out. As per instructions, the cook wore the apron inside out for the rest of his shift. But he promptly reported the matter to many people including the CAVCF.

The CAVCF obtained the apron and studied it closely. They interviewed the cook. The CAVCF then published an article on the internet in Vietnamese. They article said that the apron was communist propaganda and should not have been intentionally displayed at Lakefair by a group purporting to represent and speak for Vietnamese refugees. In the article, the plaintiffs were invited to participate in a news conference and explain where the apron came from and why they had it but they never showed.

The defendants believed the apron was just another incremental provocation like many others tied to the plaintiffs including playing the opening of the communist anthem at a refugee cultural event and running a language school that displayed a communist flag.

The parties' relationships had soured years ago due to an argument over whether to accept community donations from known or suspected communist sources. Defendants were adamant they not take one penny. Plaintiffs advocated taking money from any source, communist or otherwise so long as there was no undue influence. The plaintiffs repeated their position at trial.

4. Verdict:

$310,000 gross, broken down as follows:

For DT, for the internet article: $150,000
For VCTC, for the internet article: $60,000
For DT, for newspaper article, against one defendant only: $75,000
For VCTC, for newspaper article, against one defendant only: $25,000

5. Length of Trial:

Two weeks.

6. Length of Deliberation:

One day.

7. Size of Jury:

Twelve.

8. Significant Pre-Trial Rulings/Proceedings:

Plaintiffs were declared "public figures" prior to trial.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

Appeal raises many points but three main evidentiary rulings:

The court's admission of an alleged photocopy of an alleged internet webpage depicting the commercial sale of the apron five years ago. The exhibit was not disclosed during five years of litigation. Plaintiff's former member testified he searched the internet for Santa Aprons five years ago and found the exact apron in use at Lakefair advertised for sale in 5 minutes so he printed the webpage and held it for 5 years never telling his attorney. Plaintiffs argued that the defendants spoke in reckless disregard of the truth because if they had just searched the internet 5 years ago, they too would have found the very same webpage, seen the same picture, and known the apron was a normal, apolitical, consumer product made in the U.S. by a non-thinking machine.

Trial court permitted plaintiff to testify that, after the article was published, he received one anonymous death threat which caused great fear and distress. The letter and envelope purported to set forth one of the defendant's home addresses and signatures but police examination yielded no fingerprints. Who signs a letter and then wipes off his fingerprints?

The plaintiffs stipulated that no defendant had any involvement in writing or mailing the letter. In plaintiffs words, not even the defendants would be stupid enough to sign their own name or give their own home address. But, if we agree up front that a letter is not what it purports to be, is it not by definition a hoax and how can a hoax be admissible to prove anything?

The court overruled all objections and admitted the testimony as "relevant to damages."

The trial court refused to allow a former U.S. Army Special Operator who served in Vietnam as a Psychological Warfare Specialist from expressing any opinion as to whether the Lakefair apron had communist symbols. This is discussed further under "experts."

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Trial court declined to give the instruction for community interest privilege as requested by defense. If we are deciding whether words are defamatory from the point of view of a hypersensitive, discrete and insular minority, are we not bound to also consider the community interest privilege? Every witness who testified agreed the Vietnamese community had a clear, legitimate interest in the public disclosure and discussion of any public display of communist flag or symbol.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

None. But courtroom was full of spectators split into opposite camps. "Feedback" was continuous.

12. Pretrial Evaluation:

13 Defense Juror Preference During Selection:

As smart as possible.

14. Actual Jury Makeup:

All white, equal male and female, ages 22 to 75. Many college educated. Court struck the only Vietnamese juror because her parents fled communist Vietnam and she knew too much. Jury included one former US Army helicopter pilot who served in Vietnam.

15. Issues Tried:

Whether allegations written in Vietnamese in an article posted on the internet by the Committee Against the Public Display of the Communist Flag were false and defamatory and made with actual malice which proximately caused reputational damage to Vietnamese public figures?

16. Plaintiff's Demand (damages sought, compensatory/punitive):

No claims for economic damage. Emotional distress and loss of reputation only. In closing, plaintiffs' requested $300,000, almost exactly what jury gave.

17. Plaintiff's Theme(s):

Its hurtful to call someone a communist. If you have a photograph of yourself attending an anti-communist rally, you are not a communist. The defendants are seeing things in the apron in use at Lakefair that are not there. Its just santa claus.

18. Defendant's Theme(s):

If Dr. Norman Le looks at an apron and tells us he sees a communist symbol and is deeply offended, who are we to question? Dr. Le was at the fall of Saigon and saw the Nationalist Flag ripped down and replaced with a communist star, a sight the plaintiff's expert likened to an American watching the Statue of Liberty blown up by terrorists. Dr. Le was arrested by secret police and imprisoned for ten years in communist labor camp.

Phiet Nguyen ran a combat brigade and translated for the U.S. Army in Vietnam. He was arrested by secret police and served 6 years in communist labor camp. Mr. Nguyen escaped and was trained by the U.S. to assist in the processing of immigration applications by Vietnamese refugees. The U.S. trained Mr. Nguyen to identify and screen anyone with suspect ties to communist regime. Do we now know more than Mr. Nguyen?

Dat Ho grew up watching dead bodies float down the river with communist stars pinned to their chests. He risked his life serving as a translator for the U.S. Army because he wanted to live in free country. The Vietcong threatened to rip his tongue out. Do we now tell Dat Ho that, in America, we will not rip out your tongue but we will gag you just the same?

The defendants never actually called the plaintiffs communists. They characterized the Lakefair apron as the "intentional display of the communist flag." And it was.

Saying that someone eats the rice of the Nationalists but honors the shadow of the communists and is therefore green on the outside and red on the in is classic rhetorical hyperbole.

Nazi skinheads have every legal right to march in Skokie, Illinois. The plaintiffs have every legal right to fly their communist flag in Olympia, Washington. But people who are concerned or offended have every right to say so.

If you are a public figure and you inject yourself into hot button politics, be prepared for political criticism or even ridicule. If you purport to speak for a Vietnamese community, your constituents have every right to challenge your credibility and what you say and do.

Turn on the television. Someone is calling our president a communist every day of the week. Can he sue for that? Some people said that using tax dollars to bail out investment banks and insurance companies was socialist. Can someone sue for that? Or, would truth be an absolute defense?

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

All white jury knew surprisingly little about the Vietnam War.

b. Sympathy for plaintiff during trial:

Plaintiff's daughter testified tearfully that her father was hurt when he was falsely accused of communist sympathies. He had worked hard against communism. But she did not know before trial that her father signed a pledge of loyalty to the communist party.

c. Proof of actual injury:

Zero. Plaintiffs admitted they had NO economic losses.

d. Defendants' newsgathering/reporting:

e. Experts:

Defense experts:

The defense called Robert Cavanaugh who was retired US Army Special Forces. Cavanaugh performed "psychological operations" in Vietnam including the identification and suppression of communist propaganda.

The court ruled it takes an "expert" to know whether the apron has any communist symbols but refused to allow Cavanaugh to express an opinion because he was not qualified. Who is sufficiently qualified to recognize communist symbols is unclear from the court's ruling but plaintiffs argued in post-trial motions you may have to be from Vietnam.

Plaintiff's experts:

The plaintiffs called Dr. Miriam Bevi-Lam, a second generation Vietnamese refugee who teaches at UC Riverside, CA. Dr. Bevi-Lam explained why a false accusation of communist sympathies can hurt some people. But she fairly conceded many points deemed critical by the defense.

Dr. Bevi-Lam said that planting a communist flag or symbol in a Vietnamese refugee community is like planting a nazi swastika in a jewish community or posting a photo of Osama Bin Laden at Ground Zero to commemorate 9/11.

She acknowledged that two defendants who spent a combined 16 years in communist concentration camps after the War were likely psychologically scarred for life. Their visceral reaction to any communist flag or symbol was therefore rational and understandable even if abnormal for a regular American.

Dr. Bevi-Lam is an ardent supporter of free speech. She served on an art board in Los Angeles that sponsored an art show in "Little Saigon" in Orange County, CA that sparked riots. The show featured a photo of a young Vietnamese woman in a red tanktop emblazoned with a gold communist star, sitting next to a statute of Ho Chi Minh and a cell phone. Dr. Bevi-Lam knew the photo would offend but supported its public display as free artistic expression.

Paradoxically, Dr. Lam opined that a video store owner in California who posted a communist flag in a Vietnamese refugee community that sparked a riot "got what he deserved" including spit in the face. In her mind the material difference between the two incidents was the blatancy of the expression.

Dr. Bevi-Lam is a very intelligent and capable person. She has a magnetic personality. She is not a professional witness just there for the money. If you structure question correctly, you will get clear, honest answer.

I had no problem with anything Dr. Bevi-Lam said. You could trust her to do many things. But I say you never trust her (or anyone else) to decide for you what is acceptable free speech, or political or artistic expression.

f. Other evidence:

During discovery, one plaintiff testified that he was released by communists after just six months and permitted to teach school children in newly named Ho Chi Minh City. He also admitted that he signed a written pledge of loyalty to the communist party and was asked to inform on his neighbors by the secret police.

The significance of the oath is an interesting but difficult question. It was signed a long time ago. Plaintiff claimed he signed under duress. Yet every Vietnamese witness who was asked if they would want to know if public figure ever signed communist pledge said yes.

g. Trial dynamics:

i. Plaintiff's counsel:

Good plaintiffs' counsel. Always cordial.

ii. Defendant's trial demeanor:

All defendants testified. No surprises. All said they believe what they said was true and explained why.

iii. Length of trial:

Two weeks, but with multiple interruptions and days off.

iv. Judge:

Very experienced. Tough, no nonsense. Make your argument but when court makes ruling, stop talking. Do not show up late or unprepared. Do not waste time.

h. Other factors:

Translators change the ability of witnesses to communicate with jurors. It's a tough call whether to have witnesses testify in imperfect English or go through translator. In a defamation case, word precision is critical. Use a translator, however, and the jury may lose "feel" for the witness.

20. Results of Jury Interviews, if any:

Judge allowed counsel to interview jury for 15 minutes immediately following announcement of the verdict. The jury did not believe there was any communist symbols in the Lakefair apron. It was a normal depiction of Santa Claus. There was no political meaning. The defendants overreacted.

21. Assessment of Jury:

Gullible.

22. Lessons:

This could be a book but here are a few:

It's All in Translation

In a defamation case involving a foreign language, retain the best possible translators. Be aware that words and phrases cannot always be literally translated. Be careful about mixing consulting and testifying experts. Although not in this case, it can lead to privilege waiver issues.

Know the exact procedure for challenging the accuracy of in-court translation. Think very carefully what you challenge and what you let go. I could never have done it myself. All challenges to translation were handled by co-counsel, Tam Nguyen, who is fluent in Vietnamese. The trial court fielded all translation challenges with great care. Whenever Tam Nguyen (no relation to defendant) stood up to challenge translation, the trial stopped. 100% of Mr. Nguyen's translation challenges were upheld. The court translators were all certified. Their high error rate was caused by nuance in the language and the complexity of the issues, not personal bias.

It's Posted on the Internet So it Must be True

The defendants testified that the Lakefair apron was handmade, communist propaganda. On rebuttal, the plaintiffs called a former member of the VCTC who testified that he copied an advertisement for the very apron off an internet site five years ago. The "print out" was kept secret for five years and sprung at trial purportedly to impeach the defendants and prove the apron was a normal commercial product devoid of political meaning.

The defense argued print out was not authenticated and was hearsay. Its easy to fabricate such a document. Why was document never disclosed in violation of a pre-trial order? The printout says the apron was made by someone called "Lucy." Were the defendants right then when they said apron was handmade? Where is Lucy now?

In a public figure defamation case, the defendant walks for making a false statement if he believed it to be true. The belief need not be reasonable. How does some webposting the defendants never wrote or read tell us what is in their heads?

All objections were overruled and the printout was admitted. Issue is well briefed on appeal.

Parents vs. Professors

I overheard a political discussion between two college students in a bookstore months after the verdict. One student was second generation Vietnamese refugee. The students were grappling with capitalism vs. socialism vs. communism. Which is better? Their parents told them one thing and their college professor another. Who should they believe and why? I was swept right in. I felt as qualified as anyone else to give my opinion.

Irony Can be Cruel

I met some incredible people from Vietnam. I listened to their story. It blew my mind. These people fled communism and came here because they believed in freedom. They are later hauled into court for expressing political opinions? They don't know Santa from Ho Chi Minh?

It May Not Be Just in Your Head

Vietnam has declared that the activities of Vietnamese refugees in the U.S. are matters of official state business. I have letters sent by the Vietnamese embassy in Washington D.C. to Thurston county politicians and school administrator officially protesting the defendants' protests against the communist flag. The plaintiffs, the defendants, the experts and any other witnesses who were asked said that the communists are masters of deception , capable of the most sophisticated frauds and manipulations. Victory is a long, methodical process that unfolds in tiny, incremental steps, often imperceptible to the eyes of the weak and gullible.

23. Post-Trial Disposition (motions, appeals):

Motion for new trial/jnov was denied. Appeal is pending at Division II, Washington State Court of Appeal, Tacoma, WA.

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K. ***Donna West v. Tyler Perry and Lions Gate Entertainment***

Court: U.S. District Court, Eastern District of Texas, Marshall Division
Judge: Leonard E. Davis
Case Number: No. 2:07-CV-200
Verdict rendered on: December 9, 2008

1. Name and Date of Publication:

Motion picture "Diary of a Mad Black Woman" (released February 25, 2005).

2. Profile:

a. Print ___; Broadcast ___; Internet ___ Other: theatrical, television & home video
b. Plaintiff: public official _____; public figure _____; private __x___
c. Newsgathering tort ____; Publication tort __x__
d. Standard applied: Actual Malice ___; Negligence ___; Other: copyright infringement: substantial similarity of protectable expression

3. Case Summary:

Plaintiff claimed that her Play "Fantasy of a Black Woman" (performed 3 nights in Dallas in 1991) was copied and her copyright infringed by the 2005 Movie "Diary of a Mad Black Woman."

4. Verdict:

Defense verdict.

5. Length of Trial:

4½ trial days during period December 2-9, 2008.

6. Length of Deliberation:

Less than two hours.

7. Size of Jury:

Eight jurors — no alternates.

8. Significant Pre-Trial Rulings/Proceedings:

Partial summary judgment dismissing claims under Lanham Act and state law claims of conversion and unfair competition.

Granted plaintiff s motion to preclude mention of plaintiff's copyright registration or fact that plaintiff registered her script after release of Movie.

9. Significant Mid-Trial Rulings (including interlocutory appeals):

After *voir dire*, denial of plaintiff s motion to excuse for cause jurors who had heard of Perry, or had seen his movies — plaintiff failed to lay a foundation for prejudice.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Preliminary instruction on copyright law, especially the *scénes-á-faire* doctrine.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):

One-page pretrial questionnaire; each side given 30 minutes for *voir dire* by counsel. Defendants used *voir dire* to set up *scénes-á-faire* defense.

12. Pretrial Evaluation:

Because the lack of substantial similarity was patent, defendants expected summary judgment, or jury verdict, or JMOL, or direction for dismissal on appeal.

13. Defense Juror Preference During Selection:

Jurors who read novels, watch movies.

14. Actual Jury Makeup:

Four men and four women. At least four had seen defendants' movie. Most jurors were regular churchgoers and read religious oriented books.

15. Issues Tried:

Copyright infringement; defendants' profits attributable to claimed infringement.

16. Plaintiff's Demand (damages sought, compensatory/punitive):

$40 million — defendants' supposed profits.

17. Plaintiff's Theme(s):

Plaintiff is sickly, elderly, poor and a good Christian. Defendants are rich and defendant Lions Gate might be "Canadian," wink, wink.

18. Defendant's Theme(s):

Defendant Tyler Perry is a 39-year-old highly creative, hard working, successful writer, actor and producer. Stories about husbands who leave wives for younger woman are similar only because the plot is standard and reflects real life.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Almost half, both white and black, had heard of Perry and about eight had DVDs of his movies.

b. Sympathy for plaintiff during trial:

Plaintiff and her husband testified about her previous brain tumor and other illnesses.

c. Proof of actual injury:

None.

d. Defendants' newsgathering/reporting:

N/A.

e. Experts:

Defense Expert:

Bob Gale, screenwriter ("Back to the Future"), film producer and director, explained there was no evidence of actual copying in light of *scénes-á-faire* and conventions of story telling.

Plaintiffs Expert:

Professor Connie Whitt-Lambert, did not "believe" in *scénes-á-faire*; argued copying probable but was agnostic about striking similarity — could not say Perry couldn't have created independently.

f. Other evidence:

Witnesses regarding Perry's access, or lack of it, to plaintiff' s screenplay; jury heard plaintiff read her Play and watched defendants' Movie.

g. Trial dynamics:

The works were entirely different except for basic plot of husband leaving wife for younger woman. Defendants' expert, as a screenwriter, could show how *scénes-á-faire* explained any similarities.

i. Plaintiffs counsel:

Aubrey "Nick" Pittman; Willie Briscoe.

Pittman made himself the center of attention. Plaintiff was seated with her back to the jury. Plaintiff's counsel are African-Americans and used their peremptories to exclude African-Americans. During *voir dire,* Pittman was so focused on pre-conditioning the jury that they must follow rules, he failed to ask if they knew of defendant Perry, had seen his plays or movies, or had home video copies at home.

ii. Defendant's trial demeanor:

We knew it was critical for Perry to attend trial. He sat at counsel's table every day, facing the jury and was a convincing witness. He never heard of plaintiff or saw her script until trial. Plaintiff is an African-American; she was cross-examined by defense counsel who is also African-American and female.

iii. Length of trial:

Judge initially allowed 14 hours per side, then cut to 12 hours, but *sua sponte* added 45 minutes to defense because defendants were charged 3 hours to present plaintiff's Play and defendants' Movie.

iv. Judge:

Wouldn't rule on MSJ re copyright infringement claim, but gave good jury instructions. Wrote withering Order denying motion for new trial. (Same judge recently assessed Microsoft $300 million in patent infringement case, affirmed by Fed. Circuit.) Runs a tight ship. Jury trials typically get 4-5 days. Verdicts within a few hours.

h. Other factors:

This should have been a summary judgment case. Defendants unsuccessfully moved to have the jury read plaintiff's Play and show defendants' Movie before opening statements or any witness (especially experts). However, during cross-examination of plaintiff, defendants had her read her Play for the jury and showed the Movie — before anyone could explain them. Jury, marshal and judge enjoyed defendants' Movie.

20. Results of Jury Interviews, if any:

None. Jury admonished it would have to initiate interviews.

21. Assessment of Jury:

We had a mixed jury: 4 men, 4 women; 7 whites; 1 black. Three of the white jurors had a copy of Perry's movie at home.

22. Lessons:

In an infringement case where the similarity claim is weak, show the works to the jury before plaintiff s expert can "spin" their contents and make similarity claims. Defendant's chances are substantially enhanced if the creator sits through the entire trial.

23. Post-Trial Disposition (motions, appeals):

Plaintiff appealed from the pretrial partial summary judgments, the judgment on jury verdict, and the denial of new trial. Briefing was finished in March 2010; waiting for hearing in U.S. Court of Appeals for Fifth Circuit. Docket No. 09-40873.

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L. SUMMARY REVIEWS

The following reviews have been prepared in summary form, because only limited information was available.

1. *Victor Cretella III v. David Kuzminski*

Court: U.S. District Court, E.D. Va.
Judge: Dennis W. Dohnal
Case Number: 3:08-cv-00109
Verdict rendered: July 31, 2009 (remitted August 14, 2009)

a. Name and Date of Publication: Postings during 2007 on three websites: "Preditors & Editors" website, http://www.anotherealm.com/prededitors/; "Absolute Write" website, http://www.absolutewrite.com; "The Guild" message board, http://edandsootswritersguild.yuku.com.

b. Profile:

(1) Print ___; Broadcast ___; Internet _x_; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice _x_; Negligence ___; Other ___
(4) Public Official ___; Public Figure _x_; Private Figure ___

c. Case Summary: The case was brought against the proprietor of the Preditors & Editors website (www.anotherealm.com/prededitors), which offers links of interest to authors.

In February 2007, plaintiff Victor Cretella, who was then outside counsel for the on-demand publishing firm PublishAmerica, sent a cease-and-desist letter to Christine Norris, who had referred to the company as "a scam" in comments she posted to forum section of the Absolute Write website (http://www.absolutewrite.com). Norris reacted to the letter by posting additional comments on the forum, restating her complaints against PublishAmerica and inviting the company to "Bring. It. On." Many other commenters in the Absolute Write forum posted comments expressing support for Norris.

One of these was defendant David Kuzminski, who also posted comments about the controversy and other writers' disputes with PublishAmerica on his own Preditors and Editors site. The commentary by Kuzminski and others on the Absolute Write and other sites, and by Kuzminski on his own site, continued when Cretella accepted the position as general counsel of PublishAmerica.

These comments included statements that Kuzminski had filed an ethics complaint against Cretella with the Maryland bar, and encouraging others to do the same.

Cretella sued Kuzminski over several of his comments. After pre-trial motions, defamation claims remained against nine comments by Kuzminski: seven on the Absolute Write site, one on his own site, and one on "The Guild" (edandsootswritersguild.yuku.com), a message board for writers. *See Cretella v. Kuzminski*, 2008 WL 2227605 (E.D. Va. 2008) (partially granting motion to dismiss).

d. Verdict: For plaintiff, $236,000 ($120,000 compensatory, $116,000 punitive).

e. Length of Trial: Two days.

f. Length of Deliberations: Unknown.

g. Size of Jury: Unknown.

h. Issues Tried: Defamation, falsity, actual malice, damages.

i. Notes: Jury trial was held on February 3 and 4, 2009, with Magistrate Judge Dennis W. Dohnal presiding. Besides testimony from the parties, Cretella presented an expert witness on his future employment opportunities in light of the defendant's comments. (In its remittitur decision, the court expressed doubts that the expert met the *Daubert* standards.)

After a two-day trial, the jury awarded a total of $236,000 in damages ($120,000 compensatory, $116,00 punitive).

The defendant filed a post-trial motion for judgment as a matter of law or remittitur, arguing misconduct by the plaintiff and procedural errors by the court. In a written decision, after considering the jury's findings on liability and the amount awarded for each statement at issue, the court found that some of the awards were so excessive as to "shock the conscience," the standard for remittitur in Virginia.

The court found that the statements were not as available through general Internet searches as the plaintiff's evidence claimed, and that compensatory damages for the statements were thus excessive. It also found that the nature and content of most of the statements showed that they were made with actual malice, justifying the punitive damage awards for all but one. In the end, it offered a remittitur to $53,000 ($30,000 compensatory, $23,000 punitive), or a new trial. *Cretella v. Kuzminski*, 2009 WL 2423368 (E.D. Va. July 31, 2009). The plaintiff accepted the remittitur on August 14.

j. Post-Trial Disposition: Remittitur accepted.

Plaintiff's Attorneys:

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Defendant's Attorneys:

Pro se

2. ***Sid Donnell, Alan Siegel, and Sandra Orchid v. Lake County Record-Bee and Darrell Watkins***

Court: California Superior, Small Claims Court, Lake County
Judge: Vincent Lechowick
Case Number:
Bench judgment rendered on: December 3, 2008

a. Name and Date of Publication: Articles, letters, and commentaries published in *The Lake County Record-Bee* throughout 2008.

b. Profile:

(1) Print _x_; Broadcast ___; Internet _x_; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice ___; Negligence ___; Other _unknown__
(4) Public Official ___; Public Figure ___; Private Figure ___; Unknown _x_

c. Case Summary: The articles, letters, and commentaries concerned a controversy that involved the Board of Directors of the Clear Lake Riviera Community Association, which manages a 2800-home community in Kelseyville in northern California. There were also several comments posted on the newspaper's online bulletin boards. Many of the letters and comments were written by Clear Lake Riviera resident Darrell Watkins, including a commentary published on June 20, 2008 that accused the association board of breaking its bylaws, adopting new bylaws improperly, and fining homeowners without a proper hearing process.

Board member Sid Donnell sent a letter to the newspaper rebutting Watkins' charges. *Record-Bee* editor Gary Dickson apparently initially told Donnell that he would publish the letter. Although there was

conflicting testimony on what happened with the letter, the end result was that the rebuttal letter was never published.

Donnell and two other board members then sued the newspaper and Watkins for libel in small claims court, seeking $7,500 each in damages.

d. Verdict: Bench judgment for the defendants. No grounds were stated.

e. Length of Trial: Two hours, held November 6, 2008.

f. Length of Deliberations: N/A

g. Size of Jury: N/A

h. Issues Tried: Defamation, falsity, fault.

i. Notes: The trial began with the judge questioning Watkins about another letter he had written, which had appeared in the *Lake County News* the Saturday before the trial. The letter referenced the libel suit, and analogized the pending hearing to a Western shootout:

> It won't be at high noon, nor will it be the OK Corral. Guns will disseminate fiery flames in the Lake County Courthouse. Crackling sounds of gunfire will be heard and clouds of gun smoke will fill the room on Nov. 6 at 9 a.m.

Judge Lechowick asked Watkins whether the letter was a "threat to the court or a physical threat [to the defendants]," noting that he had requested an extra bailiff to be on duty for the case. Watkins, who like the other parties represented himself, objected to the judge's question, saying that it was prejudicial.

The judge then questioned *Record-Bee* editor Gary Dickson about the newspaper's failure to publish Donnell's rebuttal letter. The editor said he was planning to publish the letter until the lawsuit was filed, when a corporate attorney advised him not to. The judge questioned why the editor published Watkins' commentary without consulting his attorneys, but did not publish the rebuttal.

Judge Lechowick then turned to the plaintiffs, asking what damages they had suffered. Defendant Alan Seigel, who is a teacher and was named a California Teacher of the Year in 2005, said that the steady stream of offers for him to serve on education boards and panels stopped after the letters were published. Plaintiff Donnell said that the statements had stopped him from volunteering in the community, and plaintiff Sandra

Orchid said the people had approached her asking why she was breaking the law.

Plaintiff Donnell also complained about the *Record-Bee*'s overall coverage of the disputes within the Clear Lake Riviera Community Association. "They showed absolutely no interest in determining the truth of Mr. Watkins' allegations," he said, adding that the newspaper's failure to investigate the claims showed "reckless disregard for the truth."

In response to further questioning by Judge Lechowick, editor Dickson said that by publishing the letters the newspaper was fulfilling its role as a public forum, and said that it may stop publishing letters if it lost the case. The specific letter at issue, he argued, was protected opinion, and was substantially true. "We were only conducting business as usual," he said.

On his own behalf, defendant Watkins called as witnesses two Clear Lake Riviera residents who had been fined by the community association for brush on their properties, arguing that the fines were excessive and thus violated the state requirement that such fines be reasonable.

j. Post-Trial Disposition: None.

Plaintiffs' Attorneys:	Defendants' Attorneys:
Pro se	*Pro se*

3. *John Erb v. The Virginian-Pilot*

Court: Virginia Beach Circuit Court
Judge: Patricia L. West
Case Number:
Directed verdict on: January 15, 2009

a. Name and Date of Publication: Article published in *The Virginian-Pilot* reporting allegations of misconduct against the owner of homes for mentally disabled adults.

b. Profile:

(1) Print _x_; Broadcast ___; Internet ___; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice ___; Negligence _x_; Other ___
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: The plaintiff, John Erb, filed suit seeking $7 million, including $350,000 in punitive damages, based upon a story that appeared in *The Virginian-Pilot*. This story concerned the licensing of group homes for adults with mental disabilities. In Virginia, the care for mentally disabled adults has primarily been left in the hands of private individuals operating group homes pursuant to licenses received from the state. The story that led to the lawsuit reported on four homes in the Hampton Roads area that were operating under a "provisional license," a status that may lead to a revocation.

The plaintiff is the owner and executive director of Silver Lining, one of the four homes discussed in the article. At the time the article was written, Silver Lining was operating under a provisional license after having been cited for a number of violations of the state regulations. These violations included both minor administrative issues as well as two serious allegations that the plaintiff had inappropriately touched a resident on his upper thigh, and that the plaintiff and his home failed to provide medical care in the period leading up to the death of another resident.

Conceding that the first allegation had been made, the plaintiff did not sue the newspaper based on the reporting of that allegation. Rather, the lawsuit focused on the allegations regarding the death of the resident. The plaintiff identified two statements as being false and defamatory: "State officials also found that Erb and staff did not properly follow procedures in the death of a resident at the home on May 17th," and "An investigator found that Erb did not seek medical care for the resident leading up to his death."

The court granted summary judgment as to the first statement based upon investigation reports provided by the state, but denied summary judgment as to the second statement, finding that a factual issue existed as to whether the plaintiff was responsible for failing to provide medical care to the resident given that he was not in town on the day that the resident died.

d. Verdict: Directed verdict for defendant.

e. Length of Trial: Three days.

f. Length of Deliberations: N/A.

g. Size of Jury: Unknown.

h. Issued Tried: Defamation, falsity, negligence.

i. Notes: The court granted the newspaper's motion for directed verdict, finding that the plaintiff had failed to provide sufficient evidence from which a jury could conclude that the allegedly defamatory statement was false or that the newspaper acted with negligence in publishing the statement.

During the trial, the plaintiff conceded that the state investigator had found that the "Provider" had failed to provide medical care in the three weeks leading up to the resident's death. The plaintiff also conceded that the investigation reports showed that the term "Provider" meant either the plaintiff or the plaintiff and his staff.

Although the newspaper argued that the plaintiff was a limited purpose public figure based upon his petitioning activities against local and state officials in which he claimed that the state was retaliating against him after illegally removing another resident from his home, the court avoided that issue and determined that, even under a negligence standard, the plaintiff had failed to provide sufficient evidence to show that the newspaper acted negligently.

j. Post-Trial Disposition:

Plaintiff's Attorneys:	Defendant's Attorneys:
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4. ***Davar Gardner and Todd Gardner v. John Stokes, d/b/a Radio KGEZ-AM, Kalispell***

Court: Montana District Court, Flathead County
Judge: Katherine Curtis
Case Number: DV-07-729
Verdict rendered: September 17, 2008

a. Name and Date of Publication: Comments on radio KGEZ-AM, Kalispell, Montana, July 2007 (approx.).

b. Profile:

(1) Print ___; Broadcast _x_; Internet ___; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice _x_; Negligence ___; Other ___
(4) Public Official ___; Public Figure _x_; Private Figure ___

c. Case Summary: The defendant John Stokes purchased KGEZ-AM in 2000, rebranding it as "The Edge" and adding conservative talk radio programs, including a morning show he hosted himself. Last year, several Kalispell residents and the Montana Human Rights Network challenged the station's 2004 re-licensing, arguing that the station was not serving the public interest. The FCC rejected their objections and renewed the station's broadcast license. *See In re: KGEZ(AM), Kalispell, MT*, DA 07-1949 (F.C.C. letter ruling April 30, 2007).

The station broadcasts from two transmission towers along U.S. Highway 93 south of Kalispell. Through an easement executed by the preceding property and station owners in 1949, the towers occupy 31 acres of a 160-acre property that is currently otherwise used for hay baling.

Shortly after his purchase, Stokes informed the property owners, Douglas and Ruth Anderson and Davar and Todd Gardner, of his intention to enlarge the radio towers, or relocate them somewhere else in the 160-acre property. The Andersons and Gardners objected, arguing that the 1949 easement covered only the 31 acres actually used by the station, not the entire tract. They filed suit, seeking a declaratory judgment on the property issue and also seeking to force Stokes to repair the feeder lines to the transmitters.

Ruling on several summary judgment motions, the district court eventually ruled for the property owners; on appeal, the Montana Supreme Court affirmed. *Anderson v. Stokes*, 2007 MT 166 (Mont. July 11, 2007); *see also Stokes v. Montana*, 2007 MT 169 (Mont. July 12, 2007) (affirming dismissal of claim against state for alleged interference with easement by widening of U.S. 93).

Stokes apparently spoke about the dispute on the air several times. In 2007, after the Montana Supreme Court ruled against him in the land dispute, Stokes apparently said on the air that Davar Gardner and his son Todd had lied under oath and that they had committed bank fraud by getting a $900,000 loan under false pretenses.

The Gardners demanded a retraction, then sued in November 2007 after Stokes did not comply with the demand. A defendant's failure to retract after such a request is a prerequisite for punitive damages in Montana.

d. Verdict: For plaintiff, $3.8 million ($0.9 million compensatory per plaintiff, $2 million punitive).

e. Length of Trial: Three days.

f. Length of Deliberations: 75 minutes on liability and compensatory damages, 55 minutes on entitlement and amount of punitive damages.

g. Size of Jury: Twelve.

h. Issues Tried: Defamation, falsity, actual malice, damages, punitive damages.

i. Notes: Ruling on a summary judgment motion, Montana District Judge Katherine Curtis held that because of the Gardners' prominence in the community – they own a local RV park and a renowned auction house – they were public figures. The jury was thus instructed that it had to find actual malice in order to award compensatory or punitive damages.

Although Judge Curtis had also held prior to trial that the statements were untrue, Stokes testified at trial that he had verified the statements and that they were accurate. But other witnesses and evidence presented at trial, including bank documents, contradicted Stokes' assertions.

The punitive damages was approved by eleven of the twelve jurors (ten are required for a binding verdict in Montana).

j. Post-Trial Disposition: Unknown.

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5. ***Ed Hammitt and Brenda Hammitt v. Ken Busbin, Sr. and Theresa Watson***

Court: Georgia Superior Court, Chattooga County
Judge: Jon Woods
Case Number: 07-13353
Verdict rendered: August 4, 2009

a. Name and Date of Publication: Comments posted by user with pseudonym "dirtyboy" on website "Rome News by Watson" in which defendant Theresa Watson reports and comments on news in Rome, Georgia, posting occurred December 2007.

b. Profile:

(1) Print ___; Broadcast ___; Internet _x_; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice ___; Negligence _x_; Other: Encouragement or participation in development under CDA § 230
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: Ed and Brenda Hammitt sued Watson over comments posted to her blog in December 2007 by a user with the pseudonym "dirtyboy," stating that marijuana plants had been found on their property, and that Ed Hammitt had gotten an employee of the local power company to work on the couple's new house while the employee was on company time.

The Hammitts initially filed suit against Watson and her company in Floyd County, *Hammitt v. Watson*, Civil No. 07-4954 (Ga. Super., Floyd County, filed Dec. 2, 2007), and filed a separate suit against the anonymous poster in Chattooga County. They then dropped both these cases, and refilled a few days later in Chattooga County against all three defendants.

The poster was eventually identified as Ken Busbin, Sr., who was then added to the suit. Busbin eventually filed a counterclaim for abusive litigation under Ga. Code Ann. § 9-15-14, which allows for awards of attorney fees and litigation costs.

It is unclear why Watson was not dismissed from the case before trial under section 230 of the Communications Decency Act (47 U.S.C. § 230). She had two different attorneys during the course of the litigation, and ended up representing herself at trial. She reported that she raised section 230, as well as the terms of Georgia's retraction statute (Ga. Code Ann. § 51-5-11), which she says the plaintiffs did not follow, both to no avail.

Judge Jon Wood allowed three days for trial, saying that he would declare a mistrial if the case went any longer. At the time, he was due to preside over a high-profile murder trial that was due to begin shortly afterwards.

d. Verdict: For defendants.

e. Length of Trial: Two days.

f. Length of Deliberations: Less than one hour.

g. Size of Jury: Twelve (six men, six women).

h. Issues Tried: Defamation, falsity, damages, encouragement by website proprietor.

i. Notes: The testimony at trial established that marijuana plants had been found on the Hammitt's property, but the local sheriff determined that they were growing wild and the plants were destroyed. And the utility employee testified that while he used a Georgia Power truck because he was on call, he used his own material and time to work on the Hammitt's home.

Although the jury charge was apparently not transcribed, it appears that the judge instructed the jurors that Watson could be held liable if she encouraged the comments and actively edited them.

After less than an hour of deliberation, the jury found that while Busbin's comments were libelous, they did not cause any damages to the Hammitts; thus the jury awarded no damages.

The jury also held that Watson could not be held liable for the comments that Busbin posted to her blog. The jury forewoman, who runs an Internet business, told *The Rome News-Tribune* after trial that website operators should not be held liable for postings by users.

The jury also found for the Hammitts on Busbin's counterclaim.

j. Post-Trial Disposition:

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Pro se

6. ***Arthur "Gerald" Hudson and Gerald "Heath" Hudson v. WLOX-TV, Biloxi, Mississippi***

Court: Mississippi Circuit Court
Judge:
Case Number: A-2402-06-212
Verdict rendered: September 30, 2009

a. Name and Date of Publication: Series of television news broadcasts during June 2006, in the wake of Hurricane Katrina.

b. Profile:

(1) Print ___; Broadcast _x_; Internet __; Other ___
(2) Newsgathering Tort ___; Publication Tort ___
(3) Standard applied: Actual Malice __; Negligence _x_; Other ___
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: After Hurricane Katrina hit the Mississippi Gulf Coast, WLOX-TV in Biloxi began a series that it dubbed "Action Report." The series addressed numerous hurricane recovery issues, including owner-contractor construction disputes.

The report in question described a typical construction controversy. A homeowner alleged that building contractor H&H Construction Co. had done "shoddy work" and had walked off the job after demanding more money. The principals in the contracting company, Arthur "Gerald" Hudson and his son Gerald "Heath" Hudson, refused to be interviewed on camera, but told the reporter that the company left the job because it was not paid as agreed.

The station's initial story, broadcast on June 21, 2006, related the homeowner's story, and the contractor's response. The station also

reported that the contractor had told the reporter he was licensed, but that the station was unable to find the contractor listed on a state website of licensed contractors.

WLOX then ran a follow-up story on June 26, which included on-camera statements by Heath Hudson's wife. H&H then sent a letter to the station complaining about the story, but did not demand a retraction.

The Hudsons sued for defamation and tortious interference with business relations. Plaintiffs were represented by two of the state's leading trial lawyers, including a former Mississippi Supreme Court justice, who argued that the story, while literally accurate, nevertheless had a negative and defamatory "tone" by implying that plaintiffs' company was not and had never been licensed, and that it performed substandard work.

The contractor was, in fact, licensed, but was listed on the state website under the individual name of "Hudson, Gerald" rather than the company name. Also, the reporter was unaware that the contractor had sued the homeowner and filed a lien on the property because the owner had stopped paying amounts due under the contract.

Prior to trial, the defense moved for summary judgment on the grounds that the plaintiff was alleging libel by innuendo. The summary judgment motion was denied.

The Mississippi Supreme Court has repeatedly held that "defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation, or conjecture." *Hamilton v. Hammons*, 792 So. 2d 956, 960 (Miss. 2001), *overruled on other grounds by Dedeaux v. Pellerin Laundry, Inc.*, 947 So. 2d 900 (Miss. 2007); *accord Baugh v. Baugh*, 512 So. 2d 1283, 1285 (Miss. 1987); *Ferguson v. Watkins*, 448 So. 2d 271, 275 (Miss. 1984). But the court has also stated that the overall tone or structure of a story may distort the truth as to make the underlying implication false, even where no material omissions are involved. *Journal Publ'g Co. v. McCullough*, 743 So. 2d 352, 360-61 (Miss. 1999) (*citing McCullough v. Cook*, 679 So. 2d 627, 632 (Miss. 1996)). Plaintiff's counsel in the trial against WLOX, Chuck McRae, was a judge on the panel that heard and concurred in the opinion of *McCullough v. Cook* in 1996, during his 11-year tenure on the Mississippi Supreme Court, but did not participate in *Journal Publ'g Co. v. McCullough* in 1999.

d. Verdict: For defendant.

e. Length of Trial: One and one-half weeks.

f. Length of Deliberations: Two hours.

g. Size of Jury:

h. Issues Tried: Defamation, falsity, fault.

i. Notes: At trial, the plaintiff argued that the tone of the article harmed his reputation, although he did not present evidence of pecuniary loss, and did not make a specific demand until closing. Plaintiff also argued that the station should have taken more time to research the story, and that the station's high reputation in the community created a higher responsibility for its reporter to confirm the facts of the story before airing it.

WLOX argued truth as a defense, and that the station had done the best job it could under the circumstances. During the defendant's case, an employee of the state's contractor board testified about problems with the website that made it difficult to search except by the exact name entered in the database. In the final closing, plaintiff's counsel suggested that $1 million would be sufficient compensation for their damages.

After a week and a half of trial, at the conclusion of evidence the court partially granted a defense motion for a directed verdict, dismissing the tortious interference claim on the grounds that plaintiff had not shown common law malice.

The court allowed the defamation count to go to the jury. Over the objection of the defense, one of the instructions stated that "a statement which is true on its face may, in fact, be false because it leaves out crucial information. Furthermore, the overall tone of a story may so distort the truth as to make the underlying implications of the story false."

Another instruction stated:

"The Court instructs the jury that the Defendant has alleged in this case that its telecast did not exactly and literally state either that the Plaintiffs 'were not licensed contractors' or that Plaintiffs 'had been sued for defective work by Wayne Fairley.' However, I charge you that Plaintiffs are not required to prove that they used the exact language 'were not licensed contractors' or 'had been sued for defective work by Wayne Fairley.' They are only required to demonstrate that the Defendant made statements substantially the same as saying that Plaintiffs 'were not licensed contractors' or substantially the same as saying they 'had been sued for defective work by Wayne Fairley.'"

j. Post-Trial Disposition: Unknown.

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7. ***Donald Rosenberg v. Musical Arts Association and Plain Dealer Publishing Co.***

Court: Cuyahoga County Court of Common Pleas of the State of Ohio
Judge: John D. Sutula
Case Number: CV 08 678705
Verdict rendered: August 6, 2010

a. Name and Date of Publication:

b. Profile:

(1) Print _x_; Broadcast ___; Internet __; Other ___
(2) Newsgathering Tort ___; Publication Tort ___
(3) Standard applied: Actual Malice __; Negligence ___; Other ___
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: Plaintiff Donald Rosenberg was the Classical Music Critic for the Cleveland Plain Dealer for 16 years until his beat was partially changed in mid-September 2008 so that he no longer reported about or reviewed the Cleveland Orchestra. In December 2008, he filed suit against the Musical Arts Association, its Executive Director and two of its Trustees, as well as against the Plain Dealer Publishing Company and the Editor of the Plain Dealer. The suit asserted claims of defamation and tortious interference with employment relations against the Musical Arts Association-related defendants. The suit also asserted a claim of age discrimination, among other things, against the Plain Dealer-related defendants. These latter defendants removed the case to federal court on the grounds that some of the claims were preempted by federal labor law.

Plaintiff then dismissed all of his claims against the Plain Dealer defendants that would have supported federal court jurisdiction, leaving only the age discrimination claim, which was remanded to state court along with the claims against the Musical Arts Association defendants. After the suit against the Musical Arts Association defendants was filed, Plaintiff was prohibited (due to the conflict of interest presented) from referring to the Cleveland Orchestra in anything he wrote for publication in the Plain Dealer. Thereafter, Plaintiff added a claim of retaliation to his suit against the Plain Dealer defendants, claiming this prohibition was in retaliation for his age discrimination lawsuit. Upon the Plain Dealer defendants' motion for a directed verdict at the close of the Plaintiff's case, the Court dismissed the retaliation claim. At the conclusion of the three and one-half week jury trial, the jury unanimously found in favor of the Plain Dealer defendants on the age discrimination claim, unanimously found in favor of the Musical Arts Association defendants on the defamation claim, and found 7-1 in favor of the Musical Arts Association defendants on the tortious interference with employment relations claim.

d. Verdict: In favor of all defendants and against plaintiff on all claims.

e. Length of Trial: July 12, 2008 to August 6, 2008

f. Length of Deliberation: Approximately 9 hours.

g. Size of Jury: 8 persons; 6 women, 2 men; one African-American

h. Issues Tried:

i. Notes: During the trial, directed verdict granted in favor of Plain Dealer Publishing Company and Editor Susan Goldberg on Plaintiff's retaliation claim.

The plaintiff's initial demand was $2.5 million; pretrial demand was $900,000.

The plaintiff argued at trial that the Editor of the Plain Dealer caved in to pressure from the powerful and influential members of the Musical Arts Association when they defamatorily complained about negative reviews of the Cleveland Orchestra's Music Director by Plaintiff.

The Plain Dealer urged that the Editor of the Plain Dealer made her own, independent assessment regarding the Plaintiff's bias against the Cleveland Orchestra's Music Director, lack of an open mind, lack of appropriate professional distance from the subject matter of his coverage, and inability to provide fair and balanced coverage. That even the Plaintiff

acknowledged the Editor's right to change anyone's beat at any time, his lack of an open mind about the Music Director, and that the person who replaced Plaintiff with respect to covering and reviewing the Orchestra was the only person on staff who was capable and qualified to cover that beat.

The defense called expert: Tom Goldstein, professor of Journalism and Mass Communications and director of the Mass Communications Program at Berkeley.

Plaintiff called expert: Tim Page, professor in both the Annenberg School of Journalism and the Thornton School of Music at the University of Southern California.

In post-trial interviews, the jurors believed that the Musical Arts Association defendants had the right to criticize Plaintiff's opinions about the Cleveland Orchestra's Music Director, and they believed that the Editor of the Plain Dealer had the right to change Plaintiff's beat on the basis that she independently formed the conclusion that Plaintiff was biased against, and lacked an open mind about, the Music Director, such that Plaintiff's work was undermining the credibility and integrity of the paper with its readers.

j. Post-Trial Disposition: None as yet.

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8. ***Jim Sollami v. Tom Sheppard, a/k/a Archibald Cornballis and "Blithesome Spirit"***

Court: New York Supreme Court, Orange County
Judge: Lewis J. Lubell
Case Number: 007550/2003
Verdict rendered: August 17, 2009

a. Name and Date of Publication: Internet postings in 2003 on "Cornball Local" blog, www.cornball-local.com, which focused on local news and politics in the town of Cornwall, New York. The blog was written by Sheppard under various pseudonyms, including "Archibald Cornballis" and "Blithesome Spirit."

b. Profile:

(1) Print ___; Broadcast ___; Internet _x_; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice _x_; Negligence ___; Other ___
(4) Public Official ___; Public Figure _x_; Private Figure ___

c. Case Summary: The 27 postings at issue accused the then-Town Supervisor Jim Sollami of various improprieties, including maintaining a "hit list" of town employees that he intended to fire after his re-election in 2003 (which he lost).

Supreme Court Justice Lawrence Horowitz dismissed the entire suit on April 28, 2004, holding that the statements at issue were opinion. But Sollami appealed, and an Appellate Division panel reversed the dismissal on eight of the blog statements. *Sollami v. Sheppard*, 21 A.D.3d 408, 799 N.Y.S.2d 427, 2005 N.Y. Slip. Op. 06311 (Aug. 8, 2005). Sollami was later awarded $650 in costs for the appeal.

The case proceeded to trial in May 2007, but ended in a mistrial after four days, when Sollami's attorney became ill and he could not find a replacement. *Sollami v. Sheppard*, No. 007550/2003 (N.Y. Sup. Ct., Orange County, mistrial declared May 21, 2007). In declaring the mistrial, Judge Horowitz ordered Sollami to pay Sheppard's attorney fees for the proceeding, later determined to be $4,500.

Retrial was held in August 2009 before Justice Lewis J. Lubell.

d. Verdict: $2,900; $1,400 for one posting and $1,000 for a second posting found to be defamatory, plus $500 in punitive damages.

e. Length of Trial: Seven days.

f. Length of Deliberations: Two hours.

g. Size of Jury: Unknown.

h. Issues Tried: Defamation, falsity, actual malice, damages.

i. Notes: Throughout the seven-day trial, the plaintiff emphasized that the statements on the blog were purportedly true facts, pointing to the blog's motto, "All the truth they won't print." The defense argued that the entire blog was meant to be satire, along the lines of "The Daily Show" and Stephen Colbert.

Among the witnesses was former *Cornwall Local* editor Dave Gordon, who testified that he stopped publishing Sheppard's letters about Sollami, which he said were repetitive. Afterwards, Sheppard began his blog.

After two hours of deliberation, the jury found that two of the statements at issue were defamatory to Sollami, and awarded $1,400 in compensatory damages for one, and $1,000 for the other. Through an oversight, the verdict sheet for one of the statements for which the jury awarded compensatory damages also included a line for punitive damages, even though the parties had agreed to bifurcate that issue and the jury was not instructed on punitives. Nevertheless, the jury awarded $500 in punitive damages for the statement with the incorrect verdict form.

Instead of addressing this error, the parties agreed to a settlement of the case in which all judgments, including the $2,900 jury award, the $4,000 in attorney fees that Sollami owed Sheppard for the mistrial, and the $650 that Sheppard owed Sollami for the costs of the appeal would all be vacated, and all rights to appeal waived.

j. Post-Trial Disposition:

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9. ***Jennifer Strange v. Entercom Sacramento LLC***

Court: California Superior Court, Sacramento County
Judge: Lloyd A. Phillips
Case Number: 07AS00377
Verdict rendered: October 29, 2009

a. Name and Date of Publication: "Hold Your Wee for a Wii" contest, staged on "The Morning Rave" radio show, KDND-FM, Sacramento, January 12, 2007.

b. Profile:

(1) Print ___; Broadcast _x_; Internet ___; Other ___
(2) Newsgathering Tort _x_; Publication Tort ___
(3) Standard applied: Actual Malice ___; Negligence ___; Other _negligent supervision__
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: The contest was staged on "The Morning Rave" show on KDND-FM in Sacramento on January 12, 2007. At first, contestants were required to drink eight 8-oz. bottles of water every ten minutes, then 16-oz. bottles every ten minutes. First prize in the contest was a Wii video game, worth about $250, which was in short supply at the time.

Jennifer Strange, a 28-year-old mother of three who participated in the "Hold Your Wee for a Wii" contest, was found dead about six hours after she dropped out of the contest after drinking 1½ gallons of water over three hours, coming in second, and winning tickets to a Justin Timberlake concert. The cause of death was determined to be hyponatremia, a form of water intoxication in which the level of sodium in the blood is abnormally low, and the body's cells swell. This swelling, especially of the brain cells, can lead to seizures.

Strange's husband and children sued KDND-FM's owner, Entercom Sacramento, parent corporation Entercom Communications, and several individual managers and employees. The station's employees, which included the station's manager, its promotions manager, the "Morning Rave" show's producer, three DJs, and two on-air personalities, were all fired by the station in the aftermath of the contest.

The employees paid $100,000 in settlement of the claim and were dropped from the case in early September. The claim against the regional manager was dropped from the case during trial, leaving Entercom Sacramento and Entercom Communications as the defendants at trial.

After 26 days of testimony and nine days of deliberations, a California jury awarded $16.58 million in wrongful death damages solely against Entercom Sacramento; the jury rejected plaintiffs' claim that the parent company should also be liable because its legal department should have better trained the subsidiary and its employees.

d. Verdict: For plaintiff, $16,577,118 ($1,477,118 economic damages; $15,100,000 non-economic compensatory damages).

e. Length of Trial: 26 days.

f. Length of Deliberations: Nine days.

g. Size of Jury: Unknown.

h. Issues Tried: Negligent supervision, wrongful death, damages..

i. Notes: In pretrial proceedings, Judge Lloyd A. Phillips barred evidence of the settlements and of prior Entercom contests at trial. He also required jurors to sign declarations that they would not use personal electronic and media devices to research or communicate about the case.

At trial, the plaintiffs argued that the contest was meant to be "cutting edge," and "dangerous," in a crass effort to increase ratings. They presented testimony from three other contestants about the physical effects of the contest, and various family members on the loss of Strange.

The three contestants who testified for the plaintiffs included the winner of the contest. All three filed their own lawsuits over the contest, which were combined, then settled: two for $5,000, and one for $10,000. *Davidson v. Entercom Sacramento*, No. 07AS02328 (Cal. Super., Sacramento Cty. settled Aug. 11, 2009).

The plaintiffs' case also included recordings of the contest, in which callers to the station warned that it was a dangerous stunt.

John Geary, regional manager of Entercom's six stations in Sacramento, testified that while he had little to do with the stations' contests, the company had a written policy that contests "which are illegal, dangerous, misleading, rigged, or in bad taste must be avoided." An in-house Entercom attorney testified in a videotaped deposition that she had her own policy of requiring medical personnel to be present at any contests involving "physicality" or "ingestion." No medical personnel were present at the contest.

Station manager Steve Weed, who was fired over the contest, testified that the contest was similar to other contests run by the station, and to television programs such as "Fear Factor" and "Survivor." He also said that he had not received any corporate training regarding contests, and was unaware of any written policies. Weed filed his own wrongful termination suit, although the suit was dismissed for failure to state a claim and

Entercom eventually collected $275,142 in attorney fees. *Weed v. Entercom Sacramento, LLC*, No. 2008-112 (Cal. Super.).

The plaintiffs concluded their case with testimony from Strange's immediate family. Her husband, Billy Strange, testified with a slideshow of him and his wife at their wedding, their children's births, and other family activities.

The defendants presented their case in one day, calling just four witnesses. Their argument was that Strange's death was not foreseeable, and that the local station personnel acted without consulting management.

A forensic pathologist with the Sacramento County Coroner's Office testified about the rarity of hyponatremia. But a recurring theme during the trial was the death of a Chico State University student after a hazing in which the student drank a large amount of water.

The other defense witnesses were an engineer for the radio station, and two other contest participants. The two contestants testified that they understood that they could drop out of the contest at any time. Overall, the trial included 41 witnesses and 192 exhibits.

In closing arguments, plaintiffs argued that the KDND employees were acting within the scope of their employment, and were inadequately trained and supervised by Entercom. They asked for an award of $34 to $44 million.

The defense argued that the death was not foreseeable, and that the Entercom corporate parent should not be held liable for the "serious, tragic mistakes" of its local employees. Even if the company is held liable, defense counsel argued, the award should be only about $4.5 million.

In rebuttal argument, plaintiff's counsel Roger A. Dreyer showed a photograph of the Strange family, then showed the same picture with Jennifer Strange removed.

In his instructions to the jury Superior Court Judge Lloyd A. Phillips said that the parent company could not be held liable for the actions of employees of the subsidiary, "merely by reason of ownership or control."

After deliberating for nine days, the twelve-member jury found that Entercom Sacramento was entirely responsible for Strange's death. The jury also unanimously found that Entercom's corporate parent was not liable in the death, and found by a vote of 10-2 that Strange was not contributorily negligent in her own death.

The award total of $16,577,118 consisted of economic and non-economic damages. $1,477,118 – approved by the jury 10-2 – was for economic damages based on Jennifer Strange's potential future earnings.

One juror told the *Sacramento Bee* that the more contentious issue was non-economic damages, for which the jury approved $15.1 million by a 9-3 vote. The final amount, the juror said, was an average of the amounts that various jurors wanted to award.

On its sixth day of deliberations, the jury asked for access to a computer spreadsheet program. The court initially gave the jury a pad of paper and calculator instead, then provided a 10-digit adding machine when the jury requested it. The same juror also told the *Bee* that the evidence against Entercom Sacramento was "overwhelming." "These stations need to be more cognizant of what they're doing," another juror told the newspaper, "and they need to take the time to do the research to make sure no one's harmed."

j. Post-Trial Disposition: No post-trial proceedings; existence and terms of post-trial settlement unknown.

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10. ***Kenneth I. Trujillo v. Hernan Guaracao, d/b/a Al Día***

Court: Pennsylvania Court of Common Pleas, Philadelphia
Judge: William Manfredi
Case Number: 070101481
Verdict rendered: April 2, 2009

a. Name and Date of Publication: *Al Día*. Various issues 2006.

b. Profile:

(1) Print _x_; Broadcast ___; Internet _x_; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice ___; Negligence _x_; Other ___
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: Kenneth I. Trujillo, who was Philadelphia's city solicitor from 2000 through 2002, became president of the Chamber of Commerce in February 2006, after the resignation of the Chamber's president and its executive director. *Al Día*'s initial story on the change, published February 19, 2006, raised doubts over the legitimacy of Trujillo's selection by the Chamber's board of directors. And during the next three months, *Al Día* published stories in its print edition and on its website, in both Spanish and English, questioning the change in Chamber leadership, alleging that a "conspiracy" among chamber board members led to the forced resignation of the former president and the election of Trujillo.

In January 2007, Trujillo sued *Al Día* and publisher Hernan Guaracao in Pennsylvania Common Pleas Court over five of the articles – three in the printed paper, and two published only online, in English. The claims based on the Spanish articles were dismissed prior to trial, after the plaintiff failed to provide certified English translations. So, at trial, only the English articles were at issue.

Common Pleas Judge Patricia A. McInerney held that despite his prominence in Philadelphia's Hispanic community, Trujillo was a private figure for purposes of his libel suit. According to defense counsel, this was based on the rationale that few people knew, or cared, who the president of the Hispanic Chamber of Commerce was until the controversy over Trujillo's election arose. (Of the Hispanics in the *voir dire* pool, none knew who the plaintiff was.)

d. Verdict: For plaintiff, $210,000 ($150,000 compensatory damages, $60,000 punitive).

e. Length of Trial: Seven days.

f. Length of Deliberations: Two hours.

g. Size of Jury: Nine (eight plus an alternate allowed in deliberations by stipulation of the parties).

h. Issues Tried: Defamation, falsity, negligence, damages, punitive damages.

i. Notes: During the seven-day trial, the plaintiff said that he thought about the articles and the allegations they contained every day, and that his main concern was protecting his daughter. He expressed particular dismay over the cover of the March 12, 2006 issue of *Al Día*, which featured a picture of him in a broken-glass frame with the headline, in English, "Broken Trust." The defense argued that the articles were true, and that Trujillo had not shown any actual, pecuniary damage. The defense also argued that the "Broken Trust" picture was an expression of opinion.

The parties each had an expert on journalist standards. Plaintiff's expert as Joseph Goulden, author of several book on military history and on the culture of law and judges. The defendant presented Christopher Harper of Temple University, who formerly worked for ABC News and *Newsweek*.

The parties agreed to allow the alternate juror who made it through trial to join the eight jurors in deliberations; the jury deliberated for about two hours before finding for the plaintiff and awarding him $150,000 in compensatory damages and $60,000 in punitives.

No post-trial motions were filed, and no appeal is expected. The parties apparently reached a post-trial settlement.

The jury was working class, including one teacher and one student.

j. Post-Trial Disposition: Settled after trial.

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11. ***Siraj Wahhaj v. Curtis Sliwa***

Court: New York Supreme Court, Kings County
Judge:
Case Number: 02671/2003
Verdict rendered: October 10, 2009

a. Name and Date of Publication: Forum at City University of New York on "The Limits of Freedom: Civil Liberties in Wartime" taped in March of 2003, aired several times on the University's CATV during April, and archived on the station's website.

b. Profile:

(1) Print ___; Broadcast _x_; Internet ___; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice ___; Negligence ___; Other ___ unknown
(4) Public Official ___; Public Figure __; Private Figure ___ unknown

c. Case Summary: After naming plaintiff Siraj Wahhaj's Masjid at-Taqwa mosque as the "epicenter of terrorist activity in our city," Sliwa was asked whether undercover police should attend services at the mosque to monitor its activities and speakers. "Oh, I definitely do, because I know that they trafficked in guns up to Canada already," Sliwa said about 23 minutes into the program. "I definitely know that," Sliwa added, in response to catcalls from fellow panelists.

While Wahhaj has been praised for organizing anti-drug patrols and his other community activities, he has also been criticized for hosting militant Islamic speakers at his mosque. Among the speakers was blind Sheik Omar Abdel-Rahman, who was convicted in 1996 of conspiring to carry out terrorist attacks on several New York City landmarks. At one point, Wahhaj was also identified as one of 170 "unindicted persons who may be alleged as co-conspirators" in the 1993 bombing of the World Trade Center.

"I have never trafficked guns," Wahhaj testified at trial, according to the *New York Daily News*. "I felt a sense of outrage. I felt embarrassed that someone would say that about me." In his suit, Wahhaj sought $5 million in damages.

According to the *New York Post*, during the libel trial Sliwa testified that he once respected and worked with Wahhaj, and that in the late 1980s Wahhaj approached Sliwa about how the drug patrols could be effective without weapons. Sliwa testified that several members of the patrols told him that they had illegal guns, and that they went "on vacation" to Canada when they feared being discovered.

Sliwa added that his opinion of Wahhaj changed when the imam served as a defense character witness for Sheik Abdel-Rahman during the conspiracy trial.

d. Verdict: For defendant.

e. Length of Trial: Two days.

f. Length of Deliberations: Less than one hour.

g. Size of Jury: Unknown.

h. Issues Tried: Defamation, falsity, fault.

i. Notes: The jurors unanimously decided for Sliwa in their first vote. "We all said in one shot, 'No,'" juror Jacqueline Lopez told the *Post*. According to the newspaper, as she left court Lopez asked Sliwa for a hug, saying, "I love you guys."

j. Post-Trial Disposition: Unknown.

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12. ***Rebecca West v. Morehead and City Paper, Columbia, S.C.***

Court: South Carolina, Common Pleas
Judge:
Case Number: 2008CP4000074
Verdict rendered: June 2, 2009

a. Name and Date of Publication: Article published October 24, 2007 in *City Paper*, Columbia, South Carolina.

b. Profile:

(1) Print _x_; Broadcast ___; Internet ___; Other ___
(2) Newsgathering Tort ___; Publication Tort _x_
(3) Standard applied: Actual Malice ___; Negligence _x_; Other ___
(4) Public Official ___; Public Figure ___; Private Figure _x_

c. Case Summary: The case stemmed from an article published on October 24, 2007, on the divorce proceedings of Harold Whitney ("Whit") Black and his wife Stella Black. Whit Black is the owner of a large South Carolina furniture retailer.

The article described the divorce case as having "all the ingredients of a cheap detective novel," including "two-bit lawyers who'll even turn on their own clients if the retainer isn't juicy enough." The article also said that once the divorce case was concluded, no one would recall the "corruptible attorneys" involved.

The plaintiff, attorney Rebecca West of the Masella Law Firm, P.A. in Columbia, was initially hired to represent Stella Black on legal issues related to her musical career, which was encouraged by Harold Black. Later, however, she represented Harold Black in the divorce proceeding, apparently without consulting Stella Black. (Stella Black filed a civil suit for malpractice against her husband and West, which was settled. *See Black v. Black*, No. 2007CP4002204 (S.C. C.P. dismissed June 19, 2008).

In the libel suit, plaintiff claimed that even though she was not named in the statements, they referred to her. She also claimed the reference to her by name in the article as Stella Black's "entertainment lawyer" was libelous, and that the location of her name in the article, on the top line of the middle column in a section noting her role in Stella Black's singing career, made her name prominent to readers and led them to associate her with the allegedly libelous comments.

After West called to complain about the article, the newspaper printed and added to its web version of the article a statement that "references to 'two-bit lawyers' and 'corruptible attorneys' [in the article] were not intended as references to any particular attorney in South Carolina." The publisher also claimed that the paper offered West the opportunity to respond in its pages. West filed suit on January 4, 2008.

After a defense motion for summary judgment was denied on May 19, 2009, the case proceeded to trial under a negligence standard.

d. Verdict: For plaintiff, $40,000 ($10,000 compensatory damages, $30,000 punitive damages).

e. Length of Trial: Two days.

f. Length of Deliberations: Two hours.

g. Size of Jury: Twelve.

h. Issues Tried: Defamation, falsity, negligence, damages.

i. Notes: Plaintiff's counsel began his opening argument by telling the jury that once the article was printed, he advised Rebecca West to demand a retraction. Defense counsel moved for a mistrial, saying that the attorney had introduced irrelevant evidence – the post-publication behavior of the parties – and had made himself a witness. The motion was denied. Later, defense counsel attempted to call plaintiffs' counsel as a witness, which the judge did not allow.

Plaintiff's negligence theory was that a motion to disqualify the plaintiff from the marital litigation was denied before the article was published. The order in that matter, however, was in a family court file to which the paper did not have ready access. Plaintiff also focused on the alleged harm by the article, including $800 in psychiatric bills, a reduced number of referrals, and the anxiety from people asker her about the article; but she offered little proof of pecuniary injury. The newspaper argued that the statements in the article were accurate, and based on court documents from the divorce case.

j. Post-Trial Disposition: Defendants' post-trial motions for judgment notwithstanding the verdict and for new trial were denied June 25, 2009. Appeal pending.

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2010 NAA/NAB/MLRC MEDIA LAW CONFERENCE
LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL TRIALS

By Tom Kelley
Levine Sullivan Koch & Schulz, L.L.P.

August 15, 2010
Denver, CO

PART II
SUMMARY AND ANALYSIS OF COMMON FACTORS PRESENT IN RECENT VERDICTS IN LIBEL TRIALS

A. INTRODUCTION

The methodology and results of this tenth biennial survey of trials of publication and newsgathering tort claims against media defendants are reported in Part I of this survey. This Part II discusses the trends and common factors observed in the cases tried during the two years covered in Part I. I mention past surveys; if you do not have them and want them, they are available at www.medialaw.org.

In subsection B, I summarize the results and discuss trends. The results show, among other things, (1) a dip in our heretofore steadily improving success rate; (2) a halt in the heretofore steady decrease in the number of cases tried; (3) a resumption (after a brief respite in the 2008 survey) of the long-term trend in which print media have enjoyed a lower success rate than broadcast/cable/video media; (4) a continuation of the long-term trend in which the success rates for cases tried under the actual malice standard are no greater than for cases tried under a negligence standard.

In subsection C, I discuss common factors identified in the cases, and trial themes and tactics that have proven successful (and those that have not).

B. SUMMARY OF RESULTS AND COMPARISON TO PRIOR STUDIES

This summary covers trials concluded from August 8, 2008 through August 19, 2010. During the two-year period covered by the survey, there were 18 trials of content-based tort claims (newsgathering claims normally also are included, but none resulted in a verdict during the survey period) asserted against media defendants. From these, there resulted 16 jury verdicts, 1 directed verdict, and 1 full bench trial. There were 19 trials (but only 15 jury verdicts) reported in the 2008 biennial survey, 24 in 2006, 43 in 2004 (covering a three-year period), 28 in 2001, 33 in 1999, 33 in 1997. The 2010 results, which do not reflect post-trial relief, were as follows:

	CASE	MEDIUM	VERDICT
1.	*Craig Elmer ("Owl") Chapman v. Journal Concepts Inc, d/b/a The Surfers Journal, et al.* United States District Court, District of Hawaii Case No. Civ. No. 07-0002 JMS/LEK March 5, 2009	print	For defendants
2.	*Sid Donnell, Alan Siegel, and Sandra Orchid v. Lake County Record-Bee and Darrell Watkins* California Superior, Small Claims Court, Lake Cty. Case No. December 3, 2008	print	Bench judgment for defendants
3.	*John Erb v. The Virginian-Pilot* Virginia Beach Circuit Court Case No. January 15, 2009	print	Directed verdict
4.	*Thomas S. Flippen vs. Gannett Co., Inc., et al.* Erie Cty. Court of Common Pleas, Ohio Case No. 2006 CV 0944 September 26, 2008	print	For defendants
5.	*Davar Gardner and Todd Gardner v. John Stokes, d/b/a Radio KGEZ-AM, Kalispell* Montana District Court, Flathead Cty. Case No. DV-07-729 September 17, 2008	broadcast	For plaintiff: $3.8 million ($0.9 million compensatory per plaintiff, $2 million punitive)
6.	*Ed Hammitt and Brenda Hammitt v. Ken Busbin, Sr. and Theresa Watson* Georgia Superior Court, Chattooga Cty. Case No. 07-13353 August 4, 2009	internet	For defendants
7.	*Arthur "Gerald" Hudson and Gerald "Heath" Hudson v. WLOX-TV, Biloxi, Mississippi* Georgia Superior Court, Chattooga Cty. Case No. 07-13353 August 4, 2009	broadcast	For defendants
8.	*Leon A. Kendall v. The Daily News Publishing Co., Joy Blackburn, and Joseph Tsidulko* Virgin Islands Sup. Ct., St. Thomas Division Case No. 517/2007 March 16, 2010	print	For plaintiff $240,000 (compensatory damages only)

	CASE	MEDIUM	VERDICT
9.	*Harold L. Kennedy v. Times Publishing Company* Sixth Judicial Circuit, Pinellas Cty., Florida Case No. 05-8034-CI-11 August 28, 2009	print	For plaintiff: $10.3 million ($1.6 million past economic damages, $2.2 million future economic damages reduced to present value, $1.5 million past non-economic damages. $0 future non-economic damages, $5 million punitive damages)
10.	*Charles Mazetis v. Enterprise Publishing Co.* Commonwealth of Massachusetts, Bristol Cty. Superior Court Case No. 04-00326 December 9, 2008	print & internet	For plaintiff: $28,000 (JNOV subsequently entered for defendants)
11.	*Glenna M. Riley and Ronald Riley v Enterprise Publishing Company, Stephen Damish and Charles Hickey* Massachusetts Superior Court, Plymouth Cty. Case No. 05-00841-A February 9, 2010	print	For defendants
12.	*Jim Sollami v. Tom Sheppard, a/k/a Archibald Cornballis and "Blithesome Spirit"* New York Supreme Court, Orange Cty. Case No. 007550/2003 August 17, 2009	internet	For plaintiff: $2,900 ($1,400 for one posting and $1,000 for a second posting found to be defamatory, plus $500 in punitive damages)
13.	*Linda Stewart v. NYT Broadcast Holdings, LLC and Griffin Television OKC, LLC* District Court of Oklahoma Cty., Oklahoma City, Oklahoma Case No. CJ-2006-5464 January 20, 2009	broadcast	For defendants

	CASE	MEDIUM	VERDICT
14.	*Vickie Stewart v. Haywood Smith* Hall Cty. State Court, Gainesville, Georgia Case No. 04SV1137 November 19, 2009	print	For plaintiff: $100,000 on libel claim; For defendants: on claims for invasion of privacy and for attorneys' fees
15.	*Jennifer Strange v. Entercom Sacramento LLC* California Superior Court, Sacramento Cty. Case No. 07AS00377 October 29, 2009	broadcast	For plaintiff: $16,577,118 ($1,477,118 economic damages; $15,100,000 non-economic compensatory damages)
16.	*Kenneth I. Trujillo v. Hernan Guaracao, d/b/a Al Día* Pennsylvania Court of Common Pleas, Philadelphia Case No. 070101481 April 2, 2009	print	For plaintiff: $210,000 ($150,000 compensatory damages, $60,000 punitive)
17.	*Siraj Wahhaj v. Curtis Sliwa* New York Supreme Court, Kings Cty. Case No. 02671/2003 October 10, 2009	broadcast	For defendant
18.	*Rebecca West v. Morehead and City Paper, Columbia, S.C.* South Carolina, Common Pleas Case No. 2008CP4000074 June 2, 2009	print	For plaintiff: $40,000 ($10,000 compensatory damages, $30,000 punitive damages)

As always, I will provide some statistics, but with my usual disclaimer of significance of the numbers, given the uniqueness of each case and the small number of trials over the two-year period. But the data is nonetheless of interest in relation to past trends. My stats are derived from slightly different criteria but are not dissimilar from the results of the MLRC 2010 Report on Trials and Damages (MLRC BULLETIN, Spring 2010).

In the statistics that follow, I omit the one bench trial and the one directed verdict. I calculate with and without the very high verdict in *Strange* because it did not involve media content or newsgathering and is *sui generis*. The defendants won 7 of 16, or 43.75% of the completed jury trials. Omitting *Strange*, defendants won 7 of 15, or 46.66%. These results

compare to my prior surveys as follows: 2008 – 53.8%; 2006 – 52.9%; 2004 - 48.6%; 2001 - 49.9%; 1999 - 34.6%; 1997 - 35.5%; 1995 - 35.7%. In the current survey, the overall rate of success, including the full bench trial and the directed verdict, was 9 of 18, or 50%. At this point, there is no reason to believe the current downturn in our heretofore steadily growing success rate over the years is statistically significant or represents any change in reporting or litigation practices or in the litigation climate.

The average of the plaintiffs' jury awards was $3,477,558. Omitting the *sui generis* *Strange* case, the average was $1,840,113. This compares to $2,084,208 for the 2008 survey, $548,636 for the 2006 survey, $3,032,067 for the 2004 survey, $3,732,867 for the 2001 survey, and $2,545,875 for the 1999 survey. The median verdict was $225,000 (without *Strange*, it was $210,000), as compared to $1,300,000 in 2008, $260,000 in 2006, $505,000 in 2004, $1,975,000 in 2001, $450,000 in 1999, $280,000 in 1997, and $300,000 in 1995.

The 2010 survey results resume a trend (briefly interrupted in 2008) that began in 1979 in which electronic media have enjoyed a greater rate of success than print: In this survey, print media won 3 of 9 or 33.33%; broadcast media won 2 of 5 or 40%, and, omitting Strange, 2 or 4 or 50%; internet media won 1 of 2 or 50%. In the 2008 results, print media won 5 of 8 or 62.5%. Television media won 1 of 2 or 50%. Electronic media combined (including the one radio and the one independent blogger case) won 2 of 4 or 50%. In the 2006 survey, print media won 4 out of 10 jury cases or 45%, while electronic media won 5 of 7 cases, or 71.42%. In the 2004 survey, print media won 47.4%, electronic media 53.3%. In 2002, print media won 5/12 or 41.7%, electronic media won 4 of 9 or 44.4%; in 1999, print media won 6 of 20 or 33.3%, electronic media won 4 of 8 or 50%.

The electronic media returned to the long-term trend in earlier surveys showing them to be at greater risk of large verdicts than print media. This trend had been reversed in the 2004, 2006, and 2008 surveys, in which print media averages were higher than broadcast. In this survey, the average electronic media verdict was $10,185,559 and the median was $11,188,559. Omitting the *Strange* case, the average electronic verdict was $380,000, and the median $380,000 (based on a single case). The average print media verdict was $269,750, and the median $225,000.

These results reflect the same trends as those produced by the MLRC staff in its annual reports on trials and damages, but tend to be slightly less optimistic because they focus solely on jury trials and do not include directed verdicts or bench trials.

The following is a table of winners and losers, showing the relevant background of each plaintiff (as always, giving the plaintiff the benefit of the doubt) and the standard of liability:

Case		Plaintiff's Background	Fault Standard for Liability
Successful Plaintiffs/Recovery (000's)			
Gardner	$3,800	owners of property subject to radio station easement	actual malice

Case		Plaintiff's Background	Fault Standard for Liability
Kendall	$240	judge	actual malice
Kennedy	$1,300	cardiologist	actual malice
Mazetis	$28	court officer	actual malice
Sollami	$2.9	town supervisor	actual malice
Stewart (v. Smith)	$100	middle-aged female & member of female lunch club	negligence
Strange	$16,577	housewife & participant in on-air radio contest	negligence
Trujillo	$210	former city solicitor & president of chamber of commerce	negligence
West (v. Morehead)	$40	divorce attorney	negligence
Unsuccessful Plaintiffs			
Chapman		surfer	actual malice
Donnell		board members of homeowners association	unknown
Erb		proprietor of group home for adults with mental disabilities	negligence
Flippen		deadbeat dad	negligence/clear & convincing evidence
Hammitt		property owner & power company employee	negligence
Hudson		construction contractor	negligence
Riley		school board member	actual malice
Stewart (v. NYT)		patron of ATM machine	negligence
Wahhaj		Islamic cleric, head of mosque	unknown

In the past, the most frequent and successful plaintiffs have been lawyers and other professionals, judges, businesses and businesspersons, and celebrities. It is difficult to see much of a pattern in the above, except for the businesspersons who won big in *Gardner*, the very successful cardiologist in *Kennedy*, and Judge Kendall.

Another counterintuitive trend over the years has been that media defendants defending in content jury trials enjoy roughly the same success in cases in which the standard is negligence as they do in cases in which the standard is actual malice. In this survey, that trend continued with a vengeance. Defendants won 2 of 7 cases in which actual malice was the standard, or 35%; defendants prevailed in 5 of 9 cases in which negligence was the standard, or 55.55%. (These data omit two cases which we could not determine the standard applied.) The considerably greater success rate in negligence cases provides a counterintuitive skew to the already counterintuitive trend indicating roughly the same success rate in negligence cases as has been achieved under the ostensibly much more defense-friendly actual malice standard. Beginning in 1997, the results have been as follows: 1997 – 35% victory rate in negligence cases, 26.66% in actual malice cases; 1999 – 26.8% in negligence cases, 50% in actual malice cases; 2001 –

33.3% in negligence cases, 33.3% in actual malice cases; 2004 – 57.1% in negligence cases, 57.1% in actual malice cases; 2006 – 50% in negligence cases, 50% in actual malice case; 2008 – 33% in negligence cases, 60% in actual malice cases.

C. ANALYSIS

The observations that follow draw on my experience as a trial lawyer and, in some cases, in-depth conversations with defense counsel. For the most part, however, what follows reflects no special knowledge of the cases discussed beyond what you can read in Part I of this survey. Unfortunately, my analysis this time around is limited to a handful of cases, *Chapman*, *Flippen*, *Kendall*, *Kennedy*, *Mazetis*, *Riley*, *L. Stewart*, and *V. Stewart*. Those were the only cases tried to a verdict on which I was able to cajole defense counsel into baring their souls and discussing in depth the perceived dynamics of their trials.

1. Ending Up with the Right (Wrong) Jury

This continues to be the most important but also most elusive aspect of trying media cases to juries.

In the 2006 survey, I discussed at some length the art of selecting jurors. To save anyone interested the task of consulting that survey on the MLRC website, let me repeat the conclusory passages:

> Over the fifteen years I have done this survey, I have reported defense counsels' (including my own) preferences for jurors in the defense of libel cases based upon socio-economic, educational, and employment background. However, the more I watch jury trials, the more I conclude that generalizations based upon background are the least useful criteria for jury selection. A much more important factor, in my opinion, is the personality type, and in particular whether the individual has high self-esteem, a tendency to run off her own gyroscope more than external influences, and the ability to accept and live with ambiguity, uncertainty, and unanswered questions. Such people are most likely to react favorably to an articulate defendant reporter, columnist, or producer, and understand and appreciate her role in stimulating thought and bringing issues to light.
>
> Related to personality, but even more difficult to delve into in *voir dire*, is the juror's life experiences and how those experiences have instilled biases. The most direct example of a relevant life experience, of course, would be a bad encounter with the media on the part of the juror or a relative or acquaintance. Jury consultant Jason Bloom tells me that the pro-plaintiff group also includes those who "generally carry with them a sense of entitlement, who have been taken advantage of by others, who have lost opportunities in life due to actions of others without a chance to defend themselves. For instance, they may feel they have been passed up for promotion in the workplace because they perceived that

> someone else is out to get them or that a rumor has been spread around the office that they have not had a chance to diffuse nor can they, or that a performance evaluation was unfair or incorrect. In other words, those most pro-plaintiff in a libel case are best able to parallel a life experience to the case fact pattern and conclude they have seen this movie before."

Counsel experienced in jury selection urge the use of two tools that are readily available in most courts. The first is the written jury questionnaire, which (1) asks jurors to rate on a scale their views on matters relevant to the case and/or (2) poses open-ended questions seeking narrative answers, likely to reveal the types of life experiences and bias that indicate a pro-plaintiff or pro-defense disposition. Useful answers in this setting are much more likely to be forthcoming than those given in courtroom *voir dire*. The second tool, of course, is face-to-face questioning of the members of the venire, which enables counsel to get a feel for the person of the potential juror.

Questionnaires were put to good use in *Flippen*, *Riley*, and *L. Stewart*. Counsel were permitted to submit juror questionnaires in *Kendall*, but they did not receive the responses in time to effectively utilize them for jury selection. Questionnaires were refused in *Albritton*.

In this survey, there were not many cases in which it can be said that counsel "won" in the jury selection process. In most, counsel were unable to reach a comfort level or even familiarity with the panel selected, but nonetheless managed to end up with a non-toxic, "ordinary average" jury, variegated in educational background, intelligence, and sophistication. Those who prevailed were simply able to achieve at least a draw in the "battle of the personas" (discussed below) and proved their cases on the merits (*Chapman*, *Riley*, and *L. Stewart*), or at least won moral victories with what appear to be low, compromise verdicts. *See Kendall*, *Mazetis*, and *V. Stewart*.

There was a telling exception to the above generalization. *Flippen* was a case in which the defendant erroneously published that the plaintiff had been found guilty of unlawful sexual contact with a child, where the offense was failure to pay child support. The case was tried under Ohio's negligence standard, which requires clear and convincing evidence. Defense counsel was Rich Panza, who is not a member of the Defense Counsel Section, but a journeyman trial lawyer from whom we might learn well. Rich has the benefit of an unassuming and charming personality, which he puts to work during jury selection. In his survey response, Rich reported that going into trial, his jury selection preference was "older jurors without a college degree, preferably parents." That was contra the general consensus among defense counsel that better educated jurors are to be preferred on liability issues. In our e-mail conversation, Rich explained:

> On this case at any rate, I wanted jurors with more common sense and less analytical intelligence. The publication was terrible but the guy had no reputation to disparage other than someone who fathered children and then refused to support them. I honestly felt that was something that could be decided without too much thought. I felt that the jury should react, not think. I knew the majority

> of the jurors in the district would not have college degrees and that was fine with me.

Rich tried the case on the themes: that the defendant was conscientious, and made an understandable error in transcription from a list of offenders/offenses, the kind of error that could be made by anyone without negligence; and that the plaintiff, a chronically unemployed deadbeat dad, had suffered no real damages but was seeking to convert an opportunity. The jury reacted as Rich had hoped. Tellingly, when asked to assess the jury, Rich wrote, "the more sophisticated, educated the juror, the more he or she seemed to side with the plaintiff." And, as to the "lesson" of the case, "regardless of how one tries to classify potential jurors, it is best to choose those who seem to like you."

2. Battle of the Personas

Beginning in the 1997 survey analysis, and many times since, I have written:

> There is agreement [among responding counsel] that the following factors, probably in descending order, affect the outcome of a case: (1) which party the jury likes best (or least); (2) which party the jury feels is being most honest and direct; (3) which party is the most competent and conscientious at his or her endeavor in life; (4) whether the plaintiff's proof on liability and damages meets the requirements of the charge to the jury.

Thus, while factor (4) is the principal focus of defense counsel in preparing and trying the case, factors (1) through (3), which focus on the parties' personas, are in reality the most important. Unfortunately, counsel has limited control over how these factors play in the courtroom. However, the lessons of our trials are that what little control there is must be exercised to the hilt.

In this survey, there were several cases in which the defendants clearly won the battle of the personas. In *Chapman*, Jeff Portnoy defended a magazine article concerning a notorious surfer from the 1970s who is now considered an artist in the hand-making of surfboards. The article contained reports of the plaintiff's various exploits and hedonistic lifestyle. Although Jeff had decent proof on the factual statements in the article, it was difficult to deny that the gestalt of the article painted the plaintiff as something of a "horse's ass." Of course, attempting to prove that a libel plaintiff, particularly one who is something of a folk hero, is also something of a "horse's ass", can be an undertaking fraught with imminent peril. Instead, Jeff cross-examined the plaintiff with questions that enabled and encouraged the plaintiff to demonstrate to the jury that his persona was exactly as portrayed in the article, thus winning both the battle of the personas and the issue of falsity.

As noted above, Rich Panza in *Flippen* defended, under a negligence standard, a publication that falsely accused a person convicted of failure to make child support payments of being convicted of unlawful sexual contact with a child. Not a likely winner in most

circumstances. But when you effectively show that the plaintiff is a scofflaw and an opportunist, and the defendant to be conscientious, the playing field is tilted the other way.

On the defense side of the persona battle, the results of this survey underscore the importance of sparing no time and expense in preparing and presenting a complete case showing the conscientiousness and dedication of the challenged reporting effort at all levels. The best example is *Kennedy,* in which the defendant was deprived of the heart of the defense case by the unexpected death of the defendant reporter, prior to his deposition. Resulting collateral damage included inadmissibility of notes and other documents, unwillingness of many sources to acknowledge their contributions to the story and support the defendant as witnesses, the ability of the plaintiff to testify without contradiction concerning his conversations with the reporter, and resulting ability of plaintiff's counsel to falsely portray the reporter as a "loose cannon." The evidence of truth was limited to dry documents prepared by a government investigator. But the most crippling handicap was the absence of a face for the news organization's work. The trial work of defense counsel Alison Steel and co-counsel and husband Thomas Reynolds, whom, sadly, we recently lost to cancer, was heroic and resulted in a JNOV.

In *Mazetis* and *Riley*, Jon Albano defended *The Brockton Enterprise* in separate defamation cases by public officials (courthouse police officer, school board member). The Brockton area is largely blue collar, and Jon ended up with largely blue collar juries in both cases. The plaintiff's verdict (JNOV granted post) in Mazetis, the case by the police officer, favored the persona of a court officer arguably doing his job over that of a reporter who was likely perceived as "stirring the pot."

In Riley, the case by the former school board member, the plaintiff, a person of charm, had been accused of providing too much support for an administrator accused and eventually convicted of embezzlement. She claimed that she had only urged accusers to mind our shared principle that one is presumed innocent until proven guilty. Jon nonetheless achieved a defense verdict by showing the defendant newspaper as conscientious in doing its job, and proving that the plaintiff's support of the malefactor administrator was a bit more than she acknowledged. Jon may have been aided by a plaintiff's witness who was permitted to blurt on cross that he had heard that "the plaintiff and other officials likely received improper financial benefits from the disgraced former business manager." After a tumult from the plaintiff's table, the judge called a recess and later instructed the jury to disregard the testimony as hearsay (an instruction that appeared to surprise and confuse the jury). Having taken the starch out of the plaintiff's persona, and brought the defendant's newsgathering and reporting to a level warranting respect, the defendant prevailed on most statements in issue on the basis of the absence of falsity, and in the case of the one item found false and defamatory by the jury, the absence of actual malice.

Both cases illustrate how, particularly with unsophisticated juries, the battle of the personas, more than precise application of the correct legal standard, will drive the outcome.

In *L. Stewart* and *V. Stewart*, the plaintiffs were shown to be overreaching, which will normally be the death of a plaintiff's case. It was so in *L. Stewart*, and in *V. Stewart* resulted in a small plaintiff's verdict in the very difficult circumstance of alleged libel by fiction. In *L.*

Stewart, Bob Nelon and Doug Dodd bolstered the credibility of the defendant TV station's challenged report of an oral press release by a PD PIO by showing that numerous other media outlets reported it exactly as the defendants did. In *V. Stewart*, Peter Canfield and Tom Clyde performed deftly in defusing a potentially dangerous "thin skull" plaintiff's damage theory.

The battle of the personas would appear to be an even bigger factor in blogging and other internet libel trials than it is for the mainstream media. This is exemplified by a case not included in the survey, but reported in MLRC MEDIA LAW LETTER (April 2009), *ORIX Capital Market, LLC v. Super Future Equities, Inc.* (N.D. Tex. Feb. 6, 2009), in which a jury awarded $2.5 million presumed damages and $10 million punitive damages. The defendant's blog, www.predatorix.com, falsely defamed ORIX and its employees for years, apparently out of pure spite. The award came even though the site's traffic was not impressive, and ORIX could prove no financial losses. A bad guy using the net to hurt an undeserving good guy can bring more trouble than one would imagine. *See also, Omega World Travel v. Mummographics, Inc.* (E.D. Va. April 27, 2007) ($500 compensatory, $2.0 million punitive). This topic is further discussed under section C.9, *infra*.

3. Judicial Gravitas

Kendall was tried in the Virgin Islands, where leisure is the major industry, but where there are also significant socio-economic and racial tensions. Racial and cultural issues in the Virgin Islands are more complex than in the United States, since the population of the Caribbean tends to be migratory among the islands and the northern coast of South America. Judge Kendall, it turns out, was from Guyana, a former British colony, and not likely to be embraced by the diverse non-white jury as one of their own on the basis of his cultural and ethnic background alone. However, most people who serve as jurors in the Virgin Islands are law abiding, and tend to have considerable respect for judges. Michael Sullivan came very close to surmounting that challenge, although the jury ended up awarding Judge Kendall--who saw himself as another Judge Murphy (2006 survey) or Justice Thomas (2008 survey), recovering millions of dollars--a token verdict of $240,000 (which was promptly set aside on the defendants' motion for judgment NOV). The key to Michael's success was to hammer away at the truth of all that was written, along with its origins in court records, and the unrealistic unwillingness of the judge to accept responsibility for his unacceptable judicial performance.

4. Special Verdict Interrogatories and Other Trial Management Initiatives

Most defense counsel prefer special interrogatories that require the jury to determine defamatory meaning, falsity, and fault with respect to each discrete defamatory statement in issue. That is so unless, of course, it is a case in which discrete statements are likely to be found false and recklessly so. Then, the better strategy is to seek a more general formulation of the issue and argue that the overall gist of the publication is true. Special interrogatories seemed to work to the defendants' benefit in *Chapman*, *Flippen*, *Riley* and *L. Stewart*.

Jon Albano, in cases included in this and prior jury verdict surveys, has always sought the best of both worlds: an interrogatory that at first inquires whether the overall gist of the

publication has been shown to be false, and only if the answer is yes, an itemization of discrete statements as to which the jury determines the liability issues for each. This time, in *Mazetis*, Jon got neither, but merely a statement that addressed falsity by allowing the jury to determine whether the defendant's publication contained one or more false statements. In *Riley*, he obtained only a verdict form that required findings as to discrete statements, but this, in the end, facilitated a defense verdict.

In *Kendall*, the court used an undetailed verdict form and did not give the jury written instructions, which apparently contributed to the jury's inability to understand and correctly apply the standard of actual malice. Special verdict issue interrogatories were given the jury in *Kennedy*, but to no avail.

Pre-evidence instructions, in varying degrees of specificity, were given in *Kendall*, *L. Stewart*, and *D. West*.

Defending a lengthy series of articles (*Kendall*), a book (*V. Stewart*), or a movie (*D. West*), with content that favored the defense, counsel asked the court to direct the jurors to review the publication in issue before presentation of evidence. In all cases the request was refused, but counsel nonetheless managed to get the material before the jury early on. Counsel highly recommend this tactic.

5. Explaining Actual Malice

Effective communication with a jury on the true meaning of constitutional malice remains one of the most elusive challenges of trying defamation cases, on a par with selecting a good jury. That is borne out by the nearly equal success rate, over the years, in cases involving negligence as opposed to actual malice. Even when defense counsel effectively communicates the actual malice concept to an attentive and intelligent jury, that can be nullified by the antics of an experienced plaintiff's lawyer. After all, successful plaintiff's lawyers, in all kinds of cases, live on the edge between actual malice and negligence, always attempting to make the defendant out to be one who callously disregards likely harm to other human beings.

Actual malice was lost on a dull, inattentive, media-skeptical jury in *Kennedy*; and to unsophisticated juries who were morally inclined to support the plaintiff and lacked sufficient judicial guidance in *Kendall* and *Mazetis*. The defendant prevailed on actual malice in *Chapman* and *Riley*, but these cases were aided by a strong showing of truth.

In three major cases in which plaintiffs prevailed on actual malice, the court granted a JNOV. *See Kendall*, *Kennedy*, and *Mazetis*. We know little of what mischief was afoot in the jury room in *Kennedy*. In *Kendall*, we know that at least some of the jurors (not familiar with the opinion in *Bose Corp. v. Consumers' Union of the U.S.*, 466 U.S 485 (1984)) thought that one reporter's unwillingness to admit an error proved reckless disregard for the truth. In *Mazetis*, the jury apparently felt that the reporter, personally involved in the incident reported, was making a mountain out of a molehill.

6. Punitive Damages

As noted by the 2010 MLRC report on trials and damages (MLRC BULLETIN, Spring 2010), punitive damages awards have dropped significantly in the past thirty years. *Id.* at p. 8. In my 2008 analysis, I noted that there has not been a significant exponential punitive damage award since the 1997 survey (which included *MMAR Group, Inc. v. Dow Jones, Inc.*, in which the jury awarded punitive damages of $200,000,020 on top of a compensatory damage award of $22.7 million). Since that verdict in 1997, there have been very few awards in which punitive damages exceeded the amount awarded as compensatory damages, and only one case in which the punitive award was more than a multiple of two times the compensatory award. *See Meriwether v. Philadelphia Newspapers, Inc.*, 2001 survey ($400,000 punitive damages on top of $100,000 compensatory damages). The results in this survey veer from that trend in that there was one exponential punitive damage award (*Gardner v. Stokes*, $2 million punitive damages on top of $1.8 million compensatory damages), and another that was nearly exponential and in any event very large (*Kennedy v. Times Publishing Co.*, $5 million punitive damages on top of $5.3 million compensatory damages).

7. Professional Negligence and Experts

Defendants did a very good job of presenting credible and persuasive testimony of experts on journalism standards in *Flippen* and *L. Stewart*, which apparently played a significant role in the outcomes. *See Panza* for the defense's excellent work in demonstrating how mistakes occur in the absence of negligence.

8. Libel by Implication

These survey results reflect no exotic libel-by-implication theories. Many involved the standard plaintiffs' arguments that the published words carried a pejorative spin, *e.g.*, *Kendall* (statement that judge released criminal defendant on personal recognizance "despite his history of violence" implied that the criminal history was presented at the bail hearing and was ignored) and *Kennedy* (statement that the plaintiff was "reassigned" due to staff complaints implied that he was "fired"). Both cases resulted in plaintiff verdicts, suggesting that claims of innuendo may complicate a defense. None of the cases in this survey, however, presented the more gnarly sort of libel-by-implication issue.

9. The Internet's Effect Upon Attitudes

The effect of the Internet upon common experience and possible impact in libel litigation shows itself in various ways. In *V. Stewart*, for example, an unusual number of jurors felt that they had been victims of false or embarrassing statements, most likely the result of interaction with social media. In *Albritton*, the jurors, who skewed older, seemed spooked by the Internet and did not seem to like anonymous postings.

As noted in the above discussion of the *ORIX* case, and also as found by Jason Bloom in connection with work in *Albritton* and his further research for his white paper being published at

this biennial conference, jurors regard blogs as powerful instruments of communication regardless of the extent of readership (the "so what" attitude frequently heard in reference to the credibility of the internet does not seem to take hold in the jury room); focus on the publisher's intent and react strongly to spite or malice, particularly when the publisher is anonymous; and have the same expectations as they do from mainstream media and hold blogs to the same standards. Jason's findings obviously represent generalizations and tendencies and not absolutes, but they should get your attention if you are defending a blog.

10. Libel in Fiction

In recent years there has been a palpable uptick in the number of libel-by-fiction cases. In this survey, *V. Stewart* provides a paradigm of the special challenges presented by jury trials of such cases. Although to most lawyers and many lay persons the damages in fiction cases seem contrived, there are many who feel it is wrong to take an individual's persona and put it in a novel or movie.

Regardless of the predisposition of the jury, the crux of the defense of any libel-by-fiction case is very difficult to communicate. For the plaintiff to prevail, not only must the fictional work be understood as a depiction of the plaintiff, it also must be reasonably understood as an assertion that the plaintiff actually acted as described. The latter is arguably an issue of constitutional dimension under the "statement of fact" requirement of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *See Pring v. Penthouse Int'l Ltd.*, 695 F.2d 438 (10th Cir. 1982). To focus a jury on these two issues separately, the experience of *V. Stewart* and other cases counsels that nothing less is required than a jury charge that clearly separates the issues and a verdict form that requires a separate finding on each. Just that was sought but not provided in *V. Stewart*.

D. CONCLUSION

With its five out of seven losses on the issue of actual malice (three followed by JNOV), this survey reinforces the need to be respectful to the tendency of juries to be skeptical of the media and to find the applicable legal standards counterintuitive. In general those who prevailed under any standard did so only with meticulously prepared and very persuasive proof and argument. Do not underestimate the challenge.

Let us end on an upbeat note (at least so for those of who find libel trials fascinating). In the 2008 survey, I lamented at some length that the libel trial was perhaps becoming extinct, and that in the future there may not be enough such trials to warrant a survey such as this one. Fortunately (or not), I have been proven wrong by the significant number of trials that have occurred since then, many of them very well tried cases. A temporary reprieve, perhaps. Or, perhaps, after all, the libel trial will not become extinct before we do.