

1999 LDRC/ANPA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL/PRIVACY JURY TRIALS
AND IDENTIFICATION OF COMMON FACTORS

BY THOMAS B. KELLEY

CASE SURVEY

Case Name: Jamie Messenger v. Gruner + Jahr Printing & Publishing

United States District Court,
Southern District of New York
97 CV 0136 (LAR)
Verdict rendered on: March 27, 1998

1. **Date of Publication:**

YM Magazine – June 1995

2. **Case Summary:**

Action for defamation, invasion of privacy, negligent infliction of emotional distress, intentional infliction of emotional distress and negligence arising out of use of plaintiff's picture to illustrate an advice column that appeared in the June 1995 issue of YM Magazine. The advice column was written in question and answer format and contained a letter signed by an anonymous teenager. The letter described the teenager's experiences of drinking too much and having sex with her boyfriend and two of his friends. The plaintiff is a model, who posed for the pictures that were used, but claimed that she was not aware of the subject matter of the advice column that her photographs would be used to illustrate.

3. **Verdict:**

Compensatory: \$100,000

Punitive: 0

4. **Length of Trial:** 7 days

5. **Length of Deliberation:** Between 3 and 4 hours

6. **Size of Jury:** 12

7. Significant Pre-Trial Rulings:

Summary judgment granted for defendant on claims for defamation, negligence, negligent infliction of emotional distress and intentional infliction of emotional distress based on plaintiff's failure to comply with Florida statute requiring that notice be given to defendant in libel action five days prior to filing suit. Motion for summary judgment dismissing plaintiff's claim under N.Y. Civil rights law §§ 50 and 51 denied based on court's interpretation of statute as permitting a claim if plaintiff could prove that the use of her photographs was infected with substantial fictionalization or falsification.

8. Significant Mid-Trial Rulings:

Directed verdict granted at close of plaintiff's case dismissing claim for punitive damages based on plaintiff's failure to adduce any evidence of "actual malice."

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

Special verdict

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Conducted jury exercise based on lawyer presentations

11. Pretrial Evaluation:

12. Defense Juror Preference During Selection:

Preference for men, preference for younger people

13. Actual Jury Makeup:

Varied by sex, age, race

14. Issues Tried:

Whether there was substantial fictionalization or falsification, to wit: whether reasonable readers believed that plaintiff was the author of the letter to the editor that was the basis for the advice column.

15. Plaintiff's Theme(s):

Defendant magazine took advantage of younger, impressionable, naïve model.

16. Defendant's Theme(s):

No reasonable reader would believe that the person in the photographs wrote the letter used in the advice column, and that reasonable readers would realize that the person pictured was a model.

17. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant or issues:
No.

b. Sympathy for plaintiff during trial: Yes.

c. Proof of actual injury: No.

d. Defendants' newsgathering/reporting: No.

e. Experts: Yes. Tom Goldstein, Dean of the Columbia University, School of Journalism testified for plaintiff (over defendants' strenuous objection) to journalistic standards.

f. Other evidence: No.

g. Trial dynamics: No.

h. Other factors: No.

i. Lessons: Sympathy for teen-age plaintiff is impossible to overcome.

18. Results of Jury Interviews, if any:

19. Assessment of Jury:

20. Post-Trial Disposition:

Defendant appealed denial of summary judgment on plaintiff's claim under §§ 50 and 51 of the New York Civil Rights Law and on the sufficiency of the evidence supporting the verdict. Plaintiff cross-appealed the dismissal of her punitive damages claim. The United States Court of Appeals for the Second Circuit certified the question relating to §§ 50 and 51 to the New York Court of Appeals and did not reach the other issues. The certified question is being briefed and oral argument in the New York Court of Appeals is set for October 14, 1999.

Plaintiff's Attorneys:

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Lieberman & Nowak

Defendant's Attorneys:

Robert G. Sugarman, Marcia S. Cohen, Jennifer Sclar,
Weil, Gotshal & Manges

1999 LDRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL TRIALS

by Tom Kelley

September 10, 1999
Denver, CO

PART I
CASE SURVEY

Introductory Note

This is my report of responses to a survey of recent jury verdicts in tort litigation against the media arising from communication content or newsgathering activities. Twenty-nine jury trials and four bench trials are reported. I made every effort to cover all such trials concluded during the period from September 8, 1997 through September 10, 1999, plus one (Haskell) that I missed last time. Three cases are reported that resulted in directed verdicts, but I made no attempt to include all aborted trials.

The reports in paragraphs A through Z below are survey responses prepared by defense counsel. The responses received a light edit, and suffered some additions and clarifications based upon follow-up telephone interviews. Because most of what follows comes from the pens of the lawyers who tried the cases, responding counsel – particularly the many who did not prevail – deserve our sincere thanks.

In six cases, summarized more briefly in sections AA.1 through AA.7, counsel were unwilling or unable to comment because of pending appeals, pending similar claims, or other reasons. The latter summaries are based upon public record information.

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Survey Responses

A. **Case Name:** Carbonaro v. The Mountaintop Eagle, Inc. and Stephanie Grubert, Individually and t/a *The Mountaintop Eagle*
Court of Common Pleas of Luzerne County
Case No. 474-C-1996, consolidated with 2853-C-1996
April 15, 1999

1. **Date of Publication:** January 17, 1996 and May 1, 1996

2. **Case Summary:**

Plaintiffs, Nick Carbonaro and Catherine Carbonaro, were the parents of Vincent Carbonaro, who at the time this action was commenced was a freshman student in the Crestwood School District.

Defendant, Mountaintop Eagle, Inc., owns and operates a newspaper of general circulation known as the *Mountaintop Eagle*. Defendant, Stephanie Grubert, is the chief executive officer of the Mountaintop Eagle, Inc. and is the editor and publisher of the *Mountaintop Eagle*. Since 1994, defendant Grubert, also served as a member of the Crestwood School Board.

Some time in the fall of 1995, Vince Carbonaro was informed by the varsity wrestling coach, Mr. Gaetano, that he would not be wrestling on the varsity team but would be on the junior high team for his freshman year. The Carbonaros complained to various school officials regarding the coach's decision. They ultimately wrote a letter and memo to the school board dated December 22, 1995. In this memo disseminated to each school board member, the Carbonaros voiced their objections to their son being denied what they viewed as an equal opportunity to compete for a varsity position, and complained that political retaliation was behind the coach's decision to deny the student a tryout for the varsity. Subsequent to receiving this information packet regarding the Carbonaros' complaint, Mrs. Grubert learned that a meeting was arranged by Superintendent Gordon Snow to allow the Carbonaros an opportunity to discuss the issues concerning them.

Mrs. Grubert received a memo from Dr. Snow informing her and other board members that a meeting was scheduled for January 11, 1996, to discuss what Dr. Snow entitled "Vince Carbonaro - Wrestling Problem." When Mrs. Grubert received this memo, she understood it to be the Carbonaros coming before the public school board to present their case. Nothing in the memo to the school board indicated that the meeting was to be held confidentially or in executive session. In fact, when setting up the meeting, Dr. Snow indicated that Nick and Cathy Carbonaro requested that Coach Gaetano and Dr. Snow be

present, but Dr. Snow personally requested Mr. Storm, the high school principal, and Mr. Rezyloski, the athletic director to be present. Regarding the board members, the Carbonaros specifically requested that Principal Tom Ford be available for the meeting, but Dr. Snow invited all board members to attend.

At the January 11, 1996 board meeting, the Carbonaros were given the opportunity to verbally present their complaint to the Crestwood School Board, the same complaint they had articulated in their letter of December 22, 1995. According to the Carbonaros, they felt that their son was unreasonably denied an opportunity to compete for a position on the varsity wrestling program. This initial portion of the meeting was held in a room located in the administration building. According to Superintendent Snow, the meeting was open to the public and there was no prohibition as to who attended. Present at the meeting were the plaintiffs, the school board directors, the Superintendent, the Principal, the Assistant Principal, the Athletic Director, the school solicitor, and members of the varsity wrestling staff.

On January 17, 1996, a regular opinion column authored by Mrs. Grubert and entitled "Under the Circus Tent" appeared in the *Mountaintop Eagle*. In writing the article, Defendant Grubert derived some of the information from a public letter and addendum submitted to the Crestwood School Board dated December 22, 1995, authored by Nick and Cathy Carbonaro. She also relied upon the memo authored by the Superintendent and directed to the school board members.

In the January 17, 1996 column, Grubert criticized various Crestwood District officials, including the District's Superintendent, for treating an ordinary educational and administrative matter - namely, whether a student should be allowed to wrestle on the high school's varsity or junior varsity squad - as the kind of dispute that necessitated School Board involvement in the high school athletic department's affairs. Mrs. Grubert opined that the meeting was granted as a political payback to Nick and Cathy Carbonaro and that the Carbonaros' political affiliation resulted in giving them an edge to call an investigation regarding this matter. She based that opinion on the fact that it was unusual for the board to listen to complaints from parents about coaching decisions and the fact that Cathy Carbonaro was a political supporter of Tom Ford. The article further made the statement that Cathy Carbonaro worked at the polls to unseat Joe Krivak, another school board member. This statement was based on Mrs. Grubert's personal observation of Mrs. Carbonaro campaigning against Joe Krivak. Further statements, which plaintiffs claimed to be defamatory included the opinion of Mrs. Grubert that "the luck of the sport determines the outcome." The plaintiffs filed an action on January 29, 1996, for defamation and invasion of privacy arising from the *Mountaintop Eagle*'s January 17, 1996 editorial ("First Action").

Another editorial, published on May 1, 1996, and entitled "Disgruntled Parents Should Not Dictate Coaching Decisions" was written by an editor employed by *The Mountaintop Eagle*, Kathy Flower. The information contained within this editorial was

obtained by Ms. Flower from the public school board meeting held on April 25, 1996, a week before the article was published, and was based upon information that had been publicly stated or released in the previous months. The editorial contained some of the same information as the January 17, 1996 editorial but included information regarding the Carbonaros' attempts to have the coach's employment terminated. The plaintiffs filed an action on May 6, 1996, for defamation and invasion of privacy arising from the *Mountaintop Eagle's* May 1, 1996 editorial ("Second Action"). The two actions were consolidated for trial.

3. Verdict:

First Action - for Plaintiffs
Second Action - for Defendants
Total award was \$50,000

Compensatory:

First Action - \$ 5000 for defamation (2500 to parents and 2500 to son)
\$10,000 for invasion of privacy, intrusion upon seclusion
(3000 to parents and 7000 to son)
\$20,000 for invasion of privacy, publicity given to private life
(5000 to parents and 15,000 to son)

Second Action - None

Punitive:

First Action - None for defamation
\$15,000 for invasion of privacy (5000 to parents and 10,000 to son)

Second Action - None

4. Length of Trial: Two weeks

5. Length of Deliberation: Approximately six hours

6. Size of Jury: Twelve

7. Significant Pre-Trial Rulings:

Summary judgment was denied prior to trial. Defendants' motion to bifurcate the trial was denied. In addition, prior to trial, the court granted the plaintiffs' motions *in limine* on several issues. The defendants were precluded from presenting any evidence disputing

that the January 11, 1996 meeting was an executive session or that Mrs. Grubert did not believe that it was an executive session. The defendants were also precluded from presenting the testimony of many witnesses.

8. Significant Mid-Trial Rulings:

The trial court's rulings on objections and the admission of documents were almost unanimously in favor of the plaintiffs and against the defendants. The court denied the defendants' motion for a directed verdict.

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

The trial judge frequently questioned witnesses during their examination in a manner that reflected bias in favor of the plaintiffs. She instructed the jury during the trial not to draw any inferences from her questioning of the witnesses.

Defendants sought to bifurcate the liability and punitive damage phases of the trial, but the motion was denied.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None, except *voir dire*. A significant issue was media exposure. The larger local newspapers frequently reported negatively about the *Mountaintop Eagle* and Mrs. Grubert. They also covered the trial extensively and displayed a bias toward the plaintiff and against the defendants.

11. Pretrial Evaluation:

The defendants valued the case minimally, at the most, \$25,000.

12. Defense Juror Preference During Selection:

The defendants sought educated persons who would understand the complicated issues involved in the case.

13. Actual Jury Makeup:

The jury consisted of 12 individuals, 8 men and 4 women. Two alternates who were selected during jury selection were substituted for two jurors who could not continue to serve because of the length of the trial.

The final jurors consisted of the following: a 42 year old female nurse; a 39 year old male county transportation employee; a 22 year old male material handler; a 49 year old male sales representative; a 49 year old male QC inspector; a 30 year old male maintenance worker; a 40 year old civil engineer employed by the Pennsylvania Department of Environmental Protection; a 73 year old retired male; a 67 year old retired female; a 40 year old female child care provider; a 39 year old male level operator; a 49 year old homemaker.

Five of the jurors had a college education.

14. Issues Tried:

Whether the publications were defamatory, whether they were opinions or contained false statements of fact, negligence, and whether the publications caused damage to the plaintiffs. Also at issue was whether the defendants invaded the plaintiffs' privacy and whether punitive damages were warranted on both the defamation and invasion of privacy claims.

15. Plaintiff's Theme(s):

The plaintiffs painted the defendant as vindictive and political and charged that Grubert used her paper to advance her own political interests, even at the expense of a child. They argued that her paper had been very controversial in local affairs. They asserted that the coach discriminated against Vince on the basis of an alleged handicap and that Mrs. Grubert knew that this was the reason they were pursuing the issue through the district's administration.

16. Defendant's Theme(s):

The defendants argued that the plaintiffs were overreaching parents who were trying to live vicariously through their son and that they could not accept that he had not made the varsity team. They also painted the plaintiffs as being very involved in school district politics and attacked the plaintiffs' credibility on several fronts. The defendants also argued that the plaintiffs had made the issues public and had brought their problems on themselves. In addition, the defendants argued that the handicap discrimination issue was only raised after the fact to support their defamation lawsuit.

17. Factors Believed Responsible for Verdict:

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

There was concern that the venire would be prejudiced against the media and the defendant in particular. The concern existed because of the extension coverage that the local

papers gave to the defendant and the trial. However, this did not appear to be a reality during the trial. The jurors selected did not appear to have any predispositions regarding the defendant or the case.

b. Sympathy for plaintiff during trial:

The jury did not have much sympathy for the plaintiff parents and thought that they brought most of their problems on themselves by going to such extremes within the district. They did appear to have some sympathy for the son, but mostly for what his parents had put him through.

c. Proof of actual injury:

The plaintiffs presented testimony that their reputation suffered in the community. The defendants countered with testimony that any damage caused to the plaintiffs' reputation was caused by their relentless pursuit through the school board and not as a result of the publications.

The plaintiffs also argued that they had to move out of the district because of the articles. They claimed that the mother was living in the former home, trying to sell it (they allegedly lived apart for three years while they tried to sell the home), that the rest of the family was living in another school district, and that this caused them great distress and emotional harm. However, the jury disbelieved this testimony and determined that the plaintiffs were still living in their former residence and that the children were going to a different school because the parents would not let the son wrestle under the varsity coach who remained employed by the district.

d. Defendants' newsgathering/reporting:

The plaintiffs attempted to attack the paper's editing practices and the layout of the paper, and disputed the fact that the publications appeared on the editorial page of the paper.

However, the key problem for the defendant was that Mrs. Grubert was a school board member and attended the meeting in that capacity. When she wrote her column, she believed that the meeting was a public session of the board. The court's ruling that the meeting was an executive session as to which privacy was reasonably expected made Mrs. Grubert vulnerable to the claim she abused her position.

e. Experts: None

f. Other evidence:

The jury was informed that the plaintiffs had filed two other lawsuits against the school district for handicap discrimination and a personal injury lawsuit against the district and an assistant wrestling coach.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' counsel was extremely dramatic throughout the entire trial and was very argumentative with defense witnesses.

ii. Defendant's trial demeanor:

The defendants' witnesses, mostly school administration and the varsity coach, appeared as very impartial and objective. Plaintiffs' counsel became argumentative with Mrs. Grubert. The editor, Kathy Flower, was an excellent witness and appeared very objective as to why she wrote what she did in her editorial.

iii. Length of trial:

The trial should have been a three to four day trial, but was stretched to two weeks because the trial judge was consistently late, took frequent and long breaks, took long lunches and recessed at lunchtime on several days.

iv. Judge:

The trial judge was biased in favor of the plaintiff and against the defendant. She was rude to defense counsel and witnesses. Jurors commented on how unfair her treatment of defense counsel was, and one stated that he was going to ask to be removed from the jury because he could not continue to serve due to the judge's treatment of defense counsel.

The judge's tactic may have backfired because she generated a lot of sympathy among the jurors for the defendants and their counsel. In addition, because of the numerous rulings excluding evidence and witnesses for the defense, the jury began to believe that there was extensive evidence favorable to the defense that they were not being allowed to hear and consider.

h. Other factors:

A key point in the case was the plaintiffs' credibility. Mrs. Carbonaro testified that she had never had a conversation with a certain board member wherein she tried to convince

the board member to vote to terminate the wrestling coach. During Editor Flower's testimony regarding a school board meeting, she stated that the board member said that he had had an eight hour conversation with Mrs. Carbonaro. When plaintiffs' counsel cross-examined Flower, he called her a liar and said that he had a tape of the meeting and the statement was never made. She said that she heard it and that she had a tape as well. He challenged her to locate the tape. The defendants had the tape in the courtroom, and it was played for the jury. The jury heard the statement on tape, and later indicated that it was a turning point in the trial, and that it destroyed the plaintiffs' credibility.

18. Results of Jury Interviews, if any:

Interviews with jurors revealed that they were extremely upset with the judge for her treatment of defense counsel. They were slightly turned off by the plaintiffs' counsel's dramatics and found the plaintiffs to have lacked any credibility, particularly with regard to damages. In addition, they thought that the plaintiffs went too far in their pursuit of "justice" for their son. However, they did feel that the defendants should not have used the name of the student in the paper. That resulted in the verdict reached.

19. Assessment of Jury:

The jury was very intuitive and practical and rendered a proper verdict.

20. Lessons:

Jurors generally can determine credibility, and will pick up on inconsistencies and implausibilities in testimony.

21. Post-Trial Disposition:

No post trial motions were filed by either side.

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B. **Case Name:** Randall Craig Cobb, a/k/a Randall "Tex" Cobb v. Time Inc., d/b/a Sports Illustrated, William Nack, and Sonja Steptoe
U.S. District Court, Middle District of Tennessee, Nashville
June 9 (compensatory) and 11 (punitive), 1999

1. **Date of Publication:** October 4, 1993
Sports Illustrated

2. **Case Summary:**

In its October 4, 1994 issue, *SI* published an article called "The Fix Was In." The article reported on the activities of boxing promoter Rick "Elvis" Parker, including his fixing of fights in order to build up the records of Mark Gastineau and plaintiff Randall "Tex" Cobb. The article included the allegation made by Paul "Sonny" Barch that his September 15, 1992 bout with Cobb was fixed and that he met with Parker, and separately with Cobb, to discuss allowing Cobb to win the fight. The Cobb-Barch fight was part of a card promoted by Parker in Ft. Lauderdale, Florida. As part of the same card, Gastineau was matched against Rick Hoard in another fight that Parker tried to fix. The article also reported Barch's allegation that after the fight he, Parker, and Cobb shared a quantity of cocaine.

SI's journalists fully investigated the background of the story, including the allegations made by Sonny Barch. *SI* journalists interviewed Barch a number of times and made efforts to investigate his background, including his criminal history. *SI* journalists also interviewed a number of other critical sources, including Don Hazelton, the Executive Director of the Florida Athletic Commission, who supervised the Cobb-Barch fight and was investigating Parker for fixing that fight and others; Rob Russen, Parker's ex-partner; and fighters Rick Hoard, Kevin Barch, and Tim Anderson. *SI* journalists also reviewed a videotape of the Cobb-Barch fight and a variety of background documents and other research materials. *SI* journalists also spoke to Parker and Cobb. Cobb refused to cooperate or be interviewed for the story, issuing only a blanket denial that the fight was fixed. Despite diligent efforts, *SI* was not successful in getting a comment from Gastineau.

3. **Verdict:** For plaintiff

Compensatory: \$8,500,000

Punitive: \$2,200,000

4. **Length of Trial:** Approximately three weeks

5. **Length of Deliberation:** Approximately one day

6. **Size of Jury:** Began with ten, finished with nine

7. Significant Pre-Trial Rulings:

The individual writers were dismissed from the action based on a lack of personal jurisdiction.

Summary judgment was granted for defendant with respect to several allegedly defamatory statements.

The court permitted plaintiff to use alleged factual errors in the previously-dismissed defamatory statements as evidence of actual malice with respect to the two statements that were the basis for the trial under a “cumulative errors” theory.

The court granted defendant’s “reverse” motion *in limine* regarding the admissibility of the audiotapes of the investigative reporter’s interviews with several of the sources.

The court granted defendant’s “reverse” motion *in limine* regarding the admissibility of the statements made to the reporters in their preparation of the article.

The court ruled that plaintiff had to prove actual damages as part of his *prima facie* case.

8. Significant Mid-Trial Rulings:

Notwithstanding the prior ruling on defendant’s motion *in limine*, the court excluded the majority of the audiotapes of the investigative reporter’s interviews, and excluded a number of statements made to the journalists in their preparation of the article.

The court refused to admit the entirety of certain newspaper articles regarding plaintiff’s reputation despite a stipulation to their admissibility.

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

The issue of punitive damages was bifurcated. A special verdict form was used.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Conducted a mock trial/focus session prior to trial. Each of the focus groups favored the defense.

11. Pretrial Evaluation:

Maximum exposure \$100,000.

12. Defense Juror Preference During Selection:

Educated persons, without knowledge of Tex Cobb.

13. Actual Jury Makeup:

Moderately educated, most of whom had heard of Cobb.

14. Issues Tried:

I. Was Randall "Tex" Cobb defamed by the statement in the *Sports Illustrated* article that he knowingly participated in a fixed fight.

1. Was this statement false?
2. Was this statement libelous?
3. Did *Sports Illustrated* have actual knowledge that this statement was false?
4. Did *Sports Illustrated* recklessly disregard whether this statement was false?
5. Did Randall "Tex" Cobb actually suffer damage as a direct result of this statement?

II. Was Randall "Tex" Cobb defamed by the statement in the *Sports Illustrated* article that he shared cocaine with others after his boxing match with Sonny Barch.

6. Was this statement false?
7. Was this statement libelous?
8. Did *Sports Illustrated* have actual knowledge that this statement was false?
9. Did *Sports Illustrated* recklessly disregard whether this statement was false?
10. Did Randall "Tex" Cobb actually suffer damage as a result of this statement?

15. Plaintiff's Theme(s):

Repetition does not equal corroboration. Rushed to print because of a deadline. Took the word of a known drug user. Charge of fight fixing ruined reputation of a "warrior."

16. Defendant's Theme(s):

Sports Illustrated thoroughly investigated and corroborated all aspects of the story. In order to get a story about fight fixing, it is necessary to deal with unsavory characters.

Plaintiff's boxing and acting careers were long over prior to the publication of the article. Plaintiff had a reputation for drug use.

17. Factors Believed Responsible for Verdict:

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

Sports Illustrated most powerful and influential sports magazine in the world. Plaintiff is celebrity in Nashville, his former hometown.

b. Sympathy for plaintiff during trial:

Not so much sympathy as awe of celebrity. *Sport Illustrated* showed that plaintiff had engaged in shady fights and drug use in the past, but this seemed to have little effect.

c. Proof of actual injury:

Plaintiff and expert testified to severe emotional damages. Plaintiff's damages expert testified to \$6.7 million in lost fight, film and endorsement opportunities.

d. Defendants' newsgathering/reporting:

Specific allegations of fight fixing not susceptible to direct corroboration. The court's ruling prohibiting the admissibility of many statements made to the writers essentially left the writers saying "there was corroboration," but not allowing them to testify what, precisely, that corroboration was.

e. Experts:

Plaintiff:

Robert Hunt, M.D. Hunt was plaintiff's treating physician and testified that plaintiff was emotionally destroyed by the publication of the article.

Jay Shapiro. Shapiro is a Hollywood accountant who testified that plaintiff lost \$6.7 million in potential earnings.

Steve Smoger. Smoger testified that his review of the videotape shows that the fight was legitimate.

Defendant:

William Kenner, M.D. Dr. Kenner testified that plaintiff's emotional distress could have been caused by any number of sources, including plaintiff's drug withdrawal, marital problems, and child support issues. Also, Kenner testified that plaintiff likely would have responded the same way if the article was true as if it was false.

Herb Goldman. Testified that many of the assumptions underlying Shapiro's calculations are patently false.

f. Other evidence:

SI paid Sonny Barch for writing his first person account.

g. Trial dynamics:

i. Plaintiff's counsel:

Sat alone at counsel table to give "David vs. Goliath" more effect.

ii. Defendant's trial demeanor:

Witnesses generally performed well, some performances were mixed.

iii. Length of trial:

Three weeks may have been a factor.

iv. Judge:

Inexperienced with libel and hearsay.

h. Other factors: N/A

i. Lessons:

Jury was upset at what it perceived to be checkbook journalism and *Sports Illustrated's* reliance on a shady character.

18. Results of Jury Interviews, if any: N/A

19. Assessment of Jury:

Jury was awed by plaintiff's celebrity status and permitted him to have more slack in judging his personal behavior. Jury was fed up with the media generally.

20. Post-Trial Disposition:

Post-trial motions currently pending.

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C. **Case Name:** James M. Corcoran v. Isaiah Wilhelm (a/k/a D.C. Chymes), Tim Melton, and Zimco Incorporated
St. Louis Circuit Court
November 10, 1997

1. **Date of Conduct in Issue:** April 1994

2. **Case Summary:**

Plaintiff, a radio morning show personality, alleged malicious prosecution against two competing morning show personalities and their radio station as a result of an incident arising from an attempt to interview plaintiff while he was working and performing on-the-street interviews. The competing morning show personality sent an intern to a location where plaintiff was interviewing people on the street for a promotional event. The plaintiff had named his daughter Addison-Clark (after the streets that intersect at the front gate of Wrigley Field in Chicago), and the intern had successfully irritated the plaintiff by assuming the on-

air name of "Addison Clark." The intern approached plaintiff with a Dictaphone and a set of questions. When the intern approached and asked the plaintiff if he was "still in radio," plaintiff struck the intern, knocked him to the ground, and kicked him. Plaintiff denied striking the intern, but stated that the entire incident was staged and that the intern "took a dive." There were numerous witnesses, pretty much divided between plaintiff's story and defendant's story. The police were called, and issued both plaintiff and the intern summonses for peace disturbance. The charges were not prosecuted against either plaintiff or the intern defendant.

3. **Verdict:** 8-2 for plaintiff

<u>Compensatory:</u>	\$70,000
<u>Punitive:</u>	\$300,000

4. **Length of Trial:** Six days

5. **Length of Deliberation:** Four hours

6. **Size of Jury:** Twelve

7. **Significant Pre-Trial Rulings:** None

8. **Significant Mid-Trial Rulings:**

Defendants were precluded from offering any evidence of similar instances and pranks as performed by plaintiff throughout his career, in an effort to show the state of mind of the parties and that pranks are part of the morning radio business, and not evidence of willful and wanton conduct.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** N/A

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):** N/A

11. **Pretrial Evaluation:**

Pretrial evaluation was difficult, in light of the nature of the case. The defendants were very successful, but extremely controversial morning radio personalities, who, several years ago, had been fired for racial comments on the air and subsequently rehired. On the other hand, plaintiff himself has been a controversial figure in morning radio.

12. Defense Juror Preference During Selection:

Young males.

13. Actual Jury Makeup:

An approximately even mix of middle to older-aged white and black males and females.

14. Issues Tried:

Malicious prosecution and a counterclaim of assault.

15. Plaintiff's Theme(s):

Defendants intentionally "set up" the plaintiff to be arrested.

16. Defendant's Theme(s):

Defendants simply attempted to create a humorous situation, which got out of hand when the plaintiff assaulted one of the defendants.

17. Factors Believed Responsible for Verdict:

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

b. **Sympathy for plaintiff during trial:** Not a factor

c. **Proof of actual injury:**

\$3,300 in attorneys' fees for defending plaintiff against a peace disturbance charge.

d. **Defendants' newsgathering/reporting:**

Defendants' "newsgathering" was at issue, but probably not the key factor, see below.

e. **Experts:** None

f. **Other evidence:**

Various audio tapes of defendants' on-air activities.

g. Trial dynamics:

Nothing in particular factored into the judgment, except perhaps the jury's impression of the defendants' on-air personalities.

18. Results of Jury Interviews, if any:

Defense counsel spoke to the two jurors who held out for defendant. They felt the conduct on both sides was attention-getting by competing "shock radio" shows, not the stuff of a damage award. Counsel did not speak to the jurors who voted for the plaintiff.

19. Assessment of Jury:

The jury either disbelieved defendants, in the face of numerous witnesses who corroborated defendants' version of the events, or were so aware of defendants' controversial nature that it precluded a reasonable judgment.

20. Post-Trial Disposition:

Case settled for \$99,000 just before appellate briefs were filed.

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D. Case Name: Maxine Durham v. Phoenix Newspapers, Inc.
Maricopa County Superior Court, Arizona
Case No. CV 96-10445
Verdict rendered November 20, 1997

1. Date of Publication: February 7, 1996
Phoenix Arizona

2. **Case Summary:**

The dispute arose out of a story that originally was written as a sidebar to a story chronicling the history of the main street of a suburb. The main story was published in 1995, but there was not enough space for sidebars. One of the sidebars described a local legend that the reporter obtained from two longtime residents. The gist of the legend was that a "Jomax Road" was named for two "ladies of the night" who worked out of wooden shacks on a remote dirt road. Their names were Josephine and Maxine, hence "Jomax" Road.

The reporter investigated libraries, the local historical society and place name publications but could find no other such reference.

The legend was then published a year later in an "Around the Town" column under the heading "A look back."

Who knows? It's a legend that might not stand up to investigation but it's too good to disprove; some folks say Jomax Road took its name from two 'ladies of the night' who worked out of wooden shacks on the remote dirt road. Their names were Josephine and Maxine. Hence, Jomax Road.

The road had actually been named by the owner of a sand golf course for his sister, Josephine, and his wife, Maxine Durham. Maxine was 85 years old and very much alive when the publication was made. Her demand for correction and the true story of the name Jomax was answered in the next week's edition of the column explaining how the road was named and saying "one reader not only knew the truth . . . but we besmirched her reputation."

Three weeks later a more detailed correction and apology was published and a letter of apology sent to plaintiff. Her action for defamation and false light invasion of privacy followed. An internal educational staff memo which included a comment the legend was false, unverified and said "we have no defense" (journalistically) came into evidence.

3. **Verdict:** For defendants
4. **Length of Trial:** Four days
5. **Length of Deliberation:** 6¾ hours
6. **Size of Jury:** Eight

7. Significant Pre-Trial Rulings:

Motion for summary judgment contending that the words in issue were not actionable *per se*, not *per quod*, did not occasion any general or special damages, were not false as to plaintiff, were about what was clearly identified as legend, and did not concern plaintiff's private life or privacy; and that plaintiff waived privacy by demanding accurate publication with names, and lack of actual malice – denied.

8. Significant Mid-Trial Rulings: None

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

No special verdict forms or questionnaires were utilized.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

No special jury investigation, surveys, mock trial or pre-selection questionnaires were utilized.

11. Pretrial Evaluation:

Defamation action 100% defensible based on testimony of plaintiff's friends and lack of damage to reputation or special evidence.

Privacy action 75-80% defensible – same bases.

12. Defense Juror Preference During Selection:

Young males and females who were not fundamental or evangelical Christians.

13. Actual Jury Makeup:

Five men, three women. Three retired men, a male investment broker, one female hospital technician, two housewives, one aerospace expediter, split between middle age and retired persons.

14. Issues Tried:

Of and concerning plaintiff, falsity, identification of story as legend, legend was in existence, waiver of privacy, negligence, absence of reputation or special damage.

15. Plaintiff's Theme(s):

Story stated it failed to investigate to learn true story, admission of falsity, actual malice.

16. Defendant's Theme(s):

Reporter did undertake investigation at logical sources. The story confirmed as true as a legend; it was not of and concerning plaintiff and no damage to plaintiff.

17. Factors Believed Responsible for Verdict:

a. **Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:** None conveyed

b. **Sympathy for plaintiff during trial:**

Respectful but no measure of sympathy apparent.

c. **Proof of actual injury:**

None. The single doctor's visit was regarded as attorney instigated and worked against plaintiff.

d. **Defendants' newsgathering/reporting:**

Jury accepted an effort was made to verify the legend and had no belief the Josephine or Maxine were real people. The jurors did regard the initial story and first correction as somewhat flippant.

e. **Experts:** None

f. **Other evidence:**

Plaintiff's friends testified no damage to reputation. For the most part, these witnesses had been identified by plaintiff, but counsel for plaintiff failed to interview them before trial. The defense interviewed them and called them at trial, and their testimony proved most helpful to the defendant. Plaintiff testified she went to doctor once two weeks after the publication but not until her attorney suggested it. Plaintiff also admitted she had heard of the "legend" before the publication and she only "guessed" the story besmirched her reputation. She also testified she wanted more than the corrections and apology letter – "more, money, a large sum of money."

g. Trial dynamics:

i. Plaintiff's counsel:

Trial experience primarily in personal injury law and did not read jury well. Attempted to make case a "you can teach the world of journalism a lesson" by your verdict.

ii. Defendant's trial demeanor:

Composed and answered questions directly. Junior reporter and junior editor gave strong indications of sincerity and that they honestly tried to investigate the story.

iii. Length of trial: Four days

iv. Judge:

More than 10 years on bench but this was his first defamation/privacy trial. He was not thoroughly cognizant of the applicable law.

h. Other factors: None

18. Results of Jury Interviews, if any:

Jury did not believe plaintiff defamed, defense verdict, 8-0. Most did not believe plaintiff's privacy was invaded although two were adamantly in plaintiff's corner, verdict 6-2 in favor of defendant.

19. Assessment of Jury:

Jury not swayed by emotion and looked carefully at the evidence and did not display a bias against the newspaper.

20. Lessons:

Be honest with jury. It was admitted the legend was not true as to plaintiff, reporter did make effort to investigate, initial correction not the best and plaintiff was not damaged.

21. Post-Trial Disposition:

Plaintiff's motion for new trial was denied. Plaintiff paid defendant's taxable costs and did not appeal.

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E. **Case Name:** A.J. Faigin v. James E. Kelly and Vic Carucci
U.S. Dist. Ct., D. N.H.
Verdict rendered April 19, 1998

1. **Date of Publication:** 1992
2. **Case Summary:**

In December, 1992, All-Pro Professional Football Player, Jim Kelly, quarterback of the Buffalo Bills, published his autobiography *Armed & Dangerous*, which was co-authored by Buffalo sports writer Vic Carucci. The autobiography contained approximately five or six references to A.J. Faigin, who served as one of Kelly's agents from 1983 to 1987. Essentially, the references charge Faigin with untrustworthy conduct in his representation of Kelly and that as a result of this conduct, Kelly fired Faigin in 1988. In one of the passages, Kelly wrote that he had "filed a major lawsuit" against others, including his former agents. The suit that Kelly wrote about was filed in the United States District Court for the District of Texas. At the time *Armed & Dangerous* was published in 1992, all claims were pending and being actively litigated in Texas. A year later in 1993, Kelly amended his complaint in Texas against Faigin, narrowing it to allegations of wrongdoing with respect to investment counseling. In May, 1994, in light of his former agents' nominal assets, Kelly voluntarily dismissed the claims against them. Upon dismissal of the suit, Faigin filed for Rule 11 sanctions against Kelly. The district court awarded Faigin \$11,000, sanctioning Kelly for bringing a frivolous lawsuit against Faigin.

The defense in the defamation suit focused upon substantial truth and constitutionally protected opinion. Kelly introduced significant and voluminous evidence that (1) Faigin breached his fiduciary duties by improperly representing him in connection with the signing bonus he had with the USFL's Houston Gamblers; (2) Faigin and his company improperly double-billed Kelly and received commissions on monies that were not paid to Kelly; (3) Faigin mishandled various matters relating to Kelly's investments; (4) Faigin failed to properly advise Kelly with regard to investment improprieties; and (5) Faigin and his company recommended to Kelly the purchase of an insurance policy from an insolvent

insurance company, and failed to advise Kelly of their knowledge of the company's insolvency.

Defendants moved for summary judgment arguing Faigin was a limited public figure and that the statements were substantially true on protected opinion. The court granted in part and denied in part defendant's motion for summary judgment.

The court ruled that read as a whole, the passages in the autobiography clearly implied factual allegation susceptible of being true or false. The court further found that A.J. Faigin was a limited public figure and thus subject to the actual malice standard. The court found that the plaintiff might be able to meet its burden of proving actual malice with respect to Kelly, however, the court found that there was no evidence that Carucci, as co-author, knew that any allegations against Faigin were false or in reckless disregard of the truth. Accordingly, the court dismissed Carucci from the lawsuit.

3. **Verdict:** For defendants
4. **Length of Trial:** Five weeks
5. **Length of Deliberation:** Approximately two hours, including lunch
6. **Size of Jury:** Six
7. **Significant Pre-Trial Rulings:**

Summary judgment against Kelly was denied but was granted in favor of Carucci.

Prior to trial, defendants filed a motion in limine in order to preclude introduction of evidence of the Rule 11 sanctions order. Plaintiffs filed a motion that the Texas court's Rule 11 order be given collateral estoppel effect, and that the order in its entirety be introduced as an exhibit at time of trial. The court ruled that the Rule 11 sanctions issued against Kelly by the Texas court would not be given preclusive effect. The court found that the issue decided in the Rule 11 order was whether Kelly knew that the allegations in the Texas lawsuit complaint against Faigin were false. The issue at trial was whether Kelly knew that the "defamatory message in his autobiography was false." Thus, the court ruled that the jury could find that the defamatory message in the book consisted of allegations that are different and broader than those presented in the Texas lawsuit. The court reserved ruling on the defendants' motion to preclude evidence of the Rule 11 opinion on sanctions. The court determined that at the pretrial stage, it was difficult to gauge the probative value of the Rule 11 order and found that the more evidence introduced at trial that the defamation was based upon complaints about Faigin that differed from the complaints Kelly raised in the Texas lawsuit, the less probative the Rule 11 order finding that Kelly knew the complaints raised in the Texas lawsuit were false. The court stated that once the probative value of the Rule 11

order became better established during the course of the trial, the court would apply the Rule 403 balance test.

8. Significant Mid-Trial Rulings:

The court ruled during the course of the trial that the Rule 11 sanctions hearing would not come in to evidence, but allowed plaintiff to introduce the facts leading up to the court's order. The court found that the evidence presented at trial was different in degree and scope from the complaints raised by Kelly in the Texas litigation.

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

A special verdict form was used by the jury. The jury found that the statements were defamatory of and concerning the plaintiff and that they were substantially true.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None, except for *voir dire*.

11. Pretrial Evaluation:

Probable defense verdict.

12. Defense Juror Preference During Selection:

Small business owners, wage earners, and others, who would appreciate Kelly's blue collar background and dependency on professional advisers.

13. Actual Jury Makeup:

Primarily middle class, wage earners, some retired. A mix of men and women, mid-twenties to mid-sixties.

14. Issues Tried:

Whether the statements contained in *Armed & Dangerous* regarding A.J. Faigin were defamatory, false, published with actual malice, and whether and to what extent those statements actually damaged the plaintiff.

15. Plaintiff's Theme(s):

Plaintiff argued that Kelly knew that Faigin had engaged in no wrongdoing and that any harm he suffered was as a result of Kelly's other agents. He further argued to the jury that he gave Kelly a warning that he was leaving the agency that had represented Kelly and that the principal agent was not serving Kelly's best interests. He argued that Kelly knew that the statements in the book were defamatory to him and that they were false based upon his failure to produce any evidence in the Texas suit tying Faigin to the investment improprieties. He further argued that because as Kelly knew Faigin had left the agency, Kelly's statements in the book that he fired Faigin were false.

16. Defendant's Theme(s):

Defendants asserted the defenses of truth and opinion, and stressed the trust that individuals such as Kelly necessarily place in an agent and attorney such as Faigin. In light of Faigin's role as an officer and director of the agency, Faigin had knowledge of the wrongdoing in the agency and its effect upon Kelly. Defendants further asserted that the statement that Kelly had fired Faigin was accurate because Faigin had requested and received prepayment of commissions for a two year period which extended beyond Kelly's termination of his agency relationship. Furthermore, in an audiotape that Faigin had made and sent to Kelly, he had indicated that he believed he still represented Kelly. Thus, the statement that Kelly had fired his agents was substantially true. Defendants introduced a smorgasbord of evidence of Faigin's wrongdoing as Kelly's agent.

17. Factors Believed Responsible for Verdict:

- a. **Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:** None
- b. **Sympathy for plaintiff during trial:** None
- c. **Proof of actual injury:**

There was no proof of actual injury to plaintiff resulting from the alleged defamatory statements published in the book. In fact, the testimony presented at trial established that plaintiff represented no ballplayers in the year prior to publication of the book and that he was collecting unemployment insurance at the time of publication of the book.

- d. **Defendants' newsgathering/reporting:**

Defendant publishing house had carefully vetted the book prior to publication. The defendant's statements were based upon his personal knowledge of the events in question.

e. Experts:

Jack Mills, a sports agent, was plaintiff's expert. Mills testified that the passages in the book constituted reputational impediments which would have hurt the plaintiff and plaintiff's ability to sign new players.

Defendants' expert was Richard Berthelsen, General Counsel for the National Football League Players Association. Mr. Berthelsen testified that plaintiff's conduct was not in accordance with the NFLPA Rules & Regulations. He further testified that agents occupy a position of a trust and confidence in the lives of young NFL players.

f. Other evidence:

Defendants introduced the testimony of four former professional football players who had been represented by Faigin and his sports agency. All of the ballplayers testified in conformity with Kelly's view that Faigin had mishandled their accounts.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff was represented by two out-of-state attorneys, as well as local counsel. Local counsel is an experienced trial attorney. The out-of-state counsel did not have extensive trial experience. Plaintiff sat at the counsel table during the entire trial. Plaintiff's wife sat in the audience during the trial.

ii. Defendant's trial demeanor:

Defendant was represented by New Hampshire attorneys, as well as the director of litigation for the publisher, Bantam Doubleday Dell. Lead counsel has extensive trial experience. Kelly sat at the counsel table during the entire trial. Kelly's brother sat in the gallery during the entire trial.

iii. Length of trial:

The jurors had made several inquiries as to how long the case would go. The plaintiff's case was concluded after approximately four-and-a-half weeks. Defendants put on their case in several days.

iv. Judge:

The judge was even-handed throughout the trial.

h. **Other factors:** None.

18. **Results of Jury Interviews, if any:** N/A.

19. **Assessment of Jury:**

Reasonably attentive, but felt that the case went on too long.

20. **Lessons:**

The jury was presented with voluminous evidence regarding alleged improprieties and plaintiff's knowledge and/or role of them. The jury was able to distill and understand this evidence and accurately reach a conclusion that the complained of statements were truthful.

21. **Post-Trial Disposition:**

Plaintiff appealed, asserting a variety of legal errors, including the limited public figure finding. The First Circuit Court of Appeals affirmed the trial court rulings on July 19, 1999.

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F. **Case Name:** Rachel Ferrara v. The Time Inc. Magazine Company, et al.
Los Angeles County Superior Court, California
Verdict Rendered: March 17, 1998

1. **Date of Publication:** August 29, 1994
Time

2. **Case Summary:**

Plaintiff, a private person, contended she was libeled by a *Time* article on the O.J. Simpson case that allegedly stated or implied she had committed perjury in her testimony as to what her boyfriend, Kato Kaelin, told her about the events at the Simpson estate the night of the murder.

3. **Verdict:** For the defendant

4. **Length of Trial:** Two weeks

5. **Length of Deliberation:** Two days

6. **Size of Jury:** Twelve

7. **Significant Pre-Trial Rulings:**

Court denied *Time*'s motion for summary judgment on grounds of substantial truth and fair and true report.

8. **Significant Mid-Trial Rulings:**

(1) Excluded testimony by plaintiff's journalistic expert on grounds that the expert, a broadcast journalist, had no print experience or knowledge thereof; (2) No punitive damages.

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

Court granted motion for special verdict and motion to bifurcate liability and damage phases.

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):**

We did conduct a mock trial and also persuaded the court to submit lengthy written questionnaires to the prospective panel prior to jury *voir dire* and selection.

11. Pretrial Evaluation:

Mock trial showed significant risk of high damage award, especially on punitives, if a general verdict was permitted. This caused the defense to push for special verdict form, and a pretrial ruling on punitive damages.

12. Defense Juror Preference During Selection:

Hard to generalize – lots of conflicting factors and selections largely were individually based on questionnaires.

13. Actual Jury Makeup:

Eight men, four women; Ages 21-30 (1); 31-40 (3); 40-50 (1); 50-60 (5); 60+ (2); three retired; one professional, rest clerical/blue collar; education: two college graduates; nine some college; one high school graduate.

14. Issues Tried:

(1) Truth/Falsity; (2) Libelous Nature; (3) “Libel *Per Se*”; (4) Negligence; (5) Fair and True Report.

15. Plaintiff's Theme(s):

Defendants, in an effort to get scoop and beat TV journalists, got sloppy and falsely reported the plaintiff's testimony and painted her as a perjurer.

16. Defendant's Theme(s):

Story, while not perfect, was product of careful good faith reporting, and was substantially true.

17. Factors Believed Responsible for Verdict:

(1) Jury's negative impression of plaintiff; (2) strategic errors by plaintiff's attorneys; (3) good performance by *Time*'s witnesses, especially reporter Elaine Lafferty; (4) special verdict procedure. Marsha Clark testified favorably to the plaintiff, but was contradicted by her supervisor. Clark was not well received by the jury; her supervisor, William Hodgman, was.

18. Results of Jury Interviews, if any:

9-3 or 10-2 vote on most special verdict issues.

19. Assessment of Jury:

Worked hard to follow evidence and instructions.

20. Lessons:

Special verdict form disciplined jury and prevented run-away verdicts we saw in mock trials. Mock trial helped identify witnesses who needed work on non-substantive testifying techniques. Greatly improved their performance at trial.

21. Post-Trial Disposition:

Still on appeal.

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G. Case Name: Forgione v. The Scranton Times

Case No. 93-CIV-4100

Verdict rendered December 9, 1998

1. Date of Publication: December 18, 1991

2. **Case Summary:**

The defendants publish the *Scranton Times* newspaper. During December of 1992, the *Times* was covering a federal drug- trafficking trial of an individual named Philip Forgione residing at 1315 North Webster Avenue, Dunmore, Pennsylvania. A total of ten articles were published on the trial that resulted in an acquittal on December 18, 1992. On Saturday, December 19, 1992, the *Times* published an article about the acquittal, including a photograph that it had obtained from its reference library. However, the photograph was not of Philip Forgione, 1315 North Webster Avenue, but was of his cousin, Philip Forgione of 812 Williams Street, Dunmore, Pennsylvania. The *Times* learned of its error in publishing the wrong photo on the morning of December 19, 1992 and published a correction and apology in the Sunday, December 20, 1992 paper, placing it in the same location that the article of December 19, 1992 had appeared. In addition, the *Times'* publisher and editor sent letters of apology to Philip Forgione, 812 Williams Street.

3. **Verdict:** For the plaintiffs

Compensatory: \$150,000

Philip Forgione was awarded \$100,000 and his wife, Theresa, was awarded \$50,000.

Punitive: 0

Punitive damages were dismissed pursuant to a Motion for Partial Summary Judgment because there was no evidence of actual malice.

4. **Length of Trial:** 2½ days

5. **Length of Deliberation:** Approximately three hours

6. **Size of Jury:** Twelve

7. **Significant Pre-Trial Rulings:**

The punitive damage claim was dismissed pursuant to a Motion for Partial Summary Judgment.

8. **Significant Mid-Trial Rulings:**

The trial court allowed emotional testimony regarding comments made by third persons to the Forgiones' daughter about whether her father was a drug trafficker, and as to comments by third persons at Mr. Forgione's place of work to the same effect. In addition, the court denied a motion for directed verdict regarding the loss of consortium claim.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** Nothing unusual
10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):**

None, although defense counsel was concerned about possible bias against the defendant. See below.

11. **Pretrial Evaluation:**

Defense counsel valued the case at approximately \$25,000.

12. **Defense Juror Preference During Selection:**

Educated jurors who would understand the issues.

13. **Actual Jury Makeup:**

The jury consisted of 7 men and 5 women; a 44 year old female accountant; a 32 year old male state trooper; a 47 year old female teacher; a 37 year old male banker; a 65 year old retired male; a 47 year old male clerk; a 50 year old female clerk; a 24 year old male tire technician; 71 year old retired male; a 50 year old male construction supervisor; a 49 year old female who was self-employed; a 59 year old female real estate agent.

14. **Issues Tried:**

Whether the defendant was negligent in publishing the wrong photo, whether the plaintiffs suffered damages, and whether the wife suffered loss of consortium of her husband.

15. **Plaintiff's Theme(s):**

The plaintiffs' theme was that the defendants did not do enough checking to make sure that they had the right photo, and that they did not have adequate procedures in place to address the issue of photos of individuals with the same name.

16. **Defendant's Theme(s):**

The defense theme was that there was a mistake, but that it did not rise to the level of negligence. The defense also questioned the damages and whether there was any harm to the plaintiffs' reputation in that anyone who saw the photo and knew the plaintiff knew that a mistake had been made and that the plaintiff had not been on trial for drug trafficking. The

defense also relied upon the correction that was printed as mitigation of damages. The defense argued that there was no loss of services between the plaintiffs to support the wife's loss of consortium claim.

17. Factors Believed Responsible for Verdict:

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

There is a bias in Scranton, a blue collar town, against the local paper because it is owned by a local wealthy family. In addition, the *Times* bought a competing paper in town and some now perceive that has a monopoly. This is also resented by residents.

b. Sympathy for plaintiff during trial:

The plaintiff was very sympathetic during trial. He broke down and cried on the stand when he testified regarding what happened when his picture was published regarding the drug trafficking trial. He and his wife appeared very sincere and were sympathetic during the trial.

c. Proof of actual injury:

There was no direct evidence that anyone who read the article and saw the picture thought that the picture was of the plaintiff or that the plaintiff was the defendant. However, hearsay was allowed concerning statement of third persons on the subject of Mr. Forgione's drug trafficking. The plaintiff testified that he feared for his and his family's lives because the trial involved alleged Mafia ties and he was concerned that his being tied to the Mafia would endanger his and his family's lives.

d. Defendants' newsgathering/reporting:

The plaintiffs argued that the defendants did not do enough checking to make sure that they had the right photo and that they did not have adequate procedures in place to address the issue of photos of individuals with the same name.

e. Experts:

Joseph Stella, M.D., for the plaintiff, testified regarding his treatment of Mr. Forgione for stress related problems following the publication.

f. Other evidence: Nothing unusual

g.. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel was very competent and experienced and did an excellent job trying the case.

ii. Defendant's trial demeanor:

Defendant's witnesses were all strong except for the employee who actually selected the picture and gave it to the editor. During testimony, this employee appeared to be very nervous and unsure of himself, and he actually testified that he had doubts that the photo was of the correct individual when he pulled it and gave it to the editor.

iii. Length of trial:

The length of the trial was not a factor.

iv. Judge:

The judge was very competent and impartial. The defendants disagreed with some of her rulings regarding testimony of statements that were made out of court, including the comments made to the plaintiff's daughter, and comments at Mr. Forgione's place of work that he had been charged with drug trafficking.

h. Other factors:

There is a bias against the *Times* and its owners in the local community.

18. Results of Jury Interviews, if any:

The jury was sympathetic with the plaintiff. One juror commented that there is no way to repair someone's reputation. However, they differed greatly as to the amount of damages that should have been awarded. The high verdict reflected the average of the amounts that each recommended when polled by the jury foreperson. Several jurors who favored very large verdicts pushed the average up to the final amount that was awarded.

19. Assessment of Jury:

The jury may have been biased against the defendants and this may have resulted in what the defendants believed to be an excessive verdict, especially for the wife.

20. Lessons:

Defendants put too much emphasis on the fact that a correction was printed and that they took responsibility for the mistake that had been made. Defense counsel thought that the jury would appreciate the fact that the paper did not try to avoid responsibility and would feel that the plaintiffs were overreaching. However, the jury did not appear to take this factor into consideration.

21. Post-Trial Disposition:

The plaintiff sought delay damages and interest. The defendants filed post trial motions. The matter was resolved for less than the verdict.

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H. Case Name: Patricia Graves and Frank Amedure, Sr., as co-personal representatives of the Estate of Scott Amedure, deceased v. Warner Bros., Telepictures, and the Jenny Jones Show
Oakland County Circuit Court, Pontiac, Michigan
Case No. 95-494536-NZ
May 7, 1999

1. Date of Broadcast:

2. Case Summary:

Shortly before 11:00 in the morning on March 9, 1995, Jonathan Schmitz shot and killed Scott Amedure at Amedure's trailer home in Lake Orion, Michigan. Three days earlier, on March 6, the two men had appeared together in a Chicago studio for a taping of the *Jenny Jones Show*. During the taping, Amedure had expressed a crush on Schmitz.

This case has generated a great deal of publicity – indeed, notoriety. Most of it has focused on the role played by *Jenny Jones* in providing a forum for Amedure to reveal his secret crush on Schmitz. But the relationship between these two men cannot be defined

simply by what happened in Chicago. Nor can it be defined solely by what happened in the trailer that fateful morning. Rather, to understand why Schmitz shot Amedure, one must go back to the time they first met in an apartment parking lot, several weeks before the shooting.

Jonathan Schmitz was 24 years old when he met Scott Amedure. He had been working for several months as a waiter at the Fox & Hounds Restaurant. He was well-liked, hard-working, and dependable. Although he had a history of alcohol abuse, he seemed to be working hard to put it behind him, drinking only socially, from time to time.

Donna Riley was a single mother who lived just upstairs from Schmitz at the Lake Orion Apartments. They were neighbors and friends – Riley sometimes gave Schmitz a ride to work. She was also a friend of Wayne Amedure, Scott Amedure's brother, who also lived in the same apartment complex.

Riley and Schmitz met Scott Amedure just a few weeks before the murder, in late January 1995. Schmitz was working on Riley's car in the parking lot of the apartment complex. Amedure had come over to see his brother Wayne. Since Wayne was not home, Amedure approached Riley and Schmitz (who was still under the car) and asked if he could borrow a telephone. Riley let him borrow her telephone. While being escorted to Riley's apartment, Amedure told Riley that he found Schmitz attractive. Riley had previously heard that Wayne Amedure had a gay brother.

In the weeks after this uneventful initial meeting, Riley and Amedure became close friends. Amedure was at Riley's house regularly and helped her son with various projects. A few weeks after they met, Riley invited Amedure and Schmitz to her home for dinner. Over dinner, Amedure talked openly about being gay and the gay lifestyle. He and Schmitz laughed and joked, both talking with lisps to imitate a common stereotype of gay men. During dinner, Schmitz admired a woven bracelet that Amedure was wearing. At some point around the end of February, Amedure left a similar bracelet on Schmitz' car door.

On March 2, 1995, the *Jenny Jones Show* ran a notice – a “plug” – asking viewers if they had a crush on a person of the same sex and would like to surprise that person on the show. Amedure, who was a regular viewer and fan, called the show and said he had a crush on “Jon Schmitz.” Later that day, a producer interviewed both him and Riley over the phone, at Riley's apartment, about his crush on Schmitz.

After receiving the initial call from Amedure, the show's producer, Karen Campbell, called Schmitz, who was at work. Campbell explained that the show was taping an episode on secret crushes and that someone wanted to express a crush on him on the show. She told Schmitz that she could not divulge the identity or gender of the crush, stating that “it could be a man, a woman, or a transvestite.” Initially, according to Campbell's notes, Schmitz told her that he “didn't want a guy saying that to him.” Campbell told him that was fine, but to call back if he changed his mind. Less than thirty minutes later, Schmitz called back, telling

Campbell he had thought about it, was curious and had decided to “go for it.” Any doubts that Schmitz was aware of the possibility that his crush could be a man were erased the next day, March 3. During a pre-interview, Campbell asked Schmitz point blank: “What if it isn’t a woman?” Schmitz’ response, as recorded in the written notes from the conversation:

I’m into it, but I’ll say thanks, but no thanks. It would be a disappointment. Don’t worry, I’ll be okay.

In fact, Schmitz already suspected that his secret admirer was Amedure. After having received the initial call from Campbell on March 2, he talked to his close friend and co-worker, Chuck Hoover – an openly gay man with whom Schmitz frequently socialized – who told him that the secret admirer was going to be a man and, moreover, was likely Scott Amedure. Hoover advised Schmitz to walk off the stage if this were the case. Later that evening, Schmitz confronted Amedure and Riley at Riley’s apartment. He asked each of them, separately, whether s/he was the secret crush. Neither Riley nor Amedure revealed the surprise. Amedure, though, questioned Schmitz “what if it is me?” Schmitz replied that it would be “no big deal,” and repeated that he was going to “go for it.”

On Sunday, March 5, Schmitz traveled to Chicago. Amedure and Riley also traveled to Chicago, unbeknownst to Schmitz. After arriving in Chicago, Schmitz called his family. His brother and brother-in-law both told him that the secret admirer was going to be a man. He also talked to his mother, father, and sister. Despite their suspicions, none of them – not even his brother, a doctor – called the show or did anything to prevent Schmitz from going on the show.

On Monday, March 6, the show was taped. During the taping, Schmitz did not appear upset or angry. He appeared embarrassed at one point, while Amedure’s earlier taped description of a sexual fantasy with Schmitz was played back for him. Yet he emphasized, to great audience applause, that he was heterosexual and was not interested in a gay relationship with Amedure. But, he politely said that he and Amedure were and would continue to be friends.

After the taping, Schmitz, Amedure, and Riley rode to the airport together. At Schmitz’ request, Amedure and Riley rearranged their flight schedules so that all three could fly back to Detroit together. Schmitz seemed upbeat and curious, questioning Amedure and another show guest about the gay lifestyle. At the airport, he bought drinks. Schmitz offered to give Amedure and Riley a ride home from the airport. After they arrived at Amedure’s trailer, Schmitz asked Amedure and Riley to go out for more drinks. Although it was snowing and the roads were terrible, the threesome went to a local bar, Brewski’s, and drank until closing. Still, Schmitz was not done partying. At his suggestion, they went back to Riley’s apartment and continued to drink late into the night. At one point, Schmitz made a comment – “let’s go for it” – that Riley interpreted as an invitation to three-way sex. According to Riley, she and Amedure demurred.

Over the next three days, Amedure told at least three separate persons that he and Schmitz had had some sort of intimate contact. On Tuesday, March 7, Amedure told an associate producer from the show, Ron Muccianti, that he and Schmitz had kissed the previous evening. He similarly told Roney Perez, a fellow gay guest on the show whom Amedure had befriended, that he had slept with Schmitz. On Thursday morning, March 9 – less than one hour before his tragic murder – Amedure told his mother that he and Schmitz “did it” after the show.

Schmitz returned to work at the Fox & Hounds on Tuesday morning, hung over and late. His co-workers noticed that he seemed quiet and withdrawn. On Tuesday evening, Riley saw Schmitz after she arrived home from work and asked him how he was doing. Schmitz replied that he was fine. Since he had no telephone at the time, Schmitz asked Riley to call Amedure and ask him to come over on Saturday, March 11, so that he and Amedure could go shopping and Amedure – an amateur electrician – could put up a ceiling fan in Schmitz’ apartment.

On Wednesday, March 8, 1995, Schmitz worked a double shift. After work, he went out for a drink with friends and wound up the evening at the house of a friend, Michelle Wright. Meanwhile, Amedure went to Riley’s apartment to wait for Schmitz to come home. While waiting, Amedure tinkered with a flashing yellow construction light that he had jokingly picked up at Detroit Metro Airport the previous Monday evening. Rigging it to flash, he put it on Schmitz’ apartment door, along with yellow police tape. He also left a note, handwritten on a piece of paper towel from Riley’s apartment. The note read:

If you want it off, you have to ask me. It takes a special tool.
Guess who?

Thursday morning, March 9, Schmitz came home, found the flashing light, police tape, and sexually charged note. According to a subsequent police confession, he then – and only then – decided to kill Amedure. He went to the bank and withdrew \$350. He went to a hardware store and bought shotgun shells. Finally, he went to a gun store, where he carefully selected and bought a Mossberg, 12-gauge pump action shotgun.

Schmitz then drove to Amedure’s trailer. When Amedure saw Schmitz driving up, he initially told his roommate, Gary Brady, to tell Schmitz that he was not home. Brady told Amedure that he should talk to Schmitz. Brady let Schmitz in, and Amedure waved him to the back bathroom, where he was brushing his teeth. Schmitz and Amedure had a brief conversation. Schmitz said he had to go turn his car off. Schmitz went to his car. Instead of simply turning off his car, he retrieved the shotgun, which he had loaded before coming in the first time. Returning to the trailer, Schmitz shot Amedure twice in the chest, at close range. Amedure lost consciousness and died almost immediately.

Shortly thereafter, Schmitz called 911 from a gas station and turned himself in, saying, among other things, that “he just wouldn’t leave me alone . . . that’s why I did it.”

On November 12, 1996, Jonathan Schmitz was convicted of second-degree murder for the death of Scott Amedure. The conviction was thrown out on appeal on a technicality arising from an error in jury selection.

Plaintiffs Patricia Graves and Frank Amedure, Sr., as personal representatives of the Estate of Scott Amedure, originally filed this wrongful death action in Oakland County Circuit Court naming Schmitz as the sole defendant. Plaintiffs subsequently amended their complaint, however, to add negligence claims against defendants Warner Bros. (which owned the *Jenny Jones Show*), Telepictures (which distributed the show), and “the *Jenny Jones Show*.” Plaintiffs claimed that the show’s negligence caused Schmitz humiliation and embarrassment, which in turn led Schmitz to kill Amedure.

On June 23, 1995, the trial court entered an order staying proceedings against Schmitz pending the resolution of the criminal case. Two years later, on June 17, 1997, the defendants filed a motion seeking to depose Schmitz. This motion was subsequently withdrawn after Schmitz opposed it by indicating that he would plead the Fifth Amendment. As a result, the defendants were not able to depose Schmitz before trial, or to compel his testimony at trial. Plaintiffs settled all claims against Schmitz before trial.

After numerous delays, the trial began on March 29, 1999, and continued for six weeks. The jury awarded damages to the plaintiffs in the amount of \$25,000,000. The defendants are currently seeking post-trial relief with the trial court, and, if that fails, intend to appeal.

Recently, on August 17, 1999 – after completion of the civil trial – Schmitz was convicted of second degree murder a second time. He awaits sentencing on September 14, 1999.

3. **Verdict:** For plaintiff (8-1)

A. **Past Damages**

1.	Funeral and burial expenses	\$ 6,500
2.	Conscious pain and suffering during time between injury and death	\$ 5,000,000
3.	Loss of gifts and other valuable gratuities, services, society, companionship as of 5/7/99	<u>\$10,000,000</u>
TOTAL PAST DAMAGES AS OF 5/27/99		\$15,006,500

B. Interest

Statutory interest from 8/17/95-5/7/99 \$ 4,326,186

TOTAL PAST DAMAGES AS OF 5/7/99,
including statutory interest: \$19,332,686

Future damages suffered by plaintiffs for the loss of gifts and
other valuable gratuities, services, society, and companionship
of Scott Amedure: \$10,000,000

Total damages as of 5/7/99, including past damages, statutory
interest, and future damages: \$29,332,686

4. Length of Trial: Six weeks

5. Length of Deliberation: Approximately nine hours (over two days)

6. Size of Jury: Nine

7. Significant Pre-Trial Rulings:

As indicated above, the trial court refused to adjourn the trial until the conclusion of Schmitz' criminal retrial. As a result, the defense lacked the ability to compel and present the testimony of the key witness in the entire case: Jonathan Schmitz. Moreover, despite Schmitz' unavailability to the defense, the court nonetheless allowed psychiatric experts to express opinions based on inadmissible hearsay statements by Schmitz that were not made for purposes of treatment.

In addition, the trial court permitted plaintiffs to introduce evidence, through both lay and expert testimony, of: (i) other, unrelated episodes of the *Jenny Jones Show* and other talk shows; (ii) alleged employment practices by the show's producers; and (iii) the alleged harmful effects of daytime TV talk shows in general on society.

8. Significant Mid-Trial Rulings:

Despite plaintiffs' claim for loss of society and services, the court refused to allow the defense to introduce evidence of how Amedure himself viewed his relationships with his family members – in particular, evidence that Scott Amedure hated his mother, Patricia Graves.

The court refused to allow the defense to present evidence of Amedure's drug and alcohol abuse on issues relating to: (i) damages for plaintiffs' alleged loss of society; (ii) the

quality of Amedure's relationship with his parents; and (iii) the show's negligence, given plaintiffs' claim at trial that the show's producers goaded Amedure to drink before the taping.

The court refused to allow a medical doctor and forensic pathologist, Michael Baden, to offer expert evidence about Amedure's diminished life capacity resulting from drug and alcohol abuse.

The court allowed a witness who sat next to Schmitz on the plane ride back to Chicago to testify about statements Schmitz made to her to the effect that "if I think about it long enough, I could get angry." The court ruled that this statement, made hours after the taping of the show and at a time when Schmitz was unwinding after a long day, was nonetheless an excited utterance and constituted an exception to the hearsay rule.

The court allowed plaintiffs to play the tape of the 911 phone call of Amedure's emotionally desperate and distressed roommate who witnessed the shooting, despite its lack of probative value on any contested issue of fact and its highly prejudicial effect.

The court allowed numerous lay witnesses, including but not limited to police officers, to offer opinion testimony as to why Schmitz shot Amedure.

The court denied multiple motions for a mistrial based on instances of misconduct by plaintiffs' counsel.

The court denied the defendants' motion for a directed verdict, ruling in effect that the show had a duty to protect against foreseeable criminal acts by third parties – on or off its premises.

The court allowed questionable and misleading argument by plaintiffs' counsel that the requirement of proximate, or legal, causation could be satisfied by evidence that "but for" their joint appearance on the Jenny Jones Show, Schmitz would not have shot Amedure.

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

The trial court, after the close of proofs and over the defense's objection, crafted its own jury instruction regarding the show's alleged duty toward Amedure. See attached. According to this instruction, the show had a duty, among other things, to protect Amedure against foreseeable criminal acts by third parties – on or off its premises. [The full instruction appears in *LDRC Libel Letter*, May 1999, at p. 22.] In addition, the court instructed the jury on elements of misrepresentation that are applicable to a business torts case, not a personal injury case. The court further instructed the jury on intentional infliction of emotional distress, a cause of action that was never pleaded by plaintiffs. The court gave

the following instruction at defendants' request (modifying the instruction the defendants tendered):

Under the concept of free speech, you cannot find the defendant negligent because of: (1) the *Jenny Jones Show*'s decision to tape a "Same Sex Secret Crush" show on March 6, 1995; or (2) the topic of any *Jenny Jones Show* taped before March 6, 1995.

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):**

Both sides conducted mock trials, and a jury questionnaire was used.

11. **Pretrial Evaluation:**

Possible exposure: \$0 to \$12 million.

12. **Defense Juror Preference During Selection:**

Educated, younger, open-minded persons who (i) believed that every person is responsible for his own actions, (ii) were not homophobic, and (iii) were not predisposed against Jenny Jones or daytime TV talk shows in general.

13. **Actual Jury Makeup:**

<u>Sex/Age</u>	<u>Occupation</u>	<u>Education</u>
M/42	Shop worker	High school
M/41	Anesthetist	College
F/22	Student	College
F/21	Hairdresser	High school
F/43	Delivery analyst	High school
M/28	Publisher	High school
F/25	Administrative asst.	High school
F/49	Clerk	High school
M/66	Grocery clerk	High school

14. **Issues Tried:**

1. Was the show negligent?
2. Was Amedure's death foreseeable?

3. Was Amedure's death the natural and probable result of the show's alleged conduct (i.e., was the show's conduct a proximate cause of Scott Amedure's death)?

15. Plaintiff's Theme(s):

1. The show was fixated on sex and lurid sexual fantasies – both this particular episode and other episodes.

2. The show lied to Schmitz when they told him his secret admirer could be a man, a woman, or a transvestite, because it knew his crush was a man – Scott Amedure – and that Schmitz would not come on the show if he knew his crush would be a man.

3. The show deliberately humiliated Jonathan Schmitz on national television, for the sole purpose of developing high ratings.

16. Defendant's Theme(s):

1. Amedure's death was not foreseeable and was not the natural and probable result of any arguable negligence by the show.

2. The show did not lie to Schmitz or Amedure. The show's producers told Schmitz that his secret crush could be a man. Knowing that the show would not tell him the identity or gender of his crush, Schmitz made an informed and knowing decision to come to Chicago for the taping.

3. In the days, weeks, and months leading up to the taping, Schmitz appeared perfectly normal to those who knew him well, and no one who had contact with him during this period – including Riley and Amedure – thought he was incapable of handling the revelation of a same sex secret crush.

4. Schmitz told the show he would be "okay" if his crush were a man. The show took Schmitz at his word.

5. The show had previously aired several secret crush shows, and they were light-hearted and well-received by the audience and the participants.

6. No violence among show guests had ever resulted from the taping of a segment of the *Jenny Jones Show*, including several previous secret crush shows (and one previous same sex secret crush show).

7. The show had no way of knowing or learning –legally and reasonably – about Schmitz' psychological problems. To impose such a burden on the show in this case creates

a dangerous precedent for all reality-based television shows, including game shows, news programs and magazines, and other entertainment shows.

8. Jonathan Schmitz is solely responsible for the tragic murder of Scott Amedure, not the *Jenny Jones Show*.

17. Factors Believed Responsible for Verdict:

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

Jurors appeared disposed to dislike daytime TV talk shows and believe such shows are “trash.” They appeared further prone to resent the media because of its perceived power and wealth.

b. Sympathy for plaintiff during trial:

Scott Amedure’s mother, father, and siblings cried at points during the trial, while expressing how much they had all loved him, why they loved him, and how much they were going to miss him. The jury seemed moved.

c. Proof of actual injury: Death case.

d. Defendants’ newsgathering/reporting:

The show’s producers testified that the information gleaned from the pre-interviews was accurate and complete for the show’s needs. No other formal investigation was conducted, a point on which plaintiffs’ counsel focused considerable attention.

e. Experts:

Plaintiff:

Dr. Vicki Abt (sociologist) (testified to adverse effects of daytime TV)
Maryaltani Karpos (sociologist) (same)
James Huysman (social worker)
Michael Abramsky (psychiatrist)
Habib Vazeiri (psychiatrist)
Bernard Carroll (psychiatrist)
Dr. Werner Spitz (forensic pathologist)
Dr. Thomas Gualtiere (psychiatrist)
Dr. Mark Fischione (forensic pathologist)

Defendants:

Dr. Park Dietz (forensic psychologist)
Dr. Thomas Gutheil (forensic psychologist)
Ed Glavin (television industry expert)
Jim Paratore (television industry expert)
Michael Baden (forensic pathologist)

f. Other evidence:

g. Trial dynamics:

The trial court largely allowed the plaintiffs' lawyer to control the courtroom and try the case as he saw fit.

i. Plaintiff's counsel:

Flamboyant, seasoned trial lawyer who tries cases in the media. Rude and argumentative with witnesses.

ii. Defendant's trial demeanor:

Tried to stay focused on the murderer's responsibility.

iii. Length of trial:

A factor because out of the six weeks, only one was devoted to the defense. Plaintiffs were able to drive his points home for five straight weeks.

iv. Judge:

Unable or unwilling to control plaintiffs' counsel's inappropriate conduct in the courtroom. At times appeared to display disbelief of certain show witnesses (rolling eyes toward ceiling, etc.).

h. Other factors:

Case televised live by Court TV, which required daily interviews.

18. Results of Jury Interviews, if any:

Not willing to be interviewed by the defense. According to Court TV interviews, however, it appears they were swayed by the sexual content of the show and by their reading of the court's specially crafted duty instruction.

19. Assessment of Jury:

Difficult without interviews. But in order for the jury system to work, the jurors must receive proper, admissible evidence and correct instructions on the law. Here, in the defendants' view, the jurors received neither.

20. Lessons:

Jurors in this venue appear prone to see the media, and in particular daytime talk TV, as committed to exploiting lurid and sensational subjects for money, and using the First Amendment as an excuse. The subject matter of the program involved in this case – same sex secret crushes – did little to dispel that bias. In view of the latitude enjoyed by plaintiffs' counsel in asserting the perniciousness of the defendants' program and daytime TV in general, the defendants might have been more aggressive in seeking to eliminate that issue from the case by admitting, up front and throughout, that the jurors would not like the format and subject matter of the defendants' program. If the defendants had repeatedly emphasized that the social utility of the program was not in issue, and that "we are here" only to determine whether the defendant was negligent in failing to foresee that Schmitz, while outwardly normal, was homicidally dangerous, this might have diffused Mr. Fieger's antics aimed at the content of the program.

21. Post-Trial Disposition:

The defendants intend to file post-trial motions for JNOV and a new trial after the transcript is prepared and completed. If these motions are denied, in whole or in part, the defendants will appeal.

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I. **Case Name:** Haskell v. Stauffer Communications, Inc.

Ford County District Court, Kansas

Verdict rendered June 1997

1. **Date of Publication:** September 2, 1994
Dodge City Daily Globe

2. **Case Summary:**

The defendant newspaper published news story about anonymously posted "wanted" posters appearing in Dodge City. The article contained reproduction of such a false poster depicting the plaintiff and announcing that he was "wanted" for assault and similar crimes. The article fully disclosed the spurious nature of the poster, including a statement from the police chief favorable to the plaintiff. Claims of libel, false light, misappropriation and intrusion were submitted to jury.

3. **Verdict:** For defendant on all claims except misappropriation.

Compensatory: \$2,500.00

Punitive: none

4. **Length of Trial:** Three days
5. **Length of Deliberation:** One day
6. **Size of Jury:** Twelve
7. **Significant Pre-Trial Rulings:**

Plaintiff was not a limited public figure. Neutral reporting recognized but held inapplicable.

8. **Significant Mid-Trial Rulings:** N/A

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

Extensive special verdict form approved.

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):** None

11. **Pretrial Evaluation:**

Defense verdict expected.

12. **Defense Juror Preference During Selection:**

Common sense folks. Struck an irregularly employed "party" type; elderly lady who did not want to be there.

13. **Actual Jury Makeup:**

Housewives, school teachers, and hourly workers.

14. **Issues Tried:**

Falsity (substantial truth), negligence, misappropriation.

15. **Plaintiff's Theme(s):**

The story was not legitimate news and falsely portrayed plaintiff as a wanted man.

16. **Defendant's Theme(s):**

The plaintiff is nuts. Carries guns around in public. The story corrected the impression that he was wanted. Insofar as the article implied that plaintiff was guilty of menacing with firearms, it was true.

17. **Factors Believed Responsible for Verdict:**

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

Newspaper and its publisher are well respected in community.

b. **Sympathy for plaintiff during trial:** None

c. **Proof of actual injury:** None

d. **Defendants' news gathering/reporting:**

Minor mistakes. No balance--failure to interview plaintiff.

e. **Experts:** None

f. **Other evidence:**

Defendant subpoenaed a reporter for another newspaper to testify to plaintiff's background. This witness brought with him the SDX code of ethics; in discussing the case with plaintiff's counsel after he appeared at the courthouse, this witness volunteered that he thought the defendant violated the ethics code by, among other things, failing to interview the plaintiff. Over objection, plaintiff was permitted to call the witness to elicit this testimony.

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

Scott Hattrup -- inexperienced, stiff, tended to introduce evidence adverse to his client.

ii. **Defendant's trial demeanor:** Acceptable

iii. **Length of trial:** Three days

iv. **Judge:**

The Honorable Van Z. Hampton. Worked well with jury.

h. **Other factors:** N/A

18. **Results of Jury Interviews, if any:**

Not allowed by presiding judge.

19. **Assessment of Jury:** Reasonable

20. Lessons:

It is difficult to get across to a jury the notion that judgments about what is “news” are none of their business and the prerogative of editors. If you can’t forcefully argue that the publication was newsworthy, stay away from that issue and stick to the question of truth.

21. Post-Trial Disposition:

Appeal on misappropriation verdict is pending.

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J. Case Name: Rochelle James and Mediatrix, Inc. v. The LBJ Holding Company, f/k/a The LBJ Co.
District Court of Travis County, Texas, 98th Judicial District
Cause No. 97-08099
May 26, 1998

1. Date of Publication: November 1, 1996

2. Case Summary:

On January 24, 1996, Rochelle “Rollye” James was hired by KLBK radio station (a division of the LBJ Holding Company of which Luci Baines Johnson is the chairperson to the board of directors), to present an on-air talk show Monday through Friday, 2:00 p.m. to 6:00 p.m., “The Cyber Show.” The nature of the format was the airing of controversial opinions and discussions. On October 15, 1996, a particularly controversial discussion was initiated by a caller commenting about a bumper sticker he had seen: “Lee Harvey Oswald, where are you when we need you?” Ms. Rollye’s responses included, “Unless that bullet passes through Al Gore first, I think we’re in deeper trouble,” and discussed how she doubted that she could inspire anyone to kill the president, but that if she could, she would hope that Vice President Al Gore and first lady Hillary Rodham Clinton would also be hit for a “trifecta.”

This particular issue was extremely sensitive to Ms. Johnson, whose father had assumed the office of the President as a result of an assassination. She maintained that any statement, whether in fun or not, threatening the President or Vice President is a violation of federal law. The U.S. Secret Service investigated, but no charges were filed.

On October 25, 1996, KLBJ terminated Ms. James' employment contract.

On November 1, 1996, a FAX was sent out from the KLBJ sales room to the Radio Advertising Bureau and The Davis Group which stated in part:

Ding! Dong! The (picture of plaintiff on a broom) is gone!
Good Golly! Miss Rollye has taken her leave
From the sarcasm and opinions we have a reprieve.
The Woman and Week from Hell is behind us
So for lunch in your office with food you will find us!

The FAX was widely disseminated and news of the FAX was disseminated locally and nationally, including the *New York Times* and on the National AP Wire. Defendants denied responsibility for the transmission of the FAX. Defendants' Vice President and General Manager Crusham was quoted in various media attributing the reason for canceling the show to the plaintiff's vitriolic style.

Plaintiff alleged breach of contract and libel, and filed suit on July 15, 1997, asking originally for \$1 million in actual damages and \$2 million for punitive damages.

The breach of contract suit was not as heavily disputed as the libel suit, which plaintiff alleged was based not only on the dissemination of the FAX, but also on the premise that her liberal-minded employers "couldn't take the heat" of her controversial, right-wing opinions, and so had injured her reputation in the broadcast business by various public comments.

3. Verdict:

The jury answered specifically as follows:

1. Did KLBJ libel Rollye James in making statements in any of the following?
 - a. The fax.
Yes.
 - b. Crusham's statements in the *Rockford Register* article on October 27, 1996:

“Crusham, vice president and general manager of LBJ Broadcasting Co., called James’ remarks inappropriate, but said they were not the main reason the show was pulled from KLBJ-AM.” According to Crusham, “We’ve had some disagreement in the show’s direction . . .”

Yes.

- c. Crusham’s statements in “Radio World” on December 11, 1996:

“He thought James’ show “was going to be a little more down the middle and not necessarily mean or vitriolic.” “James’ show was getting increasingly more mean spirited . . . It wasn’t going in the direction I originally thought we were going . . .”

Yes.

2. Was KLBJ’s failure to comply with the contract, by taking the Rollye James Show off the air and discontinuing payment to Mediatrix, excused?

No.

3. What sum of money, if now paid in cash, would fairly and reasonably compensate Rollye James for its damages, if any, that resulted from such conduct? Answer in dollars and cents for damages, if any, that were sustained in the past and that in reasonable probability will be sustained in the future.

- a. Loss of reputation.

Answer: \$25,000

- b. Mental anguish.

Answer: \$10,000

- c. Loss of income.

Answer: \$100,000

- d. Expenses incurred because of libel.

Answer: \$ 0.00

- e. Lost business opportunities.
Answer: \$250,000

- 4. What sum of money, if paid now in cash, would fairly and reasonably compensate Mediatrix for its damages, if any, that resulted from such failure to comply?

Answer in dollars and cents for damages, if any.

- a. Totally of monthly income under the contract.
Answer: \$119,000
- b. Bonuses, promotional fees, advertising fees lost as a natural, probable, and foreseeable consequence of KLBJ's failure to comply.
Answer: \$50,980

- 5. What sum of money, if any, should be assessed against KLBJ and awarded to Rollye James as exemplary damages, if any, for the conduct found in response to Question No. 1(b) or (c)? Answer in dollars and cents, if any.
Answer: \$10,000

Compensatory:

\$170,000 for the plaintiff on the breach of contract claim, along with attorneys' fees in the amount of \$81,245.

\$535,000 for the plaintiff on the libel issue.

Punitive: \$10,000

- 4. **Length of Trial:** May 18, 1998 through May 26, 1998
- 5. **Length of Deliberation:** Five hours
- 6. **Size of Jury:** Twelve
- 7. **Significant Pre-Trial Rulings:**

Plaintiff submitted six amended petitions.

The second amended petition requested an increased judgment of \$2 million in actual damages.

The plaintiff's fourth (actually third) amended petition stated additional issues of latent ambiguity and oral contract provision or modification of written contract.

Defendants filed a motion for partial summary judgment on April 22, 1998, stating grounds on the issue of libel were that the alleged defamatory statement was not a referral to, nor made in the discharge of any duty owed by an agent of LBJ; that the plaintiff was a public figure and had failed to establish evidence of actual malice; and that the draft FAX was not reasonably capable of a defamatory meaning. The court denied the motion.

The plaintiff's fifth amended petition included new issues of intentional infliction of emotional distress and negligence cause of action.

Defendants filed a motion to strike the fourth and fifth amended petitions, with special exceptions and a first amended answer. Defendants submitted to the court that the complaint of the second plaintiff, Mediatrix, had failed to submit any indication of harm from the alleged libel and should be dismissed from that part of the proceedings, along with the argument that the fifth petition was not filed timely.

Plaintiff submitted a sixth amended petition which included new grounds claiming harm of Mediatrix, Inc., on May 13, 1998, five days before the scheduled trial.

8. Significant Mid-Trial Rulings:

Plaintiff submitted a seventh amended petition on May 19, 1998, one day after trial commenced, including the issue of defamation of character.

Defendant submitted defendants' partial motion to dismiss and renewed special exception regarding negligence.

9. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): N/A

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None

11. Pretrial Evaluation:

Defendants thought the jury would find the plaintiff's comments about assassination to be inappropriate and the statements in issue justified.

12. Defense Juror Preference During Selection:

Older, common sense types who would be sympathetic to Ms. Johnson's concerns; employers, if possible.

13. Actual Jury Makeup:

Typical of central Texas: good people, a bit young. The group was clearly sympathetic to plaintiff.

14. Issues Tried:

See above. On the libel claim, the issues were defamation, falsity, actual malice.

15. Plaintiff's Theme(s):

The plaintiff's comments were spoken facetiously and were what was expected and even encouraged by KLBJ, so the defendant's comments were unjustified and libelous.

16. Defendant's Theme(s):

The comments about assassinating the president were outrageous and justified the firing of plaintiff and the comments that were made by the station's employees.

17. Factors Believed Responsible for Verdict:

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

b. Sympathy for plaintiff during trial:

During trial, the jury came to sympathize with plaintiff.

c. Proof of actual injury:

None, except for plaintiff's testimony that she was unemployable.

d. Defendants' newsgathering/reporting: N/A

e. Experts: None

f. Other evidence: N/A

g. Trial dynamics:

i. Plaintiff's counsel: Not a significant factor

ii. Defendant's trial demeanor:

Luci Johnson testified and did well.

iii. Length of trial: N/A

iv. Judge:

The trial dynamic that worked in plaintiff's favor was the jury's willingness to sympathize with the talent on outrageous talk shows versus their employers.

h. Other factors: N/A

18. Results of Jury Interviews, if any:

Defense counsel spoke to jurors, one of whom told counsel candidly that counsel's view that it is outrageous to speak of assassinating the president was appreciated but considered "quaint" and dated; the jury felt that everyone knows that "anything goes" on these shows, that KLBH hired plaintiff knowing that, and indeed encouraged plaintiff.

19. Assessment of Jury: See above

20. Lessons:

This jury, and possibly others, are prone to sympathize with controversial talk show hosts and not their employers, seeing the latter as willing to encourage and profit from outrageous talk when it suits them.

21. Post-Trial Disposition:

On June 23, 1998, defendant's motion to disregard certain jury answers and for judgment notwithstanding the verdict on plaintiffs' libel claim, defendant's supplemental motion to disregard certain jury answers and for judgment notwithstanding the verdict on plaintiffs' exemplary damage claim, and plaintiffs' motion to enter judgment were heard before the court. The court entered its order on the motions, granting the defendants' motion for judgment notwithstanding the verdict on plaintiffs' libel claim, but denied the motion on the breach of contract claim.

Plaintiff appealed the trial court's judgment notwithstanding a verdict, denying her claim of libel.

In October 1998, plaintiff and defendants entered into a "Full and Complete Mutual Release and Indemnity, and Settlement Agreement," in which plaintiff received \$250,000, in return for which she agreed to submit a non-suit motion in the trial court case and an agreed motion to dismiss in the appellate case she filed in the Texas Court of Appeals, Third District, at Austin.

The appeals court assessed all appeals costs to the plaintiff.

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K. **Case Name:** Kentucky Kingdom, Inc. v. Journal Broadcasting of Kentucky d/b/a WHAS-TV
Jefferson County Circuit Court, Kentucky
Case No. 94-CI-05547
Verdict rendered February 27, 1998, judgment entered March 3, 1998
On appeal: Belo Kentucky, Inc., d/b/a WHAS-TV v. Kentucky Kingdom, Inc.

1. **Date of Publication:** July 27, 1994; May 19-22, 1996
WHAS-TV, Louisville

2. Case Summary:

A serious injury accident occurred on the Starchaser indoor roller coaster at the Kentucky Kingdom amusement park on July 26, 1994, and WHAS-TV was one of many Louisville-based media to report on the accident and its aftermath.

Five passengers were hurt, with critical injuries to seven-year-old Mary Noonan, when two cars collided in the dark during otherwise routine operation of the indoor ride. The collision occurred after one of the Starchaser's operators discovered that two cars had climbed the initial lift chain at the same time and were speeding down the track dangerously close together. The operator activated an emergency stop button, but the cars were sharing an area of the track between two automatic brake points. When the lead car came to a halt at the next brake point, the second car, not yet slowed by a brake, struck the rear of the lead car. The accident and the investigation attracted immediate and continuing news coverage from all area television stations, several radio stations, and the local newspaper.

As required by law, Kentucky Kingdom reported the accident to Kentucky regulatory authorities. After a preliminary evaluation failed to establish the precise cause of the accident, a state ride inspectors issued a "stop operation order" pursuant to KRS 247.234. The language of the statutorily-authorized order required Kentucky Kingdom to cease operating the roller coaster and take these specific steps:

Factory to be notified for advice on dispatch safety.

Safety to be incorporated to ensure that no vehicle can be released from the station until advance vehicle has passed the first brake past loop chain.

Also, start tire brake to be [in] full operation.

Install mirror in dispatch area in order that operator can view lift chain.

In all its public statements after the accident, Kentucky Kingdom insisted that the accident occurred simply because one of its operators dispatched two cars too close together; but, Kentucky's chief state inspector, Carl Dills, testified at trial that he and his inspectors were never able to reconstruct the accident. Dills testified that the accident likely was caused by a combination of operator error and Kentucky Kingdom's configuration of the roller coaster's car dispatch machinery.

Kentucky Kingdom and state inspectors agreed that it was improper operation for two cars to climb the roller coaster's lift chain together. After the accident, the park made changes to prevent a recurrence of this event by adding a mirror to the dispatch area and

reactivating the start tire brake referenced in the state's stop operation order. In addition, Kentucky Kingdom relocated a sensing switch on the track and implemented new operator training.

The day after the accident, a WHAS-TV report summarized the incident, carried an interview with a Kentucky Kingdom spokesman, and included the following reaction from an uninjured Starchaser passenger who witnessed the collision: "Everybody should know . . . how dangerous this ride is. It should be closed down forever, I think." The reporter's transition from this interview to a report on the state's stop operation order used the phrase "state inspectors also think the ride is too dangerous . . . They ordered the park to make brake improvements and to install mirrors to help the ride operators to avoid releasing cars too soon."

In other news reports aired two days later, WHAS-TV updated the status of the injured passengers and the impending re-opening of the roller coaster by referring to the Starchaser as "the ride that malfunctioned earlier this week." These reports also carried an interview with the state's chief ride inspector saying the Starchaser roller coaster was "safe."

On August 3, 1994, Kentucky Kingdom made a written demand for retraction of WHAS-TV's use of "too dangerous" and "malfunctioned." Believing its reports to be substantially true, WHAS-TV did not retract any statements. Instead, the station directed another reporter to prepare a fresh report on the aftermath of the accident. This report aired on August 17, 1994, just before the opening of the Kentucky State Fair. WHAS-TV's story detailed the safety changes made to the ride and said that ride inspectors believed the Starchaser was safe. The story also reiterated Kentucky Kingdom's belief that operator error caused the accident.

In July 1995, Mary Noonan's parents filed a lawsuit in Jefferson Circuit Court claiming that Kentucky Kingdom was liable for the child's injuries. After learning of the litigation, WHAS-TV aired several reports in August 1995 about the Noonan's allegations.

In the spring of 1996, while following the progress of the Noonan lawsuit, a WHAS-TV reporter obtained court records and deposition transcripts filed in the case. From May 19 to May 22, 1996, WHAS-TV aired a four-part investigative series reporting on the litigation allegations that poor maintenance and the park's failure to timely report another accident a few days earlier could have played a part in Mary Noonan's accident. The reports contained interviews with three former ride operators. Two of the operators said that the Starchaser had a history of maintenance problems and that they had seen two cars go up on the lift chain together before the accident. WHAS-TV reported that state records indicated ride inspectors had not inspected the Starchaser after the earlier accident, but that the earlier accident was different from the Noonan accident and occurred in a different area of the ride.

The series also reported that Kentucky Kingdom's Technical Services Manager had testified in a deposition that the park had "disabled" or "removed" the start tire brake (also referred to as "dispatch motor brake") the year before the accident due to maintenance problems. The report included the manager's testimony that Kentucky Kingdom had not consulted the Starchaser's manufacturer before to determine if the brake should be disabled because the company was out of business. The broadcast also reported the manager's opinion testimony that the accident would not have occurred if the brake had been operational.

In the 1996 broadcasts, the reporter interviewed, via a transatlantic phone call, an official at the Schwarzkopf Company, a roller coaster manufacturer in Germany. The reporter found the company name and telephone number on two letters that Kentucky Kingdom's technical services director FAXed to Schwarzkopf after the Noonan accident pursuant to instructions in the state's stop operation order. The company official referred to the Schwarzkopf Company as "essentially the same company" that had made the Starchaser and he said that the brake on the start tire motor was a necessary feature to the ride's braking system.

In the months following his May 1996 broadcasts, the reporter learned that one of the three former operators he interviewed was related to Mary Noonan. He learned that the Schwarzkopf Company was the successor to the company that manufactured the Starchaser.

In October 1996, Kentucky Kingdom demanded a retraction of multiple alleged inaccuracies in the May 1996 broadcasts. WHAS-TV responded a few days later by airing an "update" that said the Schwarzkopf Company was not the original manufacturer of the Starchaser, but was essentially the same business. The update also stated that one of the former operators interviewed in May 1996 was related to Mary Noonan.

Kentucky Kingdom first filed suit against WHAS-TV on October 21, 1994, alleging defamation from the July 1994 broadcasts. Kentucky Kingdom amended the complaint in November 1996 to add claims for defamation arising from the May 1996 broadcasts.

Before trial, WHAS-TV moved for summary judgment on the grounds that Kentucky Kingdom could not prove at trial that the broadcasts were false, could not show that WHAS-TV acted with actual malice, and could not prove that the park had suffered actual damages. Although the trial court responded by ruling that Kentucky Kingdom was a public figure plaintiff, the court overruled the motion without addressing the other issues. Instead, the court found that the broadcast statements would be viewed as "actionable per se" if the jury found the statements defamatory.

At the February 1998 trial, three specific statements were submitted to the jury:

- (1) the July 1994 statement that “state ride inspectors also think the Starchaser is too dangerous,”
- (2) references in July 1994 reports to the “ride that malfunctioned,” and
- (3) the description in May 1996 of testimony by the park’s technical services manager, characterized by the reporter in the words “a component of the ride was removed by the park”

The jury was also instructed to determine whether the July 1994 reports, taken as a whole, and the May 1996 reporters, taken as a whole, “created false inferences or implications” concerning the park. The trial court instructed the jury to determine damages for Kentucky Kingdom’s “lost profits” in 1994 and 1996, damage to Kentucky Kingdom’s reputation, and punitive damages.

The trial court overruled WHAS-TV’s motions for a directed verdict. After deliberations, the jury found for Kentucky Kingdom on every issue submitted and return verdicts totaling \$3,975,000.

3. **Verdict:**

<u>Compensatory:</u>	\$100,000 Lost Profits 1994
	\$375,000 Lost Profits 1996
	\$1,000,000 Injury to reputation (reputational damage award vacated on defendant’s post trial motion)

<u>Punitive:</u>	\$2,500,000
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4. **Length of Trial:** 2/17/98 – 3/2/98
5. **Length of Deliberation:** 8 hours, 25 minutes (two days)
6. **Size of Jury:** Twelve
7. **Significant Pre-Trial Rulings:**

The trial court granted WHAS-TV’s pretrial motion establishing that Kentucky Kingdom was a public figure, but overruled its motion for summary judgment. Kentucky law does not permit interlocutory appeals.

8. Significant Mid-Trial Rulings:

The trial court overruled WHAS-TV's motion to exclude the testimony of plaintiff's journalism ethics expert, David Boeyink, Ph.D., offered to determine "whether or not WHAS-TV acted with reckless disregard." As evidence of actual malice, the court permitted Boeyink to opine that the station's reporting and news gathering techniques fell below the standards of ethics taught in journalism schools. The court also allowed Boeyink to criticize WHAS-TV for failing to comply with the Kentucky retraction statute, which operates to eliminate recovery for punitive damages when a television station complies with the statute, as evidence of actual malice.

The trial court overruled WHAS-TV's motion to exclude plaintiff's accounting expert, who was allowed to testify that based on discussions with Kentucky Kingdom management, the broadcast caused attendance to drop and resulted in lost profits. Kentucky Kingdom did not present any witnesses who causally linked the broadcasts with a drop in attendance.

The trial court overruled WHAS-TV's motions for directed verdict.

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

Nothing unusual. General verdict form.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

11. Pretrial Evaluation:

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

12. Defense Juror Preference During Selection:

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

13. Actual Jury Makeup:

Not available, pending appeal.

14. Issues Tried:

Liability – Defamation

- a) Whether broadcast statements were substantially true.
- b) Whether the broadcasts created false impressions or implication about Kentucky Kingdom
- c) Whether WHAS-TV broadcast with actual malice.
- d) Whether Kentucky Kingdom suffered damages.

15. Plaintiff's Theme(s):

The plaintiff had paid for its mistakes; now it is time for the newspaper to have a lesson in good journalism and pay for its mistakes.

16. Defendant's Theme(s):

The broadcasts were substantially true; defendants acted in good faith.

17. Factors Believed Responsible for Verdict:

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

- a. **Pre-existing attitudes of the venire towards the plaintiff, defendants or issues:**
- b. **Sympathy for plaintiff during trial:**
- c. **Proof of actual injury:**
- d. **Defendants' newsgathering/reporting:**
- e. **Experts:**

Plaintiff called David Boeyink at Indiana School of Journalism on journalistic practices, and a local CPA, Michael Mountjoy, to prove lost profits; defendant called no experts.

- f. **Other evidence:**

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

ii. **Defendant's trial demeanor:**

iii. **Length of trial:**

iv. **Judge:**

h. **Other factors:**

i. **Lessons:**

18. **Results of Jury Interviews, if any:**

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

19. **Assessment of Jury:**

Survey information obtained from appellate counsel. Trial counsel's appraisal not available.

20. **Post-Trial Disposition:**

WHAS-TV moved for judgment notwithstanding the verdict and for a new trial. In response, the trial court vacated the \$1.0 million award for injury to Kentucky Kingdom's reputation, but affirmed the remaining verdicts. The case is on appeal to the Kentucky Court of Appeals, No. 98-CA-1983.

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L. **Case Name:** Sunny Kim v. The Korean Times & Soon Joo Hong
Circuit Court for the City of Richmond, Virginia
Verdict rendered January 2, 1998

1. **Date of Publication:** August 16, 1997
Korea Times

2. **Case Summary:**

In August 1997, the *Korea Times* published an article reporting on allegations that plaintiff Sunny Kim, President of the Richmond Korean Senior Citizens Association, had misappropriated funds belonging to the Association.

3. **Verdict:**

Compensatory: \$1,000,000

Punitive: \$505,000

4. **Length of Trial:** Two days

5. **Length of Deliberation:** One hour

6. **Size of Jury:** Unknown

7. **Significant Pre-Trial Rulings:**

Defendants' trial counsel failed to timely respond to requests for admissions from the plaintiff. The court refused to accept late-filed response and granted judgment as a matter of

law on liability, including that the defamatory statements were made with actual malice and thus that the plaintiff could be entitled to punitive damages.

8. **Significant Mid-Trial Rulings:** Nothing special
9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** Nothing special
10. **Pre-Selection Jury Work (psychological profiles, attitudes survey, mock trial, pre-selection questionnaires):** None
11. **Pretrial Evaluation:** Unknown
12. **Defense Juror Preference During Selection:** Unknown
13. **Actual Jury Makeup:** Unknown
14. **Issues Tried:**

Amount of compensatory damages. Amount of punitive damages.

15. **Plaintiff's Theme(s):**

Plaintiff suffered significant damage to reputation and severe emotional harm. Conduct was particularly egregious.

16. **Defendant's Theme(s):**

No damage.

17. **Factors Believed Responsible for Verdict:**

Judge's pre-trial ruling regarding admissions. The jury was read the admission twice and heard that the Defendants admitted, among other things, that the statements were made "with malice" and "with knowledge the statements were false." The jury was not informed that these admissions were by default as a result of the lawyer's failure to timely respond.

- a. **Pre-existing attitudes of the venire towards the plaintiff, defendant or issues:** Unknown
- b. **Sympathy for plaintiff during trial:**

Likely high because of the default admissions.

c. **Proof of actual injury:**

Plaintiff offered little proof of any tangible injury, never sought medical advice, and took no medication.

d. **Defendants' newsgathering/reporting:** Unknown

e. **Experts:** None

f. **Other evidence:** None

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

Very capable lawyers doing a good job with limited evidence of damages.

ii. **Defendant's trial demeanor:** Unknown

iii. **Length of trial:** Not a factor

iv. **Judge:** Unknown

h. **Other factors:**

18. **Results of Jury Interviews, if any:** None

19. **Assessment of Jury:**

The jury was obviously colored by the default admissions.

20. **Lessons:**

Watch deadlines.

21. **Post-Trial Disposition:**

After trial, new counsel was hired to file post-trial motions. After arguments on defendants' motion to set aside the verdict and for remittitur, the case was settled. The amount of the settlement is confidential.

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M. Case Name: LaVoie v. KVOA Communications, Inc.

Arizona Superior Court for Pima County

Cause No. 312547

Verdict Rendered July 14, 1999

1. **Date of Publication:** April 27, 1995
KVOA Television (Channel 4), Tucson, Arizona

2. **Case Summary:**

A few days after the Oklahoma City bombing, KVOA news department was contacted by Harvey Matusow who offered to arrange an interview with members and supporters of a local militia group. A reporter and two photographers attended the interview in which six people participated, including Matusow and John LaVoie.

From more than an hour of tape, KVOA produced a three-minute news story that appeared on the 5:00 news and was seen by 70,000+ viewers. The story led off with a lengthy quote from LaVoie describing himself as a liberty-loving American. All of the four interviewees whose voices were used in the story were identified by graphic name tags, but LaVoie was the only one whose name was used in the story, and the others were referred to collectively as "John LaVoie and his friends." Several of the interviewees expressed rather extreme right-wing anti-government paranoia, including the view that A.T.F. agents had been responsible for the bombing at Oklahoma City. The story made extensive use of file footage of the bombing, and of people dressed in camouflage fatigues engaging in automatic weapons training exercises. The reporter stated at the beginning that only two of those interviewed claimed to be members of a militia, and that the others, although not members,

did support the group. The reporter closed by stating that the interviewees claimed to be non-violent, although they would defend their constitutional rights.

A few days after the broadcast, LaVoie contacted the station. He claimed that he had been invited to a discussion of the Constitution, did not know that it was going to be reported, did not know most of the others present, did not support militias, did not know anyone who was a member of a militia, did not even own a gun, and had not made any of the more inflammatory statements that the story had used, which were imputed to him by the station's use of the term "John LaVoie and his friends" to collectively describe the speakers. He further claimed to have told all of this to the reporter at the conclusion of the interview.

LaVoie initially demanded several retractions, the publication of a weekly "constitutional minute," and unspecified compensatory damages. In the suit he claimed \$4 million in compensatory damages for loss of various business opportunities and \$18 million in punitive damages.

The complaint joined the reporter, the news director, and the station alleging defamation, by falsely reporting that he was a militia supporter, false light invasion of privacy by implying that he was the leader of a local paramilitary militia unit.

3. Verdict:

The jury awarded \$2,000 in compensatory damages on the false light claim.

The jury found in favor of the reporter on both claims, and in favor of the station on the defamation claim.

4. Length of Trial: Four days

5. Length of Deliberation: One day

6. Size of Jury: Eight, with one alternate

7. Significant Pre-Trial Rulings:

The court denied defendants' pretrial motion for summary judgment on a number of issues, including public figure status, lack of malice, and insufficient basis for economic damage claims. The court granted defendants' pretrial motion to preclude a designated expert on Internet businesses (one of the lost opportunities claimed by plaintiff).

8. Significant Mid-Trial Rulings:

The court granted a directed verdict for the news director, and ruled that there was insufficient evidence under Arizona law to permit an award of compensatory damages for loss of business opportunities, or for any award of punitive damages.

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

Defendants requested a special verdict on public figure status in order to be able to argue insufficiency of the evidence as to constitutional malice. The jury found that LaVoie was not a public figure.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None

11. Pretrial Evaluation:

Defense counsel did not believe that LaVoie could meet the proof requirements for lost profits for his lost business opportunities, or the requirements for punitive damages, and valued the case at less than the retained risk. After the newly appointed judge denied the summary judgment motions, a cost of defense offer was made.

12. Defense Juror Preference During Selection:

Defendants preferred middle class or professional jurors with substantial employment histories, who were regular television news watchers, and registered voters who were members of a major political party.

13. Actual Jury Makeup:

Two jurors were working class non-viewers. One was a student. Two were not registered voters. Only one juror met our profile. He ended up as the foreman and held out for no damages for a day, but finally gave in.

14. Issues Tried:

The primary issues tried were whether the plaintiff was a militia supporter, whether he became a public figure by voluntarily participating in an on-camera interview, whether he was falsely portrayed as the leader of a militia group, negligence, and what real damages he had suffered.

15. Plaintiff's Theme(s):

Plaintiff's primary theme was the fear of and hatred for the militia movement that came out of the revelations of Timothy McVeigh's activities immediately before the bombing. Plaintiff's secondary theme was that the story gave prominence to LaVoie and implied that he was the leader of the group solely for dramatic effect. The reporter chose to lead off with him not because he was the leader, but because the quote was a good attention grabber.

16. Defendant's Theme(s):

The primary focus of the defense was LaVoie's history of anti-government political and legal activism, that he was in fact a militia supporter, or so closely allied to those groups so as not to make a difference.

17. Factors Believed Responsible for Verdict:

a. **Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:** No.

b. **Sympathy for plaintiff during trial:**

The six jurors who participated in post-trial interviews did not express sympathy for the plaintiff. Several were put off by what they saw as obvious attempts to appeal to their sympathy.

c. **Proof of actual injury:**

Plaintiff had some credible proof in terms of his secretary/girlfriend who testified about numerous threatening phone calls received in the weeks following the broadcast, and one witness who testified that he saw the broadcast, didn't know the plaintiff that well, and avoided him for about a year until he was told by someone else that the broadcast was false. Plaintiff also produced a clergyman who testified as to pastoral counseling he gave to the plaintiff for about a year following the broadcast. The jury was initially deadlocked 4-4 on whether to award damages at all. They ultimately compromised on the projected cost of the pastoral counseling.

d. **Defendants' newsgathering/reporting:**

This turned out to be a significant contributing factor to the verdict. The jurors interviewed after the trial stated that they had decided that LaVoie was in fact a militia supporter, but not a member of the militia and not the leader of the group. The jury believed that the way the story was put together implied, despite statements to the contrary,

that he was the leader of the group. The jury focused on the fact that the reporter chose to lead off with LaVoie solely for dramatic purposes. They also focused on the fact that the other interviewees were referred to as "John LaVoie and his friends," even though neither the reporter, nor the editor who made that change, had any information as to the relationship between LaVoie and the other interviewees.

e. Experts:

None testified. No testimony from journalistic practice experts was proffered. The court excluded expert testimony from plaintiff's Internet marketing consultant concerning claimed lost opportunities.

f. Other evidence:

Plaintiff spent a lot of effort trying to promote the idea that the broadcast had caused an Internet business he was developing to be delayed, with a resulting loss of profits. The judge took the issue away from the jury when plaintiff failed to provide a reasonable basis for computing the amount of the loss. After trial the jury indicated that they were not impressed with the claim that the broadcast had hurt the business.

Plaintiff, a self-styled real estate developer and entrepreneur, had spent a lot of effort in recent years avoiding taxes and litigating a variety of disputes with government agencies. We were able to get most of that history to the jury and it certainly contributed to the low damage award.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel is a nice guy with a laid back style. The jury liked him. A more aggressive or hostile approach would probably have resulted in a defense verdict.

ii. Defendant's trial demeanor:

The reporter was a good witness and sat through the trial appropriately. The jury liked her and found in her favor individually. Most of the jurors visited with other station personnel after the trial and were friendly.

iii. Length of trial: Not a factor

iv. Judge:

Young and inexperienced. Should have granted summary judgment on some issues, but did ultimately take them from the jury. Reprimanded the plaintiff in front of the jury for excessive eye rolling and head shaking during defense case.

h. Other factors:

Plaintiff's counsel stressed the fact that the station had not kept the field tapes of the entire interview. There were factual issues as to exactly what was said by whom. Defendants' witnesses all testified as to the need and practice of recycling the tapes, the prohibitive cost of new tapes, etc. With a full explanation, the jury did not seem bothered by this practice.

Plaintiff's counsel also repeatedly stressed the enormity of the Oklahoma City disaster and the public reaction against McVeigh and anybody associated with it, in an apparent attempt to bolster his weak damage evidence. This again did not seem to have a significant impact.

18. Results of Jury Interviews, if any:

The jurors were conscientious, and deliberated for a full day on an issue on which they were initially deadlocked. They enjoyed the process and were glad of the opportunity to visit with counsel after the trial. The interviews did not provide much understanding of how they arrived at their decision, other than four of them wanted to award nothing and four wanted to award some amount more than \$2,000. The foreman, who was one of the defense jurors, appeared to have concluded that the defendants were better off with a really small verdict against them than with none at all, although he did not actually come out and say that. The jury rejected the defamation claim but compromised on false light privacy, and in so doing, apparently focused on the station's use of the words "John LaVoie and his friends," which were the work of a former assistant news director who had written the script and since moved to Albuquerque. The defense elected not to bring her back for trial, which permitted the jury to slap the hand of a faceless person (they very much liked the reporter). Defense counsel doubts that bringing the witness to trial would have helped. The defendant certainly preferred the small compromise verdict to a hung jury.

19. Assessment of Jury:

Arizona rules permit jurors to ask questions of witnesses during trial (they are submitted in writing to the court which then confers with counsel and determines whether to ask the questions). This jury asked questions throughout the trial that indicated a clear understanding of the significance of each witness' testimony, or the lack thereof. They asked

some questions, particularly of the clergyman/counselor, that were very revealing but defense counsel had not asked for fear of offending the religious beliefs of the jurors.

20. Post-Trial Disposition:

The judgment was satisfied and released before it was formally entered.

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N. **Case Name:** Marjorie Maguire v. Journal Sentinel, Inc.
Milwaukee County Circuit Court, Wisconsin
Verdict rendered October 10, 1997

1. **Date of Publication:** October 27, 1992
Milwaukee Journal Sentinel

2. **Case Summary:**

The *Milwaukee Journal Sentinel* reported on the acrimonious breakup of Maguire's marriage to Marquette University theologian Daniel Maguire. The article reported, correctly, that Mr. Maguire obtained a court injunction to keep his ex-wife from disrupting his speaking appearances after she disrupted a Catholics for Free Choice meeting at which Mr. Maguire was scheduled to speak. The paper covered the harassment hearing because Ms. Maguire called the newspaper and invited coverage.

The article accurately quoted Mr. Maguire as stating in an interview that Marquette posted a guard at his classroom after Ms. Maguire "assaulted" him on campus. The story also reported that Ms. Maguire denied the harassment charges and said that her ex-husband was trying to ruin her reputation. Ms. Maguire claimed that the word "assault" has a popular meaning of violent action and she denied assaulting her ex-husband at the university.

Ms. Maguire sued on five counts of libel. Four were dismissed on summary judgment because the pleaded statements were fair and accurate accounts of official proceedings. The last went to a jury verdict after the court held that plaintiff was not a public figure. The jury found there was negligence in publishing a statement that Marquette University had posted a

guard at Ms. Maguire's ex-husband's classroom after she "assaulted" him on campus. The statement was attributed to the ex-husband in the context of his obtaining a harassment injunction against her, and he agreed he was accurately quoted. In fact, Marquette did post a guard, but the rest of the statement was disputed. Ms. Maguire claimed the statement had cost her a career as a lawyer or a law professor. The jury found \$45,000 in past lost income, \$5,000 in future lost income and \$400,000 for generalized loss of reputation, etc.

3. **Verdict:**

Compensatory: \$450,000

Punitive: None

4. **Length of Trial:** Ten days

5. **Length of Deliberation:** Three days

6. **Size of Jury:**

Twelve persons (with two alternates, one of whom was excused during trial, and the other at the start of deliberations.)

7. **Significant Pre-Trial Rulings:**

Plaintiff was not a limited purpose public figure.

8. **Significant Mid-Trial Rulings:**

Defendants could not argue substantial truth on the basis of other cases of physical assaults by plaintiff against her ex-husband, because the reporter did not know about these other assaults at the time she wrote the defamatory statement.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** Special verdicts

10. **Pre-Selection Jury Work (psychological profiles, attitudes survey, mock trial, pre-selection questionnaires):** Pre-selection questionnaires

11. **Pretrial Evaluation:**

Not available because of pending appeal.

12. **Defense Juror Preference During Selection:** Not available

13. **Actual Jury Makeup:** Not available

14. **Issues Tried:**

Falsity, meaning of “assault” in that context, negligence, special damages, other damages, causes for plaintiff’s unemployment.

15. **Plaintiff’s Theme(s):**

Statement was false, because “assault” means only a physical assault; destruction of plaintiff’s career as a lawyer and law professor.

16. **Defendant’s Theme(s):**

(i) “Assault” has many meanings, and the publication was true because Ms. Maguire verbally assaulted Prof. Maguire, leading him to ask for a guard at his classroom. (ii) There were many causes for the damages that Ms. Maguire claimed.

17. **Factors Believed Responsible for Verdict:**

a. **Pre-existing attitudes of the venire toward the plaintiff, defendant, or issues:** None perceived

b. **Sympathy for plaintiff during trial:**

Jurors seemed to accept early in trial plaintiff’s argument that “assault” statement was false if there was no physical component to the encounter with Prof. Maguire.

c. **Proof of actual injury:**

Expert testimony from a vocations expert, Timothy Riley, that plaintiff could have earned \$100,000 annually as a tenured professor at a law school, jobs plaintiff had sought but did not receive. Plaintiff also offered the usual emotional reputation witnesses. Defendant countered with evidence that plaintiff, a Ph.D. in moral theology, had been underemployed most of her professional life, and had been unsuccessful (before the article) with the law degree she obtained while in her 50s.

d. **Defendants’ newsgathering/reporting:**

Jury deemed reporter negligent for failing to verify that an actual physical attack took place.

e. **Experts:**

Plaintiff:

Journalistic Practices: Edmund P. Reiley, Gaithersburg, MD, retired P.R. person, served as an assistant editor, *Philadelphia Bulletin*, 1935-1948.

Vocational Issues: Timothy J. Riley, Milwaukee, WI. Edward Reisner, Administrator, University of Wisconsin Law School, Madison, WI.

Defendant:

Journalistic Practices: Ralph L. Holsinger, Ashton, MD, Professor Emeritus, Indiana University; former editor, *Cincinnati Enquirer*.

Vocational Issues: Rick Bauman, Milwaukee, WI.

Edmund Reiley, long retired from the newspaper business, was the plaintiff's father. He testified that defendants' use of the term assault was negligent. For the defendant, Ralph Holsinger testified to the opposite, but his testimony was rejected by the jury.

f. **Other evidence:**

The newspaper's stylebook, and that of the A.P., indicate that the word assault connotes physical contact.

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

Plaintiff's pro se status made the case difficult to manage.

ii. **Defendant's trial demeanor:**

Okay. Defendant's publisher testified, "this is a newspaper's worst nightmare: to be invited to cover a story by an attorney who sues you when she doesn't like how the story turns out."

iii. **Length of trial:** Not a factor

iv. **Judge:**

Interjected and questioned witnesses, but did so evenhandedly.

h. Other factors:

The stylebook evidence plus the jury's intuition on the meaning of the word "assault" were difficult to overcome.

18. Results of Jury Interviews, if any:

The verdict was 10-2, with two holding out for the defendant on liability issues.

19. Assessment of Jury: Average

20. Lessons:

The bad rulings on public figure and barring evidence of substantial truth made this case unwinnable.

21. Post-Trial Disposition:

Defendants (the newspaper and the reporter) have appealed on the grounds that (i) Ms. Maguire is a limited purpose public figure and (ii) the statement is substantially true because it is undisputed that she assaulted him (i.e. physically) on other occasions. Defendants do not seek a new trial. Case is now pending before the Wisconsin Court of Appeals with a decision expected during 1999.

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O. Case Name: Glenn and Virginia Malson v. Palmer Broadcasting Group and Brad Edwards

District Court of Oklahoma County, Oklahoma

Case No. CJ-94-5284

Verdict rendered September 18, 1998

- 1. Date of Publication:** August 5 and 9, 1993
KFOR-TV, Channel 4

2. Case Summary:

At the time of the news reports at issue in this case, Palmer owned and operated KFOR-TV, Channel 4, the NBC affiliate in Oklahoma City. Brad Edwards is an investigative reporter for the station who has done "In Your Corner" consumer reports for more than a dozen years.

In 1993, Edwards received a tip from the wife of a former employee of a business named M&M Drum Company that M&M was disposing of hazardous residue from its industrial drum recycling operation directly into the sewer system of Oklahoma City, without properly treating the residue. Edwards and a photographer surveyed the property where M&M did business; took labels from barrels cleaned at M&M (which had been provided by the former employee) to hazardous materials officials with the Oklahoma City Fire Department to determine whether the barrels had actually contained hazardous materials; attempted to interview the plaintiff Glenn Malson, who was described to Edwards by employees working at M&M to be the person in charge; and interviewed the Director of Water and Wastewater Utilities for the City of Oklahoma City, who informed Edwards that Glenn Malson had been cited in the past for noncompliance with municipal industrial discharge requirements.

On August 5 and 9, 1993, KFOR-TV broadcast news reports concerning Glenn Malson and his M&M Drum Company operation in its "In Your Corner" segments of the 10:00 p.m. newscast. The first report opened with an anchor lead-in stating that "Someone is dumping toxic cancer causing chemicals into a major drainage system . . . caught in the act, busting a company that may be polluting your drinking water." The reports explained, among other things, that M&M had been cited by the city in 1990 and 1992 for industrial waste discharge violations, that M&M had engaged in the conduct of discharging harmful substances into the city sewer system without adequate treatment, and that the substances discharged into the sewer system by M&M posed a hazard to health and to the system itself. No mention was made of Glenn Malson's wife, Virginia Malson.

The accompanying video in the reports was of Edwards' tour of the M&M premises; Glenn Malson refusing to respond to Edwards' questions and making an offensive gesture at Edwards; and Edwards' interviews with the wife of the former employee (who did not

disclose names or identities to viewers), the hazardous materials officials, and representatives of the city's Water and Wastewater Utilities Division. The reports contained no video of Virginia Malson.

The plaintiffs, Glenn Malson and Virginia Malson, husband and wife, d/b/a M&M Drum Company, claimed that KFOR-TV's reports defamed them, caused them humiliation, emotional distress, and economic losses. The plaintiffs did not, because they could not, sue in the name of their business. M&M was not a separate legal entity but only a name under which Glenn Malson ran his barrel washing business.

3. **Verdict:** For defendants (11-1)
4. **Length of Trial:** Five days
5. **Length of Deliberation:** Nine minutes
6. **Size of Jury:** Twelve
7. **Significant Pre-Trial Rulings:**

The trial judge initially granted summary judgment to the defendants on the ground that there was no competent evidence of negligence on their part. The Court of Civil Appeals affirmed, but the Oklahoma Supreme Court reversed and remanded, concluding that there were material issues of fact raised by competing affidavits of journalism experts which precluded summary judgment on the negligence issue. *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940. During the pendency of the appeal, the plaintiff Glenn Malson died. On remand, the plaintiff Virginia Malson conceded that her husband's claim did not survive his death, but she continued to press her individual claim for defamation.

Based on the undisputed fact that the news reports on which her claim was based referred only to M&M Drum and to Glenn Malson, and did not directly or indirectly refer to her, and on her deposition testimony that she had nothing to do with the operation of M&M Drum Company, the defendants again moved for summary judgment. In response, Virginia Malson submitted an affidavit that some of her acquaintances called her after the first news report to inquire about the reason for the broadcast. The trial court granted summary judgment for the second time, but the Court of Civil Appeals reversed, concluding that the defendants had not, in the face of Virginia's affidavit, excluded all inferences that she was defamed by the news reports. *Malson v. Palmer Broadcast Group*, 1998 OK CIV APP 68, 963 P.2d 13. The Oklahoma Supreme Court denied the defendants' petition for certiorari, and the case was again remanded.

Following remand, the defendants deposed Virginia Malson again, and based on that testimony and the deposition testimony of the only two reputation-damage witnesses

identified by Virginia, the defendants moved for summary judgment a third time, contending they could now exclude all reasonable inferences that Virginia Malson was defamed by the news reports. The court denied the defendants' motion, stating however, that it was doing so not because it found the defendants' motion to be without merit, but because the court understandably desired to let the jury get rid of the case for good.

8. Significant Mid-Trial Rulings:

The defendants filed a motion *in limine* requesting that the court prohibit the plaintiff from discussing or introducing at trial (1) the plaintiff's and her husband's income tax returns, and (2) a ledger prepared by Glenn Malson reflecting M&M Drum Company's weekly revenue and contract labor expenses during 1993. Additionally, the defendants requested that the plaintiff's damages expert be prohibited from testifying as to the plaintiff's alleged damages for lost profits.

The judge denied the defendants' motion just before the trial began, but at trial sustained the defendants' hearsay and lack of foundation objections to the introduction of the ledger sheet and the damages expert's use of the ledger sheet as a basis for his conclusions. The plaintiff's counsel admitted when he offered the ledger sheet that it had been prepared by Glenn Malson for use in the lawsuit, and not contemporaneously with the information it reflected, and that the underlying business records had been destroyed by the plaintiffs.

The defendants' motions for a directed verdict at the close of the plaintiff's case and at the close of all the evidence were denied.

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

No mid-trial jury instructions were given. A general verdict form was used, and issues of liability and damages were tried together.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None, except *voir dire*.

11. Pretrial Evaluation:

The defendants firmly believed that summary judgment should have been granted on one or more grounds, and that the plaintiff did not actually have sufficient evidence to sustain her claim. However, just prior to the filing of their third summary judgment, the defendants offered to settle the lawsuit for an amount significantly less than the expense of trial. The plaintiff rejected the offer.

12. Defense Juror Preference During Selection:

The defendants primarily sought to avoid jurors who harbored any intense dislike for KFOR-TV's "In Your Corner" reports or Edwards' style of investigative reporting. The jury pool was generally acceptable to the defendants, although the defendants had hoped to retain one or more of the professionals among the veniremen who were excused by the plaintiff.

13. Actual Jury Makeup:

Eight men and four women, several of whom had a military background and a few of whom expressly favored KFOR-TV over other local news stations. The jury was composed of a wide range of ages and occupations. On average, the jury members had some post-high school education, and included a small-business owner, a low-level manager of a national hamburger chain, homemakers, blue-collar workers, and retirees. The plaintiff used her peremptory challenges to exclude the only professionals from the jury.

14. Issues Tried:

Did the defendants publish defamatory statements of fact about Virginia Malson? Were the statements false and unprivileged? Were the defendants negligent, as that term is used in the law of defamation? Did the plaintiff suffer a loss of reputation or was she otherwise actionably injured as a result of the defendants' allegedly false and defamatory statements about her?

15. Plaintiff's Theme(s):

M&M was not dumping hazardous residues into the city sewer. M&M "treated" the chemical runoff in sand filters, a fact which Edwards could have and should have discovered. Those city's inspections, which concluded that M&M was unlawfully dumping toxic chemicals, were faulty. Glenn Malson was not notified of any citation for violations of city regulations until after the first of KFOR-TV's news reports. Moreover, M&M's activities did not present a hazard to drinking water, because the city's water treatment facilities removed any hazardous substances. Accordingly, the news reports were false. KFOR-TV was negligent in failing to discover the existence of the sand-trap filters, and therefore in erroneously reporting that M&M was discharging hazardous substances without treatment. KFOR-TV's reports put a "mom and pop" operation out of business. The jury should send a message to KFOR-TV and Edwards that "ambush-style interviews" and sensational reporting will not be tolerated.

16. Defendant's Theme(s):

The broadcasts were not about Virginia Malson. In any event, the reports were true, and were based on information from official spokespersons for the city and official city documents. The defendants adhered to the standards of reporting followed by responsible journalists. The plaintiff suffered no harm to her reputation.

17. Factors Believed Responsible for Verdict:

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

The potential jurors appeared interested in the case, probably because it involved the media and reporters who are well-known in the community. A few expressed their general dislike for overly-aggressive investigative reporting, but one juror in particular said she had a great amount of respect for KFOR-TV's evening female anchor, who appeared as the representative for the corporate defendant and testified at trial.

b. Sympathy for plaintiff during trial:

Because Glenn Malson died during the pendency of an earlier appeal, the defendants had some concern that the jury would be overly-sympathetic towards Virginia Malson and want to compensate her for any alleged wrongs against her husband. However, in the news reports, which were shown to the jury, Glenn Malson was extremely defensive about the conduct of his business and at one point made an offensive gesture at Edwards. This, coupled with the fact that Virginia's testimony was short, unemotional, and rather uninformative, probably helped balance any sympathetic predisposition the jury had towards her.

c. Proof of actual injury:

The plaintiff called two witnesses to testify that following the broadcast they called to ask the Malsons about the reason for the reports, but neither witness testified that they actually thought less of Virginia because of the allegedly defamatory statements in the broadcast. Rather, one witness' concern was that he had purchased barrels from the Malsons to use as beds for his expensive bird dogs and that they may have been exposed to chemicals in the barrels, which M&M Drum was apparently not washing properly. The other witness testified that he contacted the Malsons soon after the broadcast, continued to visit with them socially, and simply did not change his opinion of them.

d. Defendants' newsgathering/reporting:

In attempting to prove the negligence of Edwards and KFOR-TV, the plaintiff focused on Edwards' reliance on a former employee presumably with an axe to grind, his "ambush interview" of Glenn Malson, how Edwards obtained the labels from barrels on the M&M Drum property, and his reliance on official spokespersons who did not have personal knowledge of M&M's history. The plaintiff also suggested the lack of urgency in the reports, and that the defendants could have taken more time to find the "truth."

Through Edwards and the testimony of the defendants' journalism expert, the defendants demonstrated that Edwards' investigative and newsgathering techniques and reporting fell well within the standard of practice for investigative journalists.

e. Experts:

The plaintiffs called (1) a print journalism professor from the University of Oklahoma, Bill Loving, to testify that Edwards' newsgathering and reporting were substandard, and (2) an economics professor from the University of Oklahoma, Dr. James Horrell, to testify that M&M Drum lost profits following the news reports.

The defendants called (1) a broadcast journalism professor from the University of Central Oklahoma, Dr. Jack Deskin, to testify as to the standard of care adhered to by Edwards, and (2) a C.P.A., Todd Lisle, to highlight the inconsistencies in and speculative nature of Professor Horrell's damages testimony.

f. Other evidence:

Both parties called city officials and inspectors to testify as to M&M's history of violations for discharging dangerous chemicals. The plaintiff's witness focused on the quality of inspections. The defendants' witnesses focused on the findings approved by management of the water and wastewater utilities division, and the citations to M&M issued as a result. Additionally, both parties introduced city records documenting the city's inspections and findings. The defendants used large demonstrative exhibits to highlight the facts which demonstrated the substantial truth of the statements in the news reports about which the plaintiff complained.

g. Trial dynamics:

i. Plaintiff's counsel:

The plaintiff's counsel was disorganized, often late for court, and opened his case by reading into the record approximately two hours of deposition testimony of the deceased, Glenn Malson. Consequently, the jury and the judge took an early dislike to the plaintiff's

counsel. During the course of the trial, the plaintiff's counsel openly complained when the court sustained an objection to his examination of a witness or his offer of an exhibit. In closing argument, the plaintiff's counsel suggested (eliciting an objection from the defendants) that he was not going to discuss the facts or the law, but instead ask the jury to do what they knew was right to help the widowed plaintiff and to send a message to the media.

ii. Defendant's trial demeanor:

The defendants' trial demeanor was professional and courteous, but firm in their convictions about the method and accuracy of Edwards' reporting.

iii. Length of trial: Five days

iv. Judge:

Judge James Blevins ruled expeditiously throughout the trial and at times expressed his frustration with the plaintiff's counsel for his lack of preparation and evidence to support his claim. At times, the defendants were concerned that the court was showing too much favoritism to the defendants, but the judge let the plaintiff present her case.

h. Other factors:

It turned out that several of the jurors were fans of KFOR-TV, Edwards, and Linda Cavanaugh, a long-time anchor for the station who served as the corporate representative at trial and also testified about KFOR-TV's history and the various news formats it utilizes.

18. Results of Jury Interviews, if any:

The defendants' counsel spoke with two jurors, including the jury foreman, with the court's permission. Both jurors expressed the opinion that the defense case was persuasive because of the efficiency, smoothness, and brevity of presentation as well as the merits of the case on the facts. The foreman said the jury was virtually unanimous that the news reports were true, that Edwards had done a good job in reporting information they found to be interesting and valuable, and that KFOR-TV had done a public service in bringing to light the facts about M&M. Both jurors who were interviewed disbelieved the testimony of the plaintiff's expert witnesses. The one juror who voted in favor of the plaintiff did so solely on the ground that the jury had not spent enough time discussing the evidence.

19. Assessment of Jury:

The jury was generally attentive, but more so to the defendants' presentation of evidence than the plaintiff's, especially after the plaintiff's initial lengthy reading of

deposition testimony. By the end of the second day of the plaintiff's evidence, the jury seemed to have tired of the plaintiff's disjointed presentation of evidence, and may well have formed views about the probable outcome of the case.

20. Lessons:

Good facts and a little luck always help win cases. There is no question that the death of the principal plaintiff, Glenn Malson, during the early stages of the case helped simplify the issues and make it substantially more difficult for his wife, Virginia, to make a claim. Having an attractive, respected anchor for the television station serve as corporate representative, and testify briefly at trial to personalize the corporate defendant, helped keep jury interest and attention.

21. Post-Trial Disposition:

The plaintiff's motion for new trial was denied and she appealed to the Oklahoma Supreme Court. The appeal is still pending. The defendant was awarded costs, which have been paid.

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Jon Epstein (did not participate in trial)
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P. Case Name: Tony Martin v. Avik Roy

Middlesex County Superior Court, Massachusetts
C.A. No. 93-7137

Bench trial opinion: December 23, 1998 (27 Media L. Rptr. 1942)

1. Date of Publication:

September 1993

Counterpoint, a five issue per year journal of The
Advocates for Rational Discourse, an organization of students of Wellesley College and MIT

2. **Case Summary:**

Claim for libel arising from publication in student newspaper stating that plaintiff gained tenure as Wellesley College professor “only after successfully suing the college for racial discrimination.” The student defendant relied on confidential source (who in turn relied on another confidential source). Journalist ultimately was not required to identify his confidential sources.

3. **Verdict:**

Trial to the court resulted in judgment for defendant.

4. **Length of Trial:** Two days

5. **Length of Deliberation:** N/A (bench trial)

6. **Size of Jury:** N/A

7. **Significant Pre-Trial Rulings:**

- a. Pre-trial ruling on defendant’s motion to determine status; plaintiff deemed a limited-purpose public figure.
- b. Pre-trial ruling requiring plaintiff to conduct further discovery before disclosure of confidential source would be compelled; ultimately, because plaintiff failed to conduct that discovery, defendant was permitted to not disclose source’s identity.

8. **Significant Mid-Trial Rulings:**

Court effectively allowed defendant’s motion *in limine* to prohibit further inquiry into identity of confidential source; the court granted defendant’s motion *in limine* to exclude evidence of bias, hostility, or political point of view; and defendant’s motion *in limine* to exclude testimony and exhibits regarding unrelated post-publication activities [by newspaper].

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

Court permitted “direct” examination of defendant by defendant’s counsel during the course of plaintiff’s case-in-chief.

10. **Pre-Selection Jury Work (psychological profiles, attitude surveys, mock trial, pre-selection questionnaires):** N/A

11. **Pre-trial Evaluation:**

High probability of defense judgment once court ruled, two months pre-trial in response to motion to determine status, that plaintiff was limited-purpose public figure.

12. **Defense Juror Preference During Selection:** N/A

13. **Actual Jury Makeup:** N/A

14. **Issues Tried:**

Actual malice; defamatory meaning; falsity; substantial truth; damages, causation.

15. **Plaintiff's Theme(s):**

Defendant was a racist student who made up the allegation about plaintiff's status and/or lied about the source, then hid behind two layers of confidential sources.

16. **Defendant's Theme(s):**

Defendant genuinely believed what he wrote and derived it from a reliable, but confidential, source. The allegation was credible, and substantially--though perhaps not literally--true. Plaintiff, professor, was trying to "bully" defendant student.

17. **Factors Believed Responsible for Verdict:**

This was a "law" case; biggest factor was a judge who took the time to study our many submissions/motions *in limine* and apply the law.

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

b. **Sympathy for plaintiff during trial:**

Plaintiff was not particularly sympathetic.

c. **Proof of actual injury:**

No real proof of actual injury.

d. Defendants' newsgathering/reporting:

Legitimate questions were raised; defendant relied on double-level confidential sources and did not seek to contact plaintiff for rebuttal.

e. Experts:

None (because actual malice standard); expert was lined up until court ruled plaintiff was public figure.

f. Other Evidence:

We introduced book written by plaintiff establishing that article by defendant was only one negligible contributor to worldwide damage to plaintiff's reputation arising from other sources.

g.. Trial dynamics:

i. Plaintiff's counsel: Hostile

ii. Defendant's trial demeanor:

Calm, reasoned, deliberate, articulate.

iii. Judge:

Very fair, patient, even-handed.

h. Other factors:

Trial was marked by charges of racism leveled by plaintiff's counsel against defendant and his counsel.

18. Assessment of Jury: N/A

19. Post-trial Disposition:

Plaintiff's motion for new trial denied; plaintiff's appeal is pending.

20. Lessons:

Try, try again. One judge denied our motion for summary judgment; the same judge then denied our motion for reconsideration; the Appeals Court denied our petition for

interlocutory appeal. We then repackaged the motion as a motion to determine status, and it was allowed by the (different) trial judge, who ruled that plaintiff was a limited-purpose public figure.

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Q. Case Name: Derwood McCullough v. Journal Publishing Company, Sid Scott and Martin Cooke
Chickasaw County Circuit Court, Mississippi
Verdict rendered February 7, 1997

1. Date of Publication: August 16 & 17, 1991
Northeast Mississippi Daily Journal

2. Case Summary:

The plaintiff, Derwood McCullough, was Chancery Clerk for the County of Chickasaw County, Mississippi, for more than thirty years. Within the year prior to publication, McCullough had been indicated in federal court on fraud charges stemming from his doing business with the County through a dummy business together with an indicted co-conspirator, Earl Gladney. The charges had been dismissed. On the day prior to publication, Earl Gladney was arrested in connection with a drug raid in which a pickup truck and several other vehicles were confiscated.

The sheriff, Martin Cooke, refused to provide the names of the owners of the vehicles, but provided the reporter, Sid Scott, with a list of the tag numbers. When the tag number for the pickup truck was entered by another law enforcement agency through an NCIC computer terminal, the State Tax Database reflected that the pickup truck was owned by Derwood McCullough.

Journal Publishing Company ran a story in which it was reported that a pickup truck belonging to Chancery Clerk Derwood McCullough was confiscated in a drug raid in which Earl Gladney was arrested, and that Earl Gladney and McCullough had been previously

indicted on conspiracy and fraud charges in federal court, and that those charges had been dismissed.

The following morning, the State Tax Database was updated to reflect that Derwood McCullough was no longer the registered owner of the vehicle, although the tag number was still in his name. Apparently, when McCullough sold the vehicle to Gladney two weeks prior to the drug bust, the information was forwarded to the State Tax Commission, but was not updated until the morning of the date of publication. In addition, it was shown at trial that McCullough had allowed Gladney the use of the pickup truck for several months prior to the drug raid at a time when Gladney was under surveillance by drug enforcement authorities, and McCullough co-signed a note for Earl Gladney at the time of the sale of the truck for an amount in excess of the value of the pickup truck.

McCullough sued Journal Publishing and reporter Sid Scott for defamation. Defendants asserted absence of malice and substantial truth as defenses.

3. **Verdict:** For plaintiff

Compensatory: \$300,000

Punitive: \$300,000

4. **Length of Trial:** Five days

5. **Length of Deliberation:** One hour, fifteen minutes

6. **Size of Jury:** Twelve

7. **Significant Pre-Trial Rulings:**

Summary judgment was granted to the co-defendant, Martin Cooke, which was reversed on appeal. Motions for summary judgment and for change of venue made on behalf of Journal Publishing Company and Sid Scott were denied. Plaintiff's motion to force Sid Scott to reveal the name of the persons who advised a drug raid had taken place was denied as the information was not utilized in the story itself. The court also denied the plaintiff's request that Sid Scott identify the other law enforcement agency who allowed him access to the NCIC terminal as the results of the data search were not contested.

8. **Significant Mid-Trial Rulings:**

The court granted a preemptory instruction advising the jury that the story was false over objection of the defendants.

The court instructed the jury that the term “actual malice” meant that the plaintiff had to prove publication of a knowing falsehood or publication with reckless disregard, which the court further defined as “departure from good journalism standards.”

The trial judge remarked, in connection with granting a punitive damage instruction, that he did not understand why the newspaper had to report that McCullough had been indicted with Gladney on conspiracy charges when those charges had been dismissed, and that, in his opinion, this showed malice.

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

The court limited defendants’ attempt to elicit evidence of McCullough’s connection with several other public controversies involving mismanagement of public funds and/or conflicts of interest involving public funds which the defendants contended were relevant to the plaintiff’s claim that his reputation had been so damaged by the publication of the story that he decided not to run for reelection.

The court also permitted, over objection of the defendants, evidence of the plaintiff’s decision not to run for reelection as establishing actual damages and permitted him to show what the salary of the Chancery Clerk would have been if he had run and won reelection, all of which required rank speculation.

10. Pre-Selection Jury Work (psychological profiles, attitudes survey, mock trial, pre-selection questionnaires):

Several days were spent interviewing contacts in this somewhat small, rural county. The results of this investigative work was that it would be impossible to obtain an impartial jury. The reputation of the defendant for being vindictive was well-established in the county. After the jury was initially selected at trial, two of the jurors refused to be seated, although nothing stated during voir dire indicated they were not qualified to serve. The trial judge privately interviewed each of the jurors and, without making a record, allowed them to be excused and other jurors seated instead. This resulted in a motion for mistrial by the defendants, which motion was denied.

11. Pretrial Evaluation:

The reporter had absolutely no reason to doubt the accuracy of the State Tax Commission Database and in which the defense felt that a directed verdict on the issue of actual malice and substantial truth should have been granted. However, given the trial court’s rulings on the motion for summary judgment, it was determined that the defendants were unlikely to prevail at trial, but would have to rely upon an appeal.

12. Defense Juror Preference During Selection:

The ideal juror profile, based upon previous experience with jury trials of libel cases in rural counties was defined as professionals (particularly teachers) who either worked outside of the county or who were recent residents of the county.

13. Actual Jury Makeup:

One teacher who was a long-time resident of the county. All other jurors were long-time residents of the county.

14. Issues Tried:

Whether the publication was with “actual malice” defined by the trial court as failure to follow “good journalism standards.”

15. Plaintiff's Theme(s):

The article falsely connected Derwood McCullough with a drug bust, making it impossible for him to run for reelection. The published statement that McCullough had been previously linked to Earl Gladney on allegations of fraud and conspiracy in federal court, which charges were dismissed, implied that McCullough was somehow currently “linked” with Gladney on suspected criminal charges.

16. Defendant's Theme(s):

The substance of the story was true, and the Defendants had the right to rely upon public records in stating that the truck was owned by McCullough. We also tried to focus the jury's intention on the reason why the First Amendment guarantees in this case and in all other cases like it were so important. In the absence of the First Amendment, it would be unlikely that McCullough's admitted practice of doing business with the County through a dummy corporation for years, which he ultimately quit after it was made public, would have been reported. McCullough chose to associate with Earl Gladney as his supposed partner (although Gladney never actually participated in the dummy business), and the fact that Gladney had been arrested would have necessarily resulted in publication of the previous criminal charges against Gladney and McCullough.

17. Factors Believed Responsible for Verdict:

Local bias and prejudice, combined with implicit pressure on the jurors as evidenced by the attendance of prominent members of the community and public officials during closing arguments, and the statement by plaintiff's counsel that “after this trial all of these

folks (the defendants and their attorneys) will leave, but you and I and Derwood McCullough are going to have to live in this county together.” [Motion for mistrial denied on this basis.]

Defense counsel has successfully defended defamation cases in rural counties in which popular plaintiffs were involved and juror prejudice was a concern. In this case, however, the plaintiff was not so much a popular figure as one who was, quite simply, feared. Although a very strong factual presentation was made with regard to the substantial truth of the publication, the lack of fault, and the lack of damages, the verdict was not a surprise.

The trial judge presided over the trial of a similar case which was reversed on appeal. See Gulf Publishing Co. v. Lee, 434 So. 2d 687 (Miss. 1983).

18. **Results of Jury Interviews, if any:** Not applicable

19. **Assessment of Jury:**

The jurors were either apathetic or intimidated and were completely biased in favor of the local plaintiff. The local defendant, the sheriff who provided the tag numbers to the newspaper, prevailed.

20. **Post-Trial Disposition:**

In early August 1999, the Mississippi Supreme Court reversed the judgment for insufficient evidence of constitutional malice. McCullough v. Journal Publ'g Co., 1999 WL 571060 (Miss. 1999).

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R. **Case Name:** Stephen E. Paul, M.D. and Mary Elizabeth Paul v. The Hearst Corporation, d/b/a *Redbook Magazine* and Robert Trebilcock
United States District Court for the Middle District of Pennsylvania
Case Number 3:CV-97-616
Verdict Rendered June 23, 1999

1. **Date of Publication:** May 1996 edition
Redbook Magazine

2. **Case Summary:**

The plaintiffs filed suit against The Hearst Corporation ("Hearst") d/b/a *Redbook Magazine* and Robert Trebilcock ("Mr. Trebilcock"). The principal plaintiff is a neurosurgeon who, at the time of publication, was practicing in Pennsylvania. *Redbook* is a magazine of national circulation published on a monthly basis. Mr. Trebilcock is a freelance writer who contracted to write an article for *Redbook*.

The suit was based on an article which appeared in the May 1996 edition of *Redbook* titled "BAD MEDICINE: The Doctors Who Could Cost You Your Life." The article discussed the issue of doctors who continue to practice after encountering various professional issues during their careers, and focused upon the travails of a South Carolina woman who was treated by a physician other than the plaintiff. The article also contained a sidebar with a headnote which read as follows:

Shouldn't someone have known? Despite new safeguards, it can take many years before questionable doctors come before review and, if charges are substantiated, have their licenses revoked or restricted. Is the profession still protecting its own more than its patients? These cases of doctors' wrongdoing, taken from Court records, might make you wonder.

The sidebar contained brief paragraphs about six specific doctors. The paragraph about Stephen Paul contained several sentences which read as follows:

Stephen E. Paul, M.D. When Dr. Paul left Holyoke, Massachusetts, for Georgia in 1987, five malpractice suits were pending against him for botched bone graft-spinal fusions. Five years later, Dr. Paul left Georgia, following suspension of his hospital privileges and allegations of a drinking problem. He adamantly denied the charges, but he entered an alcohol rehabilitation program and today practices in Pennsylvania.

Dr. Paul alleged in the complaint that the thrust of the article, his inclusion in the article and the specific statements about him in the article were false and defamatory, and alleged counts for defamation and false light invasion of privacy. Mrs. Paul sued for loss of consortium.

Defense of the action included extensive discovery efforts in Massachusetts, Georgia, Virginia, Minnesota, and Pennsylvania to obtain background information on Stephen Paul, ultimately requiring the scheduling of 63 depositions for production of documents and 65 in-person depositions. Because a substantial amount of information involved treatment of patients and evaluations of patient care undertaken by Dr. Paul, significant issues as to the discoverability and admissibility of information from the peer review process existed in the case from its inception.

3. Verdict:

The jury answered six of seven special verdict questions as follows:

1. Do you find that plaintiffs have proven by clear and convincing evidence that the *Redbook* article, as it relates to plaintiff Stephen E. Paul, was false; that is, that it was not substantially true?

Yes.

2. Do you find that the plaintiffs have proven by clear and convincing evidence that defendants published the *Redbook* article with malice; that is, with knowledge of its falsity or with reckless disregard for whether it was true or not?

As to Hearst: Yes

As to Trebilcock: No

3. Do you find that the light in which defendants placed plaintiff, Stephen E. Paul, in the *Redbook* article was false?

Yes

4. Do you find that the light in which defendant(s) placed plaintiff Stephen E. Paul would be highly offensive to a reasonable person in his position and knowing what he knew?

Yes

5. Do you find that the *Redbook* article, as it relates to plaintiff Stephen E. Paul, fairly and accurately reports information contained in court or official records?

No

6. Do you find that publication of the *Redbook* article was a substantial factor in causing injury to the plaintiffs?

No

The court entered judgment in favor of the defendants on July 8, 1999.

4. **Length of Trial:** Sixteen days

5. **Length of Deliberation:** One day

6. **Size of Jury:** Ten

7. **Significant Pre-Trial Rulings:**

The court made numerous pre-trial rulings which included, *inter alia*, the following:

(a) The court ruled that the article was defamatory as a matter of law.

(b) The court determined that an article “warning the public of the risks of incompetent practitioners and questioning the effectiveness of the legal and medical licensing systems to protect consumers from these risks clearly addresses a matter of legitimate concern to the public”. The court consequently determined that the article related to a matter of public concern under Pennsylvania law.

(c) The court determined that in a case where “the plaintiff is a private figure but complains of statements that are a matter of public concern” the actual malice standard (including proof by clear and convincing evidence) applies under Pennsylvania law. This was significant, because the court ultimately determined that the plaintiff was not a limited purpose public figure.

(d) The court ruled that “[a]ctual malice is also a requisite element of false light invasion of privacy claims under Pennsylvania law.”

(e) The court denied summary judgment to defendants on the issue of actual malice, citing *Schiavone Construction Co. v. Time Inc.*, 847 F.2d 1069 (3d Cir. 1987),

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reasoning that a jury may “discount . . . assertions of subjective belief in the truth of the article” . . . and “the author’s good faith” in omitting an exculpatory clause.

(f) The court ruled that the principal plaintiff was not a limited purpose public figure despite his inclusion in various prior newspaper articles.

(g) The court ruled that “where it is undisputed that defendants’ publication corresponds with matters of public record, the [fair report] privilege applies.” In this regard, the court further ruled that the privilege applies even where the “official” records have not actually been consulted, citing *Medico v. Time Inc.*, 643 F.2d 134 (3d Cir. 1981).

(h) The court determined that the issue of abuse of the fair report privilege was a jury question.

(i) Because the case involved extensive inquiry into various medical malpractice actions, substance abuse allegations, patient complaints and professional evaluations of patient care, questions regarding the applicability of the peer review privilege were unavoidable. Notably, the court required discovery disclosure pursuant to a confidentiality order of normally protected materials and subsequently permitted utilization of the materials at trial, apparently accepting a limitation on the applicability of the privilege under the Pennsylvania Peer Review Protection Act that materials are protected only in cases where healthcare providers are defendants. The materials and information at issue were intrinsic to the presentation of the defense case, including lack of causation.

8. Significant Mid-Trial Rulings:

The court refused an effort by a non-party physicians organization (a 200-physician clinic of which Dr. Paul was a member) to limit introduction or dissemination of peer review and other information relating to various patient issues.

9. Trial Management:

(a) A seven-question special verdict form was prepared by the court following consultation with counsel. See above.

(b) The issue of punitive damages was bifurcated.

(c) The court permitted utilization of digitized evidence for documents and for deposition videotapes for impeachment purposes.

10. Pre-Selection Jury Work:

The court permitted a limited *voir dire*.

11. Pretrial Evaluation:

Not available because of potential appeal.

12. Defense Juror Preference During Selection:

Educated individuals who could appreciate and apply the legal standards, especially actual malice, as it related to the case.

13. Actual Jury Makeup:

Blue collar, rural, relatively less educated, but including one nurse practitioner.

14. Issues Tried:

See special verdict, above.

15. Plaintiffs' Theme(s):

Plaintiffs argued various themes, including, *inter alia*:

- (a) That the title and graphics of the article were provocative.
- (b) That the inclusion of the principal plaintiff with various physicians who had criminal backgrounds and who had lost their medical licenses was inappropriate.
- (c) That the statements in the article about the principal plaintiff were intended to create a false impression by placing disconnected, non-chronological statements together.
- (d) That the specific statements in the article about the principal plaintiff were false.
- (e) That the preparation of the article, as reflected in internal editorial comments, showed an intention to disregard facts recklessly.
- (f) That deletions of information which appeared in prior newspaper articles about the principal plaintiff gave a false impression of the principal plaintiff, especially deletions of allegedly exculpatory language.
- (g) That the inclusion of the principal plaintiff in the article and the national circulation of *Redbook* resulted in the loss of the principal plaintiff's neurosurgical position and made it impossible for him to acquire a new position.

16. Defendants' Theme(s):

Defendants presented various themes, including, *inter alia*:

- (a) That the article as it related to the principal plaintiff was not false.
- (b) That there was no subjective doubt as to the accuracy of the article as it related to the principal plaintiff at the time of publication and consequently plaintiffs could not prove actual malice.
- (c) That the content of the article was a fair and accurate summary of information contained in official records, including court records generated by the principal plaintiff himself. As a consequence, the fair report privilege applied and was not abused.
- (d) Based on the principal plaintiff's career, the *Redbook* article was not the cause of any harm to him.

17. Factors Believed Responsible for Verdict:

a. Pre-existing Attitudes of the Venire Towards the Plaintiffs, Defendants or Issues:

The jury did not have perceived attitudes that affected the verdict.

b. Sympathy for Plaintiff during trial:

Some jurors appeared prone to sympathize with the individual plaintiffs versus the media defendant, but this sympathy appeared to have been offset by the facts of the case.

c. Proof of Actual Injury:

Plaintiffs presented evidence of alleged special damages in excess of \$2 million, arising out of claims that Dr. Paul lost his neurosurgical position with the Guthrie Clinic in Sayre, Pennsylvania, as a result of the publication of the article and out of an alleged inability to obtain a new position as a result of publication of the article. Plaintiffs also sought substantial unliquidated amounts for general damages including loss of reputation, emotional distress, humiliation as well as spousal consortium.

Defendants focused on the professional career of the principal plaintiff to emphasize their position that the *Redbook* article was not the cause of any harm to him. The jury appears to have accepted this argument.

During trial, the defense presented an extensive compilation of information supporting the defense position that the contested article did not cause any harm to Dr. Paul.

This evidence included factual testimony on Dr. Paul's professional career problems, the reasons his last employment was terminated, the number and specifics of malpractice actions which had been brought against him, the content of his file in the National Practitioners' Data Bank, his licensing application, and the lack of meaningful efforts to seek alternative positions.

In addition, the defense presented expert testimony from a physician employment consultant and from a hospital administrator involved extensively with credentialing and privileging of physicians. This testimony was offered to demonstrate to the jury that the article would not impact employment, credentialing or privileging in any future job search by the plaintiff. Finally, the defense presented extensive graphic evidence of prior widely disseminated media accounts concerning the principal plaintiff, including an October 5, 1994 article from *The Boston Globe* which featured Dr. Paul.

d. Defendants' Newsgathering/Reporting:

The magazine maintained detailed records of the editorial process. Some memos referred to the "tone" of the article and spoke of rewriting it to express more "feeling," etc. Plaintiffs' counsel made use of enlarged versions of various internal editorial memoranda to support an argument that allegedly exculpatory words and phrases were deleted from the final article.

e. Experts:

Neither party called an expert on journalistic practices. The defense felt that its editorial personnel were experienced and articulate and would present better than a paid expert.

The decision of the jury with respect to a lack of causation suggests that defense experts who opined that the article did not cause the principal plaintiff harm were believed by the jury. These experts included a physician placement professional and a hospital/HMO credentialing administrator.

f. Other Evidence:

The large volume of documentary evidence was more effectively presented through digitized computer projection which made the evidence more visible and understandable by the jury. The software used was Trial Director and Document Director.

g. Trial Dynamics:

i. Plaintiffs' Counsel:

An experienced defamation attorney.

ii. Defendants' Trial Demeanor:

Defendants made an effort to present a highly professional and experienced image. Some testimony was too lengthy.

iii. Length of Trial:

The jury clearly became impatient after the first seven days of trial.

iv. Judge:

Attentive, bright and responsive to trial issues.

h. Other Factors:

Defendants had no single witness who could weave the entire writing and editing process together for testimony purposes.

18. Results of Jury Interviews, If Any: See below.

19. Assessment of Jury:

Defense counsel believe the jury rapidly concluded that the principal plaintiff was not entitled to recovery (nor was his spouse who had only a derivative consortium claim). Defense counsel believe, however, that the jury was unable to reach a unanimous position on other special verdict questions and compromised those, believing that the plaintiffs would not recover due to the finding of no causation.

20. Lessons:

Gratuitous comments on internal editing documents which are subject to misinterpretation combined with maintenance of unnecessary multiple drafts in files can provide a plaintiff with material for libel claims.

21. Post-Trial Disposition:

Plaintiffs have filed three post-trial motions seeking (1) a trial on punitive damages, (2) a new trial on damages only and (3) an amendment of the judgment entered by the court in favor of defendants. The post-trial motions remain pending.

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S. **Case Name:** Paul v. Philadelphia Magazine
Court of Common Pleas, Philadelphia
Judgment rendered on May 27, 1998

1. **Date of Publication:** April 1997
Philadelphia Magazine

2. **Case Summary:**

A mayoral candidate sued the magazine for publishing a statement made by a fellow politician that referred to the candidate as a "slip and fall lawyer." The statement was published in an article profiling a Philadelphia power broker known for backing winning political candidates. The article described a conversation between him and a city councilman in which they discussed the candidate's campaign for mayor. The article's description of the conversation noted in passing that the candidate was referred to by the phrase "slip-and-fall lawyer," but did not attribute the phrase specifically to either the power broker or the city councilman.

3. **Verdict:** Compulsory nonsuit for defendant

4. **Length of Trial:** Two days

5. **Length of Deliberation:** N/A

6. **Size of Jury:** Eight

7. **Significant Pre-Trial Rulings:**

Grant of defense motion in limine to exclude defendants' financial information from being introduced into evidence without showing by plaintiff that punitives were warranted.

8. **Significant Mid-Trial Rulings:**

Grant of defendants' motion for compulsory nonsuit after close of plaintiff's case.

Defendants argued in their brief that a statement about a member of the bar should not be defamatory *per se* unless it imputes to the plaintiff the want of the requisite qualifications to practice law, or corruption, dishonesty, or improper performance of duties as a lawyer. Given that the statement "slip-and-fall lawyer" did not suggest any of the above, the statement was not defamatory *per se*. Nor was it defamatory by implication or innuendo. In making that argument, *Philadelphia Magazine* looked to the dictionary meaning of the word "lawyer," which has undertones of honor and respect. Given that the term "slip-and-fall" is a descriptive phrase used (particularly by judges in crafting opinions) to refer to certain types of personal injury cases, it cannot be defamatory when used in conjunction with the word "lawyer" to describe a particular lawyer's practice.

The plaintiff had conceded in his opening statement that, as a mayoral candidate, he was a public figure and was, accordingly, required to prove with convincing clarity that the defendants acted with actual malice. Defendants argued that, particularly in light of the city councilman's testimony that he used the phrase to describe the plaintiff and that he did not believe it to be defamatory, the plaintiff had not made the proper showing. They also argued that, in light of the councilman's testimony, the privilege of neutral reportage applied.

Defendants also contended that because the plaintiff had admitted in discovery and under cross-examination that he earned income from doing "fall-down" or slip-and-fall cases, the statement was true, even though the plaintiff also handled many other types of litigation.

The court ruled that plaintiff was a public figure who had not shown actual malice; the statements were not capable of a defamatory meaning; and the statements were not shown to be false.

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

Bench memorandum given to judge a few days before trial consisted of all legal arguments we anticipated making in our motion for compulsory nonsuit, short of the facts.

Bench memoranda on evidentiary issues were prepared in advance and given to judge a few days before trial.

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):** None

11. **Pretrial Evaluation:**

Defense verdict.

12. **Defense Juror Preference During Selection:**

No "money for nothing" types, *i.e.*, those who had sued or whose family members had made a habit of suing. Educated but no educators (*i.e.*, small businessmen, but no teachers).

13. **Actual Jury Makeup:**

Somewhat more educated than had been anticipated. Ten jurors were selected (two were substitutes). Two jurors were African-American and half were women. The panel's makeup was as follows:

- (a) A single teacher with a college degree and with no children who, prior to being a teacher had worked in sales. She had not been a juror before.
- (b) A clerk in the United States Postal Service with a twelfth grade education. She was separated from her husband (who was a letter carrier for the Postal Service) and had two children. She had been a juror before.
- (c) An unmarried graphic designer who had completed sixteen years of education and who had previously worked as a cashier in a supermarket.
- (d) A truck driver who had completed twelve years of education, whose wife was a retail manager and who had two children.
- (e) An unmarried special education assistant with one child.
- (f) A career teacher who had completed twenty years of education, whose husband was also a teacher, and who had one child.
- (g) An unmarried equipment specialist, who had also worked as an instrument mechanic supervisor, who had completed twelve years of education.

- (h) An unmarried day porter, who had also worked as a laborer, who had completed eleven years of education. He had a law enforcement bent (was more likely to believe a police officer).
- (i) A married small business owner who had completed nineteen years of education and who had previously worked as a commercial property manager. His wife was also a small business owner who had previously worked as a waitress. They had one child.
- (j) An unmarried teacher who had completed sixteen years of education. She appeared to have a companion who worked as a civil rights investigator.

14. Issues Tried:

Was the statement true? The councilman to whom the statement was attributed testified that he had indeed made the statement, that it was true, and that he regarded plaintiff as a good slip-and-fall lawyer to whom he would send business.

15. Plaintiff's Theme(s):

Given plaintiff's career as a politician and lawyer, it was defamatory to refer to him as a "slip-and-fall" lawyer — a demeaning and derogatory term.

16. Defendant's Theme(s):

Publication reported a true statement made by a public figure about a matter of public interest.

17. Factors Believed Responsible for Verdict:

- a. **Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:** N/A
- b. **Sympathy for plaintiff during trial:** N/A
- c. **Proof of actual injury:** N/A
- d. **Defendants' newsgathering/reporting:** N/A
- e. **Experts:** N/A
- f. **Other evidence:** N/A

g.. **Trial dynamics:** N/A

i. **Plaintiff's counsel:** N/A

ii. **Defendant's trial demeanor:** N/A

iii. **Length of trial:** N/A

iv. **Judge:** N/A

h. **Other factors:** N/A

18. Results of Jury Interviews, if any:

Jury panel discussed plaintiff's case with trial counsel following grant of motion for compulsory nonsuit. Were pro-defense at close of plaintiff's case.

19. Assessment of Jury:

Listened carefully, were engaged in trial, intelligent.

20. Post-Trial Disposition:

No appeal taken from grant of motion for compulsory non-suit.

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T. Case Name: The Procter & Gamble Company, et al. v. Amway Corporation, et al.
U.S. District Court, Southern District of Texas, Houston Division
Civil Action No. H-97-2384
May 15, 1999

1. Date of Publication: Various times dating back to 1980

2. **Case Summary:**

This case was brought by Procter & Gamble against Amway Corporation, certain Amway Independent Distributors, and other entities related to Amway. Procter & Gamble complained about: (i) the publication of a rumor that it was affiliated with the Church of Satan; (ii) publications of certain comparative ads; and (iii) the way Amway generally conducted business; alleging it to be an illegal pyramid.

3. **Verdict:** Directed verdict at the close of all evidence

Compensatory: 0

Punitive: 0

4. **Length of Trial:** Eleven days

5. **Length of Deliberation:** None

6. **Size of Jury:** Eight

7. **Significant Pre-Trial Rulings:**

The court granted a partial summary judgment refusing to apply the “discovery rule” for tolling the statute of limitations applicable to defamation claims and dismissing illegal pyramid allegations under the Lanham Act.

8. **Significant Mid-Trial Rulings:**

At trial, the court directed verdict on the remaining Lanham Act claims based upon lack of actual malice. The court’s determination that such claims require proof of actual malice is the subject of a pending appeal.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** None

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):**

The court refused to submit a jury questionnaire, even though all parties requested.

11. **Pretrial Evaluation:**

Cannot comment, as case is on appeal.

12. Defense Juror Preference During Selection:

Cannot comment, as case is on appeal.

13. Actual Jury Makeup:

Five women, three men.

14. Issues Tried:

Libel – Tortious Interference and Lanham Act with respect to the Satanism statements.

15. Plaintiff's Theme(s):

Amway was responsible for the statements of a senior independent distributor for spreading the admittedly false Satanism rumor over an Amway voice messaging system.

16. Defendant's Theme(s):

Amway is independent from its distributors and never repeated the rumor and tried to help Procter & Gamble with its rumor. Procter & Gamble's damages were overblown and this was an anticompetitive lawsuit.

17. Factors Believed Responsible for Verdict:

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

b. **Sympathy for plaintiff during trial:**

The jury felt that Procter & Gamble had been hurt, but not nearly as much as it claimed.

c. **Proof of actual injury:**

Procter & Gamble had a damage expert who developed a model which was not credible.

d. **Defendants' newsgathering/reporting:** N/A

e. Experts:

Plaintiffs' Experts:

Harvey Rosen – damages expert
Donald House – damages expert
Nicholas DiFonzo – rumor expert
John Hauser – survey expert
Michael D. Grieff – product disparagement (P&G in-house scientist)
Robert Faller – product disparagement (P&G in-house scientist)
Sharon Dula – product disparagement (P&G in-house technician)

Amway Defendants' Experts:

M. Ray Perryman – damages expert

f. Other evidence: N/A

g. Trial dynamics:

i. Plaintiff's counsel:

All accomplished trial lawyers. Their effectiveness varied.

ii. Defendant's trial demeanor:

Amway corporate representative was excellent.

iii. Length of trial: Eleven days

iv. Judge: Hon. Vanessa Gilmore

h. Other factors: N/A

18. Results of Jury Interviews, if any:

Cannot comment, as case is on appeal.

19. Assessment of Jury:

Cannot comment, as case is on appeal.

20. Post-Trial Disposition:

Case is on appeal.

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U. **Case Name:** Roderick Antonio Sallette v. Multimedia WMAZ, Inc. d/b/a Channel 13, WMAZ
Superior Court of Bibb County, Macon, Georgia
Civil Action No. 97-CV-15380
Directed Verdict entered June 18, 1998

1. **Date of Publication:** May 20, 1996
WMAZ, Channel 13

2. **Case Summary:**

At approximately 3:00 a.m. on May 19, 1996, the plaintiff was in attendance at a gang confrontation in a department store parking lot in Macon, Georgia. The plaintiff was shot by another individual participating in the gang activity.

On May 20, 1996, WMAZ broadcast a report regarding the shooting, and the report erroneously stated that Mr. Sallette shot the other individual rather than the reverse.

Sallette filed his complaint on May 7, 1997 seeking damages for libel, slander, defamacy and intentional infliction of emotional distress and requesting both general, special and punitive damages.

WMAZ defended on the basis that the plaintiff's reputation was such that he could not have been damaged as a result of the broadcast, the broadcast was substantially true, defendant did not act with actual malice and the broadcast was conditionally privileged based on reliance upon information obtained from law enforcement officials. WMAZ also contended that it was not liable for punitive damages because it broadcast more than one retraction of the error.

3. **Verdict:**

Court-directed verdict for defendant on second day of trial.

4. **Length of Trial:** Two days

5. **Length of Deliberation:** None

6. **Size of Jury:** Twelve

7. **Significant Pre-Trial Rulings:**

There were memorandums dictated by the reporter to the News Director and by the News Director to the General Manager of the station which indicated that the probable reason

for the error was the reporter having reversed the names when writing the script for the news broadcast. A motion *in limine* was made to not allow the jury to receive these memoranda based on Georgia law, and the trial court granted the motion and refused to allow plaintiff's counsel to use or refer to these memoranda in argument or presentation of evidence. Therefore, there was no evidence from WMAZ that its reporter probably made an error in writing the story.

8. Significant Mid-Trial Rulings:

During the pretrial conference, the Court and plaintiff's counsel that defense counsel disclose its specific defenses. It became obvious that plaintiff's counsel believed that libel *per se* without proof of any fault was still the standard to be applied in a complaint brought against the news media. Defense counsel did not want to be more specific in hopes that plaintiff's counsel would not detect their error, and defense counsel was successful in simply stating in the pretrial order that its defenses were based on several cases including *Gertz v. Welch*. Notwithstanding this disclosure, plaintiff's counsel still did not grasp the fact that they had to prove fault. Because the reporter had moved to Texas at the time the complaint was filed, plaintiff's counsel did not depose the reporter, nor call him as a witness at trial. Also during the trial, plaintiff's counsel did not call a police officer to state that the reporter was given the correct information. Consequently, at the end of the plaintiff's evidence, there was no proof that WMAZ was at fault since plaintiff's counsel continued to rely on the libel *per se* theory.

Following plaintiff's evidence, defense counsel moved for a directed verdict on the grounds that the plaintiff had not presented any evidence of fault on behalf of WMAZ. The trial court was so reluctant to grant the motion that he recessed the trial and suggested to plaintiff's counsel that they find a policeman who could come and testify as to what information was given the reporter. Plaintiff's counsel announced to the Court the name of a police captain who they thought would testify in this regard, but defense counsel had already interviewed this policeman and knew he did not recall, if he ever knew, what information was given the reporter. The Court requested that plaintiff's counsel call the police officer outside the presence of the jury and have him proffer his testimony to determine whether it would make any difference in the ruling on the motion. As expected, the police officer testified that he did not recall what information was given to the reporter, and on cross-examination by defense counsel, the police officer further testified that he knew of instances where the police had given the reporter the incorrect information. Based on this testimony, and without recalling the jury, the Court granted defendant's motion for directed verdict.

9. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): None

10. Pre-Selection Jury Work (psychological profiles, attitudes survey, mock trial, pre-selection questionnaires):

The pre-selection jury work resulted in a strategy of seeking a jury of basically middle-class working people. The pretrial investigation of the plaintiff revealed several misdemeanor convictions as well as violation of probation. In view of the plaintiff's presence during a gang-related shootout at 3:00 a.m. and his criminal convictions, a middle-class jury was expected to be very unsympathetic, especially in light of the additional fact that WMAZ aired multiple retractions and corrections. Also, middle-class working people would not believe that anyone who had never held a job, such as the plaintiff, could have been seriously damaged by a story that was retracted and corrected. Therefore, defense counsel concentrated on picking a jury of middle-class working people who have a general fear of and little sympathy for people involved in gang activity.

11. Pretrial Evaluation:

While defense counsel felt that the lack of actual damage to the plaintiff coupled with his criminal background and involvement in gang activity gave the defense a chance to win the case on a jury verdict, defense counsel was concerned and felt there was possible liability due to the fact that plaintiff could have gotten the case to a jury with the proper proof. Bibb County juries have not been sympathetic with media defendants when mistakes of this nature have been made.

12. Defense Juror Preference During Selection:

See Section 10 above.

13. Actual Jury Makeup:

Records involving the age, sex and race of the jury are not available at the time of this report, but defense counsel was successful in picking a working middle-class jury which, during the trial, appeared to be very unsympathetic with the plaintiff. After the case ended, several jurors stated that they would have supported a defendant's verdict.

14. Issues Tried:

Although plaintiff sued for libel, slander and defamacist, the case was tried on the issue of defamacist which is the term Georgia has given to radio and television defamation.

15. Plaintiff's Theme(s):

Plaintiff's primary theme was that WMAZ had erroneously stated that plaintiff shot another individual, a felony, and was, therefore, guilty of a per se defamation of the plaintiff.

Plaintiff also contended that he had not been able to get a job because of the story and that he had been ostracized and shunned by his friends and acquaintances.

16. Defendant's Theme(s):

Other than defendant's legal theory that plaintiff was not prepared to prove that WMAZ was at fault, defendant's principle themes were that the plaintiff had not suffered any actual damage, that the retraction and correction of the story had eliminated any damage to the plaintiff's reputation, and because of plaintiff's criminal background, the story did not cause any damage to plaintiff's reputation in the first place.

17. Factors Believed Responsible for Verdict:

Because the Court directed a verdict as a matter of law for the defendant, this section is not applicable in this case.

18. Results of Jury Interviews, if any:

Although the case was not submitted to the jury, several jurors were questioned as to their attitude toward the plaintiff and their sympathy for his case. Several jurors indicated that they did not feel the plaintiff was entitled to any damages and that they had very little sympathy for his case. Several jurors stated that based on the evidence which they had heard before a directed verdict was granted, they would have voted for a defendant's verdict.

19. Assessment of Jury:

Defense counsel believes that they selected an excellent jury which gave the Defendant an opportunity to win the case had the case been submitted to the jury.

20. Post-Trial Disposition:

Plaintiff's counsel made no effort to move for a reconsideration of the Court's directed verdict, nor did the plaintiff's counsel appeal the Court's decision. The trial court's directed verdict ended the case.

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V. **Case Name:** Terri Stokes v. CBS Broadcasting, Inc., d/b/a WCCO Television,
County of Anoka, and Tom Johnson
United States District Court, District of Minnesota
Case No. 4-96 CV 178
August 17, 1999

1. **Date of Broadcast:** April 6, 1994

2. **Case Summary:**

Plaintiff Terri Stokes sued CBS Inc., doing business as WCCO Television, Anoka County, and Sheriff's Investigator Tom Johnson, over a report on the unresolved murder of her husband Dennis Stokes, a 3M Company executive, who was shot in his sleep in the middle of the night. The report indicated that, after a five-month investigation, Ms. Stokes, who claimed she was away from the home the evening of the murder, remained the primary suspect. The report included an on-camera interview with the principal investigator, who expressed his belief that the widow had committed the murder. In particular, plaintiff challenged the following portion of the broadcast:

Investigator: "Somebody walked directly to the house, up the stairway, into the bedroom and, it appears, shot him while he was sleeping. The gun was pressed to his head and pulled the trigger. This was a personal thing. I think this was a well planned-out, methodical execution of Dennis Stokes."

Reporter: "By his wife?"

Investigator: "I believe so."

Reporter: "Do you have any doubts about the direction you are going?"

Investigator: "No."

The report also included material tending to negate Ms. Stokes' involvement in the crime, including, among other things, that searches of Ms. Stokes' workplace and other locations had turned up no physical evidence, that her alibi on the night of the murder had substantially checked out, and that she had denied any involvement in the crime. The report concluded by telling the viewing audience that "[t]here's no murder weapon, no witnesses and no physical evidence tying Terri Stokes to the scene. In short, no proof she had any involvement in the murder of her husband." Nevertheless, Ms. Stokes claimed that the challenged portion of the WCCO broadcast accused her of murder. She also made the same claim against Anoka County and Tom Johnson in connection with certain allegedly defamatory statements that appeared in a subsequent *American Journal* broadcast regarding the unsolved murder that aired in December 1994.

3. Verdict:

The jury answered an eighteen-question special verdict form, involving three allegedly defamatory statements by Johnson, one of which was carried on the WCCO broadcast, including the statement, quoted above, that was carried on the WCCO broadcast, and two similar statements by Johnson that were carried on a program produced by King World Productions. (King World settled before trial.) As to the one statement made by Johnson on the WCCO broadcast, and the two other statements by Johnson, the jurors answered special interrogatories as follows:

- Q. Does the challenged statement in the Dimension broadcast convey a defamatory meaning about Terri Stokes?
- A. Yes (9-2).
- Q. Is that defamatory meaning false?
- A. Yes (8-3).
- Q. Did Tom Johnson/Anoka County make the challenged statement (1) with an intent to convey the defamatory meaning or (2) with a high degree of awareness that the

average viewer would interpret it to convey the defamatory meaning?

A. Yes (9-2).

Q. Did Tom Johnson/Anoka County make the challenged statement (1) with knowledge that the defamatory meaning was false or (2) with reckless disregard as to whether the defamatory meaning was true or false?

A. No (unanimous).

Q. Did WCCO/CBS broadcast the challenged statement (1) with an intent to convey the defamatory meaning or (2) with a high degree of awareness that the average viewer would interpret it to convey the defamatory meaning?

A. No (unanimous).

Q. Did WCCO/CBS broadcast the challenged statement (1) with knowledge that the defamatory meaning was false or (2) with reckless disregard as to whether the defamatory meaning was true or false?

A. No (unanimous).

(On the tenth day of deliberations, the parties agreed to waive the requirement of unanimity, and to accept a verdict rendered by an 8-3 or greater majority.)

The jury did not answer questions on damages. Because the trial was bifurcated, jurors did not hear evidence or arguments, and did not deliberate, on punitive damages.

4. Length of Trial:

Trial lasted five weeks (twenty trial days), beginning June 21 and ending July 29, 1999. Trial was not held on Fridays (the court's motion day), and was in recess the week of July 5 due to the judge's attendance at the biennial circuit judicial conference.

5. Length of Deliberation: Two and one-half weeks (ten days)

6. Size of Jury:

Eleven (a twelfth juror was excused after participating in the first four days of deliberations).

7. Significant Pre-Trial Rulings:

The parties stipulated shortly before trial that the case would be tried solely on fault issues of actual malice and that plaintiff would seek compensatory damages only in the form of presumed damages. Plaintiff was a private figure, but could not produce evidence of significant actual injury. The stipulation was directed at simplifying issues for trial. In addition, the court ruled that plaintiff could not introduce evidence of emotional distress or seek emotional distress damages as a form of presumed damages, because she had waived her claim to such damages during the course of discovery.

In pre-trial motions, the court excluded the testimony of plaintiff's proposed linguistic expert, Dr. Roger Shuy. Plaintiff moved to exclude all evidence of plaintiff's bad reputation or prior bad acts unless the evidence related to her prior reputation for committing murder; the court denied that motion.

8. Significant Mid-Trial Rulings:

At various junctures during the trial, the trial judge excluded evidence offered by defendants of plaintiff's prior acts on the grounds that the evidence, although probative, was unduly prejudicial. Some of the evidence that was excluded was directly relevant to showing that plaintiff's reputation prior to the challenged broadcast was already substantially diminished and that plaintiff had previously demonstrated extreme callousness toward family members or had threatened family members with violence.

The court refused to permit the jury to apportion fault as between the media defendant and the law enforcement defendants. Accordingly, the special verdict form, as submitted to the jury, did not require the jury to determine the percentage of fault attributable to each of the defendants.

Because the defamatory meaning claimed by the plaintiff was not the only meaning a jury might find the challenged portion of the broadcast conveyed, the court required the plaintiff to prove an intent/awareness element in order to recover. In particular, the court required plaintiff to prove by clear and convincing evidence that the defendant intended to convey the defamatory meaning alleged by plaintiff or broadcast the challenged statement with a high degree of awareness that the average viewer would interpret it to convey that defamatory meaning.

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

The jury was instructed on the basic elements of defamation before opening statements, listened to all substantive instructions prior to closing arguments, and heard full instructions after closing arguments. Each juror had a copy of the final instructions during deliberations.

The verdict form had eighteen questions, reflecting the principal issues with respect to each defendant and each set of challenged statements within the two broadcasts. At the end of the second week of deliberations, the jury was advised that it would disregard the directions within the verdict form that the questions be answered in sequence.

Defendants invoked a state statute to require a separate phase for punitive damages, and plaintiff stipulated that the state procedure would apply in this federal diversity action.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Counsel are advised not to disclose this information pending a possible appeal.

11. Pretrial Evaluation:

This case should not have survived summary judgment. Despite recognition of the risks of trial, CBS and the law enforcement defendants continued to believe they had strong defenses. To the surprise of plaintiff's counsel, who seemed to be counting on a "divide and conquer" strategy, CBS and the law enforcement defendants agreed not to engage in separate settlement negotiations with plaintiff.

12. Defense Juror Preference During Selection:

Women and older men.

13. Actual Jury Makeup:

Eight women, four men (two apparently in their 20s and two apparently older than 50). One juror was a retired newspaper copy editor, and another had majored in communications in college.

14. Issues Tried:

See above.

(a) *Defamatory meaning.* Did the statements, taken in context, convey the meaning that plaintiff had actually killed her husband, or only that she was a suspect in the murder?

(b) *Truth.* Did the plaintiff have any involvement in the death of her husband? (The court instructed the jury that, in considering the truth of the statement, they could consider the legal principle that an accomplice in a crime is just as culpable as the person who actually commits the crime.)

(c) *Defamatory intent.* Did the defendants actually intend to convey the meaning that plaintiff had killed her husband, or have a high degree of awareness that the average viewer would understand the statement to mean that plaintiff had killed her husband?

(d) *Actual malice.* Did the defendants know the statement was false, or act in reckless disregard of truth or falsity?

(e) *Presumed damages.*

15. Plaintiff's Theme(s):

Plaintiff's counsel summarized his case in his opening statement as "Terri Stokes fights back." The themes were that plaintiff did not kill, and could not have killed, her husband; that defendants knew she had an alibi for the time of the murder; and that to say or imply that "she killed her husband but we don't have any evidence that she did it" was *ipso facto* malicious and in reckless disregard of the truth. On damages, plaintiff, invoking Richard Jewell, argued that saying a woman had killed her husband was "just about the worst thing you could say about her," and asked for an unspecified but "very significant" amount of money.

16. Defendant's Theme(s):

a. Conceding that the evidence of plaintiff's involvement in her husband's death was not sufficient to meet the criminal standard of proof beyond a reasonable doubt, defendants argued that there was significant circumstantial evidence of some involvement, so that it was reasonable for some people to believe she was involved in the crime. Her alibi was not airtight, and did not preclude the possibility of an accomplice. Plaintiff had only her own word to establish that she had no involvement in the death, and her word could not be trusted because her credibility had been substantially undercut.

b. The station was not trying to solve the murder, but only to report on the status of the investigation, which had reached the stage where plaintiff was the only remaining suspect. The report was as accurate and balanced as it could be, particularly in light of the total lack of cooperation from the plaintiff and her attorney.

17. Factors Believed Responsible for Verdict:

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

Not a significant factor. Jurors' post-trial comments suggested that some believed "the media" frequently spin stories for the sake of ratings, but that they were impressed with the good faith demonstrated by the defendants on the witness stand. One juror commented that there was "absolutely no sense" among the jurors that "WCCO needed to be punished for the sins of the media."

b. Sympathy for plaintiff during trial:

Plaintiff did not generate any jury sympathy. Throughout the trial, she glared at the defendant detective and at other witnesses. Jurors considered her to have little or no credibility.

c. Proof of actual injury:

Plaintiff had no significant evidence of actual injury; a few witnesses talked about people asking more questions about the situation after the broadcast than before. Defendants presented evidence from family members, friends, plaintiff's co-workers, and the victim's co-workers that they believed that the plaintiff was involved in her husband's death and that they had come to those beliefs prior to the broadcast.

d. Defendants' newsgathering/reporting:

According to news reports, one juror commented outside the courtroom immediately after the verdict: "It was easy for us to conclude that WCCO was not being delinquent. Their report was fair. It gave both sides of the story. What really took a long time was getting inside of [Detective] Tom Johnson's mind."

e. Experts:

The only expert was the county coroner, who testified on the cause and time of death.

f. Other evidence:

Jurors did not appear concerned about a "confront" interview of plaintiff that took place on a public sidewalk outside a fast food restaurant and that was surreptitiously videotaped by WCCO. Plaintiff was confronted by her mother-in-law regarding, among other things, plaintiff's sexual "affair" in the months immediately preceding her husband's murder. The portion of the "confront" interview that was broadcast included plaintiff's

denial of her involvement in the murder and her counter-charge that the principal detective on the case was “obsessed” with her.

g. Trial dynamics:

i. Plaintiff’s counsel:

Plaintiff’s attorney is a highly regarded criminal defense lawyer, with a flair for courtroom drama and a penchant for scathing sarcasm (which occasionally misfired).

ii. Defendant’s trial demeanor:

The defendant detective came across as a decent, hard-working individual who was trying his best to solve the crime. The reporter and producer impressed the jurors as being intelligent, hard-working, thorough, and committed to being as fair as they could be in the presentation of the story. The reporter, who paused before answering every question (both on direct examination and cross) and who refused to assume a single fact (even during questioning by co-defendant’s counsel) impressed jurors as being extremely careful and thoughtful.

iii. Length of trial:

Not a significant factor in the verdict.

iv. Judge:

Generally kept the trial on track and presented a demeanor of fairness and seriousness to the jury. Occasionally, in reminding jurors not to read or watch any media coverage of the trial prior to verdict, he would comment that media accounts are not always accurate or don’t focus on what is important – without seeming to realize how such comments could impact juror perceptions in a libel trial.

h. Other factors:

18. Results of Jury Interviews, if any:

Post-trial interviews with the jurors made clear that very early on the deliberations, the jury concluded that WCCO had done nothing wrong. Similarly, it was also clear early on in the deliberations that the majority of the jurors wanted to make sure that the plaintiff did not recover any damages from the defendants. The deliberations were complicated, however, because a couple of jurors wanted to be sure that the law enforcement defendants got the message that they should not go on television to proclaim a citizen to be a murderer if they lack sufficient evidence to arrest the person. The deliberations, which took place from July

29th to August 17th, show how the process frequently works in ways that are difficult to anticipate.

The jurors reported that they did not really discuss the questions beyond defamatory meaning in the special verdict form until late in the second week of their deliberations. They also indicated that it helped considerably at the end of the second week when the judge informed them that they could consider questions out of the order mandated by the special verdict form. Accordingly, by Monday, August 16, they had answered question no. 6 (finding unanimously in favor of WCCO on the actual malice issue). Next, they answered question no. 4 (finding unanimously in favor of Tom Johnson and Anoka County on the actual malice issue), and then moved on to answer question no. 5 (finding unanimously in favor of WCCO on the defamatory intent/awareness issue). Once the court informed the jurors on Tuesday, August 17, that the parties had agreed to waive the requirement of unanimity and accept a verdict rendered by an 8-3 or greater majority, a majority group of jurors moved quickly to reach a verdict on the remaining questions. Apparently, some were concerned that, if the process dragged on too long, the minority might change their votes on questions 4, 5, and 6. At the end of the process, the two jurors who favored plaintiff accepted letting all the defendants off without paying damages and felt they had "sent the County a message" with their votes on defamatory meaning and falsity (question nos. 1 and 2).

Defamatory Meaning

The deliberations on the defamatory meaning question consumed a substantial amount of the jurors' time and energy. At one point while grappling with this issue, the jurors watched the broadcast several times and counted how many statements were made that were "favorable" to Terri Stokes and how many that were "unfavorable" to her. Apparently, the two totals were quite close: the "unfavorables" won by one statement.

The jurors who wanted to send a message to the County felt the challenged statement was clearly defamatory. One indicated that in her view, it was not even a close question. Another explained that when a law enforcement officer like Tom Johnson says a citizen is a murderer, that gets more credibility from viewers than when a reporter like Tom Gasparoli (WCCO's correspondent) says that the cops do not have sufficient evidence to make an arrest. As this juror put it, "Johnson's voice is louder and carries more weight with viewers than Gasparoli's voice." Another juror questioned to some extent WCCO's decision to put Johnson's statement in the broadcast and thought the story could have been done without naming Terri as a suspect.

The jurors were in agreement that if the broadcast had only said that Terri Stokes was the only suspect or the prime suspect, they would not have found that to be defamatory. The majority of the jurors clearly viewed the meaning of the challenged statement as "she did it – Terri committed the murder" and not that "Terri is a suspect and here is the evidence" police have obtained to date. In addition, a number of jurors were troubled with the material in the

“anchor lead” referring to another murder investigation (in which the woman and her boyfriend had already been indicted) because they felt the attempt to draw parallels between the cases for purposes of introducing the Stokes story was not entirely fair.

Falsity

A number of jurors expressed surprise and disappointment that the plaintiff’s counsel had characterized the jury’s finding on falsity as vindicating the plaintiff and proving that she had not involvement in her husband’s murder. Apparently, the majority of jurors felt that plaintiff was involved in some way in her husband’s murder. Nevertheless, the majority voted “yes” on falsity because they felt there was an insufficiency of solid evidence of her involvement, notwithstanding their understanding that the burden of proof was on plaintiff to show the statement was false rather than on defendants to prove the statement was true. As one juror explained, in determining this issue, the jurors “credited,” as proof of falsity, the “fact that Terri still had not been arrested or charged,” and the “fact that it had been six years and no accomplice had come forward.” Even plaintiff’s counsel did not argue these “facts”; nevertheless, the jurors considered them as “evidence of Terri’s noninvolvement.”

A number of the jurors agreed that if the question was – “did Terri Stokes convince you that she had nothing to do with her husband’s death?” – that would have been a much easier question to answer in the negative.

Damages

Apparently, two or three jurors wanted to find in Terri’s favor and award her one dollar as a way of expressing disapproval of Tom Johnson’s conduct, however, the majority were always adamant that they did not want plaintiff to get any money out of this case or to receive a verdict in her favor. One juror reported that, on the final day of deliberations, a juror indicated that she still would like Terri to recover one dollar, but others expressed concern that even an award of a single dollar might enable the judge to increase the award in Terri’s favor.

19. Assessment of Jury:

This was a remarkably attentive, conscientious, hard-working, and intelligent jury. For example, the jurors spent two days going through the jury instructions, reviewing and discussing each instruction. They spent another three days examining the entirety of the evidence. In fact, they read every page of plaintiff’s handwritten journals, which were voluminous and often difficult to read.

20. Lessons:

During the trial, plaintiff's counsel (a highly regarded criminal defense lawyer) floated a number of theories on who might have committed the murder. While such tactics may be effective in a criminal case where the prosecution bears the burden of proof, they tended to undercut the plaintiff's ability to present the jury with a coherent story as to who, other than the plaintiff, committed the murder.

It is important to remember that the judge's sense of how much evidence is necessary to prove a point to the jury may be quite different than the jurors' actual sense. As noted above, the judge excluded certain evidence of plaintiff's prior bad acts on the grounds that the evidence, although probative, was unduly prejudicial. In making some of these rulings, the court indicated essentially that the jury had already gotten the point and that further evidence was probably unnecessary. Comments made in post-trial interviews suggest that some of the jurors who were inclined initially toward plaintiff would have found some of the excluded evidence to be compelling. On the other hand, one juror who was inclined toward the defense, in reaction to continuing evidence concerning plaintiff's extramarital sexual activity, wondered, "why are they bringing this up again." The media defendants were able to enjoy the benefit of a lot of "bad acts" proof without having to take ownership, since much of it was offered by the County in support of its investigation, and as circumstantial evidence of the plaintiff's involvement in the crime.

The use of the special verdict form (with separate questions going to each of the elements the plaintiff must prove) enabled the jurors to reach a verdict in a very difficult case. In essence, they used the special verdict form to formulate a compromise that was ultimately acceptable to all the jurors. In particular, they felt they were able to "send a message" to the law enforcement defendants with their answers on the defamatory meaning and falsity questions, while ensuring that plaintiff would recover nothing by virtue of their answers on the defamatory intent/awareness and actual malice questions.

In many cases, the best way to prevail on an actual malice defense is to make a strong run at proving the truth of the defamatory statement. Similarly, it appears that one way to prevail on the defamatory intent/awareness issue is to make a strong run at convincing the jury that the challenged broadcast is not defamatory in the first place.

21. Post-Trial Disposition:

Plaintiff's counsel has indicated an intent to file motions for judgment notwithstanding the verdict and/or for a new trial.

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W. **Case Name:** Texas Beef Group, Perryton Feeders, Inc., Maltese Cross Cattle Company, Bravo Cattle Company, Alpha 3 Cattle Company, Paul F. Engler, Cactus Feeders, Inc., and Dripping Springs Cattle Company v. Oprah Winfrey, Harpo Productions, Inc., Howard Lyman and King World Productions, Inc.
U.S. District Court, Northern District of Texas, Amarillo Div.
Civil Action No. 2-96-CV-208
Verdict rendered February 26, 1998

1. **Date of Publication:** April 16, 1996
Oprah Winfrey Show

2. **Case Summary:**

Two groups of cattle feeders in West Texas sued Oprah Winfrey, her production company, distribution company and a guest of the *Oprah Winfrey Show* regarding comments made by Oprah and the guest, Howard Lyman, regarding Mad Cow Disease.

Oprah's staff assembled three knowledgeable people to discuss that issue – Dr. Will Hueston of the United States Department of Agriculture, Dr. Gary Weber of the National Cattlemen's Beef Association, and Howard Lyman of The Humane Society. Lyman, who was also a defendant in the suit, is a former cattle rancher turned vegetarian.

Ms. Winfrey opened the program with a description of the March 20th announcement of the British Health Minister that the disease had "most likely" crossed the species barrier from cows to humans and asked the question "Could it Happen Here?"

Lyman began the debate by agreeing, "absolutely," that a Mad Cow scare in the United States could make AIDS look like the common cold. He went on to describe a feeding practice in the U.S. where "rendered" cattle is turned into cattle feed. The authorities in Britain had determined that this practice caused or contributed to the spread of the disease and banned it.

Upon hearing that cows were being fed to other cows, Oprah exclaimed that, "It has just stopped me cold from eating another burger. I'm stopped." Cattle futures on the Chicago Mercantile Exchange went down the limit the day of the broadcast. Some members of the media described this as the "Oprah Crash."

During the editing process, approximately 75% (by time) of Weber and Hueston's comments were omitted. The program did not mention the plaintiffs, their specific cattle, or Texas.

3. **Verdict:**

For the defense. The jury answered the first special verdict interrogatory, "Did a below-named defendant publish a false, disparaging statement that was 'of and concerning' the cattle of a below-named plaintiff as those terms have been defined for you?" in the negative, and per the court's instructions answered no further questions.

4. **Length of Trial:** Six weeks

5. **Length of Deliberation:** Six hours

6. **Size of Jury:** Twelve

7. **Significant Pre-Trial Rulings:**

The judge issued a *sua sponte* broad gag order one month before trial; ordered production of "outtakes" of the program; granted summary judgment for the distributor, King World Productions and denied a motion to remand to state court.

8. **Significant Mid-Trial Rulings:**

The court entered judgment as a matter of law at the close of the plaintiffs' evidence regarding defamation, negligence and plaintiffs' claims under the Texas Veggie Libel Statute. She also granted in part *Daubert* motions regarding plaintiffs' experts.

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

The court conducted most of the *voir dire*, but permitted each side one-half hour. The defense made good use of time, effectively indoctrinating the jury on the opinion issue.

The court denied defendants' motion *in limine* to exclude evidence of the editorial process, including outtakes, but at defendants' request, the court gave a jury instruction prior to the start of evidence regarding editorial discretion and the editing process: [insert the instruction]. The court gave a similar but less forceful instruction at the beginning of the trial.

The court also submitted the case to the jury on special interrogatories or special issues in conformance with Texas practice (both state and federal).

10. Pre-Selection Jury Work (psychological profiles, attitudes survey, mock trial, pre-selection questionnaires):

The defendants used a full range of pre-trial jury services. As the case is still on appeal, and a second case has been filed, it is inappropriate to discuss this issue at this time.

11. Pretrial Evaluation:

There was a consensus among defense counsel and defendants that the defendants should win the case as a matter of law, but that there was a very low probability of a successful verdict before a jury in a venue which is highly dependent upon the cattle feeding industry.

12. Defense Juror Preference During Selection:

Demographics which match viewers of the *Oprah Winfrey Show*.

13. Actual Jury Makeup:

Eight women, four men, one Hispanic, no African-Americans. There were no African-Americans on the jury panel of approximately 60 people.

14. Issues Tried:

Defamation, product disparagement, negligence, negligent publication and violation of the Texas Veggie Libel Act. Only product disparagement went to the jury.

15. Plaintiff's Theme(s):

The defendants were irresponsible, sensationalistic, money-grubbing television personalities and producers who would say anything for ratings. The guest on the show, Howard Lyman, was a vegetarian activist whose avowed purpose was to get people to stop eating meat. The defendants selectively edited the program to omit material that would have strengthened the view that America's beef was safe.

16. Defendant's Theme(s):

People have a right to voice their opinions even if a significant segment of the population disagrees with those opinions. The *Oprah Winfrey Show* is a talk show, not an investigative news program like *20/20*, *60 Minutes* or *Dateline*. The defendants elected not to take a position on whether U.S. beef was safe or unsafe due to the questioned practice of feeding bovine tissue to cattle. Accordingly, they did not offer the substantial scientific

evidence supporting the “unsafe” view. Convincing as this evidence was, defendants believed that it would push the jurors toward a reality that was unacceptable in this venue.

17. Factors Believed Responsible for Verdict:

The free speech theme and Oprah Winfrey herself. The opinion theme was stressed in *voir dire*, opening, cross-examination of each of plaintiffs’ witnesses, direct examinations of defense witnesses, and in summation. As the trial progressed, the jury warmed up to Oprah Winfrey and some undoubtedly were starstruck. Having her show move to Amarillo was very helpful.

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

The plaintiffs were well known and successful cattle feeders in the venue. Virtually all of the venire had ties to the industry and some of them directly to the plaintiffs themselves. Prior to trial there was substantial, manifest, verifiable hostility to the defendants. On the other hand, there were many Oprah admirers among the venire, and she was perceived positively in the venue once she arrived.

b. Sympathy for plaintiff during trial:

The plaintiffs’ case began to unravel early on and sympathy for the plaintiffs’ position steadily eroded. An on-line poll conducted by the local newspaper had sentiment running in favor of Oprah more than 2:1.

c. Proof of actual injury:

The plaintiffs’ damage model had credibility problems, and the court even intimated that one of the plaintiffs’ damage models was flawed as a matter of law. The jury viewed the damages with skepticism but did not reach the damage question because they found no liability.

d. Defendants’ newsgathering/reporting:

The executive producer of the *Oprah Winfrey Show*, Dianne Hudson, said that “we don’t report the news, we discuss the news.” The defendants attempted to differentiate a television talk show from other media such as the *Wall Street Journal*, the *New York Times*, etc. and portrayed the show as a forum where people could air their views and opinions. Nevertheless, a substantial amount of research went into the program. Three executive producers did research, primarily through Lexis/Nexis to determine the extent of the Mad Cow controversy and to locate spokespersons for various points of view. The producers then

checked the credentials of the spokespeople and recruited the top three authorities in the United States speaking on this issue.

e. Experts:

The experts who testified in the case were Dr. Will Hueston, a college professor and former employee of the United States Department of Agriculture. Dr. Hueston was a guest on the program. He claimed to be the second leading expert in the world on bovine spongiform encephalopathy. Dr. Hueston tearfully apologized during his testimony to Ms. Winfrey about some of his trial comments. (He testified that the *Oprah Winfrey Show* was “like a lynch mob”; this was debunked by video showing the demeanor of all participants, including the audience, and the witness became contrite when he was forced to acknowledge the slavery era origins of the term “lynch mob.”) The defendants did not call a BSE expert, but the plaintiffs used Hueston and Dr. Lester Crawford, both BSE experts. Both sides called damage experts. Plaintiffs used Avram Tucker and Dr. Wayne Purcell while defendants used Dan Slottje of KPMG Peat Marwick and Bettina Whyte formerly of Price Waterhouse. Ms. Whyte did an alternate damage analysis. Mr. Slottje refuted the plaintiffs’ damage model and specifically a “regression” analysis performed by Dr. Purcell.

f. Other evidence:

Defendants attempted unsuccessfully to keep out of evidence the editorial process. One of the plaintiff’s claims was that the program had been unfairly edited cutting out a third more of the pro-beef comments than those of Mr. Lyman, the so-called vegetarian activist. The plaintiffs tried hard, but failed, to keep out photographs of the rendering process — that is the procedure whereby cattle not fit for human consumption are sent to a rendering plant and turned into a number of different forms, including protein supplement for cattle feed.

g. Trial dynamics:

i. Plaintiff’s counsel:

Plaintiffs’ lead counsel were Joseph Coyne of the Sheppard, Mullin, Richter & Hampton firm in Los Angeles, California and David Mullin (no relation) of the Mullin, Hoard & Brown firm in Amarillo, Texas. Both were competent and accomplished advocates in the courtroom.

ii. Defendant’s trial demeanor:

Ms. Winfrey attended every minute of every proceeding as did the President of Harpo Productions, Tim Bennett. She was stoic and unexpressive during the testimony. She was called as an adverse witness and cross-examined for over two days. Her demeanor on the

witness stand was outstanding. Mr. Bennett did not testify. Mr. Lyman was passionate on the witness stand and was adequate.

iii. Length of trial: Six weeks

iv. Judge:

Mary Lou Robinson. Judge Robinson has a well-earned reputation as a no-nonsense judge. She did not tolerate theatrics in the courtroom and chained the lawyers to the podium; rarely even permitting them to go to an easel to demonstrate a point. Her in-trial rulings were prompt, consistent and fair. On appeal, the plaintiffs complain of one pre-trial ruling (failure to remand) and one mid-trial ruling (granting the motion for directed verdict on the Veggie Libel Statute). The plaintiffs' appeal also attacks one portion of her charge — that is the instruction regarding the of and concerning requirement.

h. Other factors:

The defense intuited that at least several jurors were pro-defense, and during closing argument, urged jurors not to “compromise” their views, preferring a hung jury to a compromised low verdict.

18. Results of Jury Interviews, if any:

The judge prohibited the attorneys from speaking to the jurors after trial pursuant to a local rule. Defendants sought relaxation of the rule, but that request was denied except that the jurors were allowed to contact Ms. Winfrey if they chose and they were allowed to meet her without lawyers.

19. Assessment of Jury:

The jury had extraordinarily strong pro-speech leanings which overrode their allegiance to the hometown cattle industry.

20. Lessons:

Dealing with outtakes and claims of unfair editing can be a challenge, but it was met in this case with a multifaceted strategy of (1) sensitizing the jury to the First Amendment notion that editing is for editors through a charge from the judge at the beginning and at the end of the trial, (2) hitting that theme throughout all phases of trial, and (3) proving that the edit was indeed fair in any event by dissecting the broadcast, and demonstrating how the “parts” fairly presented the “safe” point of view.

21. Post-Trial Disposition:

There were no post-trial motions in the trial court. The case is currently on appeal and was argued June 1, 1999.

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X. Case Name: Raymond Veilleux, Kelly Veilleux, and Peter Kennedy v. NBC Inc.,
Alan Handel, and Fred Francis
U.S. District Court, District of Maine, Bangor Division
Civ. No. 97-CV-B
Verdict rendered July 8, 1998
(now pending before United States Court of Appeals, First Circuit)

1. Date of Publication: April 19 and 26, 1995
Dateline NBC

2. Case Summary:

The plaintiffs, Raymond and Kelly Veilleux, owners of Classic Carriers trucking company, and their employee, truck driver Peter Kennedy, alleged that *Dateline* representatives secured their participation in the report based on assurances that the report would show the “positive” side of the trucking industry. Along with the alleged assurance of a “positive” piece, the plaintiffs claimed the defendants also told them that the story would not include Parents Against Tired Truckers (PATT), an organization advocating more stringent trucking regulations. Veilleux allowed NBC to bring its cameras along on a coast-to-coast haul with Kennedy as the driver. NBC maintained it only promised the plaintiffs an accurate description of the trip.

The reports that *Dateline* ultimately broadcasted addressed the stresses of long-haul truck driving, including “hours of service” violations and driver fatigue, and featured representatives from PATT. *Dateline* also reported that Kennedy violated the hours-of-service regulations during the journey, based on its own observations and on Kennedy’s videotaped admissions of such violations to *Dateline*’s reporters. The reports also revealed that Kennedy tested positive for amphetamine and marijuana use in a drug test administered before his roadtrip with reporters, and was fired as a result.

Plaintiffs alleged claims for fraud, negligent misrepresentation, defamation, and false light privacy, public disclosure of Kennedy’s drug test results, and both intentional and negligent infliction of emotional distress.

3. Verdict:

For the plaintiff on claims for negligent and intentional misrepresentation, some defamation counts, public disclosure, false light, and negligent infliction of emotional distress.

Compensatory: \$525,000 (total for three plaintiffs)

Raymond Veilleux:

Pecuniary loss: \$150,000

Personal injury (physical and emotional): \$50,000

Damage to reputation: \$100,000

Kathy Veilleux:

Loss of consortium: \$50,000

Peter Kennedy:

Emotional distress: \$100,000

Damage to reputation: \$75,000

Punitive: \$0

Among the statements the jury held to be defamatory toward both defendants were: “almost every time [Kennedy] goes to work he breaks the law,” and “in just under six days, he has slept only twenty-one hours, an average of three-and-a-half hours a day . . . [Peter Kennedy] has broken the law, put himself and others at risk through dangerously long hours.” The defendants were held liable for other statements which similarly pertained to violations made by Kennedy in falsifying log books and driving without sleep.

4. **Length of Trial:** Eleven days
5. **Length of Deliberation:** 1½ days
6. **Size of Jury:** Nine
7. **Significant Pre-Trial Rulings:**

Court denied defendants’ summary judgment motion as to most claims, but dismissed all three plaintiff’s claims for intentional infliction of emotional distress, Kennedy’s claims for fraud and negligent misrepresentation because there was no proof that Kennedy suffered pecuniary loss, and all claims for punitive damages. 26 Media L. Rptr. 1929 (U.S. Dist Ct., Dist. of Me., May 29, 1998). The court permitted amendment of complaint on eve of trial to add defamation claims as to fourteen newly-challenged statements.

8. **Significant Mid-Trial Rulings:**

In mid-trial, court dismissed six of the challenged statements on ground that they were expressions of opinion, or admitted by plaintiff to be true, or non-defamatory.

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

Special verdict form.

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):**
11. **Pretrial Evaluation:**

Not available because of pending appeal.

12. **Defense Juror Preference During Selection:**

13. Actual Jury Makeup:

Middle and working class, limited post-secondary education, roughly even mix of men and women, all born and raised in Maine.

14. Issues Tried:

Falsity of statements; fault as to falsity; occurrence of alleged intentional and negligent misrepresentations and reliance thereon; public disclosure of Kennedy's drug test results and whether Kennedy had waived his right of privacy or consented to publication with respect thereto; damages.

15. Plaintiff's Theme(s):

NBC misled "little guys" by promising a "positive story." Plaintiffs would not have agreed to participate without a promise that the story would be "positive." NBC edited the facts to make the story come out the way they had planned it from the start.

16. Defendant's Theme(s):

Report was truthful and was based on what the plaintiffs themselves told NBC. NBC made no promises that report would be positive or any promise about its tone or content.

17. Factors Believed Responsible for Verdict:

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

Bias against news media. See below.

b. Sympathy for plaintiff during trial:

Hometown jury favoring small businessmen over large media entity.

c. Proof of actual injury:

Ray Veilleux and his accountant testified to loss of customers and lost profits. This evidence was allowed over objection, even though there was no customer testimony or other evidence establishing a direct causal link between the program and the downturn in plaintiffs' business, and evidence which did show alternative explanations for the losses. Veilleux, his wife, and health care professionals testified to physical illness and emotional

distress. The defense offered evidence that most of Veilleux's business losses were due to loss of a business relationship with a larger company that was unrelated to the broadcast.

d. Defendants' newsgathering/reporting:

Plaintiffs' participation and cooperation was requested by NBC, and then the report made critical statements about them. Jurors may have been concerned that material more "positive" to plaintiffs was not included.

e. Experts:

The plaintiffs called: an accountant; a toxicologist (about the drug test results); Barry Atwood, a videographer from Portland (who, according to a newspaper account, testified about what he saw as evidence of staging by defendants and their pressure on Kennedy to discuss his drug test results); a cardiologist.

Defendant called a toxicologist and an economist, but did not call their journalistic practices expert.

f. Other evidence: N/A

g. Trial dynamics:

i. Plaintiff's counsel:

Effective trial counsel.

ii. Defendant's trial demeanor:

Defendants called senior correspondent Fred Francis, independent producer Alan Handel, *Dateline* Executive Producer Neal Shapiro, and *Dateline* Associate Producer Tracey Vail. These witnesses spoke well and seemed credible.

iii. Length of trial: Not a factor

iv. Judge: Not a factor

h. Other factors:

The misrepresentation claims presented a direct conflict between the testimony plaintiffs and the defendants over what was promised. Plaintiffs essentially argued, "why would we let them travel with us if we were not assured that the story would be positive." The defendants explained that the plaintiffs had already acknowledged violating the law with

regularity, and agreed to the "ride along" because they were anxious to participate in a story that would show how the system forces truckers to break the rules. Both sides presented reasonably well as witnesses. The seeming stalemate in this swearing contest was most likely broken by the jurors' tendency to believe or "side with" their neighbors and distrust the media, particularly a national media organization. The same factor seemed at work in the jury's rejection of convincing proof of truth of the broadcast's conclusions that was contained in the outtakes of the interviews with the plaintiffs, perhaps because of the omission of some material more favorable to the plaintiffs.

18. Results of Jury Interviews, if any:

None (prohibited by court). One juror was quoted in the press making disdainful comments about NBC and indicating that plaintiffs' account was credited by jury.

19. Assessment of Jury:

Unwilling to consider NBC's proof of truth of broadcast based on plaintiffs' own statements, and conversely, willing to accept all claims made by plaintiff.

20. Lessons:

Outtakes that are arguably more favorable to the plaintiff create opportunities for plaintiff's counsel and significant challenges for the defense. No matter how true what was said in a broadcast might be, a jury sympathetic to the plaintiff will engage in editorial second-guessing about omitted material, and it is difficult to convince them that this is not their role.

21. Post-Trial Disposition:

Post-trial motions for judgment as a matter of law and for a new trial were denied. Appeal has been fully briefed and was argued June 8, 1999. Presently awaiting decision.

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Y. **Case Name:** Peter Vitale, individually and d/b/a Vitale Stereo Co. v. Gannett
Minnesota Broadcasting, d/b/a KARE-TV 11
Ramsey County District Court
Verdict rendered July 1998

1. **Date of Publication:** October 3, 1996
KARE-11 TV

2. **Case Summary:**

Mr. Peter Vitale, Sr. and his T.V. repair shop were misidentified in a TV news program on a major drug bust. The person arrested was Peter Vitale, the plaintiff's son. The Minnesota U.S. Attorney had announced in a press conference that Peter Vitale, a 37-year-old man owning a T.V. repair shop in St. Paul, and ten others had operated a cocaine ring through their seemingly legitimate businesses. The station sought to identify the businesses, and confirmed through a telephone directory and a telephone call that Peter Vitale owned the Vitale Stereo Co., and concluded that this was the T.V. repair business referred to. The station's reporter and videographer confronted plaintiff at his store. Plaintiff claimed he told the reporter he was the wrong person, as he had reporters for two other stations who did not subsequently refer to the store in their broadcasts. His wife denied hearing him say this to Channel 11 reporters, and the reporters say he just ordered them to leave.

Channel 11 then did a broadcast tying plaintiff and his store to the indictment. A portion of the broadcast showed the store in the background. An anonymous notification of the error was received after the 10:00 p.m. newscast. Station management ordered that the report not be repeated, but the night staff forgot that the 10:00 p.m. newscast would be automatically replayed at 1:30 a.m., so the report was broadcast one more time at 1:30 a.m. After formal demand letters from plaintiff's attorney, Channel 11 made three offers to run retractions, but these were refused.

3. **Verdict:** Defense verdict – no negligence

4. **Length of Trial:** One week

5. **Length of Deliberation:** Four hours

6. **Size of Jury:** Six

7. **Significant Pre-Trial Rulings:**

The court determined negligence standard would apply and refused to apply malice standard.

8. **Significant Mid-Trial Rulings:** None

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** None

10. **Pre-Selection Jury Work (psychological profiles, attitudes survey, mock trial, pre-selection questionnaires):** None

11. **Pretrial Evaluation:** None

12. **Defense Juror Preference During Selection:**

Highly educated people with significant life experience.

13. **Actual Jury Makeup:**

Similar to above.

14. **Issues Tried:**

There were three issues at trial: (1) whether KARE had negligently defamed the plaintiffs in news broadcasts on October 3, 1996 at 6:00 p.m. and 10:00 p.m. and on October 4 at 1:30 a.m.; (2) whether any of the broadcasts caused damages to either plaintiff; and (3) whether KARE should be found liable for punitive damages (common law malice).

15. **Plaintiff's Theme(s):**

The reporters were careless. On the issue of negligence, plaintiffs argued that KARE acted negligently because it was wrong about the plaintiffs' connection to the indictment and it had information which indicated that it might be wrong. Plaintiffs cited the information that the indicted Peter Vitale was 37, the failure to check the telephone white pages which showed two Peter Vitales, the presence of KARE's reporter at an arraignment where the indicted Peter Vitale appeared, and KARE's failure to stop the 1:30 a.m. broadcast as evidence of KARE's negligence.

16. Defendant's Theme(s):

The plaintiffs were less than candid. The reporters took reasonable care. An odd set of circumstances caused the mistake: two men, in the same city, with the same occupation. KARE's employees stated during the trial that they made an honest factual mistake in the broadcasts and they apologized for it. KARE contended, however, that the mistake was a reasonable one. KARE emphasized that its employees followed normal procedures by reporting information from a credible source, law enforcement personnel, and then checking that information against other sources, a telephone book, and calling the store to determine whether a Peter Vitale worked there. That two other television stations followed similar or identical procedures and also went to Vitale T.V. & Stereo Co. demonstrated the reasonableness of KARE's actions. KARE argued that if plaintiff had in fact told the KARE reporter that he was not the indicted Peter Vitale, as he told the other two stations, then KARE would never have done the story. With respect to the 1:30 a.m. rebroadcast, KARE contended that it was understandable human error for KARE's news management to forget that KARE's engineering department automatically replayed each night's 10:00 p.m. news telecast.

17. Factors Believed Responsible for Verdict:

Odd circumstances; appealing defense witnesses; admission of error; plaintiffs overstated their case.

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

b. **Sympathy for plaintiff during trial:**

Substantial. One juror said they felt sorry for Vitale, but determined there was no negligence.

c. **Proof of actual injury:**

Business records showing decline in sales.

d. **Defendants' newsgathering/reporting:**

e. **Experts:**

No standard of care testimony. Defendants called Arthur Cobb, C.P.A., Minneapolis, to meet testimony by plaintiff and his wife regarding claimed business losses as reflected in plaintiffs' financial documents.

f. **Other evidence:** N/A

g. **Trial dynamics:**

The defense witnesses were amiable, apologetic about the error, and well received. Plaintiffs repeatedly overstated their case. For example, in closing argument, plaintiffs' counsel argued that a "mad race for profits" led KARE to run the story without taking enough time to verify the information.

h. **Other factors:**

The fact that Mr. Vitale's wife testified that she said she did not recall her husband telling the defendant's reporter about the mistake in identity was most helpful on the credibility issues.

18. **Results of Jury Interviews, if any:**

The jurors felt very sorry for the plaintiff, but were convinced an "honest mistake" had been made.

19. **Assessment of Jury:**

Neutral to begin with, reached a common sense result.

20. **Lessons:**

When the standard of liability is negligence, show that the error was one that anyone could make under the circumstances. This means showing that normal procedures were followed, and that there were no "red flags." The defense witnesses must appear honest and appropriately apologetic.

21. **Post-Trial Disposition:**

No appeal.

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Z. Case Name: W.D.I.A. Corporation, d/b/a National Credit Information Network and NCI v. McGraw-Hill, Inc. and Jeffrey Rothfeder
S.D. Ohio (Cincinnati)
Bench trial opinion issued December 18, 1998

1. Date of Publication: August 1989
Business Week

2. Case Summary:

In the September 4, 1989 issue of *Business Week* magazine, McGraw-Hill published an article entitled "Is Nothing Private?," principally written by Jeffrey Rothfeder, which referred to an undercover test the magazine had conducted to assess the adequacy of procedures used in the credit reporting industry to protect the privacy of credit information. Plaintiff W.D.I.A., which was not identified in the article, is a credit reporting agency that was a subject of defendants' test. Plaintiff sued for breach of contract, fraud, and violation of Ohio's Pattern of Corrupt Activities law (the Ohio RICO statute), seeking compensatory damages of nearly \$500,000, punitive damages of at least \$45 million, and a decree which would have, *inter alia*, required McGraw-Hill to divest itself of any interest in *Business Week* and revoked any license for McGraw-Hill to operate in Ohio. No claim for libel was asserted, and nothing in the article was ever alleged to be false.

3. Verdict:

After a bench trial, the Court found that Rothfeder had signed an agreement with W.D.I.A. after having made misrepresentations in his application and that he had then gathered credit information in breach of the agreement. The Court thus held defendants liable for fraud in the inducement and breach of contract. However, the Court declined to award punitive damages, citing the important role played by testers in safeguarding individual rights, the matter of "vital public interest" addressed by the ensuing *Business Week* article, and the absence of malice or ill-will. The Court narrowly confined the compensatory damage award to damages actually caused by the republication acts.

Compensatory:

\$4,010.52 plus prejudgment interest; total judgment \$7,580.95. No award for damages arising out of publication of the truthful article.

Punitive: Denied

4. **Length of Trial:** Seven days
5. **Length of Deliberation:** N/A
6. **Size of Jury:** N/A
7. **Significant Pre-Trial Rulings:**

W.D.I.A.'s Ohio RICO claim was dismissed on April 4, 1995; ruling of Court that no damages would be permitted against defendants arising out of publication of truthful article.

8. **Significant Mid-Trial Rulings:** N/A
9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** N/A
10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):** N/A
11. **Pretrial Evaluation:** N/A
12. **Defense Juror Preference During Selection:** N/A
13. **Actual Jury Makeup:** N/A
14. **Issues Tried:**

Breach of contract, fraud.

15. **Plaintiff's Theme(s):**

In applying for W.D.I.A.'s services, defendants had included misrepresentations, including misstatements of their reason for seeking to obtain consumer credit information. Defendants obtained consumer credit information, including the credit report of then-Vice President Dan Quayle, in violation of an agreement to obtain such information only for purposes authorized under the federal Fair Credit Reporting Act. Plaintiff maintained that,

even though W.D.I.A. had not been named or identified in the *Business Week* article, it was required to expend time and money to avoid being suspended by a supplier of credit information following the publication of the article and that various public relations expenses and the cost of complying with a federal regulatory investigation and subsequent consent order were attributable to defendants' actions.

16. Defendant's Theme(s):

Defendants' test served to inform Congress and the public about a matter of vital public interest. Such tests were commonly used and widely commended within the credit reporting industry; similar tests of compliance with other federal laws had been approved by the courts. Plaintiff had previously failed an undercover test conducted by an industry trade association. Defendants' undercover test was carefully considered and was approved only because no alternative newsgathering method was available. Defendants had not previously engaged in such newsgathering methods. Defendants made misstatements and omissions only to test the effectiveness of procedures intended to prevent unauthorized access to credit information. In conducting the test, defendants took precautions to protect the identity of the firms tested and to guard against disclosure of consumer credit information. Any award of damages flowing from the publication of the truthful article would violate the First Amendment.

17. Factors Believed Responsible for Verdict:

- a. **Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:** N/A
- b. **Sympathy for plaintiff during trial:** Some
- c. **Proof of actual injury:**

Plaintiff failed to prove that a regulatory investigation and compliance costs had been caused by defendants' actions and not by plaintiff's prior conduct, and plaintiff failed to prove that it had lost an opportunity to be acquired as a result of defendants' actions.

d. Defendants' newsgathering/reporting:

The Court found liability on the basis of defendants' use of misrepresentations to gain information but refused to award damages arising from publication of a truthful article and denied punitive damages because the public was served by the disclosure of information of public interest and because defendants had taken care to avoid identifying the plaintiff or disclosing confidential consumer credit information without authorization.

e. Experts: N/A

- f. **Other evidence:** N/A
 - g. **Trial dynamics:** N/A
 - i. **Plaintiff's counsel:** N/A
 - ii. **Defendant's trial demeanor:** N/A
 - iii. **Length of trial:** Seven days (spread over several months)
 - iv. **Judge:** U.S. District Judge Herman J. Weber
 - h. **Other factors:** N/A
18. **Results of Jury Interviews, if any:** N/A
19. **Assessment of Jury:** N/A
20. **Post-Trial Disposition:**

Plaintiff's motion for attorneys' fees was denied on April 26, 1999. Plaintiff's appeal to the Sixth Circuit from denial of additional compensatory damages and denial of punitive damages is pending.

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AA. SUMMARY REVIEWS
PREPARED WITHOUT INPUT FROM DEFENSE COUNSEL

1. **Case Name:** Dixon v. News-Examiner
Sumner County Circuit Court, Tenn.
Hon. Thomas Goodall
April 8 & 9, 1998

- a. **Date of Publication:** February 21, 1997
The News-Examiner
Gallatin, Tennessee

- b. **Case Summary:**

The case involved fabricated quotes inserted by a reporter into an otherwise legitimate story concerning a high school soccer team. The fictitious quotes presented the soccer team's coach as using vulgar and sexually explicit language to charge one of his players with bestiality and unsanitary habits.

The reporter who inserted the fabricated quotes had previously engaged in similar pranks with his editor, but in all previous instances, the editor had caught the material and deleted it before publication. In this case, the editor missed the inserted copy.

Following publication, the newspaper sought to retrieve all unsold copies of the offending edition, fired the reporter, suspended the editor, and printed a front-page apology. The coach and the student, however, sued for libel.

The trial court allowed plaintiffs to assert, and ultimately prove, liability against the newspaper's corporate parent, Gannett Co., despite Gannett's arguments that it was not responsible for its subsidiary's conduct.

- c. **Verdict:** For plaintiffs

Compensatory: Garrett Dixon Jr. (student): \$550,000
Rufus Lassiter (coach): \$100,000

Punitive: Dixon: \$300,000
Lassiter: none

- d. **Length of Trial:** Eight days

e. Length of Deliberations:

One day each for compensatory damages and punitive damages phases.

f. Size of Jury: Four women, eight men.

g. Issues Tried:

Whether the newspaper was negligent in allowing a fabricated quotation to be published; whether the plaintiffs were injured by the fabricated quotation; whether the newspaper's corporate parent was responsible for those injuries; damages; liability for and amount of punitive damages.

h. Notes:

The newspaper argued that the inserted quotes could not be understood as statements of fact because of their gross and vulgar nature. The newspaper also argued that the plaintiffs had failed to prove any damages in that the coach was soon after promoted to assistant principal and the student went on to matriculate as a student at University of Tennessee-Chattanooga.

The plaintiffs, however, established that they were private figures, and the case was tried under a negligence standard.

After trial, the plaintiffs' attorney contended that the plaintiffs would have settled for \$200,000, but that Gannett refused to make any monetary settlement offers. At trial, the plaintiffs had sought \$2 million in compensatory damages and \$5 million in punitive damages.

i. Post-Trial Disposition:

Defendants moved for JNOV or a new trial, but the motion was denied. The judgment subsequently was paid in full.

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2. **Case Name:** Gray v. Trento & St. Martin's Press
S.D. of New Hampshire
Hon. Steven McAuliffe
June 25, 1999

- a. **Date of Publication:** July 1992
The Power House: Robert Keith Gray and the
Selling of Access and Influence in Washington
(Author resided in Washington, D.C.)

- b. **Case Summary:**

The case involved a book that described the rise and fall of Washington lobbyist Robert Keith Gray and his public relations firm Gray & Co.

Gray waited three years after the book was published to bring suit, filing in New Hampshire because of its three-year statute of limitation. Gray had no personal contacts with New Hampshire, and neither did the author. The trial court, however, denied a motion to dismiss the author as a defendant. The court found personal jurisdiction over the author based on the fact that 61 copies, out of a printing run of 40,000 copies, were sold in New Hampshire.

Gray's suit asserted claims of false light invasion of privacy, libel, and intentional infliction of emotional distress based on eight passages in the 430-page book. Gray contended that the statements falsely portrayed him as faking telephone calls from the White House and taking on international clients with the purpose of spying on them for the CIA.

The case was tried under a limited-purpose public figure standard based on Gray's involvement in public affairs as a public relations agent in Washington, D.C.

The plaintiff voluntarily dismissed his claims of false light and intentional infliction of emotional distress. The court granted summary judgment against the libel claims based on four of the published statements.

The jury found for the defendant on all four remaining statements on both the question of whether the plaintiff had proven libel and whether the plaintiff had proven actual malice.

- c. **Verdict:** For defendant
- d. **Length of Trial:** Ten days

e. **Length of Deliberations:** Six to eight hours

f. **Size of Jury:** Eight women and two men

g. **Issues Tried:**

Whether the statements were libelous; whether the statements were published with actual malice; whether and to what extent the plaintiff was injured.

h. **Notes:**

The bulk of plaintiff's testimony involved evidence attempting to show the falsity of the challenged statements. The plaintiff also offered extensive testimony to support his contention that St. Martin Press showed actual malice in agreeing to publish Trento's book when her proposal for the book was allegedly riddled with factual errors.

The plaintiff presented no expert testimony on the question of damages.

i. **Post-Trial Disposition:**

The plaintiff has appealed to the First Circuit, asserting error in a series of pre-trial rulings. The plaintiff has challenged the trial court's refusal to order the author to reveal a confidential source; the trial court's finding that the plaintiff is a limited-purpose public figure; that summary judgment should be granted on the four other dismissed libel claims, and the court's denial of a motion to amend the pleadings on the eve of trial to add 20 more allegedly defamatory statements.

The defendant author has cross-appealed the trial court's determination of personal jurisdiction in New Hampshire.

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3. **Case Name:** Hoffman v. ABC Inc. & L.A. Magazine
Los Angeles County Superior Court, Calif.
Hon. Dickran Tevrizian (bench trial)
January 22 & 28, 1998

a. **Date of Publication:** March 1997
L.A. Magazine

b. **Case Summary:**

The Academy Award-winning actor Dustin Hoffman sued the publisher of *L.A. Magazine* over a photo spread in the March 1997 issue that used a digitally altered photograph of Hoffman from his role in the movie "Tootsie." The photo illustration placed Hoffman's head on the body of a female model. The illustration was accompanied by the caption, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."

Hoffman, who has a reputation within the entertainment industry for refusing to allow his name to be associated with commercial products, sued the magazine for commercial misappropriation under the common law and as well as state and federal law.

The court found that the magazine's conduct was "technological mischief" which would have grave consequences for the future if allowed to go unchecked.

c. **Verdict:** For plaintiff

Compensatory: \$1,500,000

Punitive: \$1,500,000

Attorneys' Fees: \$270,000

d. **Length of Trial:** Eight days

e. **Length of Deliberations:** N/A

The court's written decision following the first phase of the bench trial, on liability and compensatory damages, was issued one week after the close of evidence.

f. **Size of Jury:** N/A

g. Issues Tried:

Whether plaintiff's common law claim for misappropriation was preempted by the federal Copyright Act; whether the magazine's publication of the digitally altered photograph was a commercial solicitation or a news/public affairs publication; whether the illustration was a fair use of Hoffman's likeness; whether the illustration appropriated the plaintiff's likeness to the magazine's commercial advantage; whether the publication was likely to confuse consumers as to the plaintiff's sponsorship or endorsement of the magazine or the designer products in the illustration; whether the illustration was an unfair or deceptive advertisement; whether and to what extent the plaintiff was injured by the publication; whether ABC/Capital Cities, the corporate parent for the publisher of *L.A. Magazine*, had ratified; liability for and amount of punitive damages.

h. Notes:

The court noted that in previous fashion spreads published in the magazine, the magazine had obtained consent from celebrities to have them appear as models. However, in the March 1997 fashion spread that used the Dustin Hoffman photo, the editors did not get consent from any of the film stars who appeared. Moreover, the editors violated an explicit provision of the contract the magazine had with the photo archive that supplied the Hoffman still, *i.e.*, that the photo would not be altered for publication.

The plaintiffs made much during the trial of the conventional wisdom in Hollywood that film actors who lend their name to commercial endorsements have fallen on hard times or are on the skids in their film careers.

An expert witness for the plaintiff, who is an agent who procures endorsement contracts for celebrities, also testified that because Hoffman does not participate in the endorsement market and has not appeared in any commercial advertising, the value of his first-ever endorsement would be as much as \$5 million.

The court based its award of punitive damages on the evidence that showed the magazine's editors knew that their plan to use Hoffman's likeness violated Hoffman's well-known position on the use of his name or image and on evidence that the editors failed to contact their own lawyers when a subordinate staff member expressed concerns about the plan.

i. Post-Trial Disposition:

An appeal is pending before the Ninth Circuit.

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4. **Case Name:** Kanaga v. Gannett Company

New Castle County Superior Court, Dela.
Hon. Herlihy
January 26, 1998

a. **Date of Publication:**

July 5, 1992
The News-Journal
Wilmington, Delaware

b. **Case Summary:**

The case arose out of a complaint that a former patient filed against her obstetrician-gynecologist with the New Castle County Medical Society. The patient had charged in the complaint that her doctor recommended an unnecessary hysterectomy when a much less invasive procedure was all that was medically necessary for the fibroid tumor in her uterus. Two months after filing the complaint, and while it was still pending with the Medical Society, the patient provided a copy of the complaint to *The News Journal* and alleged that her doctor had recommended the procedure for economic gain.

The patient played for the newspaper a surreptitiously recorded tape of the patient's consultation with the doctor. The patient contended that this tape showed that the doctor intended to do the procedure even though it wasn't necessary. The patient, however, failed to inform the newspaper that she had misled her doctor by telling the doctor that the patient already had obtained a second opinion confirming the first doctor's recommendation for a hysterectomy.

The newspaper published the patient's allegations and a no comment from the doctor. Three months later, when the Medical Society, exonerated the doctor of wrongdoing, the newspaper published a follow-up story that reported the result of the Medical Society's review and the negative reaction of the patient. The doctor again declined to comment.

The doctor subsequently sued for libel on both articles, naming both the patient and newspaper, along with the reporter, as defendants. The trial court granted summary judgment on the grounds that the allegations of the patient were protected opinion, but the Delaware Supreme Court reversed. (The Delaware Supreme Court affirmed the trial court's separate ruling that the later article was not libelous.)

The case was tried on the basis of the doctor having private-figure standing, needing only to prove falsity as to the statements by the non-media defendant and negligence as to the media defendants, for purposes of compensatory damages. The actual malice standard was applied to the claim for punitive damages against both categories of defendants.

The case was bifurcated between liability/compensatory damages and punitive damages.

c. **Verdict:** For plaintiff

Compensatory: Against media defendants: \$2.6 million
Against non-media defendant: \$402,000

Punitive: Against media defendants: \$260,000
Against non-media defendant: \$20,000

d. **Length of Trial:** Three weeks

e. **Length of Deliberations:** One-and-a-half days

f. **Size of Jury:** Five men, seven women

g. **Issues Tried:**

As to the media defendants, the issues tried in the first phase of the case were:

Whether the article was defamatory; whether the gist of the article was false; whether the article could be construed as conveying statements that were statements of fact rather than opinion; whether the media defendants were negligent in publishing the article; and whether the publication caused actual damage to the doctor.

In the second phase of the case, the issues tried were:

Whether the plaintiff had shown by clear and convincing evidence that the media defendants had published the article

with actual malice, and whether the plaintiff was entitled to punitive damages.

h. Notes:

In an early pre-trial ruling before the substantive issues in the case were litigated, the plaintiff moved to disqualify the attorneys for the media defendants on the grounds that plaintiff previously had been represented by the law firm that was initially defending the newspaper. The court granted the disqualification on the plaintiff's theory that even though the libel case was not the same as the medical malpractice suit that had involved the plaintiff and the defense firm more than ten years before, there was enough overlap in issues to threaten the former attorney-client relationship.

The trial court initially granted summary judgment to the media defendants on the grounds that the statements were protected by a fair reporting privilege. The decision was reversed by the Delaware Supreme Court.

Following remand, the plaintiff sought financial records on Gannett Company, the corporate parent of *The News Journal*, to support her punitive damages claim. The trial court denied the request.

During the trial, much of the testimony concerned estimating the amount of damage caused to the doctor's practice as a result of, first, the patient's complaint to the Medical Society board and, next, her publication of the complaint to the newspaper and the newspaper's republication of the patient's allegations. This testimony largely involved assertions and comparisons by competing experts. The most evocative evidence, however, appears to be the testimony that prior to the publication of the article, the doctor's waiting list was longer than two months, but after the article, the waiting list evaporated to zero.

In his ruling on the post-trial motions, the trial judge indicated that one of the principal pieces of evidence supporting the finding of actual malice against the media defendants was the defendants' decision to publish the story even though the Medical Society had not yet rendered a decision on the patient's complaint. The trial judge noted that this decision indicated that the newspaper did not care what the true facts were and suspected that the Medical Society would side with the doctor. This evidence suggested that the newspaper published the story in advance of the Medical Society's decision in order to avoid having that decision "drain the newsworthiness" out of the story.

The trial judge also noted that the newspaper's reporter and editors showed dramatically poor judgment in concluding that the proceedings before the Medical Society were matters of public record and in relying on statements of a patient when the medical information that was presented to them was contradictory.

i. Post-Trial Disposition:

Plaintiff moved to amend the judgment seeking an *additur* to the jury's award of punitive damages, arguing that it was too low in light of the fact that it was below the amount of compensatory damages and in light of Gannett's net worth. The trial court denied this motion.

Both the media and non-media defendants filed motions for JNOV and a new trial on a variety of issues, but the motions were denied. The judgment has been stayed pending appeal of both sets of defendants.

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5. **Case Name:** Kim v. Mid-America Export, Inc. & Denver Korean News
Denver District Court, Colo.
Hon. J. Stephen Phillips (bench trial)
May 8, 1998

- a. **Date of Publications:** January & February, 1995
Denver Korean News
Denver, Colorado

b. Case Summary:

The plaintiff, a martial arts instructor and film star, sued for defamation based on several statements printed in editorials published by the defendant newspaper during the lead up to a 1995 libel trial between the same parties.

The 1995 trial resulted in a \$25,000 verdict against the defendant, which was affirmed on appeal by the Colorado Court of Appeals.

In the 1998 trial, the new libel claims involved statements that asserted the plaintiff had been involved in a plot to murder another member of the Korean-American community and that he was "a gangster." The court denied the plaintiff's demand for a jury trial. Following the bench trial, the court found that the plaintiff was a public figure, but that the defendant had published defamatory statements with actual malice.

c. Verdict: For plaintiff

Compensatory: \$5,000

Punitive: \$2,500

d. Length of Trial: 3½ days.

e. Length of Deliberations: N/A

(The court issued a written verdict several weeks after the close of trial.)

f. Size of Jury: N/A

g. Issues Tried:

Whether the plaintiff was a public figure; whether the challenged statements were false; whether the statements were published with actual malice; whether the defendant's conduct warranted punitive damages.

h. Notes:

The defendant publisher initially appeared in the case *pro se*, but prior to trial, he retained an attorney to conduct the trial.

The defendant raised a counter-claim of abuse of process in the case, but the trial judge dismissed the claim on the grounds that the defendant had failed to present sufficient evidence to support the counter-claim. The plaintiff subsequently moved for attorney's fees

on the grounds that the counter-claim was frivolous. The trial court denied the request for attorney's fees.

i. Post-Trial Disposition:

No appeal is pending.

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6. Case Name: Messenger v. Gruner & Jahr Printing and Publishing

S.D. of New York
March 27, 1998
Hon. Lewis Caplan

a. Date of Publication: June 1995
YM, Young and Modern

b. Case Summary:

This misappropriation case involved an advice column published in *YM, Young and Modern*, a magazine aimed largely at young female readers. In the "Love Crisis" column for the June/July 1995 edition, an anonymous letter writer – given the pseudonym "Mortified" – recounted how she had gotten intoxicated and then had simultaneous sex with three men.

The column was illustrated with three photographs of a young woman in poses intended to convey the anxiety of the letter-writer. The captions to the photographs did not identify the young woman as a model. The photographs had been shot for the magazine at photo session in Miami Beach. The model at the time of the photo shoot was fourteen years of age, and she was living in Miami, away from her home in Sarasota, Florida, under the chaperonage of a modeling agency. The family contended that the consent form she signed for the magazine's photo session was not valid because neither of her parents also signed the consent.

The model's mother subsequently sued the magazine's publisher for misappropriation, defamation, negligence, and negligent and intentional infliction of

emotional distress. The trial court early on dismissed all but the misappropriation claim under New York Civil Rights Law §§ 50 & 51.

The publisher defended on the grounds that the photographs were entitled to protection under the newsworthiness exception to the misappropriation cause of action. The trial court denied summary judgment, however, finding that the newsworthiness exception would not be available to the publisher if the jury concluded that the use of the model's photographs was "infected with material and substantial falsity."

The jury found that the photographs could be interpreted by an ordinary *YM* reader to be photographs of the actual author of the letter by "Mortified," and as a result, the jury found that the model was entitled to compensation for misappropriation.

The trial court, however, limited the amount of recovery to only economic losses, refusing to allow the plaintiff to recover for emotion distress or other non-economic injuries.

c. **Verdict:** For plaintiff

Compensatory: \$100,000

Punitive: none

d. **Length of Trial:**

e. **Length of Deliberations:**

f. **Size of Jury:** Eight

g. **Issues Tried:**

Whether an ordinary and average reader of the magazine would have understood the letter by "Mortified" to have been written by the plaintiff pictured in the photo illustrations; whether the publisher was grossly irresponsible in allowing such an interpretation to arise; and whether the plaintiff was proximately injured by the magazine's publication.

h. **Notes:**

During the trial, the plaintiff contended that she was unaware that any photograph taken during her one-day photo shoot for the magazine would be used to illustrate a "Love Crisis" advice column. The defense offered evidence from other models and crew at the photo session indicating that all parties knew the purpose of the photos, *i.e.*, that they were to illustrate an article about a teenager who had just had sex with three men.

The defense sought to offer evidence about an earlier incident involving the same model where she had posed topless for a photographer and then sought to deny that she had given consent for the photo session, but the court refused to admit the evidence. The court also refused to allow evidence concerning the under-age model's sexual relationship with a 21-year-old man while she was living away from home in Miami.

The defense introduced evidence that 92% of the magazine's readership believes that models are used to illustrate articles, and the defense also introduced testimony from the plaintiff's high school classmates that they did not really believe she had written the "Mortified" letter.

i. Post-Trial Disposition:

The publisher moved for judgment as a matter of law and for a new trial, but both motions were denied.

On appeal, the publisher raised the issue it had presented in its summary judgment motion that the newsworthiness exception to the misappropriation claim was not defeated by a finding of fictionalization. The Second Circuit has certified this question to the New York Court of Appeals on the grounds that this issue is unsettled under New York law. The question is now pending before the Court of Appeals.

The plaintiff also cross-appealed on the grounds that the trial court improperly limited the amount of recovery, but this aspect of the case was not addressed in the Second Circuit's *per curiam* order.

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7. **Case Name:** Scripps Howard, Inc. and The Daily Camera v. Krupski
Boulder County District Court, Colo.
Hon. Morris Sandstead
March 25, 1999

a. **Date of Publication:** December 17, 1997
The Daily Camera
Boulder, Colorado
(Newspaper's initial claim of theft against defendant reporter was based on conduct on November 14 and December 10, 1997)

b. **Case Summary:**

This case arose out of the heated journalistic competition in covering the JonBenét Ramsey murder investigation in Boulder, Colorado. Alli Krupski was the police beat reporter for the *Boulder Daily Camera* who became the *Daily Camera*'s lead reporter on the story. During a medical leave following Thanksgiving 1997, a leave that may have been precipitated by the stress of covering the Ramsey story, Krupski was fired by the *Daily Camera*. However, prior to receiving the letter informing her of her dismissal, Krupski returned to the newsroom and collected all her files pertaining to the Ramsey case and announced that she was quitting. Krupski left copies of her materials, but there was an issue over when the newspaper knew this.

Four days later, apparently believing that Krupski was taking the Ramsey files to another media outlet, the *Daily Camera* filed suit against Krupski for theft, claiming that her taking of the Ramsey files was a theft of the newspaper's property. The *Daily Camera* printed a story about its suit against Krupski, and the newspaper's publisher gave interviews about the suit to other media.

Krupski later filed counterclaims in the case for defamation, outrageous conduct, false light, and invasion of privacy.

At the close of the plaintiff newspaper's evidence on the initial theft charge, the trial judge granted judgment as a matter of law, ruling that under Colorado law, there must be a criminal conviction for theft before a civil claim may be brought.

The jury found for Krupski on her counterclaims of defamation, false light privacy, and outrageous conduct. The jury awarded Krupski as punitive damages the amount that the *Daily Camera* had sought in its initial claim.

On post-trial motions, the amount of damages was reduced on the grounds of inconsistent jury verdicts, and the verdict on the false light and libel *per quod* claims was set

aside, but judgment was entered on the libel *per se* and outrageous claim for damage reduced by roughly 50%.

c. **Verdict:** For counterclaimant (reporter)

Compensatory: \$70,000, reduced post-trial to: \$30,000.

Punitive: \$45,000, reduced post-trial to \$30,000.

d. **Length of Trial:** Eight days

e. **Length of Deliberations:** Four hours

f. **Size of Jury:** Five women, one man

g. **Issues Tried:**

Whether Krupski's taking of her materials on the Ramsey case constituted theft; whether the *Daily Camera* was negligent in publishing a story asserting that she had stolen the newspaper property (no fair report privilege defense was allowed); whether the newspaper portrayed Krupski in a false light; whether the newspaper's conduct was outrageous; whether the newspaper's conduct was intentional; whether Krupski was injured by the newspaper's conduct.

h. **Notes:**

The *Daily Camera* initially obtained a temporary restraining order upon filing its theft claim against Krupski, ordering her to preserve the files and not to use them in any way. Soon after Krupski's attorney entered his appearance in the case, the trial court held a hearing on the newspaper's request for an injunction ordering Krupski to return the Ramsey case files. The court held that Krupski had done nothing surreptitious in collecting her files, and that she would not be required to return the originals of what she had taken. Instead, she was required only to provide copies of the material that she had collected.

Following this ruling, the *Daily Camera* sought to dismiss its complaint against Krupski, but Krupski opposed the dismissal on the grounds that she had a right to prove that the newspaper's allegations were unfounded. The trial court refused to dismiss the newspaper's complaint, and two days later, Krupski filed her counter-claims against the *Daily Camera*.

Although the trial court made these initial pre-trial rulings suggesting that there was not sufficient evidence to support the newspaper's claim of theft, the newspaper's witnesses continued to insist during their testimony that Krupski had stolen the newspaper's property. The newspaper's executive editor engaged in a heated exchange on the witness stand with

Krupski's attorney, where the newspaper's witness adamantly insisted that "We're not here because of what the *Camera* did. We're here because Alli stole documents."

One of Krupski's principal defenses to the theft charge – which her attorney established through cross-examination of the newspaper's witnesses – was that none of the 26 items that were listed as stolen were actually missing from the newspaper's possession. The newspaper's theory of its theft claim was that it would have cost at least \$15,000 to replace the material that Krupski had taken. The testimony, however, showed either that the 26 items had never existed or that the newspaper still had possession of the information.

The trial judge ruled that the *Camera* was not entitled to rely on the fair reports privilege because, according to the trial judge's reasoning, the privilege is not available to a media outlet that is a party to the proceeding reported.

During her case, Krupski was able to present a sympathetic story of a young journalist – the job with the *Daily Camera* was her first full-time position after graduating from college at the age of 21 – overwhelmed by an international story, and who had been sabotaged by the internal newsroom infighting at her paper. (There was testimony that her editors and fellow reporters did not trust her reporting and accused her of using sexual favors to obtain information.) She also testified as to the medical complication that she suffered as a result of the stress of working for a newsroom management that did not appear to trust or support her, and she testified about the personal difficulties that she was experiencing at the same time with her parents' divorce and her own romantic break-down.

After the trial some of the jurors indicated that their verdict was intended to punish the newspaper for treating Krupski badly. They said the newspaper should never have gone to court against Krupski over the stolen documents issue.

i. Post-Trial Disposition:

After trial, the court granted Krupski's motion for attorneys' fees as part of her consequential damages as a result of the newspaper's outrageous conduct. The amount of those fees has not yet been determined. As a result, the judgment in the case is not yet final, and no appeals are pending at this time.

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