2001 LDRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL TRIALS

by Tom Kelley

August 24, 2001
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. I have included twenty-two jury trials and one bench trial that have concluded since my last survey. I made every effort to cover all such trials concluded during the period from September 11, 1999 through August 24, 2001. I have also included one trial that was not covered in detail last time (Gray v. St. Martin's Press), two that resulted in hung juries (Wells v. Liddy and Nannicola v. Warren Newspapers), one case that was dismissed at the close of the plaintiff's evidence in a directed verdict (Metlis v. Rhodes). I did not attempt to include all trials that did not result in a verdict or judgment.

The reports in paragraphs A through U below are survey responses prepared by defense counsel. I provided a light edit and some additions and clarifications based upon follow-up telephone interviews. In six cases, summarized briefly in sections X.1 through X.4, counsel were unwilling or unable to comment in detail because of pending appeals, pending similar claims, or other reasons.

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.

Table of Trials Reported

Survey Responses

A. **Case Name:** Alvin Lee Banks v. Viacom Broadcasting of Missouri and Julius Hunter
Court: Circuit Court of City of St. Louis, Missouri
Anna C. Forder, J.
Case Number: 972-7863
Judgment rendered on: June 1, 1999

1. **Name and Date of Publication:** KMOV-TV newscast, June 15, 1995.

2. **Case Summary:**

Plaintiff claimed libel from a newscast that stated he was arrested on gun and drug charges in connection with a police raid on his small liquor and food store. In fact, he was arrested on multiple charges, but all were relatively minor regulatory violations, only one related to guns, and none was related to drugs. Plaintiff was not named in the broadcast, but the video showed him in custody.

3. **Verdict:**

Bench trial – judgment for defendant. The judge concluded:

> The evidence showed that the only statement that was not true in the broadcast was the statement that police confiscated drugs. The remaining statements were true.
>
> The Court finds that defendant is entitled to judgment because plaintiff has failed to show actual damages from the statement regarding the confiscation of drugs. While this single statement might be evidence of sloppy reporting, it does not rise to the level of a defamation given the context in which it was made and given the truth of the remaining statements in the broadcast.

4. **Length of Trial:** One day.

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

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

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

8. **Significant Mid-Trial Rulings:** None.

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, "shadow" juries):** N/A.

11. **Pretrial Evaluation:**

Falsity of the statement about drug charges was a problem, but because of plaintiff's *pro se* handling of the case, we did not expect plaintiff to effectively exploit this issue.

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

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

14. **Issues Tried:** N/A.

15. **Plaintiff's Theme(s):** KMOV falsely portrayed him as a drug dealer.

16. Defendant's Theme(s):

The newscast substantially accurately reported the multiple charges against him. The newscast was protected by the fair report privilege. As to drug charges, he was suspected of drug activity by officials and neighbors and the erroneous statement did not affect his reputation. He was clearly not harmed by the newscast. Finally, he could not prove fault.

17. Factors/Evidence:

(1) Plaintiff's prior testimony in other cases tended to contradict his claims, particularly that the KMOV report damaged him. In other cases, he blamed the city and another TV station (which he never sued) for damaging his reputation. (2) KMOV's witnesses explained their care in reporting and reliance on the police for the information they used.

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

b. Sympathy for plaintiff during trial:

None – by acting as his own attorney, he forfeited sympathy he otherwise might have received.

c. Proof of actual injury:

None. On cross, plaintiff admitted that persons who knew him and thus could identify him from the video knew he had not been charged with any drug violation.

d. Defendants' newsgathering/reporting:

Basic police reporting, in keeping with standard practices in the St. Louis TV market.

e. Experts: None.

f. Other evidence:

In addition to absence of actual damages, the defense asserted a substantial truth/absence of incremental harm defense as recognized in Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993). The defense presented evidence, some of it through cross-examination of the plaintiff, that plaintiff had long been suspected by neighbors and police of drug activity and that he spent the night before his arrest with a female drug user who was arrested with him with drug paraphernalia in her possession.

g. Trial dynamics:

i. Plaintiff's counsel: *Pro se.*

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

The defense had two good witnesses involved in preparing the broadcast.

iii. **Length of trial:** One day.

iv. **Judge:** Inscrutable.

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

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

19. **Assessment of Jury:** N/A.

20. **Lessons:**

A no damage, lack of incremental harm defense can work, at least in a bench trial with a *pro se* plaintiff.

21. **Post-Trial Disposition:** Judgment affirmed on appeal.

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B. **Case Name:** John Doe (Tony Twist) v. TCI Cablevision, Inc., et al.
Court: Circuit Court of City of St. Louis, Missouri
Case Number: 972-09415
Verdict rendered on: July 5, 2000

1. **Name and Date of Publication:**

Spawn Comics. The first publication relevant to the case was in 1992, when the use of plaintiff's name first appeared in issue #6 of *Spawn* Comics. The use of plaintiff's name (Tony Twist) continued in various issues of *Spawn* Comics up to the date of trial.

2. Case Summary:

In the early 1990s, Todd McFarlane, a comic book artist, launched a new comic entitled "*Spawn*." The comic was a huge success and approximately eighteen months after the first issue, a new character appeared in the *Spawn* series. The character's full name was Antonio Twistelli (also known as Tony Twist). The comic character was a stereotypical New York mobster portrayed throughout as an unsavory and generally despicable character. At the time the name "Tony Twist" was first used in the comic, plaintiff, whose full name was Anthony Rory Twist (a/k/a Tony Twist), was a relatively obscure hockey player with the Quebec Nordiques. In 1994, he became a member of the St. Louis Blues professional hockey team and subsequently earned a reputation as an "enforcer," and was recognized in some national sports publications as being perhaps the best fighter in the National Hockey League.

In 1997, Twist's mother learned of the Twist character in the *Spawn* comic book series and alerted her son to the use of his name and the character with which the name was associated in *Spawn*. At no time did Todd McFarlane obtain the consent of plaintiff to use his name. McFarlane admitted that he is an avid hockey fan and that he has used the names of various other professional hockey players for characters in the *Spawn* series.

After learning of the use of his name, Twist filed suit in the Circuit Court of the City of St. Louis against Todd McFarlane, Todd McFarlane Productions (the corporate creator of *Spawn*), Image Comics, Inc. (the printer and distributor), and a host of other distributors of the comic. He also sued TMP International, Inc., a toy company also owned by Todd McFarlane which produced and marketed various plastic figures of some of the characters appearing in the *Spawn* series. Although TMP International never produced or marketed a "Tony Twist" figure, it did use a comic book insert containing the name Tony Twist comic character in the packaging of two of its toys. This was done only for a short time and the name was not visible from the exterior of the packaging.

The plaintiff alleged libel and appropriation of name and sought damages and an injunction to prohibit the use of his name by defendants in the future.

In pre-trial motions to dismiss, the Circuit Court ruled that, based upon the pleadings and exhibits, the libel claim should be dismissed against all defendants because no reasonable person would believe that the comic book character Tony Twist was of and concerning the real live Tony Twist hockey player. There were no resemblances between the physical attributes of the character nor any association with the comic book character to any of the hockey playing attributes of Tony Twist, the real life person. The Circuit Court also dismissed all of the claims against all of the distributors of the comic with the exception of Image Comics, Inc., a company in which Todd McFarlane owned a minority interest and which, the Circuit Court reasoned, might have had some input into the content of the *Spawn* comics.

The case proceeded to trial on the appropriation of name count and the count for injunction against Todd McFarlane, Todd McFarlane Productions, TMP International, Inc., and Image Comics. Inc.

3. **Verdict:**

The jury returned a verdict in favor of plaintiff and against all defendants jointly and severally in the amount of $24,500,000. The amount of the verdict was based upon plaintiff's theory of recovery that plaintiff was entitled to receive 20% of the gross revenues of all of the defendants added together. As noted below, however, this verdict was set aside in its entirety on post-trial motions.

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

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

6. **Size of Jury:** Twelve.

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

The trial court refused to grant defendants' motions to dismiss for failure to state a claim (except with respect to the libel claim) and further denied defendants' motions for summary judgment. Defendants' summary judgment motions stressed the fact that the comic was purely a fictional work protected by the First Amendment and that plaintiff had suffered no damages, as a matter of law, based upon the pre-trial discovery in the case.

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

The Circuit Court refused to grant defendants' motions for directed verdict although the judge indicated that he had "serious doubts" about plaintiff's purported cause of action.

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

The case was not bifurcated and plaintiff's count for injunction was heard concurrently with plaintiff's claim for damages, and the court ruled that it would decide the equitable injunction count subsequent to the jury's decision on the damage claim.

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

11. **Pretrial Evaluation:**

Defendants believed that the plaintiff could not prevail because of the purely fictional nature of the comic book character and the fact that plaintiff had suffered no damages. Based on discovery, defendants were able to show that plaintiff's value for endorsements and appearances had actually increased subsequent to the time that the name was used. This, in

addition to the First Amendment considerations, convinced defendants that plaintiff could not recover.

12. Defense Juror Preference During Selection:

Defendants sought jurors who would identify with the protagonists of the *Spawn* comic book series, who were blue collar Afro-Americans.

13. Actual Jury Makeup: Predominantly as sought.

14. Issues Tried:

Appropriation. The charge required the plaintiff to prove only use of the plaintiff's name without his consent, that defendants gained any advantage from doing so, without addressing First Amendment issues surrounding defendants' editorial use of the name.

15. Plaintiff's Theme(s):

Plaintiff's theme to the jury was that defendants had appropriated his name without his consent and with the intent to gain a financial advantage by doing so. Plaintiff also contended that the association of plaintiff's name with the despicable comic character had injured his reputation and ability to obtain endorsements and contracts in the future. In that regard, plaintiff submitted evidence from a vice president of a health food company who testified that he had offered plaintiff a contract several months prior to trial that was worth $100,000 to obtain plaintiff's endorsement for the company's products, but that after plaintiff advised him of the use of his name in the comic book series, he withdrew the offer. No writings were produced to confirm this alleged offer and the witness admitted that he was a friend of the plaintiff. The trial court, in its opinion denying the injunction and in granting defendants' post-trial motions, characterized this testimony as being "totally incredible."

Plaintiff also offered two "expert" witnesses over objections filed by defendants. One was a professor of marketing from a local university and the other was the agent of several professional football players. Both testified that, had McFarlane sought plaintiff's consent for the use of his name, it is reasonable to assume that it would have cost him 20% of all revenues generated by the sale of all *Spawn* products. That total would be $24,500,000 based upon whether the revenues of all of the defendants in the aggregate. Both defendants testified that they did not know whether defendants' use of the name resulted in any increased revenues to defendants.

16. Defendant's Theme(s):

Defendants emphasized the fact that the character was purely fictional and that no reasonable person would believe that Tony Twist the hockey player was associated with or had any of the attributes of Tony Twist the comic character. Defendants also emphasized the fact that plaintiff had suffered no objective damages and, in fact, that his popularity and ability to attract endorsements increased throughout the period of time when the name was used in the comic series. In addition, the most that plaintiff had ever received in any year for

endorsements was less than $20,000 and that amount was received after his name was used. Prior to the use of his name by McFarlane, plaintiff had received no income from endorsements.

17. Factors/Evidence:

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

At the trial's inception, the jury appeared to have no pre-existing attitudes with respect to the *Spawn* comic books or Todd McFarlane. All of the jurors, however, were aware of the fact that plaintiff was a popular hockey player with the hometown hockey team, but all indicated that this would not influence their opinions.

b. Sympathy for plaintiff during trial:

Plaintiff made an excellent witness having had experience as a radio show host and because he is a very personable communicative individual. He was intelligent and well-spoken throughout, and the jury not only was in awe of his "celebrity" status, but also liked him personally.

c. Proof of actual injury:

The only proof of actual injury was the alleged $100,000 contract referred to above.

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

e. Experts:

Plaintiff produced two experts (Brian Trill, professor of marketing at St. Louis University; Rocky Arreneau, agent for N.F.L. running back Marshall Faulk) who testified that had Todd McFarlane sought and obtained the consent of an athlete of the status of plaintiff to consent to the use of his name in the comic series, it would have cost McFarlane 20% of the total gross revenues of all *Spawn* products. Neither alleged expert had any experience representing or dealing with professional hockey players' endorsements or contracts, and neither of them could cite any examples of any other athletes who had obtained such contracts. The experts' testimony was admitted after the court overruled motions *in limine* to disqualify them and over the objections of defendants. In the post-trial motions filed by defendants, however, the court indicated it had erroneously overruled the motions *in limine* and that neither expert was qualified to testify.

Defendants called an expert (Kit Kiefer, Plover, WI, consultant to trading card industry and expert in market value of sports names and memorabilia) who testified that, based upon the modest ability of plaintiff to have obtained endorsements and contracts during the prior years of his hockey career and in view of the fact that hockey players, generally, are less attractive for product endorsements than athletes in almost any other sport, that plaintiff had suffered no damage as a result of the use of his name in the comic book

series. Indeed, what little solicitation for endorsements he received occurred after the defendants' use of his name.

f. Other evidence: N/A.

g. Trial dynamics:

The trial dynamics were not significant either for plaintiff or defendant, and the trial was conducted without incident and appropriately by both sides.

i. Plaintiff's counsel:

ii. Defendant's trial demeanor:

iii. Length of trial:

iv. Judge:

The judge's charge which did not permit any defense based on editorial use was close to being a directed verdict for plaintiff.

h. Other factors:

Plaintiff was a popular figure locally. This was one of those dangerous "celebrity" cases.

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

19. Assessment of Jury:

The jury was very favorably impressed with the testimony of plaintiff, and was not impressed with the testimony of defendant, Todd McFarlane, who appeared relatively bookish and did not please the jury as much as plaintiff. The jury also believed that defendants had profited by the use of plaintiff's name and were obviously prejudiced in favor of the hometown athlete. After the jury verdict was rendered, members of the jury clustered around plaintiff seeking his autograph and talking with him.

20. Lessons:

Defendants probably underestimated the jury appeal of plaintiff.

21. Post-Trial Disposition:

All defendants filed motions for judgment notwithstanding the verdict or in the alternative for a new trial based upon various errors in the trial, including instructions as well as plaintiff's alleged failure to make a submissible case. The trial court, in an opinion issued on October 31, 2000, sustained defendants' motions on all points and further denied an injunction to prohibit future use of plaintiff's name in the comic series. The case has been

appealed by plaintiff to the Court of Appeals for the Eastern District of Missouri, and briefs will be filed in the summer of 2001.

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C. Case Name: Robert K. Gray v. St. Martin's Press and Susan B. Trento
Court: United States District Court for the District of New Hampshire
Steven J. McAuliffe, J.
Case Number: C.95-285-M
Verdict rendered on: June 15, 1999

1. Name and Date of Publication:

The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington was published in July 1992.

2. Case Summary:

The Power House chronicled the plaintiff's career in Washington, from an aide in the Eisenhower administration to "super-lobbyist" and Chairman of Hill & Knowlton.

The plaintiff claimed that eight statements in the book were false and defamatory, presented him in a false light, and constituted intentional infliction of emotional distress. Prior to trial, the court dismissed four of the statements, and the plaintiff waived his false light and emotional distress claims.

3. Verdict: For the defendants. *See also* 9. below.

4. Length of Trial: Ten days.

5. Length of Deliberation: Approximately nine hours.

6. Size of Jury: Eight.

7. Significant Pre-Trial Rulings:

(a) Dismissal of four statements on summary judgment; (b) denial of motion to add twenty statements; (c) granting motion *in limine* precluding plaintiff from introducing other

allegedly false statements in the book; and (d) protection of the author's confidential source for one of the statements in suit.

8. Significant Mid-Trial Rulings:

The defendants were precluded from introducing evidence that they believed one of the statements in suit was true because the plaintiff had engaged in similar conduct earlier in his career. The ruling precluded both the author and the attorney who did the prepublication review from testifying about the earlier conduct even though it was described in the book, which was an exhibit in the case.

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

Each juror received a written copy of the instructions prior to the charge. The jury completed a special verdict form as to each of the four statements. It first had to answer whether the plaintiff had proved all elements of his claim, other than actual malice, by a preponderance of the evidence, answering the question separately as to each defendant. The jury then had to answer whether the plaintiff had proved actual malice by clear and convincing evidence as to each defendant. The jury answered each of the two sets of questions in the negative for each of the four statements and each defendant. Had the jury answered all questions affirmatively on any of the statements for one or both defendants, it then would have had to answer a separate question on the amount of damages the plaintiff was entitled to recover because of the statement.

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

11. Pretrial Evaluation:

Because the book was exhaustively researched and thoroughly vetted pre-publication by experienced outside libel counsel, the defendants believed the case was defensible, although not without some challenges. For example, the source for one statement in suit was an individual who had been fired by and involved in bitter, contentious litigation with the plaintiff. During the author's interview of him, which she tape-recorded, his hostility toward plaintiff was unmistakable. A transcript of the interview as well as the tape were produced during discovery. The defendants anticipated the plaintiff would argue the source was too biased to provide reliable information, and the author should have known that.

For another statement, the author relied on a confidential source. Although the interview was taped, the source made the statement off the record when the tape-recorder was not on and the author only had a note of what the source said.

For the third of the four statements, the author had no direct source but relied upon information provided by a number of sources and inferences she drew from such information. This statement was the most challenging to defend to the jury. The author

would have to hold their attention while she went over a number of interviews and explained the significance of certain facts and why they supported the statement. Had the interviews not been tape-recorded and transcribed, it is questionable whether the jury would have found the author's testimony credible.

From the outset of the case, the plaintiff took the position that the author was "a front" for her husband. He had written several books and been a journalist for a number of years, whereas this was the first book the author had done on her own. The plaintiff developed potentially damaging information about the author's husband, including a motive to attack the plaintiff, and the defendants anticipated he would seek to present that information to the jury.

The defendants were confident, however, that the author would make a good witness. She had spent over two years researching the book and had developed an incredible amount of material - some 25 banker's boxes - and was thoroughly committed to spending whatever time was necessary to prepare for trial.

12. Defense Juror Preference During Selection:

Jurors with at least some college education who had spent most, if not all, of their lives in New Hampshire. In other words, jurors who would have difficulty identifying with the plaintiff's high profile, "inside the beltway" lifestyle. The defense also looked for women jurors with careers who could be expected to identify with the author.

13. Actual Jury Makeup:

Six women and two men, all of whom were or had worked, and only one of whom had less than some college education.

14. Issues Tried:

As to the four statements, truth and actual malice; for two statements that did not refer to plaintiff by name, the "of and concerning" issue.

15. Plaintiff's Theme(s):

The author had prepared a book proposal which the plaintiff claimed was so riddled with errors that the author was not qualified or responsible enough to take on the project. Although plaintiff ostensibly complained about four statements in the book, his real complaint was over the book's very harsh treatment of him as a Washington super lobbyist and shameless self-promoter.

16. Defendant's Theme(s):

The plaintiff's career as a Washington "super-lobbyist" epitomized the political and cultural changes that had taken place in Washington over the plaintiff's four-decade career.

In the introduction to the book, which the defendants referred to in their opening statement, the author wrote:

> This book is about what Washington has become. Why does nothing get done in Washington? Why does government seem not to understand or care about the problems of the citizenry?
>
> * * *
>
> Today many Americans feel removed from their government. People feel that their governmental institutions no longer understand their problems, and even if they did, are powerless to solve them.
>
> * * *
>
> Gray's story demonstrates how corporate, government, international and private powers can be marshaled for their own purposes and profit, often at the expense of the public good.

17. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

None apparent, although we learned from the judge, who spoke with the jury after the verdict, that some members believed the plaintiff was courageous in pursuing the lawsuit knowing that highly embarrassing, personal information (the plaintiff is gay) would come out at trial.

c. Proof of actual injury:

Other than his own testimony, the plaintiff offered no proof of actual injury. The plaintiff testified that he had, in effect, no choice but to resign his position as chairman of the board of Hill & Knowlton because of the four statements in suit. But no witness he called supported that testimony, or otherwise testified that the four statements had any adverse effect on plaintiff. This did not escape the jury's attention. Some members commented to the judge after the trial that the witnesses called by the plaintiff said only good things about him.

d. Defendants' newsgathering/reporting:

Although not reflected in its verdict on the one statement attributed, in part, to a confidential source, the jury expressed concern to the judge that an author could claim that a confidential source said almost anything.

e. Experts: N/A.

f. Other evidence: N/A.

g. Trial dynamics:

i. Plaintiff's counsel:

The plaintiff was represented by experienced counsel who had tried one other libel case.

ii. Defendant's trial demeanor:

Both the author and editor made good witnesses, and the plaintiff was unable to "score" any significant point during cross-examination.

iii. Length of trial: Ten days.

iv. Judge:

The trial judge was Steven J. McAuliffe. This was his first libel trial subject to the actual malice standard. He made only one ruling during the trial that probably was reversible error. See *supra* at 8. While the trial judge gave counsel latitude to try the case, he did comment on several occasions out of the presence of the jury that the plaintiff was spending an inordinate amount of time on evidence that was not relevant to any of the issues before the jury.

As is the practice in the District of New Hampshire, the judge gave each member of the jury a copy of the instructions while he gave his charge and for use in deliberations. Mindful that a verdict for the plaintiff likely would have been appealed, the judge crafted special verdict questions to minimize the likelihood of a retrial.

h. Other factors:

Two aspects of the plaintiff's case were unusual and potentially problematic. First, rather than call the author, editor, or attorney who had vetted the manuscript, the plaintiff read portions of their discovery depositions as provided by Fed. R. Civ. P. 32. He was permitted to do so even though the defendants were willing to produce all the witnesses during his case. The plaintiff used this tactic because at deposition none of the witnesses had "volunteered" information or tried to get their story across. Thus, by reading the depositions the plaintiff was able to present evidence he believed supported his case without the witnesses offering any explanation to minimize the impact of the evidence. Second, in discovery the plaintiff was provided with all the interview transcripts on which the author relied for the statements in suit. When the plaintiff testified he was permitted, over objection, to comment on many portions of the transcripts he claimed undercut the statements in suit. In the hope of showing the jury what was really going on, the defense on cross-examination got the plaintiff to admit that he was nothing more than his lawyers' "mouthpiece" since they had selected all the excerpts from the interviews. What impact these tactics had on the jury is difficult to assess.

18. Results of Jury Interviews, if any:

As noted, the judge did discuss with all counsel comments the jury made to him after the verdict.

19. Assessment of Jury:

The jury consisted of eight members (the two alternates were not struck at the close of the evidence and participated in the deliberations). Six of the jurors were women, five of whom were in their 40s as was the author. One of the two men was in his early 30s and the other mid-50s. (The plaintiff was 78.) All but one juror had more than a high school education. The one who did not was married to a patent attorney, and may have been the only juror who did not work full time. Two jurors had master's degrees (in business and in education). Finally, with one possible exception the jurors were long-time residents of New Hampshire.

20. Lessons:

The importance of the jury having the written charge. The jury told the judge that when it reviewed the evidence against the elements the plaintiff had to prove the jury had no choice but to rule against him, regardless of what it thought of the book or the parties.

21. Post-Trial Disposition:

The plaintiff appealed to the First Circuit. He did not challenge any of the rulings during trial or the jury instructions. Rather, he appealed five pre-trial rulings: (1) he was a limited purpose public figure; (2) he could not prove actual malice as to one of the statements; (3) three statements were protected expression of opinion; (4) he failed to override the reporter's privilege, allowing the author to protect a confidential source for one statement; and (5) denial of his motion to amend the complaint by adding twenty additional statements that he claimed were false and defamatory. The First Circuit affirmed the trial court on each of its rulings and dismissed the appeal. *Robert K. Gray v. St. Martin's Press and Susan Trento*, 221 F.3d 243 (1st Cir. 2000). Plaintiff then filed a petition for writ of *certiorari* with the Supreme Court, but it refused to hear the case.

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D. **Case Name:** John Greiber v. Capital-Gazette Communications, Inc.
Court: Anne Arundel County Circuit Court, Maryland
Phillip T. Caroom, J.
Case Number: C-98-50742
Verdict rendered on: April 14, 2000

1. Name and Date of Publication:

9/28/97 editorial – "Gary-Weathersbee: County Executive is Playing Dirty."

2. Case Summary:

Plaintiff, an attorney who had unsuccessfully run for State's Attorney three years earlier, claimed he was libeled by an editorial that referred to him as the "unqualified ally [of the County Executive] to whom [the County Executive] continues to feed legal business."

3. Verdict:

$2.5 million:
$1.3 million economic loss
$1.2 million non-economic

4. Length of Trial: Two weeks.

5. Length of Deliberation: Five hours.

6. Size of Jury: Six.

7. Significant Pre-Trial Rulings:

1) Court ruled that plaintiff was a public figure; 2) court denied defendant's motion for summary judgment which argued that, as a matter of law, the publication was not capable

of having a defamatory meaning, the publication was protected opinion and there was no legally sufficient evidence of actual malice.

8. Significant Mid-Trial Rulings:

Court denied defendant's motion for judgment (motion for directed verdict) at the close of plaintiff's case and at close of all of the evidence.

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

Case was sent to the jury with a special verdict form.

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

11. Pretrial Evaluation:

Reasonable likelihood of plaintiff's verdict in low six-figure range. Plaintiff's lowest settlement demand was $900,000.

12. Defense Juror Preference During Selection:

Educated, older, newspaper subscribers.

13. Actual Jury Makeup:

Not well-educated, relatively young, almost no subscribers.

14. Issues Tried:

Defamatory meaning, falsity, actual malice, economic damages.

15. Plaintiff's Theme(s):

Defendant was "out to get" the plaintiff; this was evidenced by defendant's editor's instruction to a younger reporter investigating the plaintiff that she draft an unrelated story (not the editorial in question) even though she told the editors there "was no story." Rather than write the story as requested, the reporter resigned. This reporter was plaintiff's star witness at trial.

16. Defendant's Theme(s):

Editorial was not defamatory because the word "unqualified" was meant as a comment on the plaintiff's lack of qualification for the job of State's Attorney and was not intended as a comment on plaintiff's abilities as a lawyer generally; plaintiff could not prove actual malice because there was no evidence that editorial's writer intended the meaning imparted to the statement by the plaintiff; plaintiff could not prove any economic loss as a result of the editorial's publication.

17. Factors/Evidence:

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

Although plaintiff had been a candidate for public office, he was not that well known by the venire; however, he presented as a good, competent attorney. The defendant newspaper is regarded a populist paper which often investigates ("attacks") people, business, and government.

b. Sympathy for plaintiff during trial: Considerable.

c. Proof of actual injury: Very thin; sympathy/punishment verdict.

d. Defendants' newsgathering/reporting:

Good; the editorial's language (grammar and word selection) was problematic.

e. Experts:

None – court barred plaintiff's expert journalist. Plaintiff had endorsed Joseph Goulden, from Accuracy in Media.

f. Other evidence:

The most difficult aspect of this case was the testimony of a former reporter who claimed she quit because she was pressured to go with a story on a tip that certain county business had been steered to plaintiff, even though, the reporter claimed, her investigation disproved the tip.

Plaintiff also introduced evidence that defendant's editors referred to him as a "sleazebag" and that the author of the editorial called him an "asshole." This evidence was highly inflammatory and should not have been admitted because its marginal relevance was greatly outweighed by its prejudicial effect.

g. Trial dynamics:

i. Plaintiff's counsel:

Good trial attorney – but his conduct during the trial was the subject of post-trial motions.

ii. Defendant's trial demeanor:

Defendant's witnesses acquitted themselves well despite difficult facts.

iii. **Length of trial:**

One day to pick jury; eight days of testimony; verdict on day 10.

iv. **Judge:**

Thorough, unbiased; skittish about making tough calls, *i.e.*, permitting case to go to trial on constitutional malice.

h. **Other factors:**

Case was lost because trial judge allowed evidence of common law malice (*e.g.*, newsroom name calling) and failed to take the case away from the jury even though there was no evidence of constitutional malice.

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

None; jury agreed among themselves that none would speak to counsel following the verdict. One of the alternate jurors (who heard the evidence but did not deliberate) told defendant's counsel that she would have voted for a defense verdict. She also told defendant's counsel that the jury foreman (who lived in a trailer park) told her that he did not read newspapers and "didn't think much of newspapers." Juror number three was a 22-year-old sales clerk for a Victoria's Secret store who was inattentive during trial. Other members of the jury likely deferred to the foreman, who was pro-plaintiff.

19. **Assessment of Jury:** Plaintiff jury.

20. **Lessons:**

Testimony of "whistle-blowers" is difficult to overcome, even with the best cross-examination. The fact that the former reporter was naïve and inexperienced probably made defection more rather than less credible to the jury. Also, if the jury is mad at the media defendant, it does not matter that there is no evidence of constitutional malice. Finally, evidence that the plaintiff was verbally disparaged in the newsroom can fuel the plaintiff's claim that the defendant was "out to get" him.

21. **Post-Trial Disposition:**

Verdict remitted by the trial court to $562,500. Case then settled for a confidential amount.

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E. **Case Name:** Robert Howard v. Susan Antilla
Court: United States District Court for the District of New Hampshire
Case Number: 97-543-M
Verdict rendered on: June 9, 2000

1. **Name and Date of Publication:** *The New York Times*, October 27, 1994.

2. **Case Summary:**

Plaintiff Robert Howard's complaint asserted claims of defamation-by-implication and false light invasion of privacy against Susan Antilla, a former business reporter for *The New York Times*. The article at issue was written by Antilla and published by *The Times* on October 27, 1994. The article reported on a rumor circulating on Wall Street that Howard, chairman of a public company, was in fact a convicted felon by the name of Howard Finkelstein. At trial, it was undisputed that, as reported in the article, the rumor was circulating on Wall Street, was causing significant fluctuations in the stock price of plaintiff's company, and the S.E.C. was unable to tell Antilla whether the rumor was true or false. It also was undisputed that the rumor was false.

The day after the article, *The Times* published an Editor's Note stating that after examining information provided by plaintiff's lawyers, it found no credible evidence to support the rumor and regretted publishing it. That same day, Antilla wrote a *Times* article reporting that "Lawyers for Robert Howard, the chairman of Presstek, Inc., and his son, Lawrence, presented documents to *The New York Times* yesterday to show that Mr. Howard is exactly who he says he is."

The theory of the plaintiff's case, as stated in the district court's jury instructions, was that the article implied that the rumor was true, *i.e.*, implied that plaintiff was in fact Finkelstein. Unlike the defamation-by-implication claim, which was exclusively based upon the theory that the article implied that the Finkelstein rumor was true, plaintiff's false light

case also sought recovery for the article's report that he carried "baggage" that would have been of interest to investors even if it was clear that he was not Finkelstein.[1]

3. **Verdict:**

The jury returned a defendant's verdict on the defamation claim and a plaintiff's verdict on the false light claim, awarding damages of $480,000. A general verdict form was used.

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

5. **Length of Deliberation:** Four hours, ten minutes.

6. **Size of Jury:** Eight.

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

a. The district court denied the plaintiff's motion to compel the disclosure of the confidential sources who told the defendant about the Finkelstein rumor. *Howard v. Antilla*, 1999 U.S. Dist. LEXIS 17045 (D.N.H. 1999).

b. The court granted the defendants' motion for partial summary judgment determining that the plaintiff was a limited purpose public figure. *Howard v. Antilla*, 1999 U.S. Dist. LEXIS 19772 (D.N.H. 1999).

c. On the eve of trial, plaintiff limited his damages claim (which did not include any special damages) to emotional distress and general reputation injuries suffered during the 66-day period following publication of the article. By so doing, plaintiff was able to exclude evidence of a $2.7 million fine imposed on him by the S.E.C. in 1997.

8. **Significant Mid-Trial Rulings:** None.

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[1] The relevant portion of the article reported: "Robert Howard, meanwhile, carries baggage that would be of interest to shareholders and would have been ammunition for short sellers even if it was clear that Robert Howard was not Howard Finkelstein." The article went on to report that plaintiff had founded a personal computer printer company whose shares soared and then plunged before he sold the company and resigned; that two gambling ventures also had "gone under"; that in more recent history, earnings per share at Presstek had plunged to $.17 from $.63; and that in October of 1993, the company's president and chief executive had resigned after only four months in office, "raising the question of who is minding the company store." The article also reported that the S.E.C. settled an insider trading case against plaintiff in February of 1994 and had "fined and censured him." Although plaintiff cross-examined Antilla vigorously on this portion of the article, he introduced no evidence that any of the statements were false, or that Antilla published them with actual malice.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** No significant issues.

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):** No consultants were used.

11. **Pretrial Evaluation:**

Because the article reported on an admitted "rumor" that the plaintiff, then a 71-year-old successful businessman, was a convicted felon and stated that the reporter did not know whether the rumor was true or false, the case presented unique actual malice issues. The defendant testified that she was in effect "agnostic" on the truth of the rumor and did not intend by the article to imply that the rumor was true. She could not, therefore, testify that she subjectively believed that the rumor was true for actual malice purposes, nor could she testify that she did not entertain any doubts as to its truth. For these reasons, and because of the general rule imposing liability for the accurate republication of defamatory statements, the liability defense were considered problematic.

With respect to damages, because plaintiff limited his damages claim to injuries suffered during the 66 days following publication of the article (in order to exclude evidence of a $2.7 million fine imposed on him by the S.E.C. in 1997), and because no special damages were claimed, the false light damages award of $480,000 was, in the words of the district court, "very generous" compensation. At the time of trial, however, the plaintiff was a 78-year-old businessman who had founded several successful businesses in New Hampshire and who, after all, was not a convicted felon as the rumor charged.

12. **Defense Juror Preference During Selection:** Well-educated women.

13. **Actual Jury Makeup:**

Four women and four men. Generally high school education or beyond.

14. **Issues Tried:**

On the defamation-by-implication claim, the only contested elements of plaintiff's case were as follows: (a) whether the article "conveyed the false implication that plaintiff was Howard Finkelstein"; and (b) whether the defendant wrote the article "(1) with the intent to convey or endorse the implication that plaintiff was Finkelstein; and (2) with knowledge that plaintiff was not Finkelstein or with reckless disregard for whether he was."

On the false light claim, the contested elements were: (a) the defendant published an article about plaintiff that placed plaintiff in a false light"; and (b) defendant wrote the article "(1) with knowledge that the article placed plaintiff in a false light, or with reckless disregard for whether the article placed plaintiff in a false light."

15. Plaintiff's Theme(s):

Plaintiff's primary theme was that because of objective evidence within the possession of the defendant, she had to have known that the rumor was false, but decided to write an article that created a controversy where there should have been none, and that her reckless disregard for the truth was emotionally devastating to an elderly and successful businessman and caused a disruption in the sales of stock and his company.

16. Defendant's Theme(s):

Defendant's theme was that she did not intend to imply that the rumor was true, but rather intended that the article educate the average investor on the cause of the volatility of the stock price of shares of the plaintiff's company, and to place those average investors on a level playing field with Wall Street insiders. Another significant theme was that had defendant believed the rumor was false, she would have said so in the article, both because solving the mystery would have made for a better article and because not to do so inevitably would make her look foolish when the truth came out.

17. Factors/Evidence:

Because of the pending appeal, this response will be limited.

The proof of actual injury was limited to 66 days of reputation loss and emotional distress. Plaintiff was permitted to bolster the reputation damage claim by showing that trading in his company's stock was suspended the day the article was published (although the price was back up shortly thereafter).

Both sides' proof and argument focused on the alleged false implication that the rumor was true, without affirmatively suggesting to the jury that the issue of falsity under the false light claim was different from that presented by the defamation claim. Nonetheless, the jury may have felt duty-bound to return a defendant's verdict on the defamation-by-implication claim, but decided to reward the plaintiff for the article's unflattering (albeit accurate) report of "baggage" concerning the plaintiff's business career that was unrelated to the Finkelstein rumor.

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

b. Sympathy for plaintiff during trial:

c. Proof of actual injury:

d. Defendants' newsgathering/reporting:

e. **Experts:**

Plaintiff called a journalism academic (B.U.) and former media critic (*Boston Herald*) Jonathan Klarfield.

The defense called business academic (Dartmouth) Kent Woreach to testify to the importance of the information contained in the article to investors.

f. **Other evidence:** N/A.

g. **Trial dynamics:**

Because of the pending appeal, there will be no response to this subsection.

i. **Plaintiff's counsel:**

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

iii. **Length of trial:**

iv. **Judge:**

h. **Other factors:**

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

19. **Assessment of Jury:**

The magnitude of the false light verdict indicates that the jury was very favorably impressed by the plaintiff, perhaps because of his age, his successful business career, or his connection to New Hampshire, particularly given the absence of special damages and the 66-day limitation on plaintiff's damages.

20. **Lessons:**

The risk of a companion "false light" claim giving a sympathetic jury the opportunity to compensate a plaintiff who failed to prove the elements of his defamation claim.

21. **Post-Trial Disposition:**

Defendant's motion for judgment as a matter of law or for a new trial or remittitur was denied by the district court on March 30, 2000. The unpublished decision is reported at 2001 WL 322025 (D.N.H. 2000), and 29 Media L. Rptr. 1848. The appeal is pending.

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F. **Case Name:** Geneva Irvine, et al. v. Akron Beacon Journal, et al.
Court: Court of Common Pleas, Summit County, Ohio
Brenda Burnham Unruh, J.
Case Number: CV 99 10 3998
Verdict rendered on: March 29, 2000

1. **Name and Date of Publication:** N/A.

2. **Case Summary:**

Plaintiff Edward Irvine was the police chief for the City of Akron, Ohio. His co-plaintiff and wife, Geneva Irvine, had gone to the hospital in October 1998, complaining that she had been abused by her husband. The doctor notified the police, but upon arrival of the police, Mrs. Irvine claimed that she had not been abused by her husband, but rather, had fallen down the stairs. The police report did not become available for several months, and when it was, a story was published in the *Akron Beacon Journal*. Thereafter, following an investigation by the Internal Affairs Division of the Akron Police Department, it was determined that there was insufficient evidence to prosecute the police chief. The investigation was re-opened when a friend of Mrs. Irvine's reported that Mrs. Irvine had told her about abuse (and the friend had allegedly seen evidence of abuse) over a significant period of time. Further investigation by the Internal Affairs Division ensued, but once again it was determined that insufficient evidence existed in order to prosecute.

The *Akron Beacon Journal* determined that it would investigate the methodology utilized by the Akron Police Department in conducting its investigation. In May of 1999, the *Beacon Journal* published a multi-part series about the police department's investigation of its chief. In the interim, Mrs. Irvine had moved away from Ohio and was staying with her relatives in Lake Charles, Louisiana. Mrs. Irvine had not made herself available before publication of the series for an interview. Following publication, the news editors decided

that a last effort would be made to contact Mrs. Irvine to see if she had comment on the series or on the allegations made about her husband. A reporter and a photographer flew from Ohio to Lake Charles, Louisiana. In daylight, they knocked on the door of the house in which she was staying, Mrs. Irvine came to the door and told them she did not wish to speak with them. They left immediately. Thereafter, the reporter and photographer canvassed the neighborhood to see if anyone knew Mrs. Irvine or knew anything about her. The responses were generally negative. The next morning, on their way to the airport, they stopped again near the home in which Mrs. Irvine was staying. They left a copy of the series of articles appearing in the *Akron Beacon Journal* on the windshield of Mrs. Irvine's car under the wiper. (The car was parked in the yard of the home where Mrs. Irvine was staying.) They hoped that if she were to read the series, she would understand that there were people on her side, and that she might be willing to discuss her situation with the newspaper.

Mrs. Irvine and her husband almost immediately filed suit in May 1999. They asked for a temporary restraining order and preliminary injunction. Both motions were denied. Trial was scheduled for October 1999.

Meanwhile, there occurred a strange turn in events. Plaintiffs claimed that they began receiving telephone calls at their home, including some calls in the middle of the night. Those calls were traced to the *Akron Beacon Journal*. The *Beacon Journal* learned that the calls were being made by the telemarketing department using an autodialing machine. The machine focused on the Irvines as one of many homes that had changed phone numbers in the recent past.

Plaintiffs attempted to amend their complaint to include claims of telephone harassment. Because of the proximity of trial, the trial judge would not grant such a motion. Therefore, plaintiffs dismissed their complaint without prejudice and refiled. The new case went to trial in March 2000.

At trial, plaintiffs' claims involved invasion of privacy (common law intrusion) for the trip to Louisiana, invasion of privacy (common law intrusion) for telephone harassment, and violation of the federal Telephone Consumer Protection Act of 1991.

3. Verdict:

The jury found in favor of the newspaper on all newsgathering claims. However, the jury found in favor of the plaintiffs as to violation of the telemarketing laws and invasion of privacy with respect to telephone harassment. They awarded the plaintiffs $500 in compensatory damages, $200,000 in punitive damages, and $6,500 in statutory damages.

4. Length of Trial: Slightly less than three weeks.

5. Length of Deliberation: Approximately one day.

6. Size of Jury: Eight.

7. Significant Pre-Trial Rulings:

The court ruled that the reporter's practice of taping interviews without first obtaining permission of the interviewee would be admissible. The court apparently felt that, though the plaintiff had not been clandestinely interviewed, this general practice should be considered by the jury for punitive damages purposes in the event there were a verdict on the newsgathering claims.

The *Beacon*'s editor had been the managing editor of the *Cincinnati Enquirer* during the Chiquita investigation that led to the series for which that newspaper was later sued. The court ruled that plaintiffs' counsel could not introduce evidence concerning that subject.

The trial judge denied the newspaper's motion to bifurcate the newsgathering issues from the telephone harassment issues.

8. Significant Mid-Trial Rulings:

The trial court significantly limited the defendants' ability to use police tape recordings (as well as some newspaper tape recordings) in evidence. The court allowed defendants to use one recording of Mrs. Irvine telephoning the police to indicate that her husband had abused her for a significant period of time and that a child of the couple may also have been involved in the abuse, but the court would not allow the defense to use tape recordings of friends and relatives who had called in or been interviewed on the same subject.

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

See discussion of court's ruling on motion to bifurcate above.

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

Voir dire took approximately a day-and-a-half because this case had significant local publicity. Each venireman who indicated some knowledge of the case was voir dired in chambers.

We knew that the actions of the newspaper in flying to Louisiana would be troublesome to some jurors. We asked each venireman to rank him/herself from 1 to 10, with "1" being the most private and "10" being the least private. We did not select any jurors who gave themselves lower than a "6" ranking in the "privacy survey."

11. Pretrial Evaluation:

We thought we had a strong chance of losing the newsgathering part of this case, because the telemarketing aspect was so troublesome. We felt that the jury would probably

return a verdict against the *Beacon Journal* with regard to telemarketing activities. We feared that the verdict would be tainted by that.

12. Defense Juror Preference During Selection: See No. 10 above.

13. Actual Jury Makeup: See No. 10 above.

14. Issues Tried: See No. 2 above.

15. Plaintiff's Theme(s):

Plaintiffs' counsel attempted to inject racial issues into the case. He is African-American, as are the plaintiffs. In addition, plaintiffs' counsel attempted to convince the jury that the newspaper's new editors used overly aggressive investigative and reporting techniques.

16. Defendant's Theme(s):

The defendants focused upon the culpability of the police chief in allegedly abusing his wife. The defense implicated the police chief's lawyer as being involved in exercising control over the spouse. Unfortunately, Mrs. Irvine denied allegations of abuse. She engaged in frequent outbursts in court, and often ranted and raved as against the *Beacon Journal* defendants. It was a very emotional three weeks, and part of our theme throughout was to maintain calmness on the part of the attorneys and the defendants sitting in the courtroom.

17. Factors/Evidence:

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

The case was preceded by substantial publicity in the defendant newspaper about racial issues within the police department. The venire inevitably included some persons with strong feelings toward the plaintiff police chief and, to some extent, the newspaper. *See* Sec. 10 concerning *voir dire*.

b. Sympathy for plaintiff during trial:

The chief's wife was prone to outbursts, emotional rhetorical and sobbing, on the witness stand at from the trial table. These were of concern at first, but as the trial progressed they appeared contrived. Largely because of the one tape recording that was admitted (*see* Sec. 8 above), which was very powerful evidence, it is likely that the jury believed that the plaintiff husband was in fact an abuser.

c. Proof of actual injury: Emotional distress.

d. Defendants' newsgathering/reporting: *See* Sec. 10 above.

e. **Experts:**

Plaintiffs: Jack Doppelt, Professor of Journalism, Northwestern University, Evanston, IL.

Defendants: William B. Ketter, Professor of Journalism, Boston College; former editor, *Quincy Patriot Ledger*; currently an editor at *Boston Globe*.

f. **Other evidence:** N/A.

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

Skilled, aggressive, difficult. Sued defense counsel over discovery issue (since dismissed).

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

Appeared well and apparently were well received.

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

iv. **Judge:**

New to bench, fair, but difficult and arguably pro-plaintiff on some evidentiary rulings.

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

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

The jury indicated that they reached their decision in favor of the newspaper on the newsgathering issues within approximately ten minutes. They struggled, however, on the telemarketing issues. They understood that the telemarketing department had simply been negligent in allowing the autodialer to run throughout the night on a couple of occasions. However, because the jurors each have been so bothered by telemarketers, they wanted to send a message to the community.

19. **Assessment of Jury:**

The jury did exactly what we hoped they would do. That is, they separated out the newsgathering activities from the telemarketing issues. Though the award on telemarketing was larger than we had expected, we were glad that the jury's obvious disdain for the paper's telemarketing activities did not influence their assessment of the paper's newsgathering activities.

20. Lessons:

When a client indicates intention to make direct contact with a hostile subject, care should be taken to tightly monitor every aspect of the contact. In this case, a trial would have been unnecessary had there been no neighborhood canvass or if the defendant's reporters had not deposited the published series on the plaintiff wife's windshield.

21. Post-Trial Disposition:

The newspaper has appealed the verdicts on plaintiffs' telemarketing claims. Plaintiffs did not appeal the defense verdict on their newsgathering claims.

Plaintiffs filed a separate lawsuit against the newspaper and its lawyers arising out of the newspaper's publication of medical records obtained during discovery in the first lawsuit. The claims asserted against the lawyers have since been dismissed by the court.

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G. Case Name: Michael Jensen, M.D. v. Mary Sawyers and United Television, Inc., a/k/a KTVX
Court: Fourth Judicial District Court of Utah County, State of Utah
Case Number: 97-00400512CV
Verdict rendered on: December 1, 2000 and December 4, 2000

1. Name and Date of Publication:

KTVX news broadcast, 9/5/95
KTVX news broadcast, 6/17/96
KTVX news broadcast, 11/6/96

2. Case Summary:

Hidden camera investigation of doctor who had prescribed diet pills (Fen-Phen) at a party in the presence of KTVX producer. Reporter took hidden camera to medical clinic and recorded doctor prescribing diet pills for her without conducting a physical exam, after reporter told him she was a TV reporter. Reporter also told doctor that she had been on a diet, but failed to lose weight. Reporter acknowledged at trial that she had not been on a

formal diet. Doctor's receptionist alleged that reporter told her that she might lose her job if she did not lose weight quickly; reporter denied making those statements. The doctor told the reporter how to ensure the effect of the pill by biting into the capsule, and expressed willingness to prescribe Dexedrine for weight loss, while acknowledging that it is illegal in Utah to do so. Doctor was disciplined by state licensing agency. Defendants won awards for their work.

3. **Verdict:**

For plaintiff, $3,110,900.

Defamation/false light on 11/6/96 broadcast, $1,000,000 pecuniary losses, $500,000 general.

False light on 9/5/95, 6/17/96 broadcasts, $510,000 pecuniary, $85,000 general.

Common law intrusion, $50,000 general damages.

Violation of Utah Code Ann. 76-9-402(1)(a), no cause Sawyers, UTV $50,000 general damages.

Sec. 76-9-402(1)(b), $50,000 general damages.

Sec. 76-9-402(1)(c), no damages awarded.

Sec. 76-9-403, no damages awarded.

18 U.S.C. 2511, no cause.

Intentional interference claim, $25,000 general damages.

Punitives total $840,900.

4. **Length of Trial:** October 30 – December 4, 2000.

5. **Length of Deliberation:** Eight hours trial phase; one hour punitive phase.

6. **Size of Jury:** Eight, plus two alternates.

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

Summary judgment on fraud, negligent misrepresentation, defamation claims on 9/5/95 and 6/17/96 broadcasts granted; summary judgment on remaining claims denied; plaintiff's damage theory disallowed.

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

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

Bifurcation not allowed; special verdict forms used.

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

Extensive jury questionnaire used.

11. Pretrial Evaluation:

Claims should have been dismissed on summary judgment; difficult venue, i.e., small conservative community, local doctor; issues involving investigation, deception, hidden cameras may hurt client.

12. Defense Juror Preference During Selection:

Educated, watch news, no bias toward doctors, consider strong religious affiliation.

13. Actual Jury Makeup:

Primarily L.D.S. (Mormon), some skepticism of media and doctors, primarily high school education.

14. Issues Tried:

Whether use of deception and hidden camera constituted actionable intrusion, violation of state and federal law; whether broadcasts defamed plaintiff or placed him in false light under a negligence standard; punitive damages issues.

15. Plaintiff's Theme(s):

Plaintiff doctor has accepted his wrongdoing by stipulating to sanctions by state, KTVX misrepresented, intruded on his privacy, broadcast untrue statements and did not broadcast others which were favorable to plaintiff.

16. Defendant's Theme(s):

Plaintiff engaged in unlawful and unethical behavior, many bad acts were not publicized; KTVX broadcast only after careful review of facts and belief in truth; public interest story had to be investigated and reported.

17. Factors/Evidence:

Several doctors testified for and against, extensive evidence by doctors and licensing agency that plaintiff committed unlawful and unethical acts; plaintiff's experts characterized

acts as "not that bad"; extensive viewing of hidden camera footage, footage of subsequent interview which was not broadcast.

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

Mild skepticism of both doctors and media were expressed by some.

b. Sympathy for plaintiff during trial:

No obvious sympathy; at times it appeared that some jurors were skeptical of plaintiff's testimony and manner. Plaintiff was a former football player at local university.

c. Proof of actual injury:

Economic testimony regarding plaintiff's change in his medical practice.

d. Defendants' newsgathering/reporting:

Reporter represented that she wanted diet pills, used hidden camera, secretly recorded telephone conference with plaintiff's receptionist. Some of the editing arguably created false impressions.

e. Experts:

Both sides called experts in journalism. Plaintiff: Alf Pratt (B.Y.U.) and Ralph Barney (B.Y.U.). Defendant: Robert Avery (University of Utah) and Joseph Russomanno (Arizona State University).

Defendants' journalism experts were more credible, but one had difficulty re omissions from broadcasts; medical experts generally favored defense position. Plaintiff's journalism experts relied on ethics codes.

f. Other evidence:

There was testimony that plaintiff prescribed diet pills at a party, and to a nurse without following state law.

g. Trial dynamics:

i. Plaintiff's counsel:

One attorney was effective, the other was disjointed in his examination and argument.

ii. Defendant's trial demeanor:

Defendant reporter was generally good, possibly not serious enough.

iii. Length of trial:

Too lengthy due to extensive testimony from plaintiff and numerous expert witnesses allowed by judge.

iv. **Judge:**

Fairly good, mild mannered, but reluctant to make important rulings.

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

18. Results of Jury Interviews, if any:

The two alternate jurors who were dismissed before deliberations have both expressed disagreement with verdict and opinion that plaintiff engaged in bad acts and stories needed to be broadcast.

19. Assessment of Jury:

Very difficult to tell leanings during trial. The foreperson did appear to be skeptical of defendant reporter. Others expressed obvious disbelief during portions of plaintiff's testimony.

20. Lessons:

Hidden cameras and deception may prove to be insurmountable at trial, in spite of bad acts of subject. Undercover reporting was compounded by failure to broadcast subsequent statements of plaintiff in follow-up interview, and some questionable editing. Watch out for ethics codes. Very difficult venue.

21. Post-Trial Disposition:

Post-trial motions have been filed and will be fully briefed on 6/7/01. Hearing date set in September 2001.

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H. Case Name: Stephen Levin v. WJLA-TV
Court: Circuit Court, Fairfax County, Virginia
Case Number: 175329
Verdict rendered on: November 20, 2000

1. Name and Date of Publication:

The plaintiff's claims were based on six different "publications": a WJLA-TV news broadcast that aired on November 18, 1997; two televised promotional announcements for that broadcast that aired November 14-16, 1997; another promotional announcement that ran on local radio stations on those same dates; a promotional advertisement for the broadcast published in the *Washington Post* on November 15, 1997; and a statement allegedly made off-camera by a WJLA producer to a doctor interviewed in connection with the broadcast during the course of WJLA's newsgathering.

2. Case Summary:

On its 11:00 p.m. newscast on November 18, 1997, WJLA's "I team" reported that several women who had been patients of Dr. Stephen Levin, an orthopedic surgeon in Northern Virginia, had pursued complaints with the Virginia Board of Medicine alleging that he had improperly treated them for back pain – a condition that he described as "piriformis syndrome" – by repeatedly and painfully inserting his hand into their vaginas. The broadcast further reported that, after the Board rejected all of these complaints for "insufficient evidence" following a confidential hearing, one of the women served a civil action on Dr. Levin complaining of these "painful and humiliating and highly unusual pelvic examinations."

The broadcast depicted excerpts of interviews with Dr. Levin's former patients, explained that he had been removed from Fairfax County, Virginia's workers compensation list, and reported that three different specialists in the treatment of back pain – at three different hospitals – told WJLA they had never heard of Dr. Levin's treatment technique. The broadcast reported that Dr. Levin denied he had done anything wrong and that he had provided WJLA with literature describing pelvic exams as appropriate in the diagnosis of back pain. (Dr. Levin had declined to be interviewed unless his counsel was permitted to approve any editing of such an interview for broadcast – a request that was denied.)

WJLA ran separate promotional announcements in the *Washington Post*, on radio, and on its television station in the days preceding the broadcast. The announcements were written by WJLA's marketing staff before the broadcast itself was completed, based on a videotape of the reporter's interviews with the aggrieved former patients. The *Post* advertisement, which neither identified Dr. Levin by name nor contained his picture, urged viewers to watch the broadcast by asking, "When does a physical examination become sexual assault?" and answering, "When you go to the 'Dirty Doc.'" The radio announcement referenced an otherwise unidentified "x-rated doctor" who has a "very, *very* peculiar method for treating his patients," and reported that "women who have received his treatment call it

sexual assault." The television promotions each referenced an "intimate violation of women at the hands of their doctor," and one version, which did not identify Dr. Levin in any manner, asked "When does a doctor's treatment become a sexual assault?" The other version included videotape footage of Dr. Levin introducing himself to a patient (actually a WJLA producer) in his examining room, footage secured with a hidden camera by the producer, who had made an appointment, ostensibly to seek medical treatment from Dr. Levin, as part of her investigation.

In addition, Dr. Levin claimed that the producer had falsely described his treatment method as "vaginal stimulation" to another doctor that she interviewed during the course of her investigation. The producer, however, denied that she ever made such a statement and the other doctor was never asked whether it was in fact made to him.

Dr. Levin asserted causes of action for:

(1) defamation (one count based collectively on all six separate publications and broadcasts);

(2) common law and statutory conspiracy (for allegedly conspiring with one of the aggrieved former patients to put Dr. Levin out of business);

(3) trespass (based on the producer's entrance on to Dr. Levin's business premises with a hidden camera under false pretenses); and

(4) violation of Va. Code § 8.01-40(A) (commercial misappropriation) (for the use of hidden camera footage depicting Dr. Levin's name and likeness in one of the televised promotional announcements).

Dr. Levin named as defendants the corporate entities that own and operate WJLA, the producer and on-air reporter, and the former patient with whom they had allegedly "conspired." Prior to trial, the plaintiff voluntarily dismissed the reporter as a party, largely so that the reporter – who no longer worked for the station at the time of trial – could not sit at counsel's table or otherwise be present in the courtroom.

3. Verdict:

For plaintiff on (1) defamation – $2,000,000 (undifferentiated actual and presumed); and (2) statutory misappropriation – $575,000. For defendants on conspiracy claims. Plaintiff dropped his trespass claim before the case reached the jury.

4. Length of Trial: Twelve days.

5. Length of Deliberation: Two days.

6. Size of Jury:

Nine during trial, six deliberated (three were excused).

7. Significant Pre-Trial Rulings:

After granting Dr. Levin several opportunities to replead, the trial court ultimately denied defendants' demurrer to the legal sufficiency of his various causes of action, including arguments that, *inter alia*, (1) the broadcast was not reasonably capable of a defamatory meaning; (2) three of the four promotional announcements were not "of and concerning" Dr. Levin; and (3) promotional announcements for a news broadcast do not violate Virginia's misappropriation statute as a matter of law.

Virginia summary judgment practice is virtually non-existent, as a party cannot use deposition testimony to support the motion. Thus, it was, as a practical matter, impossible to prevail on a summary judgment motion arguing plaintiff's failure to carry his burden of proving that defendants violated the applicable standard of care.

Prior to trial, the court ordered several hospitals to produce to WJLA their peer review records concerning Dr. Levin. The hospitals appealed to the Virginia Supreme Court, which reversed, finding that such records are confidential, even in the context of a defamation action brought by the affected doctor. Also prior to trial, the court granted Dr. Levin's motion in limine excluding as hearsay a letter, written prior to the broadcast, from a workers' compensation administrator to Fairfax County explaining that it was terminating its contractual relationship with Dr. Levin because "his practice behavior is inconsistent with the ethical standards of medical practice."

8. Significant Mid-Trial Rulings:

The trial judge issued several significant evidentiary rulings during the course of the trial. Most importantly, although he ruled that a physical therapist practicing in Northern Virginia could not testify as an expert witness concerning the propriety of Dr. Levin's treatment method, the trial judge held that she could testify as a "fact witness" that she regularly treated "piriformis syndrome" through the vagina. In addition, the court ruled that an osteopath and a gynecologist could testify as expert witnesses that Dr. Levin, an orthopedic surgeon by training, satisfied a "national standard of care" when he treated "piriformis syndrome" vaginally. The trial court also ruled that Dr. Levin's expert economist could testify to damages allegedly sustained by his incorporated medical practice and, on Dr. Levin's motion, it excluded as hearsay the testimony of a former patient, who was diagnosed by him as having "piriformis syndrome" and who he treated for that condition vaginally, that she was subsequently diagnosed by another physician as having a herniated disc.

The trial court denied defendants' motions for directed verdict both at the close of plaintiff's case and at the close of the evidence. Those motions renewed several of the grounds previously raised on demurrer and argued, *inter alia*, that Dr. Levin, who sought to recover presumed damages, had not carried his burden of proving constitutional malice and

that he could not recover duplicative damages for emotional distress based on defamation and violation of the Virginia misappropriation statute.

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

The trial court adopted a verdict form proposed by the plaintiff that required the jury to make a single finding with respect to whether he had been defamed by the six different publications and broadcasts considered together. The court also denied defendants' request that the jury be instructed that Dr. Levin could not recover (1) the same damages for libel and misappropriation, (2) for damages sustained by his corporation, or (3) for damages sustained as a result of an earlier broadcast that was not sued upon. In addition, the jury instructions – based on pattern instructions widely used in Virginia – treated all six publications as "libel per se" and affirmatively instructed the jury that they collectively communicated the defamatory meaning that he had sexually abused his patients.

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

11. Pretrial Evaluation:

Plaintiff made no settlement demand until two weeks before trial. Offer: $6,000,000. Defense estimate of award in the event of adverse verdict: $2,000,000.

12. Defense Juror Preference During Selection: Professional women.

13. Actual Jury Makeup:

Two professional women; three men; one non-professional woman.

14. Issues Tried:

Defamation, statutory misappropriation, and conspiracy.

15. Plaintiff's Theme(s):

Plaintiff argued that WJLA, primarily through its producer, conspired with one of Dr. Levin's former patients to put him out of business. (Virginia's conspiracy statute provides treble damages and attorneys' fees.) In that regard, plaintiff emphasized (1) the producer's alleged assistance to the women in contacting authorities and in filing four civil claims against Dr. Levin; (2) the producer's use of a hidden camera; (3) the producer's allegedly defamatory references to "vaginal stimulation" in her communications with other doctors; and (4) the promotional announcements provocative references to "the X-rated doctor" and the "Dirty Doc." Plaintiff also relied on evidence – elicited from other doctors, other of his patients, and his expert witnesses – that he is a good doctor who employs sound medical techniques used by other health care practitioners. Plaintiff also argued that the complaining women were not victimized, or they wouldn't have continued their visits to the doctor.

16. Defendant's Theme(s):

Defendants' primary theme was that the treatment Dr. Levin prescribed for virtually all of his patients who complained of low back pain – the technique of "vaginal manipulation" – is not acceptable medical treatment. Defendants' secondary theme was that the broadcast was a fair and accurate report describing the complaints of Dr. Levin's former patients and that, even if the promotional advertisements were not "fair," they were accurate.

17. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

The jury was divided in their sympathies. (*See* No. 18 below.)

c. Proof of actual injury:

The court permitted testimony regarding damages allegedly sustained by Dr. Levin's incorporated medical practice, rather than only those losses he personally sustained. The court also permitted testimony that Dr. Levin's wife was dying of ovarian cancer at the time of the broadcast, that she heard about it despite his efforts to keep her from learning of it, and that it ruined their last days together. The defendants sponsored testimony that (1) any decline in Dr. Levin's practice was attributable to (a) his decision – unrelated to the broadcast – to move his office to smaller quarters and to dismiss his physical therapist who had generated significant revenues and (b) to cut back his practice in the wake of his wife's illness, and that (2) any emotional distress was attributable to the several complaints made to the Virginia Medical Board, Fairfax County, and in civil actions against him prior to the broadcast, as well as to the press conference held by his former patients after the Board's ruling.

d. Defendants' newsgathering/reporting:

Dr. Levin contended primarily that WJLA reached a premature conclusion, based solely on the accusations of a few disgruntled former patients, that his treatment method constituted "sexual abuse" and that it thereafter ignored contrary evidence and declined to investigate adequately. Specifically, Dr. Levin contended that WJLA disregarded voluminous materials he and others sent to the producer in defense of his conduct in the days and even hours before the broadcast. In this regard, there was evidence that WJLA forwarded some of this information to one of the physicians it had consulted and that he assured WJLA that the information in no way affected his opinions or the statements he had made on camera. There was also evidence, however, that this same doctor later left a message with a receptionist at WJLA, on the evening of the broadcast after receiving a phone call from Dr. Levin, that he no longer wished to appear on the broadcast.

In addition, Dr. Levin emphasized the broadcast's use of hidden camera video footage of Dr. Levin in his examining room, as well as provocative language of the promotional announcements and the manner in which they were prepared. Finally, Dr. Levin asserted that the producer and reporter attempted to "create" a story by conspiring with one of his former patients to arrange for the service of a civil action against him.

e. Experts:

The court permitted testimony of a gynecologist and an osteopath that treating "piriformis syndrome" vaginally, as Dr. Levin does, satisfies a "national standard of care" and that they treat the "same" condition in the "same" way. A physical therapist was also permitted to testify as a "fact witness" as to how she treats muscle pain through the vagina. The jury found these experts compelling in contrast to the defendants' expert, an orthopedic surgeon like Dr. Levin, who testified that the treatment was not in the medical literature and was not one that a doctor trained in orthopedic surgery would consider appropriate. The jury appeared hopelessly confused by the medical testimony, a problem not overcome even by the testimony of former patients that, *inter alia*, (1) Dr. Levin's treatment made them feel "dirty" and "humiliated"; (2) some of them felt him having an erection while he examined or treated them; and (3) he performed inappropriate breast exams on patients complaining of shoulder pain.

Virginia does not permit journalism experts.

f. Other evidence:

Dr. Levin offered testimony that he explains his proposed course of treatment to his patients, that he is not in the room alone with them when he examines or treats them , and that several patients who later complained about him had voluntarily returned for further treatments. Another physician who refers patients to Dr. Levin testified, along with some of those patients, that they were satisfied with Dr. Levin's treatment.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' counsel are excellent lawyers experienced in defamation litigation. (this 150-lawyer firm took the case because one partner is a patient of plaintiff.) They developed persuasive trial themes and structured their presentation of evidence in a very effective fashion, beginning with the testimony of their several expert witnesses (including the physical therapist who purportedly testified as a "fact" witness), then moving to the other doctors and former patients who were satisfied with Dr. Levin's care, and finally turning to WJLA's newsgathering, the promotional announcements, and his damages. They barely mentioned the broadcast itself.

ii. Defendant's trial demeanor:

The jurors apparently had strong, negative reactions to WJLA, and to the testimony of the marketing staff concerning the promotional announcements. (*See* Note 18 below).

iii. Length of trial:

Although there were twelve trial days, the trial actually lasted much longer to accommodate the judge's motion calendar and other "dark" days. In an effort to accelerate the pace of the trial, closing arguments commenced in the late afternoon and defendant's closing was actually delivered in the evening after a long day of trial.

iv. Judge:

Fairfax County does not have an individual calendar. As a result, the trial judge, who was entirely unfamiliar with the case when the jury was selected on the first day of trial, did not hear pre-trial motions. From the outset, however, the judge clearly favored the plaintiff and was particularly and visibly hostile to the WJLA producer during her testimony. He told counsel mid-trial that the verdict could be very large and that the parties should settle. WJLA offered to talk settlement if the plaintiff would come down from his initial demand of $6,000,000, but he refused.

h. Other factors:

Defendants were hampered both by Virginia's restrictive summary judgment practice and by Fairfax County's lack of an individual calendar system. Taken together, they effectively deprived the defendants of any opportunity (1) to narrow the issues prior to trial; (2) to educate the trial judge concerning the intricacies of First Amendment and defamation law; and (3) to take advantage of trial techniques such as pre-instructions, interim summations, and the like.

18. Results of Jury Interviews, if any:

Only two jurors agreed to brief telephone interviews following the trial, but they were fairly consistent in their descriptions of the jury's deliberations. According to these jurors, the jury was effectively divided into two "camps." One camp, which strongly supported Dr. Levin and wanted to award him the $30,000,000 requested by plaintiff's counsel in his closing, found the plaintiff's medical testimony compelling and concluded that WJLA had done inadequate research before the broadcast and failed to present a balanced story. The use of the hidden camera was particularly offensive to these jurors, especially the inclusion of a clip from that video showing Dr. Levin's face in a promotional announcement, as were the promotional announcements and the apparently cavalier testimony of WJLA's marketing staff concerning their preparation. These jurors reacted negatively to WJLA. Finally, some of these jurors thought the women witnesses who complained had no reason to do so because they continued their treatments with plaintiff.

One of the jurors was the wife of a writer for a quality print media publication with national circulation. Counsel suspect this juror, who favored the plaintiff, was prone to be critical of the TV news gathering and media content involved in this case.

Jurors in the other "camp," however, were apparently moved by the testimony of Dr. Levin's former patients concerning his treatment of them and in fact concluded that he had behaved improperly. These jurors were of the view that, even if the promotional announcements were inappropriate and WJLA's newsgathering methods objectionable, they did not want to "reward" Dr. Levin by awarding him money. In fact, these jurors felt that Dr. Levin should be "stopped" from continuing to treat patients in the manner he had.

In the end, the jury's verdict was apparently a "compromise" verdict between these polar positions. Apparently, the deliberations were "extremely unpleasant," which purportedly accounts for the jurors' expressed desire to put the experience behind them and not to talk at length (or at all) with counsel about their experience.

19. Assessment of Jury: See No. 18 above.

20. Lessons:

The fact that a large law firm represented the plaintiff made settlement impossible. The plaintiff's counsel spent so much time and money on the case (three lawyers at depositions, etc.) that they needed to win the conspiracy claim, which comes with statutory attorneys' fees, just to break even. In the end, they "lost" money even though they won.

21. Post-Trial Disposition:

In Virginia, there is no appeal to an intermediate appellate court in a civil case of this kind and no right of appeal to the Virginia Supreme Court. WJLA has filed a petition for discretionary appeal to the Virginia Supreme Court with the support of several amici.

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I. Case Name: Marich v. QRZ Media, Inc.
Court: Superior Court of the State of California, County of Los Angeles
James C. Chalfant, J.
Case Number: BC 176082 (consolidated with BC 204561)
Verdict rendered on: August 1, 2001

1. Name and Date of Publication:

Segment of television show *LAPD: Life on the Beat* entitled "The Final Act." Aired February 5, 1997.

2. Case Summary:

A segment of a ride-along police reality television program showed two LAPD officers responding to a call reporting a body found dead in an apartment from an apparent drug overdose. The segment showed the body and showed an officer calling the parents to notify them of his death. After the California Court of Appeal ruled that the parents could not sue over the showing of the body, they proceeded with a claim that the officer's microphone picked up sounds from their side of the call. The claims were for intrusion into seclusion and violation of Cal. Penal Code § 632.

The production company, QRZ Media, Inc., declared bankruptcy shortly before trial, so the action was stayed against it. The action against the City of Los Angeles and the two LAPD officers, consolidated for trial with the action against the media defendants, was settled shortly after trial began. The only remaining defendant was Metro-Goldwyn-Mayer Studios, Inc., the parent of the company that distributed the television series.

3. Verdict:

Verdict for the defense. The jury found 8-4 on both the intrusion and Penal Code claims that the QRZ sound operator did not intend to record the plaintiffs' side of the telephone call. Although a 9-3 verdict is normally required, the parties stipulated after learning the jury was deadlocked 8-4 on intent (without knowing which side had the majority) to accept an 8-4 verdict on liability but require a 9-3 verdict on damages.

4. Length of Trial: 2½ weeks.

5. Length of Deliberation: Five days (verdict rendered early morning of the sixth).

6. Size of Jury: Twelve.

7. Significant Pre-Trial Rulings:

(1) The trial court ruled that plaintiffs could recover only for distress they suffered from the recording and broadcast of the telephone call, not of the body, though it allowed the entire segment (including pictures of the body) to be shown to the jury.

(2) The trial court ruled that the distributor of the segment, MGM, had no direct liability for any intrusion or statutory violation: distributing a broadcast that it did not participate in recording was not actionable. It rejected, however, MGM's claim on summary judgment that the undisputed facts showed it was not vicariously liable as the producer's partner or principal.

(3) The court disallowed punitive damages against MGM based on vicarious liability.

(4) The trial court ruled that, if liability were established, plaintiffs could recover damages from the fact that the recording of the telephone call was later broadcast.

(5) The trial court instructed the jury that the intrusion or statutory violation occurred, if at all, only at the time of the recording, and that any later editing of the segment for broadcast (including sound enhancement) did not constitute intrusion or statutory eavesdropping.

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

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

Limiting instructions about the purposes for which the entire segment was admitted were read whenever the segment was shown, including before opening statements.

The judge allowed additional argument on the issue of intent after the jurors became deadlocked on that issue.

A special verdict form was used.

The court announced at the start of trial a firm date for ending the trial. He cut short plaintiffs' ability to call further witnesses when the date drew near.

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

11. Pretrial Evaluation:

Because the pictures of the deceased were gruesome and disturbing, there was a significant danger that the jury would disregard the instruction that the case was about the telephone call only and would find liability based primarily on anger over the broadcast of

the pictures. A finding of liability for this reason seemed likely, and the damages were expected to be very low (if the jury followed the instructions) or very high (if it did not).

12. Defense Juror Preference During Selection:

Preferred jurors who were not the primary caregivers for children at home and who were not in the "helping" professions. Preferred men and those who thought that civil damages awards were too high.

13. Actual Jury Makeup:

After an alternate substituted in, seven women and five men. Four African-Americans, three Caucasians, two Hispanics, two Asian-American, and one Armenian-American. Four government civil servants, four professionals, two clerks, one blue collar worker, and one nurse.

14. Issues Tried:

Liability and damages for intrusion and violation of Penal Code § 632.

15. Plaintiff's Theme(s):

The television show intruded into the most private of all possible moments: when a parent learns of a child's death. By including their voices in the episode, the defendants forced them to participate against their will in what they considered to be a desecration of their son's body. The television show preyed on people's grief to make money for callous and untrustworthy companies. The plaintiffs were emotionally destroyed by this intrusion and have never been the same.

16. Defendant's Theme(s):

The other side of the telephone call was recorded without knowledge of QRZ at the time of recording, and was included by mistake as a result of audio enhancement during editing; if the distributor (MGM) had been notified of the problem before the segment aired, it would have stopped the segment. The plaintiffs would not accept any apology, however, because they were blinded by their understandable grief and anger over their son's overdose and were looking for someone to blame.

17. Factors/Evidence:

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

We were concerned about jurors who had strong views against "reality" television or the media. We succeeded in eliminating those who admitted to such views.

b. Sympathy for plaintiff during trial:

Through the jury instructions and argument, we tried to focus the jury on the telephone call and prevent it from allowing sympathy over the plaintiffs' reactions to the pictures of their son to enter into the decision. We tried to minimize sympathy for the plaintiffs by noting that they waited over two months after learning about the crew's filming in the apartment, until the day before the broadcast, to complain to the producer, at which point the producer said (as he then believed) it was too late to stop the broadcast. This gave jurors some reason to conclude that they would not have suffered the same fate had they been in plaintiffs' position.

We also noted instances where the plaintiffs seemed to be exaggerating the importance to them of the broadcast of the telephone call, as opposed to the pictures of their son. (*See* below.) We also called into question Mrs. Marich's claim that she happened to view the broadcast by mistake after midnight in her Houston home; she claimed that she knew the episode was airing that night but that she did not know it ran in Houston.

The plaintiffs were both professional actors in their seventies. Although we feared that they would be powerful and practiced witnesses, at trial their presentation did at times seem like they were acting. We helped suggest this to the jury through evidence from their own psychiatric expert that plaintiffs both had "histrionic" personality traits, which meant they were prone to exaggerate and over-dramatize.

c. Proof of actual injury:

We attacked in several ways the claim that the plaintiffs suffered damage from the recording or broadcast of the telephone call.

First, trying to use the effect of the pictures of the deceased to our advantage, we argued that plaintiffs' real distress was from the broadcast of those images, not from the broadcast of the telephone call.

Second, we used plaintiffs' medical records to show that they had always complained to their doctors about the effect on them from the pictures of their son, not from the telephone call. We argued that the claim of distress from the telephone call arose only after the court ruled they could not recover damages from the broadcast of the pictures of their son.

Finally, we obtained admissions from plaintiffs' expert psychiatrist that the process of "projection" was a way that people who felt guilty (as many parents do when a child dies) relieve those feelings: by finding something or someone else to blame or be angry at. We argued that the anger the plaintiffs had at MGM (which was not even involved in production of the show) was misdirected and really reflected their (understandable) feelings of grief and guilt over their son's drug overdose.

d. Defendants' newsgathering/reporting:

The sound operator testified that he did not intend to record the other side of the call. Had he wanted to do so, he would have attached a microphone to the telephone receiver. The sounds were inadvertently recorded by the officer's lapel microphone. The parties disagreed on whether the sound operator testified that he knew during the call that sounds from the other side of the call were being recorded.

The evidence also showed that the sounds from the other side of the call (which were hardly audible as broadcast) were not audible at all when initially recorded. They became audible only after sound editing, which took place after the segment had been approved for broadcast by the producer's legal clearance procedure. Evidence that these procedures were extensive and generally effective helped rebut the claim that the television show was premised on invading people's privacy without their consent.

e. Experts:

The plaintiffs' psychiatric expert provided useful admissions (*see* above). MGM did not call its own expert, because the admissions were sufficient. There were no journalism experts.

f. Other evidence:

The parties litigated whether MGM's television subsidiary was the producer's partner or principal. This issue was not ultimately decided.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' lead counsel, from Houston, was often ineffective, showing a tendency to be tedious and disorganized. Although at times he could connect with the jury on a personal level, and he had flashes of passion of the revival-meeting-evangelist sort, he had difficulty focusing on key themes, and his presentation meandered. His down-home rural persona (speaking during closing about how his dog and rooster died, for example) may not have played well before this urban jury. His second-chair, however, was more likable, focused, and disciplined, and he helped make up for the lead counsel's deficiencies.

ii. Defendant's trial demeanor:

The current president of the MGM television subsidiary was likable, relaxed, and sincere. The person who was president at the time of the events testified only briefly. Because plaintiffs sought to hold MGM responsible for the conduct of the producer, QRZ's witnesses were also important. The sound operator came off as honest but a little diffident. It is hard to know how the jury responded to the other QRZ witnesses.

iii. **Length of trial:**

The two-and-one-half week trial did take a toll on juror attention. Evidence about the relationship between QRZ and MGM, and how it bore on partnership or agency, was especially tedious. The plaintiffs seemed more responsible than the defendants, however, for dragging out testimony, and this could have been a favorable factor for the defense. Indeed, by wasting time early in the trial, the plaintiffs ran out of time to call certain witnesses, such as a sound expert who (as it turned out) might have assisted plaintiffs on the area of intent.

iv. **Judge:**

Judge James C. Chalfant ran a tight ship. He restricted collateral evidence, stuck to announced time deadlines, and gave instructions that helped focus the jury on the critical issues. Plaintiffs' counsel said during closing that he thought the judge had been very fair, and the jury probably thought so as well. He was not especially courageous on pre-trial dispositive motions by MGM, although he did make some helpful rulings (*i.e.*, that MGM had no direct but only vicarious liability and that no punitive damages could be sought against MGM).

h. **Other factors:**

Because MGM had a cross-claim against the LAPD, the trial court did not give equal juror peremptories to the defense side and the plaintiff side; each defendant got six and the plaintiffs got nine. Although MGM and the LAPD did not exercise their strikes identically, having twelve "defense" strikes to the plaintiffs' nine was advantageous. Plaintiffs made a strategic error in waiting until after the start of the trial to settle with the LAPD.

The bankruptcy of QRZ also aided MGM, allowing it to try the "empty chair" to some extent.

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

Given the favorable outcome, we did not extensively interview jurors. One juror thought that the plaintiffs' lawyers were incompetent, and that the plaintiffs were acting/exaggerating. Another had real sympathy for the plaintiffs but felt bound by the judge's instructions.

Apparently, the jury at one point was 7-5 in favor of finding an intent to record. This shifted after the court allowed ten minutes additional argument by counsel on the intent issue.

19. **Assessment of Jury:**

Worked extremely hard through many days of deadlock. Was impressively able to focus on the issues as set forth in the instructions.

20. Lessons:

Attack damages. This result shows that, when a jury is persuaded that a plaintiff was not greatly harmed by the defendant's conduct, it may be more willing to reach a defense verdict on liability. The attack on damages was probably instrumental in obtaining this verdict, although from the face of it, the verdict related only to liability. Get a good psychiatric expert, have him or her do an IME, and get the plaintiffs' medical records.

An apology also helps. Although it was important to challenge the plaintiffs on their damages claims, we also incorporated an apology for what happened. It is harder for a jury to be angry at someone who apologizes. An apology was possible here in part because MGM did not produce the show. (MGM also argued, however, that even the producer simply made a mistake.) Combining an apology with an attack on plaintiffs is not always easy. Here, it was possible because MGM could argue that the very emotions of the plaintiffs with which it empathized (the feelings of grief over their son's death) were the cause of plaintiffs' misdirected anger, which MGM could attack.

Early rulings affect ultimate jury instructions. The process of educating the judge on appropriate jury instructions began with an early motion in limine (filed four months before trial) and a summary judgment motion. The motion in limine secured a ruling that plaintiffs' damages were limited to the recording or broadcast of the telephone call. Although this seemed inevitable based on the Court of Appeals' ruling, bringing the motion early set the ground rules for the later discussion of jury instructions. Likewise, the ruling on the summary judgment motion that MGM was not directly liable, because distribution of improperly-obtained material was not actionable as intrusion or eavesdropping, laid the groundwork for later jury instructions on matters such as whether the editing of the segment was part of the intrusion.

21. Post-Trial Disposition: None to date.

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J. **Case Name:** Meca Homes, Inc. and Mell Mashburn v. Tri-State Broadcasting Co., Inc., et al. (KTSM TV-9, El Paso)
Court: 171st District Court, El Paso County, Texas
Bonnie Rangel, J.
Case Number: 95-8042
Verdict rendered on: April 27, 2000

1. Name and Date of Publication:

KTSM TV-9 broadcasts of June 29, June 30, July 8, 1994.

2. Case Summary:

This was a defamation lawsuit brought by an El Paso-area homebuilder and his company. The suit arose from six broadcasts made between June 29, 1994 and July 8, 1994 concerning the collapse of a rock retaining wall on June 28, 1994 at 119 Northwind Drive in El Paso, Texas. The wall was under construction at the home of plaintiff Mell Mashburn, then the president of Meca Homes, Inc.

The gist of defendant's statements of and concerning plaintiffs was that the wall was not legal and that plaintiffs would likely face criminal charges for improperly building and then failing to timely remove the remains of the collapsed wall. Mr. Terry Williams, the Building Official in charge of the Department of Public Inspection for the City of El Paso, Texas, concluded that some remaining sections of the wall were dangerous and required immediate removal. Mr. Williams spoke about the incident with various members of the local media, including Ms. Cynthia Weyand (now Cynthia Vega) of KTSM-TV, Channel 9. The specific statements in issue were:

June 29, 1994	5:00 p.m.	"The owner of Meca Homes will probably face criminal charges after building a huge wall that crashed to the ground yesterday. City inspectors say Mell Mashburn built a wall about 40 feet high to extend his backyard on Northwind, but the permit he got from the city only allowed for a 10 foot retaining wall."

June 29, 1994	6:00 p.m.	"Their neighbor and owner, Mell Mashburn, will likely face criminal charges for building a huge wall that crashed to the ground yesterday. City officials plan to press charges, saying Mashburn built a 40 foot wall up a hill from nearby homes in order to extend his own backyard. Mashburn's city permit only allowed for a 10 foot retaining wall."
June 29, 1994	10:00 p.m.	"The walls have come tumbling down tonight for the man who owns Meca Homes. Westside resident Mell Mashburn watched his backyard extension project crash some 40 feet to the ground yesterday, and it looks like criminal charges aren't far behind."
June 30, 1994	6:30 a.m.	"And the owner of that wall could face criminal charges. Westside resident, Mell Mashburn, watched his backyard extension project crash some 40 feet to the ground and it looks like criminal charges aren't far behind."
July 8, 1994	6:00 p.m.	"The remnants of a retaining wall that fell down and injured four people two weeks ago are still there illegally, and city officials are now getting tough. A cement truck dropped and rolled over when Mell Mashburn's collapsed two weeks ago; it turned out the wall was illegal because it was too tall."
July 8, 1994	6:00 p.m.	"The city filed a complaint with the city attorney today. The judge can impose a fine up to $2,000 a day until Mashburn tears down the wall."
July 8, 1994	10:00 p.m.	"The owners of a retaining wall that fell down and injured four people are facing a hefty fine. The Mashburn family's retaining wall fell down two weeks ago when a cement truck fell on top of it. City officials say the wall was illegally built and gave until today to tear it down. It's still there, so this afternoon the city filed a complaint with the city attorney. Now the Mashburns can be fined up to $2,000 a day. City officials say they issued the family a permit for two 10-foot retaining walls. But the wall they built was 30 to 40 feet."

On July 11, 1994, the Department of Public Inspection filed a "Complaint Worksheet" with the City Attorney's Office alleging that the wall was in violation of El Paso City Code. A violation of the City Code is a misdemeanor. On several occasions prior to July 11, 1994, Mr. Williams informed Ms. Vega and other members of the media that the wall had been illegally built and that the City of El Paso was considering criminal charges

against both Mr. Mashburn and Meca Homes, which could result in a significant fine against them.

The City later determined that the original permit for the wall had been revised to permit the construction of the modified wall (contrary to city procedure), and such charges were never actually filed. At trial, a City employee testified that he approved a permit for the wall as built. Neither the City nor Mr. Mashburn/Meca Homes, Inc. could produce the revised permit.

Several years before trial, defendants filed a motion for summary judgment contending that the statements complained of were substantially true, and that plaintiffs were limited-purpose public figures and there was no evidence of actual malice. Plaintiffs filed their own motion for partial summary judgment seeking a judicial determination that the word imputing criminal conduct were defamatory *per se*. Both parties' motions were denied.

Both parties appealed the denial of their respective motions to the Court of Appeals, Eighth Judicial District of Texas (the El Paso Court of Appeals). the Court of Appeals issued a judgment and opinion affirming the trial court's denial of both motions. The Court of Appeals held a jury could find that statements concerning the "illegal wall" were not substantially true, and that neither plaintiff was a limited-purpose public figure. The Court of Appeals denied both parties' motions for rehearing. Defendants then filed a petition for review with the Supreme Court of Texas on the issue of substantial truth. The Supreme Court denied defendants' petition for review, and overruled their motion for rehearing. This placed defendants back in the trial court.

3. Verdict:

Defense verdict. The jury found that none of the statements made the basis of plaintiffs' defamation suit were false at the time they were published.

4. Length of Trial: Seven days.

5. Length of Deliberation: One day.

6. Size of Jury: Twelve.

7. Significant Pre-Trial Rulings:

The court granted defendant's motions *in limine* prohibiting comment or testimony (without approaching the bench) concerning:

1. Any reference to a retraction broadcast by defendant several years before the broadcasts made the basis of this suit, regarding an unrelated matter;
2. Any testimony interpreting the meaning of the language contained in the broadcasts;

3. Any testimony speculating upon the effect on plaintiffs' reputation of any allegedly defamatory statement;
4. Any testimony concerning any act or omission by defendant after any of the broadcasts.

The court also denied both parties' motions to strike the others' experts for lack of reliability.

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

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

Defendant timely moved for bifurcation of any determination of the amount of exemplary damages. The court used a helpful special verdict form which required findings on all issues and required a special finding that plaintiffs' damages were caused by specific statements for which liability was found. To award punitive damages, the jury was required to separately find that some of plaintiffs' damages were caused by statements for which there was proof of constitutional malice.

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

No such formal procedures.

11. Pretrial Evaluation:

While the potential damages were significant, defendants considered the statements at issue to be substantially true at the time they were broadcast, based on statements made by a relevant public official.

12. Defense Juror Preference During Selection:

Defendants sought persons who were careful with and appreciated the use of language (and, of course, those who were not hostile to the media in general).

13. Actual Jury Makeup: The jury was a composite of the El Paso community.

14. Issues Tried:

Falsity, defamatory meaning, negligence, causation, entitlement to punitive damages under the actual malice standard.

15. Plaintiff's Theme(s):

(a) Defendant should not have relied on informal comments made by a public official. (b) Defendant overplayed and sensationalized the event. (c) The broadcasts destroyed Meca

Homes, Inc. because of the bad publicity and the subsequent denial of credit by lending institutions.

16. Defendant's Theme(s):

The statements were at least substantially true at the time they were broadcast.

17. Factors/Evidence:

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

b. Sympathy for plaintiff during trial: Apparently not much.

c. Proof of actual injury:

Detailed financial documents which revealed a correlation between the broadcasts (or underlying events) and the financial decline of Meca Homes, Inc.

d. Defendants' newsgathering/reporting:

e. Experts:

Plaintiff's testifying experts:

Lee Burkholder, C.P.A.
Dr. David Schauer (finance professor)

Defendant's testifying expert:

Dr. Stephen Becker (economist)

Defendant also retained two consulting experts: a C.P.A. and a professor of journalism.

f. Other evidence:

We admitted our broadcasts, and numerous other broadcasts and newspaper articles that reported on the events at issue.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' counsel was competent and prepared.

ii. Defendant's trial demeanor:

Defendant's corporate representative was present throughout the trial, and briefly testified concerning defendant's reporting procedures.

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

iv. **Judge:**

Competent and fair. She had not previously presided over a defamation suit against a media defendant.

h. **Other factors:**

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

19. **Assessment of Jury:**

20. **Lessons:**

We prepared drafts of requested instructions, definitions and questions, citing authority, well before trial.

We prepared a detailed chronology, with references to Bates-stamped documents. We updated this document as the case progressed. It was of enormous help in finding relevant documents quickly, in making connections between documents and witnesses which would not otherwise have been apparent, and in crafting a theme for our trial.

21. **Post-Trial Disposition:** The final judgment was not appealed.

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K. **Case Name:** Hon. Ronald B. Merriweather v. Philadelphia Newspapers, Inc., et al.
Court: Court of Common Pleas of Philadelphia County, Pennsylvania
Case Number: September Term, 1987 No. 771
Verdict rendered on: February 4, 2000

1. Name and Date of Publication:

Philadelphia Daily News article dated August 21, 1987 and entitled "Feds: Court Reporter's Pot Trial Fixed."

2. Case Summary:

The article reported that a judge, Kenneth Harris, was indicted for fixing the criminal case of his court reporter by having her case reassigned from one judge to another. The article states that the judge to whom the case was reassigned was Judge Merriweather and that he acquitted the court reporter following a bench trial. The article also specifically states that Judge Merriweather was not "accused of wrongdoing." Nevertheless, Judge Merriweather claims that the article was false and defamatory because it implied that the federal indictment accused him of participating in the conspiracy to fix the court reporter's trial.

3. Verdict:

10-2 for the plaintiff. $100,000 compensatory damages and $400,000 punitive damages.

4. Length of Trial:

Eight days from the beginning of jury selection to verdict.

5. Length of Deliberation: Eleven hours.

6. Size of Jury: Twelve.

7. Significant Pre-Trial Rulings:

Summary judgment was granted twice in defendant's favor, first on the fair report privilege and second on actual malice. The Superior Court reversed both times.

8. Significant Mid-Trial Rulings:

The trial judge excluded all evidence from the Harris investigation and trial relating to Judge Merriweather except as to damages issues. Only the indictment was admitted.

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

The judge rejected defendant's request for mid-trial jury instructions.

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

Defendant conducted attitude surveys and a mock trial using employees of defense firm as a jury.

11. **Pretrial Evaluation:** Not provided due to pending appeal.

12. **Defense Juror Preference During Selection:** People who read newspapers.

13. **Actual Jury Makeup:**

Nine women, three men. Predominantly Afro-American. No one regularly read a newspaper.

14. **Issues Tried:**

Defamatory meaning, falsity, actual malice, fair report, damages.

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

Plaintiff claimed that the headline proclaiming that the federal government charged that a "trial" was fixed could only be understood as an accusation that federal government was saying the trial judge was involved in the fix. Plaintiff maintained that this implication was bolstered by the second paragraph of the article, which reported (referring to an allegation of the indictment based on wiretaps of Harris' teleconferences) that "Harris . . . suggested that a fix, not a doubt, would be behind her acquittal" by plaintiff. According to plaintiff, even the express statement to the contrary later in the article did not cure the reader of the impression.

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

The Daily News accurately reported the indictment and the record of the court reporter's trial, and it explicitly stated that Judge Merriweather was not accused of wrongdoing. To the extent the average reader was left with any impression about Judge Merriweather, it resulted from the nature of the charges against Harris.

17. **Factors/Evidence:**

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

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

Plaintiff did his best to elicit sympathy from the jury on direct. He cried during his testimony. The judge had a good solid background, was African-American, did lots of volunteer work, and seemed like a nice person.

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

d. Defendants' newsgathering/reporting:

The reporter was diligent, fair, and an excellent witness. Defendant was unable to determine who wrote the headline, however, and this may have influenced the jury (despite the trial judge's instruction that plaintiff was not entitled to an adverse inference instruction).

e. Experts:

Plaintiff did not have any. Defendant retained an expert, Chuck Stone, Professor of Journalism at University of North Carolina and formerly a beloved columnist for the defendant newspaper, to opine on defamatory meaning and the reporter's diligence in reporting the story.

f. Other evidence:

The prosecutor did testify (by videotape) as to the fact that the indictment did imply the trial was fixed.

g. Trial dynamics:

i. Plaintiff's counsel: Experienced defamation plaintiff's lawyer.

ii. Defendant's trial demeanor: Very good.

iii. Length of trial: See above.

iv. Judge:

An out of county judge. This was the judge's first libel trial.

h. Other factors: N/A.

18. Results of Jury Interviews, if any:

The foreperson, one of two defense jurors, stated that the jury was stalled 8-4 in favor of the plaintiff. According to the foreperson, the final jurors to swing did so because they were tired and wanted to go home. The $500,000 verdict was apparently a compromise to secure the final vote.

19. Assessment of Jury:

According to the foreperson, it appears the jury paid little attention to the law. They thought the plaintiff was a very decent person and a good judge, and that he was unfairly hurt by the article.

20. Lessons:

A defense verdict or at least a hung jury would have been more likely had the defense succeeded in obtaining a verdict interrogatory requiring the jury to specifically find that the meaning conveyed was that the indictment accused plaintiff of fixing the trial.

21. Post-Trial Disposition: Post-trial motions are pending.

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L. Case Name: Schuyler C. Metlis, M.D. v. Randi Rhodes and Fairbanks Communications, Inc.
Court: Circuit Court, 15th Judicial Circuit, Palm Beach County, Florida
Catherine M. Brunson, J.
Case Number: CL-96-6274-AH
Verdict rendered on: April 7, 2000

1. Name and Date of Publication:

The Randi Rhodes Show, a talk show on WJNO, West Palm Beach, Florida; October 23-24-25, 1995. At that time, the show was on AM-1230 from noon to 3 p.m. (Today, WJNO is on AM-1290, and The Randi Rhodes Show is from 3-7 p.m.)

2. Case Summary:

Action for defamation against a radio talk show host and the radio station. The host made unflattering comments on the air about a plastic surgeon whose work she saw in *The Palm Beach Post.* On the cover of its Sunday features section, the *Post* had published package of stories, pictures and graphics (jumping to the doubletruck) about plastic surgery, featuring the plaintiff, Dr. Schuyler C. Metlis, including pictures of him performing surgery and "before" and "after" pictures of two of his patients. Ms. Rhodes said, among other things, she thought the "before" pictures of Dr. Metlis' patients looked better than the "after" pictures. She criticized the results pictured in the paper, although the exact words she used remains in dispute. So he sued her for defamation and sought compensatory and punitive damages.

The case has been reported twice in Media Law Reporter. First, on February 24, 1998, the trial court entered an Order Granting Defendants' Motion for Partial Summary Judgment, holding that the plaintiff was a limited purpose public figure to the extent he sought to promote his practice through publicity in the *Post*. *Metlis v. Rhodes*, 26 Media Law Rptr. 1697 (Fla. 15th Cir. Feb. 24, 1998).

Second, MLR published the final judgment, where the trial court held that the plaintiff failed to make a prima facie case on three elements: (1) the actual contents of the allegedly defamatory statements was not sufficiently proven, (2) there was no evidence of actual malice, and (3) the plaintiff failed to introduce any evidence of compliance with Florida's retraction demand statute. *Metlis v. Rhodes*, 28 Media Law Rptr. 1990 (Fla. 15th Cir. April 7, 2000) (Order Granting Directed Verdict for Defendants, and Final Judgment for Defendants).

3. **Verdict:**

Directed verdict for defendants at the close of the plaintiff's presentation of his case in chief.

4. **Length of Trial:** April 4-7, 2000.

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

6. **Size of Jury:** Six.

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

The order granting the motion for partial summary judgment, mentioned above, was the most significant pre-trial ruling. 26 Media L. Rptr. 1697.

In addition, very early, a predecessor judge granted the plaintiff's motion for leave to seek punitive damages, based entirely on the supposed content of the allegedly defamatory statements. He expressed shock that anyone would say such things. The plaintiff's then-lawyer (a predecessor lawyer, too) admitted to us that they had assumed the ruling on the motion for leave to seek punitive damages would force a quick settlement. They assumed there was no insurance coverage for punitive damages, and a carrier would soon be informing the defendants that they were not covered for punitive damages, and the terrified defendants would promptly instruct their carrier to settle, rather than run the risk of an uninsured judgment for punitive damages. After the trial court granted the motion for leave to seek punitive damages, the plaintiff's then attorney expressed surprise and dismay to learn that the defendants' coverage included punitive damages, and the ruling therefore did not have the desired effect on us.

8. Significant Mid-Trial Rulings:

In the Final Judgment, the judge applied our view of the law on this point: that the heightened "clear and convincing evidence" standard of *New York Times Co. v. Sullivan* applied not only to the evidence of falsity and actual malice, but also to the proof that the words alleged were actually published, and that their meaning was factual and defamatory. 28 Media L. Rptr. at 1992. We did not have to argue the point much, for, in the Joint Pretrial Stipulation, the plaintiff had stipulated that this was the applicable law.

Also mid-trial, though this was mooted by the directed verdict: the trial court sustained our contention that the plaintiff's evidence of damages was entirely inadmissible. After the plaintiff's damages expert testified, the judge granted our motion to strike his testimony. She had denied our motions in limine, based on the same expert's deposition testimony, twice on this issue, but finally came around to our point of view after seeing the evidence presented live.

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

We submitted a Trial Brief arguing for pre-trial and mid-trial jury instructions, particularly to inform the jury of the trial court's decision, on partial summary judgment, to find the plaintiff a limited purpose public figure (*see* 26 Media L. Rptr. 1697). Judge Brunson denied all of these requests. During the argument on these issues, we told her that we would be compelled to read her predecessor judge's entire partial summary judgment ruling to the jury ourselves if she would not instruct them on it. Sure enough, in our opening statement, we talked extensively about the court's partial summary judgment ruling, and read most of it to the jury. The plaintiff's attorney kept objecting to this, but Judge Brunson overruled the objections. This effectively served as a pre-trial jury instruction.

We would have submitted a proposed special verdict with sequential issue determination, but the trial did not go that far. We considered bifurcation but decided against it because we felt the jury would be prejudiced against the plaintiff's case upon seeing his evidence of damages.

10. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries): We did none of these.

11. Pretrial Evaluation:

We recognized in advance that we had a chance at a directed verdict at the close of the plaintiff's case. We also felt we were reasonably likely to prevail on a second motion for a directed verdict at the close of all the evidence. If the jury ruled for the plaintiff, we also felt we had a reasonable chance to win a JNOV, or on appeal. In front of the jury, we felt that the defendants would probably prevail on liability. If the jury were to find liability, we felt they would be unlikely to find any substantial damages.

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

13. **Actual Jury Makeup:** Moot.

14. **Issues Tried:**

Publication, defamatory meaning, falsity, constitutional malice, damages.

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

Plaintiff saw himself as a hard-working, almost saintly doctor whose career was ruined by a foul-mouthed, irresponsible, wicked talk show host, who built her ratings on ridiculing nice people, and who didn't care whose lives she ruined.

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

Randi Rhodes is a serious, hard-working talk show host who connects with her audience virtually as if she were talking one-on-one. She is entitled to talk on the air about what she sees in the newspaper, just as others are entitled to talk over the breakfast table or backyard fence about their opinions of what they see in the paper. In this case, everyone shared some of her opinions. Even Dr. Metlis and his wife testified that they thought the before pictures looked better than the after pictures. He is arrogant, narcissistic and thin-skinned. He has contorted everything she said to make it sound much worse than it was, and has manufactured an utterly ridiculous theory of how to find damages where there are none. He is obsessing over nothing. He should have gotten on with his life a long time ago.

17. **Factors/Evidence:**

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

Randi Rhodes is well known for her wisecracking tone, and perhaps radio talk is generally regarded as irresponsible. Plastic surgery is big in Palm Beach County, but paradoxically plastic surgeons are the butt of jokes, as is the field itself. We anticipated these undercurrents.

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

We felt the plaintiff's efforts to appear sympathetic, through the testimony of himself, his wife and their friends, were unconvincing.

c. **Proof of actual injury:**

The plaintiff's income rose steadily before and after the allegedly defamatory broadcast. He could not identify one single patient who cancelled an appointment or even spoke of the broadcast. Yet he produced, as an expert witness, a C.P.A. who testified that Dr. Metlis had suffered an actual economic loss of $1,097,211. The expert did this by pulling data off the Internet from the American Society of Plastic & Reconstructive

Surgeons, showing increases in gross revenues for the industry for the years just before and after the talk show. He could not even authenticate his data or testify that these data were routinely relied upon by experts in the field. He assumed (without even a suggestion of any basis) that revenue to Dr. Metlis' practice should have tracked the upward trend of these industry figures, and would have had he not been defamed, and so he "proved" that Dr. Metlis failed to make $1,097,211 that he would have made had he not been defamed.

We felt that we could demonstrate, on cross-examination and by our own expert's testimony, the lack of validity of Dr. Metlis' damages expert's theory. As it turned out, we did not need to. Judge Brunson struck the expert's testimony and directed the jury to disregard it. After all of our arguments as to the abject lack of evidence of causation and other flaws in the C.P.A.'s profoundly unsound methodology, the judge struck his testimony for the narrowest and simplest of reasons: the expert could not authenticate his Internet data.

d. Defendants' newsgathering/reporting:

There was no newsgathering, but our position was that Ms. Rhodes' statements were all opinions because her comments were based entirely on what she saw in the newspaper. There was no evidence that anything she said was provoked or purported to be supported by any facts or knowledge other than what she saw in the newspaper.

e. Experts: See above.

f. Other evidence:

The doctor's evidence of liability consisted of the testimony of four people who heard parts of the broadcasts — his wife and three other women. Each gave equivocal, uncertain testimony as to various allegedly defamatory statements. Incredibly, the plaintiff's lawyer kept asking them about statements that had never appeared in the pleadings, and our objections to this testimony were sustained. (We said, "Objection, not pled," so many times that the jury sent the judge a note asking what "not pled" meant).

There was a very perverse irony as to certain evidence that was not admitted. Audiotapes of all the broadcasts existed. The plaintiff did not use them as evidence because the plaintiff claimed to believe that they were not authentic. The plaintiff rested his case without playing the tapes, apparently anticipating or assuming that we would play the tapes in the defense's case, and then the plaintiff would set about attacking their authenticity. Of course, as it turned out, the jury never heard the tapes precisely because the plaintiff's evidence of the allegedly defamatory statements was inadequate.

g. Trial dynamics:

i. Plaintiff's counsel:

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

We did not think Dr. Metlis or his witnesses affected a demeanor that would have generated sympathy or convinced a jury to award him gobs of money, but who knows? The jury did not get to speak.

iii. **Length of trial:** Less than four days.

iv. **Judge:**

Judge Brunson rarely interrupts the attorneys to make a statement or ask a question, and she lets the attorneys present their cases their way without interference. She rarely gives any indication of what she is thinking until she rules.

h. **Other factors:**

18. **Results of Jury Interviews, if any:** We have not conducted any jury interviews.

19. **Assessment of Jury:**

Those unfortunate people must have been bewildered and frustrated, but happy to leave after only two days.

20. **Lessons:**

The corporate defendant was a small company that was unsophisticated in its initial handling of the plaintiff's complaint (not that large companies are always more sophisticated in their initial handling of complaints). Initially, the defendants denied the existence of any audiotapes, thinking they had been recycled. After the lawsuit was filed, and the defendants denied in discovery that any tapes existed, the tapes were discovered when the radio station moved. They might never have been discovered had the station not moved. In any event, the fact that the tapes were denied, then produced, was the sole basis for the plaintiff to claim that there was something inauthentic about them — an Oliver Stone conspiracy theory. The amount of time and expense in pretrial proceedings was exacerbated by the issue of the tapes. The most important lesson from this case is that a lawyer cannot be too aggressive about helping a news media client to develop and institutionalize careful practices for the initial investigation and handling of a libel complaint.

21. **Post-Trial Disposition:**

The plaintiff's appeal is pending in the Fourth District Court of Appeal. The defendants' motions to recover costs and attorneys' fees, based on offers of judgment of $100 and $10,000, are pending in the trial court.

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Note: Since the trial, Florence has been appointed to the bench, and the firm is now called "The Rivas Law Firm," at the same address and phone number.

M. Case Name: H.L. Mitchell v. Griffin Television, L.L.C. and Chris Halsne
Court: District Court of Creek County, Oklahoma
Joe Sam Vassar, J.
Case Number: CJ-99-16-B
Verdict rendered on: June 27, 2001

1. Name and Date of Publication:

Series of television news reports on January 27 and 28, February 5, March 26, June 17, September 12 and 13, 1998.

2. Case Summary:

The plaintiff, a veterinarian in Bristow, Oklahoma, complained about news reports broadcast by KWTV (Channel 9 in Oklahoma City) between January and September 1998 that were based primarily on public records and statements of public officials about him. Initially, KWTV reported about a federal court complaint alleging the fraudulent sale of a champion show horse. The buyer of the horse alleged that it was lame when he bought it; that Mitchell had given the horse a drug that masked its lameness before it gave a championship performance in competition; and when Mitchell was asked by the buyer to examine the horse before the sale, he failed to disclose the facts to the buyer that he had previously examined the horse and given it a painkiller. The two-part report raised the question whether the painkiller, which is not detectable in drug tests, could have affected the horse's performance in competition, and it discussed generally the increasing use in the show circuit of the particular drug Mitchell used.

After its initial reports, KWTV received a tip, investigated, and reported that Mitchell had earlier been banned from race tracks in New Mexico for having practiced veterinary medicine there illegally. In particular, Mitchell had been investigated by the New Mexico Racing Commission for treating a race horse that broke down in the 1994 All American

Futurity and had to be euthanized. The official investigation determined that the horse raced with a broken knee and had been given an illegal painkiller before the race. KWTV's reports about New Mexico were based on public records and information provided by the official spokesman for the Commission. The February 5, 1998 report, which was the principal focus of the plaintiff's case, was scripted by the reporter to say, in part, that Mitchell was "suspected of helping kill one of the country's top race horses." The anchor misread the script, saying that Mitchell was "suspected of killing one of the country's top race horses."

During 1998, Mitchell was disciplined by the Oklahoma Racing Commission and the Oklahoma Board of Veterinary Medical Examiners for having failed to disclose the New Mexico proceedings in license renewal applications. KWTV reported those official proceedings also.

After the defendants' motions for summary judgment were granted in part and denied in part, the remaining issues were tried to a jury under theories of defamation and false light invasion of privacy.

3. Verdict:

The jury returned a verdict of $6,000,000 presumed actual damages, finding that both KWTV and the reporter, Halsne, recklessly disregarded the truth. [The standard of liability for private plaintiffs is professional negligence, but the jury was permitted to award presumed and punitive damages if they found reckless disregard for the truth, and they so found.] In a second stage proceeding to consider the issue of punitive damages, the jury awarded punitive damages of $250,000 against KWTV and $250,000 against Halsne, finding that both defendants had acted with ill will (common law malice) toward the plaintiff.

4. Length of Trial:

The trial lasted eight days. The first day was taken up with jury selection; closing arguments, instructions, and jury deliberations consumed the last day.

5. Length of Deliberation:

The jury deliberated about 2½ hours in the first stage on liability and actual damages. It deliberated about 45 minutes in the second stage on punitive damages.

6. Size of Jury:

The jury consisted of twelve jurors (five white male, seven white female) and two alternates (both white male). The alternates did not participate in deliberations.

7. Significant Pre-Trial Rulings:

The court granted the defendants' motion for summary judgment in part. The plaintiff complained originally about thirty-three statements in the various news reports. The court ruled that eighteen of those statements were substantially true, privileged, or protected

expression of opinion. The court allowed the plaintiff to introduce evidence whether the remaining fifteen statements were actionable.

The plaintiff's veterinary hospital, a corporation, was originally a plaintiff also, but it was dismissed as a party because it was not in good standing at the time of the news reports or at the time the suit was filed.

The court, over the defendants' objection, ruled that the plaintiff was entitled to a presumption of general damages (harm to reputation) if he proved reckless disregard of the truth.

The court denied the defendants' *Daubert*-based motion *in limine* to exclude the testimony of the plaintiff's journalism expert witness on the ground she was not qualified by training or experience to offer expert opinions. The court also denied the defendants' motion *in limine* to exclude some of the plaintiff's damages evidence.

The court declined the defendants' request that the jury receive pre-instructions about defamation and privacy law. The court granted the defendants' request that the jury be shown the videotape of all of the news reports before opening statements.

8. Significant Mid-Trial Rulings:

The court granted the defendants' objections to much of the plaintiff's damages evidence, excluding hearsay testimony regarding statements made about the plaintiff after the news reports began appearing on the air, and excluding testimony regarding the plaintiff's preliminary discussions with another veterinarian about the sale of part of his practice that the plaintiff contended had been aborted because of the adverse news reports. As a result of the court's rulings, the plaintiff presented no evidence of actual harm to reputation and no evidence of economic loss caused by any allegedly false statements in the news reports.

The court eliminated three more statements that the plaintiff contended were false and defamatory (or placed him in a false light), submitting twelve statements to the jury for their consideration.

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

As indicated above, the court refused to give pre-instructions to the jury. The defendants argued that the jury would be unable to understand how the evidence related to issues such as professional negligence, reckless disregard, and false light invasion of privacy unless it was informed before opening statements and the presentation of evidence at least in general terms what they would be called upon to decide. The court expressed some interest in the idea of pre-instructions, but he concluded that he was unlikely to get the parties to agree to the language of the instructions (the plaintiff was opposed to pre-instructions), and declined to give any.

The defendants also asked the court to use special interrogatories in which the jury would be required to identify which statements it concluded were substantially false and as to which statements the defendants had been negligent or had recklessly disregarded the truth. The plaintiff objected to special interrogatories and the court declined to give them.

The trial was not bifurcated on liability issues. Consideration of punitive damages was done in a separate stage of the proceedings, as is required under Oklahoma law if the jury returns a verdict of liability and actual damages for the plaintiff.

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

The defendants did not employ pre-selection techniques. The identity of prospective jurors was not available to the parties.

11. Pretrial Evaluation:

The defendants felt confident that the news reports were completely defensible under the law, properly applied. The plaintiff did not have competent evidence of actual harm to reputation and no admissible evidence of economic loss. His journalism expert witness (Oklahoma uses a professional negligence standard) was weak, and the defendants had testimony and documents, almost all from public records, to back up each of the allegedly defamatory statements about which the plaintiff complained.

The defendants' primary concern was trying the case in Bristow, Oklahoma, a small town where the plaintiff lived and worked. Creek County is a notorious plaintiff's venue (the plaintiff's counsel, who are from Tulsa, openly bragged how pleased they were to be able to file in Creek County); the judge had never tried a defamation case before; the jurors would be from rural Oklahoma; and though KWTV's signal can be seen in Bristow, the Tulsa stations rather than those from Oklahoma City were carried on cable, and jurors would have little affinity for KWTV and its on-air personalities.

The plaintiff's lowest pre-trial settlement offer was $1.8 million, which was rejected.

12. Defense Juror Preference During Selection:

The jury pool was not a particularly good one. The court selected twenty veniremen. No one was excused for cause. Each side was allowed three peremptory challenges. The defendants would have preferred business professionals as jurors, but there were none. Although there was little voir dire regarding the educational background of the jury panel (the parties were reluctant to inquire for fear of causing embarrassment and resentment), the defendants' impression was that no one on the jury had a college degree and few had even attended college.

13. Actual Jury Makeup: Five men, seven women.

14. Issues Tried:

The plaintiff presented claims of defamation and false light invasion of privacy. The jury ultimately considered twelve of the thirty-three statements in the news reports about which the plaintiff complained.

15. Plaintiff's Theme(s):

Although the plaintiff complained about statements in each of the news reports, his principal focus was on statements regarding Mitchell's role in the death of a race horse in New Mexico in 1994, and his being banned from race tracks there as a result of disciplinary proceedings against him by the New Mexico Horse Racing Commission.

Mitchell conceded that he had practiced veterinary medicine in New Mexico without a license at the Ruidoso Downs race track and that his owner's license (which authorized him to own and race horses, but not to practice veterinary medicine) was permanently revoked. However, he contended before the New Mexico Commission and at trial that he had believed he could engage in veterinary practice at the track by associating with a New Mexico-licensed vet. He also contended that his voluntary surrender of his New Mexico owner's license relieved him of having to face discipline in New Mexico proceedings. Those defenses had been rejected by New Mexico authorities in the disciplinary proceedings against him. However, because Mitchell did not appear for his disciplinary hearing in New Mexico in 1995, the only evidence presented against him related to his practicing without a license, and no evidence was presented nor any findings made concerning his involvement in treating or doping the horse before the All American Futurity.

At trial, plaintiff contended that the breakdown of two horses in the 1994 All American Futurity at the Ruidoso Downs, New Mexico, track was a huge embarrassment for New Mexico race officials; that he became the scapegoat for the investigation; and that the lead investigator for the NMHRC, Wayne Conwell, was out to get him. Conwell was the official spokesman for the NMHRC and gave an on-air interview to Chris Halsne during KWTV's investigation of the events in New Mexico. Conwell told Halsne, and provided supporting documents from the New Mexico investigative file, that Mitchell had been treating one of the horses that broke down in the race, the horse had run with a broken knee (an injury too severe to contemplate running it), and that the horse had tested positive for mepivicaine, and illegal painkiller. Conwell told Halsne that he suspected Mitchell had used holistic treatments on the horse, such as acupuncture and laser therapy, after conventional treatments by another vet had failed to get the horse ready to run, and the other vet told the owner and trainer of the horse that it was not fit to run. Conwell therefore expressed the opinion that Mitchell's unlicensed treatment of the horse had led to the death of the horse.

The plaintiff contended at trial that Conwell had, in effect, reached the wrong conclusion. He contended that it was false to say he was "suspected of helping kill" the horse because others were at fault in the death of the horse. Mitchell contended that there

was evidence in the New Mexico file that raised doubts whether the horse had a broken knee and whether it had been given an illegal painkiller. The plaintiff argued that Mitchell was exonerated in the death of the horse in the official decision of the NMHRC. (He was not; as Conwell explained to Halsne, the NMHRC did not put on any evidence in Mitchell's disciplinary hearing about the cause of the breakdown of the horse, because the only evidence needed to revoke his owner's license in Mitchell's absence was the evidence of his illegal practice of veterinary medicine.) The plaintiff therefore contended that the defendants recklessly disregarded the truth by reporting what Conwell said rather than looking at the entire file to determine whether Conwell's conclusions were sound.

The plaintiff, who is African-American, testified that he had struggled to overcome racial prejudice while setting up a professional practice in Bristow, Oklahoma, in the 1960s; he hinted that the proceedings in New Mexico were racially motivated; and he contended that all his hard work in establishing a professional practice and a positive reputation had been destroyed in a short time by KWTV's news reports.

The plaintiff accused "the media" of being abusive (e.g., there were references during voir dire and arguments to the jury about the media's poor handling of coverage of the presidential vote in Florida), and the plaintiff's counsel said to the jury several times that it had an opportunity through its verdict to "send a message to the media."

16. Defendant's Theme(s):

The defendants' themes were simple: Public records say what public records say, and it is neither professionally negligent nor a reckless disregard of the truth to report what official documents or the official spokesman for a public agency say are the facts.

The defendants contended that the sole issue for the jury to decide was whether the defendants had reported what the official records and the public official said with substantial accuracy. The defendants' argument to the jury was that the reports were substantially accurate, whether or not Mitchell agreed with the allegations, findings, and conclusions reported. The defendants did not contend that all of the statements it made were privileged as reports of official proceedings, but they argued that it nevertheless was not negligent (let alone a reckless disregard of the truth) to report accurately the statements of a public official, especially the spokesman for a public agency, who backed up his statements with public records. The defendants contended that the correctness of New Mexico officials' beliefs about Mitchell's conduct and his role in the death of the horse was not relevant: If Mitchell had wanted to challenge the investigator's conclusion and the documentary evidence that the horse he worked on had a broken knee or had been doped up, he should have done that in the hearing in New Mexico.

17. Factors/Evidence:

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

Only one of the jurors indicated he was familiar with the plaintiff; only two of the jurors said they had ever watched the news on KWTV, and they had done so infrequently. None of the jurors had an experience with a defamation claim.

b. Sympathy for plaintiff during trial:

The plaintiff became emotional during his trial testimony about his struggle as an African-American to establish a veterinary practice in Bristow, Oklahoma in the 1960s. Plaintiff played the "race card," suggesting that he was railroaded in New Mexico because of his race, and that the defendants were all too willing to accept the official stance without scrutinizing the evidence. Post-verdict interviews with some of the jurors suggested that the women on the jury responded favorably to the plaintiff's testimony; the testimony had less impact on the men.

Generally, post-verdict jury interviews did not suggest that the plaintiff was particularly well-liked by the jury, and some expressed reluctance to use him as their veterinarian.

c. Proof of actual injury:

The plaintiff presented no proof of actual harm to reputation or economic loss. He had several witnesses testify that they had seen parts of KWTV's news reports, or had heard about them, but all of his witnesses said that the reports had no impact of their opinion of the plaintiff: They still used him as their vet, still thought highly of him, and were simply offended that the media would report "old news" that they thought was unfair.

d. Defendants' newsgathering/reporting:

The jury seemed to accept the plaintiff's argument that the reporter, Chris Halsne, should have studied the entire New Mexico file to see what the evidence was of Mitchell's conduct rather than relying on the official spokesman for the NMHRC as the principal source. Post-verdict interviews of some of the jurors, and some informal comments from the trial judge after the trial suggest that the jury did not like the reporter (they thought he was arrogant and too "slick" for their liking). They also did not like Wayne Conwell, the spokesman for the NMHRC who had conducted the investigation into Mitchell's activities in New Mexico, and ignored his testimony about the conclusions he reached or the fact that he had expressed those conclusions to Halsne.

e. Experts:

The plaintiff's journalism expert was Lisa Jones, a former anchor at KOTV in Tulsa. Her contract with that station was not renewed a couple of years ago, and she is engaged in litigation with KOTV over her dismissal. Her opinions were based almost entirely on her

view that Halsne's writing style was too strong and sensational ("I would never say it that way."). She had little to say about the newsgathering aspect of the defendants' reporting, and conceded in cross-examination that she had "no problem" with a majority of the statements about which the plaintiff complained.

Jones' time on the stand was limited. The court had instructed the plaintiff's counsel to finish his case-in-chief by the end of the first week. Jones took the stand about 4:00 p.m. on Friday afternoon, and was examined for only about 45 minutes, and was cross-examined for about an hour. Her testimony seemed to have little effect on the jury. Post-verdict interviews indicated a negative reaction to her from the members of the jury.

The defendants' expert was Dr. Thomas J. Volek, a professor of journalism at the University of Kansas. His testimony was to the effect that Halsne's reporting was exemplary, and a textbook example of investigative journalism. He concluded that the defendants had adhered to the standards of reporting employed by ordinarily prudent television on the events in New Mexico, it would have been acceptable journalism practice to rely on the statements of the official spokesman for the NMHRC, and that Halsne went beyond what was minimally necessary by examining documents, inquiring of the official about the meaning of the documents, and obtaining a satisfactory answer to all his questions about the New Mexico proceedings.

f. <u>Other evidence:</u>

The testimony of the reporter, Chris Halsne, and his principal source for the reports about New Mexico, Wayne Conwell, were presented by the plaintiff in his case-in-chief by videotape deposition. At the time of trial, neither witness was available by subpoena (Halsne lived in Seattle, Conwell in Albuquerque). Both witnesses appeared in person during the defendants' case-in-chief. One juror was overheard during a recess complaining that the witnesses were appearing in person after the jury had to sit through videotape depositions. It is unclear how that opinion affected the juror's receptiveness to the live testimony, and whether it had a negative impact on either the plaintiff or the defendants.

g. <u>Trial dynamics:</u>

i. <u>Plaintiff's counsel:</u>

The plaintiff's counsel played up his background as a former U.S. Marine and was effective. The defendants gently chided him in closing argument for employing every litigation technique taught to trial lawyers in seminars (*e.g.*, parading in front of and looking at the jury while asking questions of a witness; suggesting he would come back to a topic but not doing so when a witness gave an answer he did not like; use of gestures and body language to convey his opinion whether a witness was giving testimony to which he agreed; creating demonstrative exhibits during the examination of a witness that expressed his view of what the evidence was, whether or not it conformed to what the witness said). However, the jury seemed to like his "television lawyer" style. Bottom line: he won.

ii. Defendant's trial demeanor:

KWTV's corporate representative was Angela Buckelew, an anchor and reporter for the station. She did not testify, but seemed to be well received by the jury, with whom she maintained eye contact and from whom she often received smiles and affirming nods.

David Griffin, the President and General Manager of KWTV, testified briefly, but did not attend most of the trial. Post-verdict interviews of some of the jurors suggest that the jury reacted unfavorably to his absence, wondering why he would not be present throughout the trial if he really cared about the outcome.

Chris Halsne was able to attend only one day of the trial, the first day of the defendants' case-in-chief. He left KWTV in early 2000 to take the position of lead investigative reporter for KIRO-TV in Seattle. He was unable to get time off for the trial except for a day of vacation added to a weekend for travel and trial preparation. As noted above, the jury did not react favorably to Halsne, although it is not clear whether the jury reaction was to his personality, his absence from trial, or both.

iii. Length of trial: Eight days.

iv. Judge:

The trial judge, Joe Sam Vassar, had no experience with a defamation or invasion of privacy case. He exhibited a willingness to read the briefs of the parties (although he frequently complained about the amount of paper generated by the parties), and he often did his own on-line research. Judge Vassar is very bright, but he admitted that there were some concepts about a defamation case that he "just didn't get." For the most part, his rulings during trial were fair.

h. Other factors:

18. Results of Jury Interviews, if any:

The two alternate jurors who did not participate in jury deliberations visited with defense counsel at length while the jury deliberated. They exhibited some confusion about the issues, and both seemed bothered by the fact that Halsne had relied on the statements from Wayne Conwell and only some of the documents, rather than conducting a full review of the evidence in the New Mexico file himself.

The verdict was 11-1. The one dissenting juror was originally selected as the foreman. He told the defendants' counsel after the verdict that the jury spent little time talking about the evidence and seemed anxious simply to reach a verdict and go home. He said that when he tried to guide the jury through a discussion of the evidence, they cut him off. He finally resigned as foreman and dissented from the jury verdict.

James E. Stewart (Butzel Long, Detroit, MI), chair of the DCS Ad Hoc Jury Debriefing Committee, has conducted interviews of two of the jurors (the dissenting juror and one of the alternates) and has tried to contact two other jurors (the second foreman and the other alternate) for the LDRC Ad Hoc Committee on Jury Debriefing. A report of his interviews is expected in the near future.

19. Assessment of Jury:

The jury generally consisted of simple, decent people who lived in small towns or in rural Oklahoma. They appeared to have only modest education. For the most part, they seemed attentive during the trial. (However, one juror, a young woman who described her spouse as a "house husband," slept during several parts of the trial.) The trial outcome, plus comments from some of the jurors and the trial judge, suggest that the jury did not understand the issues in the case (or were persuaded by the plaintiff's perspective on the issues), paid little attention to the evidence or the court's instructions, did not like the reporter or his primary source, and simply accepted the invitation of the plaintiff's counsel to "send a message" to the media. On the other hand, the jurors considered themselves knowledgeable concerning horses, and seemed almost fiercely independent, and willing to rely on their own common sense, unwilling to accept any testimony or argument at face value.

20. Lessons:

From interviews of the jurors and defense counsel's experience in trying the case, the "lesson" in this case would appear to be that some media cases have to be won on appeal.

21. Post-Trial Disposition:

The judgment has been appealed to the Oklahoma Supreme Court.

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N. **Case Name:** Franshawn Moore v. Akron Beacon Journal, et al.
Court: Court of Common Pleas, Summit County, Ohio
James Williams, J.
Case Number: CV 99 12 4945
Verdict rendered on: January 25, 2001

1. **Name and Date of Publication:** Article and photo, *Akron Beacon Journal.*

2. **Case Summary:**

Plaintiff was the mother of a child who was pictured in a story written about a free meals program provided by the Salvation Army. The Salvation Army distributed meals during the summer (when lunch programs were not available in the schools) to children in low-income neighborhoods. The reporter and photographer rode the van distributing meals on one particular day. The photographer took a photograph of plaintiff's daughter standing in a doorway (in a diaper) holding one of the free lunches. The caption read: "At left is Shawnnita Moore, age 2, who may not have eaten lunch had it not bee for the Salvation Army's program."

The newspaper ran a correction to the caption the next day. It stated that the caption did not mean to conclude that Shawnnita Moore had not eaten. It then concluded, "A copy editor erred in drawing that conclusion."

The plaintiff sued, claiming that, through innuendo, she was accused by the newspaper of not feeding her child. She claimed defamation.

3. **Verdict:**

The jury found 7-1 (75% required) in favor of the newspaper and awarded a defense verdict.

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

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

6. **Size of Jury:** Eight.

7. **Significant Pre-Trial Rulings:** Newspaper's motion for summary judgment overruled.

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

The judge would not allow photographs of the interior of plaintiff's home. The Health Department had taken numerous photographs at about the time of the story showing that the home was filthy and disheveled. The judge ruled that, though relevant, the photos were too inflammatory.

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, "shadow" juries):** None.

11. **Pretrial Evaluation:**

Our largest issue had to do with the correction, in that it appeared to be an admission that the caption drew a "conclusion" that the child would not have eaten lunch but for the free meal program. We felt we had a strong case, but we were afraid of jury sympathies, and we feared race issues. (Plaintiff and her daughter are Afro-American.)

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

We felt that middle-class women would be preferable, as well as conservative, lower to lower-middle-class Caucasian men. We wanted to avoid jurors who might view themselves as "victims."

13. **Actual Jury Makeup:** Four women, four men.

14. **Issues Tried:** One count of defamation (negligence standard).

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

The *Beacon Journal* was racist. It was negligent in drafting the caption, and it admitted that it drew the conclusion that plaintiff would not have fed her daughter had it not been for the free meal program.

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

The public constantly complains about newspapers publishing only negative news. This was a very positive news story about good work being done in the community. The story did not say that the child would not have eaten. It said that she "may" not have eaten. The minority issue was non-existent. In fact, a second photograph was chosen to run with the first in order to demonstrate that while children participated in the program, also.

17. **Factors/Evidence:**

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

>From post-trial interviews, these jurors did indicate some prejudice against the newspaper.

b. **Sympathy for plaintiff during trial:** Welfare mother trying to improve her lot.

c. **Proof of actual injury:** Embarrassment, humiliation.

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

Editors at the time had left the newspaper. Photographer, reporter, and copy editor did well to fill in the gaps.

e. **Experts:** No experts.

f. **Other evidence:** N/A.

g. **Trial dynamics:**

i. **Plaintiff's counsel:** Credible, reasonable.

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

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

iv. **Judge:** Fair.

h. **Other factors:**

Defense counsel believed it was important to be constantly sensitive to the potentially inflammatory issues involved in this case.

18. Results of Jury Interviews, if any:

The jury indicated that they were angry with the *Beacon Journal*. One juror said that they looked for ways to "move money to the plaintiff." However, they simply could not get over the burden of proof component. They said that the word "may" convinced them that the *Beacon Journal* drew no conclusion.

19. Assessment of Jury:

The jury was much more liberal than we had expected. There was one upper middle-class woman we believed had been on our side the entire time. Though she voted in our favor, she expressed significant anger at the newspaper for running this photograph (depicting a two-year-old child in diapers) with the caption.

20. Lessons:

I believe I should have focused even more on *voir dire*. Based upon anecdotal evidence, middle and upper-middle-class women were not favorable to our position. We won only because we had a strong case. If our case had been slightly weaker, we would have been hurt by two or three jurors selected.

21. **Post-Trial Disposition:** The case was not appealed.

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O. Case Name: Frank Nannicola, et al. v. The Warren Newspapers, Inc., d/b/a Tribune Chronicle, et al.
Court: Court of Common Pleas, Trumbull County, Ohio
Case Number: 98-CV-771
Verdict rendered on: Mistrial declared on April 27, 2001

1. **Name and Date of Publication:**

The case arose out of an article entitled "Clubs Used Nannicola for Supplies" that ran in the Warren, Ohio *Tribune Chronicle* on April 18, 1998.

2. **Case Summary:**

Frank Nannicola and his business, Nannicola Wholesale, sell bingo supplies and other gambling-related equipment.

In 1992, the Pennsylvania Organized Crime Commission issued a report concerning the influence of organized crime in the bingo industry. In part of the report, the Commission described Nannicola and his company as being "affiliated" with La Cosa Nostra. In 1998, following a series of gambling raids in Warren, Ohio, newspaper reporter Lisa A. Abraham learned of the report. The article at issue was drawn from the Pennsylvania Organized Commission report, as well as court transcripts and indictments of organized crime figures.

3. **Verdict:**

There was no verdict. The jury deadlocked and the court declared a mistrial.

4. **Length of Trial:** One week.

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

6. **Size of Jury:** Eight.

7. Significant Pre-Trial Rulings:

The defendants' initial and subsequent motions for summary judgment based upon the fair report privilege and allied statutory privileges were denied. The court ruled beforehand, however, that the privileges did apply, that the issue for trial was whether the article was a fair and accurate summary of the reports and whether it was published with actual malice.

8. Significant Mid-Trial Rulings:

The court overruled the defendants' motions for a directed verdict. The court also ruled that there was sufficient evidence to go to the jury with respect to the issue of punitive damages.

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

The primary issue at trial concerned repeated attempts by the plaintiff to avoid the application of the fair reports privilege. Apart from ruling from the court that the privilege would be available, but presented a jury question, there were no extraordinary steps taken in connection with trial management.

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

Under the court's local rules, the jurors answer a questionnaire concerning basic background information. Because the court permitted extensive *voir dire* examination, there was no formal psychological profile or similar work done.

11. Pretrial Evaluation:

Cannot be disclosed, because case will be re-tried in fall of 2001.

12. Defense Juror Preference During Selection: *See* No. 11 above.

13. Actual Jury Makeup:

The entire jury venire was made up of residents of Trumbull County. The jury was made up of five men and three women.

14. Issues Tried:

1. Whether the article was a fair and accurate summary of the Pennsylvania Organized Crime Commission report and other governmental sources;

2. Whether the report was published with actual malice.

15. Plaintiff's Theme(s):

Plaintiff claimed he was a small honest businessman who had become successful through hard work and was emotionally harmed by the impact of the article on his reputation. With respect to the article, he argued that the paper was aware that there had been litigation involving the Pennsylvania Organized Crime Commission report, and should not have published its contents since plaintiff had settled his action with the Commission's successor.

16. Defendant's Theme(s):

The public needs to rely upon government reports and that a contrary verdict would stifle the flow of information to the public. The defendants also pointed to the prior publicity over the Pennsylvania Organized Crime Commission report.

17. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Not apparent.

b. Sympathy for plaintiff during trial:

Frank Nannicola testified, as well as his wife and son, relating to their reputation and the harm allegedly caused by the article.

c. Proof of actual injury:

See above. Plaintiffs called character witnesses to testify about their prior reputation and the emotional impact on them as a result of the article's publication. There was no evidence of direct economic loss.

d. Defendants' newsgathering/reporting:

The defendants called the reporter for the article, as well as the editor responsible for its publication. They reviewed in detail the sources of the article and traced where each statement of the article originated.

e. Experts:

The plaintiffs called an expert witness on organized crime to testify that they were not known to be affiliated with organized crime. That same expert, however, testified that Frank Nannicola's father-in-law was a "made" member of the Mafia.

f. Other evidence:

Much of the trial focused on a statement in the article that the plaintiff had not returned a telephone call placed to his business. The plaintiff claimed that he returned the telephone call, and spoke with an otherwise unnamed individual named "Bob." A number of witnesses were called to demonstrate that there was no "Bob" who could have answered the telephone at that time.

A second issue concerned the terms of the settlement of the plaintiffs' claims against the successor to the Pennsylvania Organized Crime Commission. Plaintiffs characterized a settlement as a victory, while the defendants characterized it as a non-event, involving no payment of funds and no admission of liability.

g. Trial dynamics:

Hard to be specific, given the absence of a verdict, but the hung jury would indicate that none of these factors skewed the result.

i. Plaintiff's counsel:

ii. Defendant's trial demeanor:

iii. Length of trial:

iv. Judge:

h. Other factors: N/A.

18. Results of Jury Interviews, if any:

The jury, for the most part, refused to speak after the trial. According to one juror, the jurors were deadlocked 5-3 in favor of the defendants. The foreman of the jury commented to a competing newspaper that both sides had tried the case well.

19. Assessment of Jury: *See* No. 11 above.

20. Lessons: *See* No. 11 above.

21. Post-Trial Disposition: The case has been set for re-trial for September 17, 2001.

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P. **Case Name:** Rappalyea v. WSET-TV
Court: Circuit Court, Lynchburg, Virginia
M. Parrow III, J.
Case Number: CL00L-631
Verdict rendered on: June 22, 2001

1. **Name and Date of Publication:** WSET-TV, September 1, 1999.

2. **Case Summary:**

Plaintiff worked at Toys R Us; stopped 8-year-old in ladies' room; dispute as to what happened; other stations reported the incident; defendant was told by a police officer concerning the report that he thought "no assault occurred," so defendant did not cover the incident that day; later the same day parents of child swore out a misdemeanor warrant; plaintiff was arrested; then the second day, plaintiff was suspended by her employer; defendants then reported arrest, suspension, and words of mother that plaintiff "strip searched" child by raising her shirt and unbuttoning her pants in bathroom; plaintiff was acquitted four months later, and this, too, was reported by the station.

3. **Verdict:** Defense verdict.

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

5. **Length of Deliberation:** 1½ hour.

6. **Size of Jury:** Eight.

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

8. **Significant Mid-Trial Rulings:** None.

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

None (mock trial in similar case in D.C. two weeks before trial).

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

11. **Pretrial Evaluation:**

Offered $15,000 to settle. Plaintiff demanded $460,000 pre-trial; $300,000 during trial.

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

13. Actual Jury Makeup:

Five women, three men; one female was a retired school teacher and she was selected as jury foreperson, other seven employed in salaried positions.

14. Issues Tried: Truth.

15. Plaintiff's Theme(s):

Defendants reported the horrible allegation of a strip search, after being told by a policeman there was "no assault"; defendant accepted mother's accusation and failed to investigate or to interview plaintiff and did not get or report plaintiff's side of the story.

16. Defendant's Theme(s):

The plaintiff is indeed a decent person who became the subject of criminal charges after stopping a girl in a bathroom; [it was against store policy for her to stop suspected shoplifter – but court ruled defendant could not so inform jury]; the defendants did not accuse her of a crime but only reported, correctly, what was charged by the mother and the status of those charges, which was as far as defendants could go at the time of the report; that the press could not, as plaintiffs would have them do, investigate and establish what happened in the bathroom; that is for the justice system to do in due course, as it did, and as defendant reported.

17. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

Plaintiff was a decent likeable person, and must have created some sympathy.

c. Proof of actual injury: Six witnesses on how upset plaintiff was.

d. Defendants' newsgathering/reporting:

The reporter who was told by the police that there was "no assault" had left the station but was called and testified that she recommended that no story be broadcast; the station had no proof to support the mother's statement that there was a "strip search." The defendants nonetheless did well in explaining the decision to broadcast the status of the incident after the mother complained, a warrant was issued, and on day 2, Toys R Us suspended plaintiff.

e. Experts:

None [plaintiff listed a journalism expert, but Virginia does not permit experts on journalism].

f. Other evidence:

Plaintiff admitted that the broadcast as a whole did not say she was guilty, only that she was charged.

g. Trial dynamics:

i. Plaintiff's counsel:

Young, emotional, but with youthful apparent truthfulness.

ii. Defendant's trial demeanor:

Excellent; cared about facts, even though this was just one of many "arrest" stories.

iii. Length of trial: Two days.

iv. Judge: Excellent.

h. Other factors:

Defendant obtained a good charge on "substantial truth," based on the publication as a whole, that facilitated the defense theme.

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

19. Assessment of Jury: Attentive, bright, conscientious.

20. Lessons:

Didn't defend the statements challenged (in this case, the "strip search"), but instead defended the publication as a whole in accurately stating the allegations, the status of the criminal charges, emphasizing the role of the media as messenger.

21. Post-Trial Disposition: None.

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Q. **Case Name:** Kathy Reakes v. Cape Publications, Inc., d/b/a Florida Today, et al.
Court: Florida Circuit Court, Brevard County, Florida
Case Number: 96-06821-CA-DT
Verdict rendered on: March 13, 2001

1. Name and Date of Publication:

Alleged slanderous statement made January 31, 1996; alleged libel made in journalism speech in June 1996.

2. Case Summary:

Plaintiff Kathy Reakes was a general assignment reporter for *Florida Today*. She was detailed to help fellow reporter John McAleenan work on a story about Anita Gonzalez, who at the time was under arrest for murder. The pair went to Gonzalez' apartment. They walked to the rear of the apartment building and noticed that the back door to Gonzalez' apartment was ajar. As they approached the door, they did not known on it or ring the doorbell. Instead, they walked inside.

Neither Gonzalez, nor the public housing authority (which owned the apartment), nor the police, nor anyone else gave the reporters permission to enter the Gonzalez home.

Once inside the Gonzalez apartment, both reporters explored its interior, and saw papers, furniture, and other personal effects in disarray. They moved materials in the apartment around, and plaintiff picked up papers to look at them. During their search, McAleenan removed some papers containing names and phone numbers. Although the reporters had notebooks with them, they did not copy the information from the list. Instead, the reporters took the paper from the apartment believing it to be valuable. Plaintiff was unconcerned about the impact the paper's removal might have upon the active police murder investigation.

The pair later returned to the newspaper's offices, made photocopies of the confiscated paper, and began to call the numbers on the list. At no time did they attempt to return the original material to its owner.

As she left the newspaper office later on the day of her illegal entry into the apartment, Reakes encountered editor Shelly Acoca. Acoca asked plaintiff about the Gonzalez story. Reakes conceded she and McAleenan had broken into the apartment and taken papers from it:

> John and I kicked the door in. Yeah, right. We broke in, Shelly. We kicked the door in.

Plaintiff claimed at trial that her confession to Acoca was a joke, but in fact she clearly admitted to Acoca that she had acted in concert with McAleenan (*i.e.*, "we" kicked the door in; "we" broke in; and "we" took the paper from the apartment).

Plaintiff also admitted the same activities to an editor, defendant Melinda Meers, later that evening; admitted the same activities in her deposition; and indeed admitted criminal transgressions at the trial.

The next morning, the newspaper's editors, having conferred among themselves and with legal counsel, fired plaintiff and McAleenan.

In response, plaintiff immediately made her termination, and the reasons for it, a topic of discussion among the newspaper staff. She announced her firing and the reason for it to a fellow reporter, who immediately rebroadcast it to the newspaper staff, creating a "buzz" in the building. Plaintiff herself – not management – was the newsroom's source of details relating to the terminations. And it was in light of and in response to this "buzz," which effectively established plaintiff as a public figure in the confined universe of the newsroom, that Ms. Meers was compelled to advise a deputy editor, Tom Squires, of the events that had transpired while he had been away from the newspaper. Squires claimed, and Meers denied, that Meers told him plaintiff had committed "criminal acts." Meers was named as a defendant for making this statement.

Plaintiff thereafter escalated her firing into a broader public controversy by launching a media campaign, contending that her termination was unwarranted. She met with several editors from around the country at a local Florida motel, spoke to and was quoted in the *Los Angeles Times*, and also spoke with reporters for the *Orlando Sentinel*, *Florida Today*, and the *Columbia Journalism Review*. In her publicity campaign, she took the view that *Florida Today* was concerned with "the bottom line, not the story" when it fired her. Plaintiff's criticism found support in a *CJR* article, "Forgive Us Our Trespasses: In One Door, Out Another at FLORIDA TODAY," Columbia Journalism Review, May/June 1996, which quoted a journalism professor as stating that:

> [T]he aggressive investigative reporter of the past is going to become extinct, because the people running newspapers are becoming more and more corporate. They're business people, not journalists. They're afraid of lawsuits, they're afraid of offending the public and their advertisers.

Florida Today is owned by Gannett Co., Inc. Thus, in June 1996, defendant Phil Currie, a senior news executive employed by Gannett, determined to answer the rhetoric generated by plaintiff and to set the record straight. In a June 1996 speech to Gannett's editors and publishers, he observed that:

> we are still committed to doing strong First Amendment journalism, that we will still do investigative journalism, that we will still do things you have to do to get stories.

In his talk, Mr. Currie opted to quote and respond directly to the *CJR* article, which itself quoted McAleenan as saying that "we trespassed and we took something in the course of that trespass." Quoting verbatim the facts as they were set out in the *CJR* article, Mr. Currie made the statement for which he was named as a defendant:

> **Frustration**: Reporting and commentary on a case in Brevard involving two FLORIDA TODAY journalists. The story has become so twisted that editors appear wrong for believing that newspaper people should not break the law, and the reporters appear to be heroes for admittedly having done so.

The trial evidence showed that plaintiff willfully entered the dwelling of Anita Gonzalez without permission; that the apartment was not open to the public; and that plaintiff was not licensed or invited to go inside the apartment. The evidence also demonstrated that plaintiff, while inside, in concert with another, knowingly took or retained the property (papers) of the apartment's tenant with an intent to, either temporarily or permanently, appropriate the property to plaintiff's own use.

The facts – as testified to by plaintiff – support the respective opinions of her editor Ms. Meers and of Mr. Currie that she committed "criminal acts," or admitted "breaking the law":

- she entered a dwelling without authorization, and thereby committed the crime of trespass, a second degree misdemeanor. § 810.08, Fla. Stat.
- she appropriated the property of another for her own use, committing petit theft of the second degree, a second degree misdemeanor. § 812.014(1)(b), (3)(a), Fla. Stat.; and
- she entered a private dwelling without permission and, once inside, took something which did not belong to her, thus engaging in burglary, a felony of the second degree. §§ 810.02(3)(b), 810.07(a), Fla. Stat.

Plaintiff sued the newspaper, Meers, and Currie for a wide range of torts, including wrongful termination. A series of summary judgment motions whittled the case down to three claims: defamation against Meers and the newspaper; defamation against Currie; and wrongful conversion against the newspaper (based on plaintiff's claim that news source materials that she had compiled as a reporter were not returned to her after she was fired).

3. **Verdict:**

For plaintiff: $410,500.

$10,000 against defendant Cape Publications, Inc. for conversion.

$400,000 against Meers and Cape Publications, Inc. for defamation, including $150,000 past economic loss, $150,000 future economic loss, and $100,000 reputation injury.

$500 against Currie for defamation, reputation injury.

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

5. **Length of Deliberation:** 2½ hours.

6. **Size of Jury:** Six, plus one non-deliberating alternate.

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

Partial summary judgments narrowed the scope of the case; refusal to dismiss case entirely was error.

Court refused to exclude testimony and evidence concerning plaintiff's termination and damages resulting from it.

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

Court refused to grant motion for directed verdict. Court charged common law principles, with no constitutional protection. Thus, defense had to prove statements made for "good motives."

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

10. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):** Appeal pending, so counsel are unable to comment at this time.

11. **Pretrial Evaluation:** Appeal pending, so counsel are unable to comment at this time.

12. **Defense Juror Preference During Selection:** Appeal pending, so counsel are unable to comment at this time.

13. **Actual Jury Makeup:** Four female, two male.

14. Issues Tried:

Truth; opinion; fault (public figure); privilege (mutual interest, self interest, reply, self defense); lack of damages.

15. Plaintiff's Theme(s):

Injury from termination with evidence related to loss of employment rather than defamation.

16. Defendant's Theme(s): Truth; sanctity of the home; lack of damages.

17. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

Considerable testimony over objection of plaintiff's termination and the damages she and her family suffered from it affected the jury.

c. Proof of actual injury: No proof of damages from statements at issue.

d. Defendants' newsgathering/reporting: This was, of course, the core fact issue at trial.

e. Experts:

Journalistic experts of plaintiff excluded. Damages expert of plaintiff excluded because there was showing of causation and alleged diminished earning capacity. Plaintiff's treating psychiatrist testified.

f. Other evidence:

Plaintiff's teenage son tearfully testified, over objection, about damages to plaintiff and family from her loss of job.

g. Trial dynamics:

i. Plaintiff's counsel: Appeal pending, so counsel are unable to comment at this time.

ii. Defendant's trial demeanor: Appeal pending, so counsel are unable to comment at this time.

iii. Length of trial: Seven days.

iv. **Judge:**

Retired judge who heard the case during his annual two-week term. Appeared very conscientious; polite to all parties. Listened to argument, and seemed ready to dismiss the case both at the end of the plaintiff's case and during post-trial motions, but did not. Characterized plaintiff's conduct, in remarks during motions *in limine*, in a manner quite similar to the characterizations for which defendants were sued.

h. **Other factors:**

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

19. **Assessment of Jury:**

Jury was reasonably well educated, from a range of blue and white collar background.

20. **Lessons:** Appeal pending, so counsel are unable to comment at this time.

21. **Post-Trial Disposition:** Appeal pending.

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R. **Case Name:** Leonard M. Ross v. Santa Barbara News Press, et al.
Court: Los Angeles Superior Court, Central Civil West
Joseph R. Kalin, J.
Case Number: C744583
Verdict rendered on: Liability Phase: March 9, 2001
Damages Phase: March 29, 2001

1. Name and Date of Publication:

"S & L Investor Inquires Suit Mark Career," *Santa Barbara News Press*, 11/27/88
"Rosses Drop Bid to Buy S & L Stock," *Santa Barbara News Press*, 2/28/89

2. Case Summary:

This private-figure defamation case has been in litigation for the past twelve years, resulting in two trials, one appeal, and a second appeal now in process. There have been three different trial judges. The first trial in November 1993 resulted in a $7.5 million verdict for the plaintiff. Defendants' motion for a new trial was granted and affirmed by the Court of Appeal. The Court of Appeal affirmed the trial court's finding that plaintiff was a private figure. The second trial was held in early 2001. This summary discusses the second trial.

The plaintiff is Beverly Hills businessman Leonard M. Ross. The defendants are the *Santa Barbara News Press*; its then-parent company, The New York Times Company; Kathleen Sharp, the reporter who investigated and wrote the articles; and David McCumber, the editor of the articles.

The plaintiff brought claims for defamation and interference with prospective business advantage as a result of two articles published by the *Santa Barbara News Press* on November 27, 1988 and February 28, 1989. The articles profiled plaintiff because he was seeking to increase his ownership to nearly 25 percent in the Santa Barbara Savings and Loan, the oldest and largest thrift in the County of Santa Barbara.

The plaintiff conceded that the articles correctly reported that he was investigated by the FBI, a federal grand jury, and the Department of Justice Organized Crime Strike Force for allegedly extorting and pistol-whipping his former business partner. But the plaintiff argued that the articles incorrectly reported that he was investigated by various other federal agencies for massive investor fraud that sent his former partner to prison. By the second trial, the plaintiff's claims were limited to four specific statements and one alleged implication in the two articles. The defendants argued that the articles were substantially true, were fair and true reports of government documents and proceedings, and that the defendants did not act with the requisite degree of fault. The defendants also argued that the plaintiff's alleged damages could not be linked to the specific statements or implications at issue.

Before the second trial, the plaintiff amended his complaint to add $500 million in alleged lost business damages. But the trial court excluded these claims on motions in limine heard several weeks before trial on the grounds, among other things, that the claimed losses were speculative. The court also granted the defendants' motion for directed verdict on punitive damages after the liability phase of the (bifurcated) trial, ruling that there was no clear and convincing evidence of actual malice.

During closing arguments, the plaintiff asked the jury to award $30 million in general damages.

3. **Verdict:**

In a bifurcated trial, the jury found no liability on the interference claim, but found that two statements and the implication were false, and caused damage. The jury awarded $2 million for reputational damages and $250,000 for mental suffering.

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

5. **Length of Deliberation:**

Liability phase: five days
Damages phase: four days

6. **Size of Jury:** Twelve jurors and four alternates (alternates did not deliberate)

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

Summary judgment: The court denied the defendants' motion for summary judgment on the fair and true report defense. The court denied the plaintiff's motion to amend his complaint to add an allegation that the articles implied that plaintiff intended to "loot" the local savings and loan.

Motions *in limine*: The court granted the defendants' motion to exclude the plaintiff's linguistic expert, but denied the defendants' motion to exclude the plaintiff's journalism expert. The court also granted the defendants' motion to exclude the plaintiff's evidence of $500 million in alleged special damages because, among other things, the alleged losses were speculative. The court granted the defendants' motion to exclude evidence of plaintiff's alleged medical damages because, among other things, there was an inadequate link between the alleged medical damages and the articles.

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

The court granted the defendants' directed verdict on punitive damages based on a finding of no clear and convincing evidence of actual malice. The court refused to grant the defendants' nonsuit on the plaintiff's interference claim.

The court charged the jury that the plaintiff could recover only for injury caused by the specific statements and the implication in issue and not for any other statement in the article; that to recover for the implication, the implication must be not only reasonable but intended by the defendants; that the plaintiff may not recover for true or privileged statements. The court also gave a good charge that statements may contain inaccuracies but nonetheless be substantially true or substantially accurate reports of official proceedings or documents.

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

A lengthy special verdict form was used before impaneling. The trial was bifurcated into liability and damages phases based on defendants' motion several weeks before trial. Because the court granted the defendants' motion for directed verdict on punitive damages, there was no punitive damages phase.

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

A pre-selection questionnaire was filled out by approximately 125 potential jurors.

11. Pretrial Evaluation:

This and other entries have been declined because the case is on appeal and could be tried again.

12. Defense Juror Preference During Selection: (Intentionally left blank.)

13. Actual Jury Makeup:

Jury	6 men, 6 women
Alternates	2 men, 2 women

14. Issues Tried:

Defamation
Intentional interference with prospective business advantage
General damages

15. Plaintiff's Theme(s):

That the newspaper reporter, editor, and in-house lawyer were sloppy, negligent and arrogant, and motivated by spite and acted with reckless disregard for the truth. That the defendants fell below the standard of care for professional journalists by failing to interview all of the law enforcement officials involved in the two investigations at issue, and by incorrectly reporting that the plaintiff was investigated in two federal investigations, when the plaintiff was only investigated in one federal investigation.

16. Defendant's Theme(s):

The savings & loan crisis in the late '80s made this article of primary concern in Santa Barbara. The newspaper reporter, editor, and in-house lawyer published a careful and balanced account of plaintiff's complicated business dealings, litigation, and investigations by federal agencies. The defendants relied on a detailed FBI report, federal grand jury transcripts, court records, interviews with a former federal prosecutor, and a transcribed

interview with plaintiff and his lawyers. The plaintiff was investigated in both federal investigations. Plaintiff suffered no emotional distress because of the actionable parts of the articles. Plaintiff suffered from non-actionable parts of the articles that were unknown to many people before the articles were published.

17. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Nothing extraordinary.

b. Sympathy for plaintiff during trial: Moderate.

c. Proof of actual injury:

Numerous witnesses testified to emotional distress and reputation injury.

d. Defendants' newsgathering/reporting: (Intentionally left blank.)

e. Experts:

Plaintiff's journalism expert: Prof. Sherrie Mazingo (University of Minnesota);

Defendants' journalism expert: Prof. Edwin Guthman (University of Southern California);

Defendants' emotional distress expert: Dr. Thomas Garrick;

Plaintiff's emotional distress expert: none

f. Other evidence: (Intentionally left blank.)

g. Trial dynamics:

i. Plaintiff's counsel: Skilled, tenacious, aggressive.

ii. Defendant's trial demeanor:

Reporter was on the witness stand two days, the editor one day. Dealing with thirteen-year-old articles under intense and focused cross-examinations was a challenge.

iii. Length of trial: Ten weeks.

iv. Judge:

Joseph R. Kalin, an experienced, fair, calm, and unflappable judge, who is assigned to hear long and complex cases.

h. Other factors: (Intentionally left blank.)

18. Results of Jury Interviews, if any:

Juror interviews indicated that the $2.25 million verdict was a compromise between some who wanted to award an eight-digit figure, others who were in the moderate range, and the balance who wanted to give zero. They reportedly arrived at a compromise based upon what the jurors thought it likely cost plaintiff to litigate the case over the years.

19. Assessment of Jury: (Intentionally left blank.)

20. Lessons: (Intentionally left blank.)

21. Post-Trial Disposition:

The plaintiff is appealing; seeking partial retrial on damages only; arguing that it was error to exclude evidence of special damages and actual malice. The defendants are cross-appealing the judgment.

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S. **Case Name:** Schlieman v. Gannett Minnesota Broadcasting, Inc., et al.
Court: State of Minnesota, Hennepin County, District Court
Tanya M. Bransford, J.
Case Number: MC 00-2843
Verdict rendered on: March 2, 2001

1. **Name and Date of Publication:** Broadcast of May 12, 1999.

2. **Case Summary:**

Plaintiff Schlieman was a police officer responsible for a shooting of a civilian. The day following the broadcast, Gannett's local station, KARE-11, broadcast a news story on the shooting. It repeated the official version of the shooting several times during the broadcast that it was totally justified and in self-defense. However, the broadcast also attributed to unidentified neighbors questions regarding whether the shooting was justified or in self-defense. The neighbor, who was identified during discovery as making such statements, denied ever offering any critical comment regarding the police shooting. In fact, she claimed that as the reporter was doing his stand-up broadcast, she heard his comments and rushed out immediately to tell him that he got it wrong. The reporter believed he got it right and no correction was made.

3. **Verdict:**

For defendant. Jury found each of three statements in the broadcast that were in issue not defamatory and did not reach the other issues. The statements were:

> "And while police say it was a self-defense, KARE 11's Dennis Stauffer is live in St. Cloud with conflicting information from neighbors."
>
> "A man police say has no history of arrest or mental illness reportedly provoked his own death. But there's some disagreement over exactly what happened."
>
> "Today friends and neighbors left flowers where Hartwig was killed and declined to speak on camera, but two people say they witnesses the shooting and that Hartwig was not being aggressive."

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

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

6. **Size of Jury:** Eight.

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

In its pre-trial order on summary judgment, the court dismissed claims based on two of five statements challenged in the complaint, and dismissed a claim for libel by implication based on the publication as a whole.

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

The court held the plaintiff was a public official and, under Minnesota precedent, could not claim damage by implication. The court also admitted the testimony of two reputation witnesses that the defendant/reporter was of excellent character and of high reputation.

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

The court gave pre-trial instructions on the elements of the claim.

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

11. **Pretrial Evaluation:** Privileged.

12. **Defense Juror Preference During Selection:** Intelligent, well-educated and open-minded.

13. **Actual Jury Makeup:** At least half fit the ideal profile.

14. **Issues Tried:**

Defamatory meaning, of and concerning, falsity, constitutional malice, damages.

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

Plaintiff's theme was that the defendant knew they got it wrong because they were told at the time by the only witness on which they relied that they got it wrong.

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

A fair reading of the program demonstrated that it was not defamatory. It emphasized the official version of events. Raising a question is not a defamatory statement. The lack of any evidence of damage demonstrated that there was no defamatory content.

17. **Factors/Evidence:**

    a. **Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:** KARE-11 viewed favorably in the community.

b. **Sympathy for plaintiff during trial:** Non-evident.

c. **Proof of actual injury:** Very little.

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

The defense placed substantial emphasis on the extent to which this story had been carefully researched.

e. **Experts:** None.

f. **Other evidence:**

In support of the credibility of the defendant reporter, the defense offered the testimony of his church pastor and also a source in an unrelated series of articles who testified to the reporter's good character for truth, honesty, and veracity. The evidence was offered and admitted pursuant to the Minnesota analogue of F.R.E. 404(a)(1), which authorizes, as an exception to the rule otherwise barring such proof, evidence of "a pertinent trait of character offered by an accused" for "the purpose of proving action in conformity therewith on a particular occasion." [Ed. note: In *Perrin v. Anderson*, 784 F.2d 1040, 1044 (10th Cir. 1986), the court held that "when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a)" (citing cases). The criminal nature of the actual malice standard was recognized in *Desnick v. American Broad. Cos., Inc.*, 233 F.3d 514, 517 (7th Cir. 2000).]

g. **Trial dynamics:**

i. **Plaintiff's counsel:** Did a good job.

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

Plaintiff, as a police officer, was a very experienced witness, but substantially overplayed his hand.

iii. **Length of trial:**

The shorter the trial, the better from the defense point of view.

iv. **Judge:** Able and evenhanded.

h. **Other factors:**

The plaintiff's medical records did not demonstrate any harm from the broadcasts, but did demonstrate significant other problems. These records clashed with the intense description of emotional problems offered by the plaintiff and his friends and relatives during the trial.

18. Results of Jury Interviews, if any:

The jurors concluded that the broadcast was evenhanded and that the plaintiff had not actually been harmed.

19. Assessment of Jury: Reasonably able.

20. Lessons:

Public figures in defamation cases don't necessarily get a lot of slack from the jury. Balance in a particular broadcast is always extremely helpful. Well-intentioned defendants are hard to beat. Well known reputation witnesses can help.

21. Post-Trial Disposition: Case on appeal.

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T. Case Name: Dorothy S. Vislosky v. Courier Times, Inc., Robert Bauers, Michael Renshaw, James Kettler, David Clark
Court: Court of Common Pleas of Bucks County, Pennsylvania
Calvin E. Smith, J.
Case Number: 88-1727-19-2
Verdict rendered on: November 16, 2000

1. Name and Date of Publication:

Bucks County Courier Times: news article published March 6, 1987, followed by other news articles, editorials, and editor's notes, into August 1987.

2. Case Summary:

The first news article, headlined "District Attorney is probing decisions by 2 DJs," attributed to law enforcement sources, described an investigation into decisions made in eight cases by two district judges, Dorothy Vislosky and Joseph Basile (six cases disposed of by Vislosky and two by Basile).

On the same day the first article was published, the District Attorney issued a press release stating that the review conducted by his office of alleged misconduct in those cases

"disclosed absolutely no evidence of any impropriety or wrongdoing by either District Justice Vislosky or District Justice Basile."

Both District Justices commenced libel suits against both the newspaper and two police officers. Basile contended he was the innocent victim of a police vendetta aimed at Vislosky. In 1991, Basile won a verdict of $300,000 divided between the Police Chief and Police Lieutenant (after the newspaper settled before trial for an undisclosed amount). After the Basile verdict, Vislosky filed her own complaint, attacking the first news article as falsely asserting that the District Attorney had initiated an investigation, also attacking subsequent news articles and editorials, and alleging that the two police officer defendants (the Police Chief and Lieutenant) had conspired to defeat her for reelection.

The position of District Justice, evolved from the earlier "justice of the peace," is open to non-lawyers elected from a six-year term, who conduct criminal preliminary hearings and adjudicate criminal summary offense and civil small claim cases.

3. Verdict:

For defendants.

Eleven jurors (one had been excused) voted nine-to-two (three/fourths majority required) in favor of the plaintiff on the first of sixteen special interrogatories, which inquired whether the "publications meant what [plaintiff] claimed they meant to the average reader." But the jury then voted by the same margin in favor of the defendants on the second interrogatory, which asked whether the publications were defamatory of the plaintiff.

4. Length of Trial:

Three days for jury selection (morning of Monday, Nov. 13, 2000) and plaintiff's evidence, with argument on defendants' motion heard at the close of the day on Wednesday, Nov. 15 (denied). Closing arguments on the morning of Thursday, Nov. 16, charge delivered at noon that day.

5. Length of Deliberation: Six hours.

6. Size of Jury:

Twelve sworn, one excused by agreement based on alleged economic hardship (potential loss of business opportunity if unable to make a presentation in another state). State practice requires a three-fourths vote to agree.

7. Significant Pre-Trial Rulings:

The judge assigned randomly for all pretrial proceedings (but not necessarily the trial judge) denied a well-founded motion to dismiss for failure of the plaintiff to prosecute the case, based on the plaintiff's failure to respond to written discovery for two years, and also denied a motion for summary judgment filed by the police officer defendants (who had been

sued by the plaintiff as being the undisclosed law enforcement sources who were the sources for the initial news article). At the time of trial in November 2000, the case was identified by the Court Administrator's Office as the oldest case on the Bucks County docket. Because the former District Attorney was now a Common Pleas Judge and had been identified by all parties as an important witness, the Court Administrator applied to the Supreme Court's Office of Judicial Administration for the appointment of a judge from another county. Senior Judge Calvin E. Smith, retired from the Berks County Court of Common Pleas, was designated to try the case.

8. Significant Mid-Trial Rulings:

Senior Judge Smith conducted a very tight and efficient trial, correctly sustaining most of the defendants' few objections to plaintiff's counsel's questioning.

The judge also agreed to allow the defendants to provide each juror with a booklet containing a set of the exhibits that had been used in the deposition of the District Attorney (and which had been stipulated to be admissible), including his notes made as he reviewed the files in each of the six cases in which the plaintiff's preliminary hearing dispositions had been questioned by the police, and copies of the police files themselves (with police reports, charging papers, and blood alcohol findings). The judge ordered that each juror could hold the booklets only while pertinent testimony was being received and could not take them from the jury box. Some of the jurors appeared to be very interested in the police files.

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

Defendants pressed for, and plaintiff agreed, to a complex set of special interrogatories which reflected the number of defendants, the First Amendment burdens on the public officer plaintiff (an elected District Justice at the time of the publications) and the qualified governmental immunity of the police officer defendants.

Defendants pressed for and obtained a ruling that the attorney for one of the police officer defendants, who had used no exhibits in his cross-examination of the plaintiff's witnesses, had "presented no evidence" at trial and was therefore entitled to give the final closing speech after the plaintiff's closing (under the unusual Bucks County procedure in which the normal closing pattern if both sides have presented evidence is that the defendant closes first and is followed by the plaintiff, who has the last (unrebutted) word.) This meant that the order of closing was (1) newspaper defendants' counsel (who had distributed the exhibit booklets to the jury and moved their admission, although he called no witnesses); (2) the first police defendant's counsel (who had also moved exhibits into evidence); (3) plaintiff's counsel; followed by (4) second police defendant's counsel, who had used no exhibits. This strategy appeared to have the intended effect of limiting any effort by the plaintiff's counsel to misrepresent the evidence, since he would be followed by the third defense lawyer.

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

The three defense counsel relied on themselves for jury selection, without consultants. Potential jurors in a civil case in Bucks County are identified only by name and municipality of residence and do not submit questionnaires. Data on education and occupation of juror and spouse was gathered in the courtroom by questioning each of forty potential jurors. Because of the importance to the defense of the DUI cases in which plaintiff had failed to hold defendants for trial, persons who had been arrested or prosecuted for DUI offenses or who were the victims of DUI accidents were asked to identify themselves. Four defendants in DUI prosecutions and three victims identified themselves, which was a larger proportion of the forty potential jurors than defense counsel had anticipated.

11. Pretrial Evaluation:

Avoidance of liability depended upon the defendants managing to present a united front, recognizing that in a trial in 1991 arising from the same series of news articles and editorials, another District Justice had obtained a $300,000 aggregate verdict split between the two police officer defendants after the newspaper settled out for an undisclosed amount.

Probable range of a damage award if the newspaper defendants lost the verdict was estimated prior to trial at $300,000 to $500,000.

12. Defense Juror Preference During Selection:

Better educated and economically upscale, avoiding (a) voters from the Township in which the plaintiff was powerful local leader (at the time of trial, plaintiff's daughter had succeeded to the District Justice position previously held by plaintiff), and (b) defendants in DUI cases. Plaintiff struck victims in DUI cases.

13. Actual Jury Makeup: Middle class with two persons holding advanced degrees.

14. Issues Tried:

Defamatory meaning, falsity, constitutional malice, willful misconduct, damages. Most of the evidence and argument focused upon substantial truth of the publication in suit.

15. Plaintiff's Theme(s):

Alleged police conspiracy, supported by testimony from one police sergeant, to destroy Vislosky's reputation in order to elect a police officer to her District Judge seat. Plaintiff had been emotionally wracked by the false accusation that the District Attorney had initiated an investigation of her.

16. Defendant's Theme(s):

The initial article in suit was literally true in stating that "The Bucks County district attorney's office has begun an investigation into rulings in an unspecified number of cases which came before two Lower Bucks district justices over the past several years," because an assistant district attorney did take a group of files, given to him by one of the police officer defendants, from the Township police offices back to the district attorney's office in the county seat, where they were reviewed by the district attorney and two top assistants. Moreover, although the district attorney reacted to the initial news article by almost immediately issuing a press release which vindicated the two District Justices, the district attorney's own notes showed that he disagreed with plaintiff's disposition in five of the six files examined, and could not reach a conclusion whether she was correct in the sixth case. Two of the five files in which the district attorney disagreed with the disposition were DUI cases in which the plaintiff had disregarded blood alcohol findings well in excess of the 1.5 threshold. Whether the district attorney had of his own volition initiated an investigation of the plaintiff was irrelevant.

17. Factors/Evidence:

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

Plaintiff is a popular but controversial political figure. The *Bucks County Courier Times* is the dominant daily in its lower Bucks County circulation area. Earlier investigative reportage on the conduct of district justices, such as a junket to an Atlantic City casino arranged by an attorney frequently litigating district justice cases, may have sensitized the venire to possible misconduct by Vislosky.

b. Sympathy for plaintiff during trial:

Plaintiff appeared to weep throughout the trial (at least when the jury was in the courtroom), but this may have been overplayed.

c. Proof of actual injury:

Plaintiff had no quantifiable financial loss and had been reelected without opposition to another six-year term.

d. Defendants' newsgathering/reporting:

The quality of the newspaper's reportage was the defendants' (including the police defendants) primary defense.

e. Experts: No experts were used by either side.

f. Other evidence: N/A.

g. Trial dynamics:

i. Plaintiff's counsel:

Skilled, with insurance defense background; occasionally overdramatic.

ii. Defendant's trial demeanor:

Diversity of styles among media and police defense counsel.

iii. Length of trial: Not a factor.

iv. Judge: Sustained all of the few objections by defense.

h. Other factors:

Judge permitted juror notebooks with exhibits were very effective.

Defendants obtained a charge which included an instruction, based on the *Bose* decision, which required the plaintiff to prove that the newspaper defendants had subjectively intended to convey the implication, alleged by plaintiff but denied by defendants, that the District Attorney had initiated an investigation.

During deliberations, the jury asked to be instructed on the definition of "defamatory."

18. & 19. Results of Jury Interviews and Assessment of Jury:

Two jurors were favorable to plaintiff on all issues, but were outvoted. If jury unanimity had been required to reach a verdict, whether a verdict could have been reached would have been doubtful.

20. Lessons:

Defendants' united front, stressing substantial truth of the newspaper's reportage, succeeded in persuading the jury that the publications were not defamatory of the plaintiff. The two police defendants candidly conceded being the sources for the first news article and managed to minimize the evidence that they had conspired to injury plaintiff's reelection.

21. Post-Trial Disposition: Plaintiff accepted the verdict.

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U. Case Name: Debbie Wilie v. Shamrock Communications, Inc., KJFK-FM, Bill Simonson, and Steve Frasier
Court: 261st Judicial District Court, Texas
Paul Davis, J.
Case Number: 98-07611
Verdict rendered on: January 18, 2000

1. Name and Date of Publication:

Trial proceedings not published in Texas. Appellate decision ordered not published, Tex. R. App. Pro. 47.7.

2. Case Summary:

Plaintiff was a clerical employee for the Texas Department of Insurance who had befriended several employees of the defendant radio station. Employees of defendant radio station attended birthday party thrown by plaintiff at her home. At work the next week, story got around that plaintiff had been inebriated and "flashed" her breasts to some of those present, including station employees, and made advances at one of them. Station DJ, who had not attended party, broadcast these reports over the air for a period of several days, possibly "embellishing" on the version of events he had heard. Although plaintiff was not named, some of the descriptions of those involved would allow some persons to determine who was involved.

3. **Verdict:**

For plaintiff. $400,000.

Actuals and exemplaries against radio station totaling approximately $350,000, reduced to approximately $250,000 by tort law damage cap. Actuals and exemplaries against DJ for approximately $50,000.

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

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

6. **Size of Jury:** Twelve.

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

8. **Significant Mid-Trial Rulings:** Court refused defendants' motion for directed verdict.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** Nothing notable.

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

Standard juror questionnaire used by the county.

11. **Pretrial Evaluation:**

Split. Legally, the evaluation was that plaintiff should not have a cause of action for defamation, because matters broadcast were true or substantially true, nor for invasion of privacy, because acts taken in the presence of others are not the kind of intensely private matters supporting such an award. However, factually plaintiff presented a sympathetic witness, and so pre-trial settlement offer of $100,000 was made.

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

Middle-aged women. Tried to avoid those who expressed strong views re privacy and re radio "shock jocks," such as Howard Stern.

13. **Actual Jury Makeup:** Mostly women.

14. **Issues Tried:**

Did DJ defame plaintiff?

Did DJ invade plaintiff's privacy?

Was radio station liable for acts of DJ?

15. Plaintiff's Theme(s):

How would you like this to happen to you?

You need to use this verdict to send a message to the Howard Sterns of the world.

16. Defendant's Theme(s):

Truth of matters broadcast.

Lack of actual damages to the plaintiff in her job, in her relations with others, her health (*i.e.*, no mental anguish), etc.

Possibly tasteless decision to broadcast these matters did not rise to level of intentional or malicious act by DJ.

17. Factors/Evidence:

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

Venire was surprising hostile to broadcast of any personal matters over radio. Only three or four of panel members expressed opinion that even tasteless or offensive materials are okay, and if you do not want to hear them, turn off radio. Plaintiff was unknown to venire, and few listened to radio station or knew DJ.

b. Sympathy for plaintiff during trial:

Plaintiff presented a number of friends, co-workers, etc., who talked about how hard this must have been for the plaintiff.

c. Proof of actual injury:

Negligible. Plaintiff had no medical bills related to stress, etc. None of plaintiff's bosses had ever even mentioned, and her employee evaluations had gone up after broadcasts. Plaintiff lost one-half month's rent when roommate/station employee involved with broadcasts left plaintiff's home after broadcasts.

d. Defendants' newsgathering/reporting:

On advice, trial was not advertised on station.

e. Experts:

Media expert from University of Texas for plaintiff re decency standards generally.

f. Other evidence:

One audiotape of portion of broadcast, which plaintiff did not play because its contents were not particularly scandalous.

g. Trial dynamics:

i. Plaintiff's counsel:

Good lawyer, both technically and to have on the other side of a case. Presented a good case. Jury liked him.

ii. Defendant's trial demeanor:

Corporate representative held his own, but DJ got angry on cross-examination and quarreled with plaintiff's counsel, which jury did not appreciate.

iii. Length of trial: Four days.

iv. Judge: Hon. Paul Davis.

h. Other factors:

18. Results of Jury Interviews, if any:

Jurors felt that broadcast of material was reprehensible, and that DJ's justification that "it was okay, because I never used her name" was poor. Jury did not like/trust DJ. Jury felt bad for corporate representative, who they knew was not personally responsible, but who was "on the hot seat." Jury enjoyed both plaintiff's and defendants' presentations at trial.

Verdict was 11-1, because one juror would not have given any damages to plaintiff. Deliberation was rancorous, because jurors were all over the map on the amount of damages to award, from nominal to millions of dollars.

19. Assessment of Jury:

Fairly average central Texas jury. Minorities and college-educated under-represented. Women over-represented, but this was also the case with the venire pool and likely was not the result of any kind of selective use of strikes.

20. Lessons:

In media cases, legal grounds for liability is far less important than facts of the case. Most middle-aged people, especially women, hate Howard Stern, and the comparison of defendant DJ to Stern was effective.

21. Post-Trial Disposition:

Motion for new trial, remittitur and JNOV denied. Appealed to Austin Court of Appeals. Main argument was that corporation could not be liable for exemplary damages for acts of employees. Argument rejected in unpublished decision. Texas Supreme Court refused to grant petition for review.

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V. Case Name: Alan M. Wolfe, James B. Norton, and James J. Marlowe v. William T. Glenn, Sr., Troy Publishing Co., Tom Kennedy, and William Caufield
Court: Court of Common Pleas of Chester County, Pennsylvania
Thomas G. Gavin, J.
Case Number: Consolidated Civil Action No. 95-6483
Verdict rendered on:

1. Name and Date of Publication:

Article, *West Chester Daily Local News*, April 20, 1995, "Slurs, Insults Drag Town into Controversy."

2. Case Summary:

The case arose out of a dispute between public officials in Parkesburg, a small Borough in rural Chester County, Pennsylvania. In late 1994 and early 1995, William T. Glenn, Sr., a member of Parkesburg's Borough Council, became dissatisfied with the manner in which the Borough's government was being run. Instead of presenting his grievances in a professional manner, however, Glenn disrupted several meetings by calling his fellow council members names such as "draft dodgers," "liars," and "criminals." Several Borough Council meetings had to be adjourned early because of Mr. Glenn's disruptions. One meeting had to be adjourned after the police were called. According to police reports, after another meeting Mr. Glenn allegedly confronted Borough Council President James B. Norton, III in the parking lot. Norton told police that Glenn had physically threatened him. Glenn told police that Norton had made an "immoral" proposal to him by attempting to "grab his penis."

Tom Kennedy, a reporter for West Chester's *Daily Local News*, learned of the dispute when Mr. Glenn began to call him and ask him to look into matters. During one conversation, Glenn allegedly told Kennedy that Norton and Wolfe were criminals and liars. In another conversation, Glenn allegedly expressed his disappointment that Kennedy had not looked into Glenn's concerns about his fellow council members and told Kennedy that he

was beginning to suspect that Kennedy might be a homosexual. Norton alleges that, at some point, Kennedy called Norton to tell him that Glenn was saying "nasty things" about him. From his conversations with Mr. Glenn, Kennedy got the impression that Glenn was something of a "kook." According to the plaintiffs, Mr. Glenn's unusual behavior of which Kennedy was aware was sufficient to put him on notice that Glenn was not a reliable source.

President Norton called a special meeting of Council for April 19, 1005 to address Mr. Glenn's unruly behavior. Mr. Glenn allegedly called Kennedy to tell him about the meeting, and allegedly told Kennedy that a representative from the Gay and Lesbian Task Force would be present at the meeting. Kennedy told his editors about the meeting and was assigned to attend. A prominent spot in the paper was allegedly reserved for an article about the council meeting.

During the meeting, President Norton read a short statement making clear that further disruption of Borough business would not be tolerated. Before Mr. Glenn had a chance to respond, the meeting was abruptly adjourned. Mr. Glenn brought with him to the meeting a written statement, which he provided to Kennedy. The statement indicated Mr. Glenn's belief that Norton and Parkesburg's mayor, Alan M. Wolfe, were homosexuals conspiring to remove him from office. It read, in part, "Mr. Norton has been making homosexual proposals to me for some time. I detest queers and child molesters. Since he and his friend, the mayor, are in positions that give them the opportunity to have access to children, I now feel that it is my duty to report what has been happening." Mr. Norton was a high school teacher. The Borough's solicitor, James J. Marlowe, told Kennedy at the same meeting that Glenn had called him a "shyster Jew."

In an April 20, 1995 article entitled "Slurs, Insults Drag Town Into Controversy," the *Daily Local News* reported Mr. Glenn's charges, along with Mr. Norton's statement that "[i]f Mr. Glenn has made comments as bizarre as that, then I feel very sad for him, and I hope he can get the help he needs," and Mr. Wolfe's comment that "[a]s he has done in the past, he is creating stories." The article also noted that Marlowe, a Roman Catholic, did not understand Glenn's charges against him. The article went on to provide Glenn's basis for the charges against Norton and Wolfe, obtained by the reporter during an interview with Glenn after the Borough Council meeting had ended. Among other things, Glenn described how he had caught the mayor and Mr. Norton "in the act" in 1983, and also observed them holding hands while walking around the Borough.

There was some controversy at the paper after this article was published. One of the editors called a special meeting with Kennedy and his editor to ask why certain language had appeared in the article. Specifically, he was concerned that the word "penis" appeared in the article, which apparently was against the paper's policy.

Shortly after the April 20, 1995 article appeared, Glenn stood for reelection in a primary. He was defeated, receiving less than 10% of the vote. Norton and Wolfe were later reelected to their positions.

Norton, Wolfe, and Marlowe brought defamation and false light invasion of privacy actions against Glenn and the media defendants.[2]

3. **Verdict:**

For media defendants.

The jury was given four fairly complex, separate special interrogatories at the close of the evidence as to plaintiff Wolfe and Norton's claims against Glenn and the media defendants. (As discussed below, the case against Marlowe did not proceed to trial.) The jury found in favor of the plaintiffs and against defendant Glenn, awarding $10,000 in compensatory damages to each plaintiff. The jury, during separate deliberations, also awarded punitive damages in favor of the plaintiffs and against Glenn in the amount of $7,500.

In special interrogatories, the jury found that, while the media defendants printed defamatory statements about the plaintiffs, they had fairly and accurately reported Glenn's statements, and had not espoused or concurred in the charges. Given the court's legal rulings, this verdict meant that the media defendants had not abused the privilege of neutral reportage and was a verdict for the media defendants. The jury also found that the plaintiffs had not established that the media defendants acted with constitutional malice; however, as discussed below, the plaintiffs were severely limited by the court's evidentiary rulings on this issue and the trial court has indicated that, should the case be reversed on appeal, a trial would be necessary on the question of constitutional malice.

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

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

6. **Size of Jury:** Twelve.

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

The media defendants filed a motion for summary judgment, arguing that the defendants could not be held liable for republishing Glenn's remarks under the fair report privilege, and the privilege of neutral reportage as explored by the Pennsylvania Superior Court's decision in *DiSalle v. P.G. Publ'g Co.*, 544 A.2d 1345 (Pa. Super. 1988) (dicta). Judge Paula Francisco Ott found that the statements, if made by Glenn, were privileged under either the fair report privilege or the neutral reportage privilege. Judge Ott reasoned that: "the facts of this case cry out to allow the opportunity for the press to repeat what a defaming official says about his fellow public officials, all of whom are eventual candidates

[2] For purposes of trial, defendants Troy Publishing Co., Tom Kennedy, and William Caufield were treated as a single entity, the "media defendants."

for reelection, and to republish the defamation while overtly stating in the headline that the statements are slurs and insults." Judge Ott, however, found that a factual question remained as to whether or not Mr. Glenn had made the statements – at times during his deposition, he denied have made some of the statements. Accordingly, Judge Ott denied the media defendants' motion for summary judgment.

Mr. Glenn also moved for summary judgment, arguing that his statements were protected by absolute immunity since they were made in the context of his official position as a borough council member. Judge Ott granted Glenn's motion as to the "shyster Jew" comment Glenn had made about Marlowe since it arguably related to borough business. She denied Glenn's motion as it applied to Wolfe and Norton.

The plaintiffs sought permission to take an immediate appeal of the trial court's ruling that the republication of Glenn's statements fell within the scope of the fair report/neutral reportage privilege, which the trial court granted. The media defendants opposed the application in the Pennsylvania Superior Court. That court denied the petition for an immediate appeal. The case was set for trial.

8. <u>Significant Mid-Trial Rulings:</u>

Shortly before the trial date, the case was reassigned to Judge Thomas G. Gavin. It is unclear whether the case was reassigned because of Judge Ott's schedule, or because of a motion to recuse the plaintiffs had previously filed.

At the outset of the trial, the media defendants renewed their motion for summary judgment as to Marlowe, as Marlowe did not contest the fact that Glenn had made the "shyster Jew" comment. After the parties reached a stipulation that the *Daily Local News* had fairly and accurately reported Glenn's "shyster Jew" comment, Judge Gavin granted the renewed motion for summary judgment. Thus, Marlowe's case did not proceed to trial.

The media defendants also filed an *in limine* motion, seeking to preclude the plaintiffs from arguing that Mr. Glenn had not made the comments attributed to him in the *Daily Local News*. The plaintiffs, in their complaints, had affirmatively pleaded that Glenn made the remarks attributed to him in the *Daily Local News*. Accordingly, the media defendants sought to treat these as judicial admissions, and to prevent the plaintiffs from arguing that Glenn had not made the statements. The court denied the motion *in limine*, but instructed the jury that they could consider the pleadings as admissions.

Although Judge Gavin privately (and at times on the record) expressed his disagreement with the neutral reportage privilege, he felt bound to apply Judge Ott's ruling under the coordinate jurisdiction rule. The Superior Court's dicta in *DiSalle* on the neutral reportage privilege thus became the blueprint for the court's evidentiary rulings. At trial, the plaintiffs sought to introduce evidence tending to show that the media defendants knew that Mr. Glenn was an unreliable source and that they knew or should have known that his statements were false. For example, the plaintiffs wanted to introduce evidence that would

allegedly have shown that the reporter, Mr. Kennedy, had spoken with Glenn prior to the meeting where the statements at issue were made, and that Kennedy doubted Glenn's credibility – especially because Glenn had allegedly told Kennedy that he was beginning to question whether Kennedy was a homosexual. They also wanted to introduce the testimony of one of the paper's editors, who would purportedly have testified that he did not agree with some of the language that appeared in the article – especially the use of the word "penis."

Judge Gavin sustained the media defendants' objections to all of this testimony. The court reasoned that, with respect to the neutral reportage privilege, the question of constitutional malice – the defendant's belief as to the truth of the statements – is totally irrelevant because the privilege assumes that the defendant knows the statement to be false. The purpose of the privilege is to allow the media to republish the statements because the *statements*, in and of themselves, are newsworthy. The privilege applies so long as the "reporter neither espouses nor concurs in the charge and in good faith believes the report accurately conveys the charges made." *DiSalle*, 544 A.2d at 1362. Thus, the court precluded the plaintiffs from offering any testimony tending to show that the defendants knew or should have known that the statements were false, including evidence suggesting that Glenn was not a reliable source. The plaintiffs were limited to evidence tending to show that the *Daily Local News* had not accurately conveyed the charges made or that they espoused or concurred in the charges. In general, no evidence relating to actual malice was admitted.

During closing argument, the plaintiff also attempted to offer testimony that the media defendants did not offer the plaintiffs a fair opportunity to respond to the charges. Although the article contains the plaintiffs' denials, plaintiffs' counsel argued that Norton and Wolfe had not been given the opportunity to respond to the specific, more graphic allegations in the article relating to Glenn allegedly catching Norton and Wolfe "in the act." While Judge Gavin allowed the plaintiffs to continue their closing, he was not pleased with the line of argument and issued an additional charge to the jury emphasizing that the defendants had no duty to confront the plaintiffs with Glenn's charges.

Judge Gavin dismissed the plaintiffs' false light invasion of privacy claims prior to submitting the case to the jury under the reasoning of the Superior Court's decision in *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648 (Pa. Super. 1999), which holds that, in a false light invasion of privacy action, the plaintiff cannot recover if the statements relate to matters of legitimate public concern.

The court denied the media defendants' motion for judgment as a matter of law at the close of the plaintiffs' evidence. The only evidence offered by the media defendants was reading in relevant portions of the plaintiffs' pleadings.

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

Preparing the case for trial presented some difficulties because, as far as we could tell, there were few if any neutral reportage cases that had gone to trial. Moreover, the only case

law on abuse of privilege from Pennsylvania was dicta, and authority from other jurisdictions was not uniform. From the court's summary judgment ruling it *appeared* that the only relevant issue at trial would be whether or not Glenn made the statements attributed to him. However, because Judge Ott's opinion was broadly written, we did not know exactly how the court would apply the privilege, and what the parameters of any abuse issue would be. Furthermore, we did not understand how the plaintiffs would simultaneously argue their case against Glenn (that Glenn made the statements attributed to him) and their case against the media defendants (that the media defendants did not fairly and accurately report the statements).

Another important strategic question that needed to be made pre-trial was whether to concede the issue of constitutional malice. The media defendants were concerned that the plaintiffs would structure their case in such a way as to plead for jury nullification. While under the court's legal rulings the media defendants were privileged to publish Mr. Glenn's charges *even if* they believed them to be false, we did not know whether the jury would agree with this legal principle, especially since the charges involved allegations of homosexuality and sexual morality against a high school teacher. In the end, while not formally conceding the issue of constitutional malice, the reporter testified that he did have serious doubts as to the truth of Glenn's statements.

In order to avoid the potentially damaging testimony which would go to the issue of actual malice, the media defendants carefully considered filing a motion to bifurcate the trial into two phases. In the first part, the jury would be asked whether or not Mr. Glenn made the charges against him. The second phase, if necessary, would focus on whether the defendants acted with actual malice and any remaining issues. Given that Glenn was also a defendant in the case, however, we concluded that the court was unlikely to grant the motion and decided not to pursue it. Instead, the media defendants filed a motion *in limine* seeking to exclude this type of evidence which, as discussed above, was substantially granted.

The media defendants structured their proposed jury instructions along the lines of the *DiSalle* case, which were essentially followed by the trial court.

At the close of trial, the parties agreed to submit four separate jury slips containing special interrogatories to the jury, one for each plaintiff's claim against each defendant. Separate questions were asked for each element of the plaintiffs' claims. With respect to the media defendants, the jury was separately asked whether Glenn had made the statements attributed to him in the *Daily Local News* and whether the media defendants espoused or concurred in the charges made. The first question was answered affirmatively, the second in the negative.

The judge held the issue of punitive damages until after the jury returned its verdict. The issue with respect to Glenn was tried and deliberated in less than an hour.

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

11. Pretrial Evaluation:

See No. 9 above. After the court's ruling on the summary judgment motion, there were never any serious settlement discussions, as the plaintiffs claimed that they were pursuing the case on principle. Prior to trial, the media defendants were confident that they could prove that Glenn had made the charges contained in the newspaper. They were, however, concerned about how the jury would react to the concept of the neutral reportage privilege. It was (and is) also not certain whether or not the privilege will be accepted by Pennsylvania's appellate courts.

12. Defense Juror Preference During Selection:

The media defendants sought active, engaged citizens who followed local politics. The entire defense theme was that the media was simply acting as a messenger, reporting information that concerned citizens needed to know in order to intelligently exercise their right to vote. (Glenn was up for re-election at the time the article in suit was published.)

Defendants believed that middle-aged jurors would be more apt to understand the need for "political" information.

13. Actual Jury Makeup:

Juror Number	Sex	Age	Occupation
1	Female	46	Research Data Analyst and College Graduate
2	Male	43	Electronics Technician
3	Male	47	Maintenance Manager
4	Male	77	Engineer
5	Male	66	Chemical Sales
6	Female	67	Retired Nursery School Teacher
7	Male	32	Carpenter
8	Male	49	Surveyor
9	Male	59	Tavern Owner
10	Male	35	Machine Operator
11	Female	38	Dietary Aide
12	Female	38	Program Director at Non-Profit Center for Disabled

14. Issues Tried:

The main issues actually tried to the jury were whether Glenn made the statements contained in the paper, whether the statements were defamatory (as opposed to name calling or rhetorical hyperbole) and whether the neutral reportage privilege protected the media defendants' publication of the remarks. Also at issue were whether Glenn had made the statements with constitutional malice, whether the plaintiffs suffered damages, and (later)

whether the plaintiffs were entitled to punitive damages against Glenn. While the jury was asked whether the media defendants had acted with constitutional malice, the issue was essentially removed from the case by Judge Gavin's evidentiary rulings.

15. Plaintiff's Theme(s):

The plaintiffs' theme against defendant Glenn was straightforward – that he had made the statements, that he acted with constitutional malice and that the statements were outrageous. Their case against the media defendants was more difficult. They had intended to argue that the media defendants knew that Glenn was not a reliable source, that they had every reason to doubt the truth of his statements, but that they printed them anyway in order to sell newspapers. Judge Gavin's evidentiary rulings essentially gutted this theme, so the plaintiffs attempted to paint Glenn as so bizarre that no right-thinking person would publish what he had to say. Plaintiffs also argued that no one could know whether the paper had accurately quoted Glenn since the reporter had discarded his notes (prior to the institution of litigation).

16. Defendant's Theme(s):

Every one of the plaintiffs' own witnesses testified that it was important for them to know that Glenn's disruptive behavior and name-calling was making it difficult for the Borough's business to get done, and that Mr. Glenn's name-calling and other antics bore on his fitness for public office. The media defendants argued that, as unpleasant as Mr. Glenn's statements may have been, the public has a right (and a need) to know about the behavior of their elected officials. The testimony established that Borough business was not getting done because Mr. Glenn could not refrain from the type of name-calling reported in the article at issue. Indeed, the article at issue gave the public the opportunity to evaluate Mr. Glenn's fitness for office. The article appeared shortly before a primary election in which Glenn stood for re-election. He lost, receiving less than ten percent of the vote. As one of the plaintiffs' witnesses stated in response to the fact that Glenn lost, "it's a good thing."

17. Factors/Evidence:

The primary evidentiary factor was getting each of plaintiffs' witnesses to admit that voters had a right to know about Glenn's antics when making the decision on his re-election. *See also* the responses to 1 through 16, above.

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

Normal resentment versus dominant newspaper in suburban county.

b. Sympathy for plaintiff during trial:

Nothing extraordinary, except plaintiff mayor testified kids used to play. Parents of other children: Mayor's children always welcome but kids not allowed at mayor's house.

c. Proof of actual injury:

Usual reputation and emotional distress evidence; *see* above.

d. Defendants' newsgathering/reporting: Appeared to be well received.

e. Experts: None.

f. Other evidence: N/A.

g. Trial dynamics:

i. Plaintiff's counsel: Competent.

ii. Defendant's trial demeanor:

The author and principal defense witness did well in challenging circumstances. The editor who had expressed regret for publishing some of the words in the article for taste reasons was not called.

iii. Length of trial: Not a factor.

iv. Judge:

Very good. His only slip was giving charge on constitutional malice after ruling evidence on that issue irrelevant.

h. Other factors:

Throughout trial and closing argument, defense counsel emphasized the media's important role as "messenger" in informing the public of antics of elected officials. Near the end of his closing, counsel implored the jury, "don't do what the Greeks used to do . . ." He was interrupted by a juror in the back row who shouted, "Don't kill the messenger." Counsel responded, "You got it!" and invited his opponent to rebut.

18. Results of Jury Interviews, if any:

No formal interviews were conducted. Informal "hallway" interviews with some jurors revealed that they had no difficulty accepting the defense theme.

19. Assessment of Jury:

Alert, smart (what else can one say about a jury that returns a verdict in your favor?).

20. Lessons:

No long-term, strategic lessons. The headline and layout of the article, which set Glenn's diatribes in the context of name-calling, was extremely helpful to the defense.

21. Post-Trial Disposition:

Plaintiffs filed post-trial motions focusing on the trial court's adoption of the neutral reportage privilege and the court's exclusion of evidence that would have allegedly shown that Glenn was not a reliable source, that the presentation of the charges was not fair, and that the plaintiffs were not given an adequate opportunity to respond to the charges. Glenn also filed post-trial motions on the basis of absolute immunity. The court, after argument, denied all post-trial motions. Plaintiffs Wolfe and Norton appealed. Defendant Glenn did not. Nor did plaintiff Marlowe. Briefing on the appeal in the Pennsylvania Superior Court begins on May 29, 2001.

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W. Case Name: Woodie v. Tampa Bay Television, Inc.
Court: Circuit Court of the Thirteenth Judicial District, Hillsborough County, Florida
Vivian Maye, J.
Case Number: 97-04273
Verdict rendered on: April 25, 2001

1. Name and Date of Publication:

Television broadcast on WFTS Channel 28 on November 15, 1996.

2. Case Summary:

WFTS Channel 28 Tampa aired a report on November 15, 1996 titled "You Paid For It: Late For School," part of an occasional series examining the use of taxpayer money. The broadcast was spawned by an anonymous letter received at the station that said several school employees in the School District's administration building were not putting in a full day's work. The broadcast documented how certain Hillsborough County public school employees came to work late or left during the day to attend to personal errands. The broadcast described two instances in which the plaintiff, Margaret Woodie (a 50ish African-American female with thirty years of experience at the school system), was not at work at a time when official time records indicated that she was supposed to be on the job. The station had used a camera that was "hidden" (in the sense that plaintiff was not in a position to see

it) to film plaintiff shopping for clothes at a department store during the school day. Prior to the airing of the report, the School District conducted an internal investigation and excused the plaintiff's absences by allowing her to account for her time off by applying previously accrued compensatory time. The station modified the original story to explain the School District's investigation as it pertained to plaintiff and others. The report also documented three other individuals who could not account for absences witnessed by the station and who were reprimanded by the School District.

Plaintiff's lawsuit against the station, filed in 1997, argued that the report libeled her and placed her in a false light by juxtaposing her with three other school employees who were reprimanded for improperly taking time off. She named as defendants two corporate parents of the station (and later added the owner and operator of the station), and the reporter. The court permitted the plaintiff to add a claim for punitive damages on her count for false light, but denied plaintiff's motion to add a punitive damages claim on her count for libel (a curious ruling that ultimately became moot, as described below).

3. Verdict:

On April 25, 2001, the jury returned a verdict for plaintiff and awarded compensatory damages on her claim for libel in the amount of $228,000. On the special verdict form, the jury checked "Yes" to the following questions:

1. Has Ms. Woodie proved by the greater weight of the evidence that the substance of the broadcast was in some significant respect false as to her?

2. If your answer to Question 1 is yes, has Ms. Woodie proved by the greater weight of the evidence that the substance of the broadcast was defamatory to her in that it tended to expose Ms. Woodie to hatred, contempt, or ridicule, or tended to injure her in her business, reputation, or occupation?

3. If your answers to Questions 1 and 2 are yes, has Ms. Woodie proved by the greater weight of the evidence that Tampa Bay Television, Inc. was negligent by failing to use reasonable care in the preparation and airing of its broadcast?

4. If your answers to Questions 1, 2, and 3 are yes, has Ms. Woodie proved by the greater weight of the evidence that the broadcast directly and proximately caused damage to her?

4. Length of Trial: Three days.

5. Length of Deliberation: Six hours.

6. Size of Jury: Six.

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

Just prior to the commencement of the trial, plaintiff voluntarily dismissed the E.W. Scripps Co. and Scripps Howard Broadcasting Co. as defendants in the face of a motion that neither corporate entity maintained any control over or participation in the broadcast.

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

After close of plaintiff's case, the court granted a motion for directed verdict to dismiss reporter Ken Kalthoff as a defendant for plaintiff's failure to comply with Florida's pre-suit notification statute, which requires that each defendant independently receive a demand for retraction prior to the filing of a complaint. Thus, of four original defendants, the case proceeded against only Tampa Bay Television, Inc., the owner and operator of the station. The court further granted a motion for directed verdict to dismiss plaintiff's claim for false light invasion of privacy as being duplicative of her claim for libel. The motion was significant in that it negated a potential claim for punitive damages. Thus, the only claim to be put before the jury was plaintiff's claim for compensatory damages on her count for libel against Tampa Bay Television, Inc.

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

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

Defense counsel consulted with Dan Wolfe of Trial Logix for jury profiles and general case impressions.

11. **Pretrial Evaluation:**

Plaintiff's original demand was for $1.6 million, which she later lowered to $1 million. Four months prior to trial, she lowered her demand to $500,000, but never wavered from that number. Defendants' last offer was for $30,000, but as plaintiff refused to budge from her last demand, settlement negotiations were not pursued further.

12. **Defense Juror Preference During Selection:** Middle class to upper-middle class professionals.

13. **Actual Jury Makeup:** Middle class to upper-middle class professionals.

14. **Issues Tried:**

Whether the broadcast libeled plaintiff by falsely portraying her as improperly running personal errands during her taxpayer-funded workday (private figure standard).

15. Plaintiff's Theme(s):

Prior to the broadcast, the School District allowed the plaintiff to account for her absences from work by applying previously accrued compensatory time. The television station was aware of the School District's actions but included plaintiff in its story anyway. By lumping plaintiff with three other school employees who were found guilty of "wrongdoing," the station falsely portrayed plaintiff as cheating the taxpayers. Notwithstanding the School District's findings, the station kept plaintiff in the report in part because the most dramatic video shot of the employees was that of plaintiff, who was filmed shopping for clothes at a department store during the school day. Also, the station's statement that it "caught" the plaintiff on video running personal errands during the school day implied she was "guilty" of something, when in fact she had been cleared of wrongdoing by the School District.

16. Defendant's Theme(s):

Plaintiff was included in the story because she was an example of the very issue being explored in the news report – whether the School District was keeping track of employees such that it would know what they were doing on any particular given day. The station reported that the School District allowed the plaintiff to account for her time off after the fact, and thus the broadcast was substantially true. The station repeatedly attempted to obtain comment from the plaintiff – by telephone, in person, and through written questions – but the plaintiff refused to speak with the station's reporter.

17. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: No biases of any significance were noted.

b. Sympathy for plaintiff during trial:

Three senior School District administrators, including the superintendent of the Hillsborough County School District, testified as to plaintiff's sterling reputation and dedication to the school system and its students. Plaintiff, an African-American and native of the Tampa area, had spent thirty years teaching in the school system with nary a blemish. Plaintiff tearfully testified as to the emotional scars allegedly caused by the broadcast. Plaintiff's son stoically testified to the emotional harm he witnessed in his mother after the broadcast. Throughout trial, plaintiff was alone except for the presence of her one attorney. No family members or friends were present in the courtroom.

c. Proof of actual injury:

Plaintiff testified that she suffered severe emotional distress, that others shunned her, that social acquaintances made disparaging remarks to her personally, and that she ceased many social and church activities. A co-worker testified that other unnamed individuals made unflattering remarks about plaintiff behind her back. Plaintiff's son (about 22 years old) testified that his mother, who previously was a vibrant, energetic woman, became

severely withdrawn and depressed. Plaintiff did not present any medical evidence, other than to say that her blood pressure had risen and that her hypertension (a preexisting condition) had become more severe.

d. Defendants' newsgathering/reporting:

The station shot video showing plaintiff and four other school employees leaving their homes late, running personal errands, or otherwise not being at their offices during the school day. The station obtained attendance reports and leave requests indicating that the employees should have been at work at the times they were filmed at home or running errands. The station interviewed senior School District administrators who acknowledged that leave policies needed to be tightened. The station repeatedly attempted to interview the plaintiff, but she refused. The station reported the results of the School District's investigation.

e. Experts:

For defendants, Dr. Paul Smeyak, Director of the School of Journalism and Broadcasting, Oklahoma State University, Stillwater, Oklahoma

For plaintiff, Richard Lubunski, assistant professor, University of Kentucky, School of Journalism.

f. Other evidence:

Plaintiff's counsel repeatedly played the broadcast at issue, pointing out several instances that – he argued – made it appear as if the plaintiff was guilty of wrongdoing. The broadcast itself unfortunately juxtaposed plaintiff with three other employees who, unlike plaintiff, were found to be improperly away from work and who were reprimanded by senior school officials. For instance, a four-way split screen showed the four employees (including plaintiff) with audio that announced their combined salaries. The broadcast also contained video (which was taken without the plaintiff's knowledge) of plaintiff shopping at a department store. The audio stated that the station had "caught" the plaintiff "developing her wardrobe during her taxpayer-funded workday." Plaintiff focused on the word "caught" to suggest that the station implied plaintiff had done something wrong.

As for witnesses, plaintiff's immediate supervisor testified that, notwithstanding the policy that requests for compensatory time must be made in advance and in writing, the "policy" within plaintiff's department was very informal. Thus, it was an accepted practice for an employee such as plaintiff to simply call into the office in the morning and request use of compensatory time that day. Plaintiff claims she made such telephone calls on the days in question, though neither of her secretaries recall her making such requests. There were no written records supporting plaintiff's claim that she had requested the use of compensatory time in advance.

g. Trial dynamics:

i. Plaintiff's counsel: Good trial lawyer, specializes in plaintiffs' cases.

ii. Defendant's trial demeanor:

Testifying on behalf of the station were the reporter and producer for the broadcast, both of whom calmly and confidently backed the reporting and the truth of the broadcast. As an expert, Dr. Paul Smeyak of Oklahoma State University (and formerly of the University of Florida) testified that the report was well-documented and met all appropriate standards of care. Dr. Smeyak appeared truthful and reasonable, and testified forcefully.

iii. Length of trial: Three days.

iv. Judge:

Shortly before the case was originally scheduled for trial, the case was reassigned from Judge Manuel Menendez to Judge Vivian Maye. (Interestingly, Judge Maye received a bachelor's degree in journalism from the University of Florida.) Judge Maye appeared intelligent, studious, cordial, and hard-working. Significantly from the defense perspective, Judge Maye was willing to entertain the same or similar arguments that the previously-assigned judge had rejected (erroneously, defendants contended) much earlier in the proceedings and granted the relief requested by the defendants.

h. Other factors:

Some of those present at the trial commented that the plaintiff was effective in quietly portraying her humiliation and distress. For instance, during her son's testimony, plaintiff appeared to bow her head as if in shame. After her son stepped off the witness stand and walked past his mother, he did not glance at her nor she at him. Other than witnesses, no one appeared in the courtroom to offer the plaintiff support.

18. Results of Jury Interviews, if any:

Florida law strictly prohibits attorneys from initiating contact with jurors after trial. No juror contacted defense counsel.

19. Assessment of Jury:

The jury make-up was as the defendants wished. All were professionals, which defendants believe may have prevented a runaway verdict. The jury deliberated for six hours (until approximately 9 p.m.), a rather lengthy time given the relatively short trial. During the first three hours or so of deliberations, loud but undecipherable arguing could be heard from the jury room, which adjoined the courtroom. (After pizza was delivered, the high volume subsided.)

20. Lessons:

Though defense counsel were unable to interview the jurors, several aspects of the broadcast likely were critical. The juxtaposition of plaintiff (who had been cleared of wrongdoing, albeit after the fact) with three other school employees who were reprimanded likely created the impression in the jurors' minds that plaintiff was "guilty" of something. It appeared that the jury felt that such portrayal simply was not "fair" to someone who was cleared of any wrongdoing and whose reputation was highly regarded by her peers. The word "caught" may inevitably convey some notion of wrongdoing.

On the other hand, both sides of this case would probably agree that this low verdict was more of a victory for the defense than for plaintiff. The key to keeping the award at a modest level was emphasis by the defense that (1) the thrust of the broadcast was its examination of the school's practices in keeping track of its employees (to which the information about plaintiff was directly relevant), and (2) the broadcast stated that the school had found her conduct to be proper. Although not enough to carry the day, these trial themes kept the result within the acceptable range. The verdict could have been significantly greater had defendants not succeeded on critical portions of their motion for directed verdict, in which the court dismissed the reporter as a defendant and dismissed plaintiff's count for false light, which included a punitive damages claim.

Experts did not seem to make a difference. Plaintiff's counsel effectively reminded jurors that they were the ones whom the law allows to make the call on whether the plaintiff was libeled, not hired experts.

It is possible that the use of hidden cameras offended the jury slightly, although plaintiff's counsel did not emphasize that issue during argument.

21. Post-Trial Disposition:

The sole remaining defendant, Tampa Bay Television, Inc., moved for judgment notwithstanding the verdict. Just days after trial, defense counsel became aware of a not-yet-published decision by the appellate court with jurisdiction over the Tampa area that arguably suggested that claims for false light invasion of privacy should not be constrained by procedural and substantive rules governing claims for libel. Had the defendant pursued an appeal, plaintiff may have cross-appealed the dismissal of her count for false light invasion of privacy and sought a new trial on that count. Because the false light count included a claim for punitive damages (which the libel claim did not), defendants pursued a quick settlement. Defendants ultimately reached a settlement with the plaintiff for a favorable (confidential) payment.

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X. SUMMARY REVIEWS

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

1. Case Name: Bentley v. Bunton
Court: Texas District Court, Anderson County
Verdict rendered on: February 14, 1997

a. Date of Publication:

June/July, 1995, Questions and Answers, weekly cable television show.

b. Case Summary:

Defendant Joe Ed Bunton, host of a television talk show made repeated statements about Judge Bascom Bentley, III, the plaintiff, including calling him a "criminal" and the "No. 1 most corrupt official in the county." Defendant Gates also participated in the shows, agreeing with Bunton's statements.

The plaintiff also sued several behind-the-scenes personnel associated with the show, but these individuals were dismissed after presentation of the plaintiff's case.

c. Verdict:

For plaintiff.

Defendant Bunton - Actual: $7,150,000
Defendant Bunton - Exemplary: $1,000,000

Defendant Gates - Actual: $95,000
Defendant Gates - Exemplary: $50,000

The verdict was 10-2, with the dissenters disagreeing about Defendant Gates' participation.

d. Length of Trial: Unknown.

e. Length of Deliberations: Two hours.

f. Size of Jury: Twelve

g. Issues Tried:

Plaintiff claimed defamation, infliction of emotional distress, and conspiracy to defame a public official. Court ruled statements were slander *per se*.

h. Notes:

Press reports suggest defendants attempted to show the investigations they undertook, and that the statements were substantially true. Defendant Bunton also attempted to exonerate Defendant Gates.

i. Post-Trial Disposition:

On appeal, the Texas Court of Appeals for Tyler, Ramey, C.J., reversed in part, throwing out the verdict against defendant Gates, and affirmed the verdict as to defendant Bunton. The Court also rejected plaintiff's arguments that the defendants should be held jointly and severally liable. The Texas Supreme Court granted a petition for review in December 2000, and heard arguments in April, 2001.

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Defendant Bunton appealed *pro se*

2. **Case Name:** Isuzu Motors Ltd. v. Consumers Union of the United States
Court: United States District Court for the Central District of California
Richard A. Paez, J.
Case Number: CV 97-5685 RAP
Verdict rendered on: April 6, 2000

a. **Date of Publication:** October 1996, *Consumer Reports*

b. **Case Summary:**

Defendant is the publisher of Consumer Reports. In 1996, CU conducted tests of the Isuzu Trooper, and in 75 of 192 tests conducted to simulate an emergency avoidance maneuver, the vehicle tipped up on its side wheels. As a result, CU ran a report in the magazine, with a cover of the tipping vehicle and the title "UNSAFE: The complete report on our tests of the Isuzu Trooper."

Isuzu sued on the basis of fifteen statements, three made in the magazine, and the remainder made in various press releases and comments on the report to the press. Isuzu asked for $242 million on the basis that sales of the Trooper declined by 50% after the report.

c. **Verdict:**

For defendant after JNOV granted striking inconsistent portions of verdict. *See* below. Defendant to recover costs (but not attorney's fees).

d. **Length of Trial:**

Six weeks. Trial started February 8, 2000; verdict announced April 6, 2000.

e. **Length of Deliberations:**

Five days. Press reports indicated that the day before the jury was announced, the jury was deadlocked on several issues.

f. **Size of Jury:** Ten.

g. Issues Tried:

The jury was asked to review the fifteen statements.

Of those, the jury found that seven statements were true, including the cover of the magazine was true, and that the descriptions of the test and the Trooper's performance. The jury found that eight statements were false, including statements that the Trooper has "a unique and extremely dangerous propensity to roll over in a real world emergency avoidance maneuver;" that Isuzu failed to test the vehicle before making it available on the marked; and that the Trooper's tendency to roll over resulted from a design defect.

The jury was asked to determine if any of the false statements were disparaging. The jury indicated six of the false statements were also disparaging.

The jury was asked to determine whether there was clear and convincing evidence that the defendant knew the statements were false, or with reckless disregard for the truth or falsity of the statements. The jury answered that this was true of one statement ("Careful driving, however, is ultimately not the answer to this problem. Isuzu . . . should never have allowed these vehicles on the road . . . .").

Finally, when asked whether any of the statements that met the actual malice standard specifically damaged Isuzu, the jury responded that none did.

h. Notes:

According to press reports, the jury foreman said eight of the ten jurors considered awarding Isuzu up to $25 million, but did not because "we couldn't find clear and convincing evidence that Consumers Union intentionally set out to trash the Trooper." The foreman characterized the verdict as a "slap on their wrist."

In related matters, the First Circuit affirmed a trial court's ruling that Isuzu's exclusive dealer in Puerto Rico could not sue CU for its damages as a result of the same article. Later in 2000, a federal court judge dismissed claims by Suzuki against Consumers Union related to a 1988 test of the Suzuki Samurai that revealed it likely to tip up in the same test as the Trooper. Finally, in August 2001, Consumer Reports published a report concerning the Mitsubishi Montero Limited, deeming the vehicle likewise "Not Acceptable" for its tendency to tip up in the same test.

i. Post-Trial Disposition:

Defense motion for JNOV (to strike inconsistent portion of jury verdict) granted. No appeal filed.

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3. **Case Name:** Morsette v. Final Call
Court: Supreme Court of New York, Manhattan
Nicholas Figueroa, J.
Verdict tendered on: May 31-June 6, 2001 (approx.)

a. **Date of Publication:** June 3, 1997, *The Final Call,* Chicago, Illinois

b. **Case Summary:**

This case involved a doctored photograph of the plaintiff, published in *The Final Call*, a newspaper published by the Nation of Islam, which was also named in the suit, along with Minister Louis Farrakahn, the editor of the paper, and the author of the story with which the photograph appeared. The court dismissed all defendants except *The Final Call* for lack of jurisdiction (in the case of the editor and reporter) or defective service (in the case of Farrakahn and the Nation of Islam).

In June 1997, *The Final Call* published an article entitled "Mothers in Prison, Children in Crisis—as Female Prison Population Grows, What will Happen to the Children" on the negative results for society of mothers in prison, with a front-page photo of Morsette holding her baby. Accompanying the article, under the caption "Mommy is in jail," was another photograph of Morsette, which had been altered to make it appear that she was wearing striped prison clothes, with a number emblazoned on the chest. However, Morsette has never been in jail.

Although the defendant's lawyer attempted to claim that the photo was a "fictionalized illustration," the jury found for the plaintiffs and awarded compensatory and punitive damages.

c. **Verdict:**

For plaintiffs

Compensatory: $640,000
Punitive: $700,000

d. Length of Trial: Unknown.

e. Length of Deliberations:

Punitive damages awarded Wednesday June 6, 2001; compensatory damages awarded the week before, according to press reports.

f. Size of Jury: Unknown.

g. Issues Tried: Unknown.

h. Notes:

i. Post-Trial Disposition:

Press reports indicated that the defendant intended to appeal.

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4. Case Name: Wells v. Liddy
Court: United States District Court of Maryland
Case Number: JFM-97-946
Verdict rendered on: February 1, 2001

a. Name and Date of Publication:

The actionable statements were made during a question and answer session following a motivational speech given by Mr. Liddy at James Madison University in April, 1996 and on a cruise ship in August, 1997.

b. Case Summary:

The plaintiff, Ida Maxwell Wells, a former Democratic National Committee Secretary, claimed that the defendant, G. Gordon Liddy, defamed her when he stated that her desk and telephone were targets of the 1972 Watergate break-in, and that one of the purposes of the break-in was to obtain salacious information about the activities of prominent Democrats, who were believed to be contacting a call-girl operation. Mr. Liddy's statements were based upon a theory of Watergate history, which has been researched and developed by historians and journalists as more information about the Watergate events has been disclosed, and which has appeared in the published literature.

c. Verdict:

The jury was unable to return a verdict, deadlocking 7-2 in Liddy's favor on the issues of truth/falsity and fault. After declaring a mistrial, Chief Judge Motz entered judgment as a matter of law, holding that there was a substantial body of evidence upon which Liddy could reasonably rely in making the challenged statements, and that no reasonable juror could find that he acted negligently in making his statements. In so doing, the court noted that the First Amendment protects open and robust debate regarding historic events, including the Watergate controversy.

d. Length of Trial: Three weeks.

e. Length of Deliberation: Two days.

f. Size of Jury: Nine jurors (all deliberated)

g. Issues Tried:

Truth, negligence, defamatory content, lack of damages or causation.

h. Notes:

The court had earlier granted summary judgment to Liddy, finding that the plaintiff was an involuntary public figure, and could not carry her burden of proving constitutional malice. On appeal, the Fourth Circuit reversed and remanded, holding that the plaintiff was a private figure. *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999).

In 1992, John W. Dean, another Watergate participant, had brought a similar defamation case against Liddy and others. During the course of discovery in that case, additional facts were disclosed upon which Liddy relied in making the statements at issue in this litigation. Many of these facts were disclosed to Liddy by his counsel, who represented him in both cases. In discovery, Wells attempted to subpoena counsel's work product in the *Dean* case as relevant to Liddy's state of mind. The court rejected this attempt as overreaching and invasive of the attorney-client privilege. Plaintiff was entitled to know what Liddy saw or was told, but not other materials in counsel's files.

i. Plaintiff's Theme(s):

One of the sources of the particular Watergate theory at issue was a disbarred attorney convicted for prostitution activity, who suffered from mental disease. Plaintiff attempted to establish that this witness was the sole source for the call-girl theory, and that he was not credible. The defense attempted to establish that this witness was one of many corroborating sources; that the defendant had relied upon a great deal of material beyond the statements of this witness; and that the statements of the witness had previously been relied upon and published by other journalists.

j. Defendant's Theme(s):

The defense sought to establish that after initial skepticism and years of independent evaluation and investigation, Liddy embraced and began to publicly discuss an existing, albeit controversial, theory which had appeared in the published literature for decades; that the theory was fully supported by the evidence; and that Liddy's statements about matters of such intense historic debate were protected by the First Amendment.

k. Factors/Evidence:

Testimony relevant to the truth and reasonableness of this Watergate theory was introduced, both live and through deposition, from a number of Watergate figures, including Charles Colson, John Ehrlichman, Howard Hunt, Howard Liebengood, Officer Carl Shoffler, burglar Eugenio Martinez , and others. Gordon Liddy also testified, as did journalists Jim Hougan and James Rosen, regarding the substantial evidence underlying this theory.

l. Trial Management:

The verdict form asked the jury, in the first instance, to determine whether the statements were false and whether they were made negligently. The jury was further told that they could determine the order to proceed, and if the answered "Not" to either question, their verdict would be in favor of the defendant.

m. Post-Trial Disposition:

Judgement as a Matter of Law granted after a mistrial was declared. Currently on appeal to the 4th Circuit.

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2001 LDRC/ANPA/NAB LIBEL DEFENSE SYMPOSIUM SURVEY OF RECENT LIBEL/PRIVACY JURY TRIALS

PART I

CASE SURVEY

Y. **Case Name:** Esther Johnson, et al. v. The E. W. Scripps Company, et al.
Court: Circuit Court for Kenton County, Kentucky
Greg Bartlett, J.
Case Number: 97-CI-02512
Verdict rendered on: August 28, 2001

1. Name and Date of Publication:

Television broadcasts on WCPO Channel 9 September 3, 4, and 16, 1997.

2. Case Summary:

Plaintiffs Esther Johnson, Classic Properties, Inc. and Johnson Properties, Inc. alleged libel and intrusion upon seclusion in connection with an investigative news report about the local administration of federal loan money to rehabilitate property in Covington, Kentucky (a suburb of Cincinnati, Ohio). The broadcasts conveyed the public perception of favoritism towards developer Esther Johnson and reported on certain irregularities that were reflected in Housing Department files. WCPO and several of its employees were defendants, along with several individuals who were sources. Prior to trial, all of the sources except for defendant Toni Allender settled the claims asserted against them. The claims against Allender involved some statements made on the broadcast and some which were not broadcast. The plaintiffs' experts testified that Esther Johnson had suffered $18 million in economic damages and that she suffered from post-traumatic stress syndrome.

3. Verdict:

At the close of all of the evidence in the case, the Court granted the WCPO defendants' motion for directed verdict. The case went to trial against defendant Allender. The jury returned a 9-3 defense verdict in favor of Allender.

4. Length of Trial: Three weeks.

5. Length of Deliberation: 5½ hours.

6. Size of Jury: Twelve.

7. Significant Pre-Trial Rulings:

The court ruled that developer Esther Johnson was a limited-purpose public figure. The court also granted summary judgment on the invasion of privacy/intrusion by seclusion claim, despite plaintiffs' contention that she was "followed" and "chased."

The court also allowed evidence of a 1998 HUD audit which supported the truth of the broadcasts. The HUD report was not completed until one year after the broadcasts.

8. Significant Mid-Trial Rulings:

The court denied plaintiffs' repeated efforts to introduce evidence of "following" and "chasing" as irrelevant to the defamation claim. The plaintiffs had argued it was relevant to show malice.

The court also denied plaintiffs' efforts to introduce evidence of prior complaints against the television station and its investigative reporter.

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

After it became apparent that the case would last longer than the anticipated two weeks, the court threatened to declare a mistrial. In response, counsel for all parties agreed to strict time limits which would allow all evidence to be completed by the end of the third week.

The court declined to give instructions on actual malice following the plaintiffs' expert witness testimony on breach of journalistic standards.

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

Defense counsel consulted with Starr Litigation Services, Inc. for jury selection and a mock trial session.

11. Pretrial Evaluation:

Plaintiffs' settlement demand was $3 million. Defendants made no offer.

12. Defense Juror Preference During Selection:

Middle-class to upper-middle-class professionals who were long-time county residents. Length of county residency was identified as a positive defense characteristic in mock trial.

13. Actual Jury Makeup:

Eight women, six men. Middle-class. Average age 45 years. Average of 27 years as county resident.

14. Issues Tried: Defamation.

15. Plaintiff's Theme(s):

The broadcasts implied fraud, corruption and wrongdoing through use of a source whose voice and face were distorted. The broadcasts also selectively edited comments and visual images in a manner which suggested the plaintiffs were engaged in improper activity. The investigative news report created news to fit its agenda and did not merely report the news.

16. Defendant's Theme(s):

The broadcasts involved public perceptions of favoritism in the administration of federal loan money. The public documents reflected irregularities in the disbursements of the loan money. Plaintiffs and the Housing Director were given an opportunity to appear on camera or respond to written questions, but chose not to. The audit by HUD in 1998 confirmed the irregularities and showed the Housing Department was susceptible to claims of favoritism.

17. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

Several jurors were visibly emotional when the plaintiff testified about the difficulties she has faced in her life, including having polio, raising a mentally handicapped son and being married to a recovering alcoholic husband.

c. Proof of actual injury:

The medical experts testified that Esther Johnson suffered from post-traumatic stress disorder and major depressive episode as a result of the broadcasts. The accounting expert testified she had business losses of $18 million after the broadcasts.

d. Defendants' newsgathering/reporting:

The station used video of Esther Johnson travelling with the Housing Director on vacations and around town. Neither Esther Johnson nor the Housing Director would agree to an on-camera interview. In response, the reporter sent a detailed list of written questions. Neither Esther nor the Housing Director responded. On-camera interviews of the City

Manager and Mayor, both of whom supported the Housing Director, were used in the broadcasts.

e. Experts:

(a) Journalism: For WCPO defendants, Dr. Paul Smeyak, Director of the School of Journalism and Broadcasting, Oklahoma State University, Stillwater, Oklahoma. For plaintiffs, Tim Wulfemeyer, Professor of Communications, San Diego State University.

(b) Medical: For defendants, psychologist Michael Hartings. For plaintiffs, psychologist Tina Kaminsky.

(c) Accounting: For defendants, Don Fritz. For plaintiffs, Macke McNeill Mohr.

f. Other evidence:

The plaintiffs devoted considerable trial time to showing the video tape of interviews which were not used in the broadcasts.

g. Trial dynamics:

i. Plaintiff's counsel: Capable.

ii. Defendant's trial demeanor:

The television station employees were excellent witnesses who withstood rigorous cross-examination.

iii. Length of trial: Three weeks.

iv. Judge:

Greg Bartlett was well versed in the applicable law and devoted a considerable amount of attention to the case.

h. Other factors:

Having another defendant significantly impacted the presentation of evidence because it allowed the defense two opening statements and two opportunities for cross-examination of the plaintiffs' witnesses. It also allowed for some coordination of the defense case.

18. Results of Jury Interviews, if any:

Juror interviews revealed a bias towards media defendants which had to be overcome.

19. Assessment of Jury:

Attentive throughout the trial. Jurors were allowed to take notes and submit written questions for witnesses. Jurors asked approximately 25 questions throughout the trial.

20. Lessons:

1. Written questions to the subjects of the broadcasts were critical, particularly after they declined to appear on camera.

2. Use of multiple sources and avoiding reliance on one source was helpful.

3. Pre-publication review of broadcast and correspondence to plaintiffs.

4. Effective use of motions practice to educate judge on anticipated issues and obtain directed verdict.

21. Post-Trial Disposition: An appeal by the plaintiffs is anticipated.

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