2004 MLRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL/PRIVACY JURY TRIALS

by Tom Kelley and Eileen Kiernan-Johnson

PART I

CASE SURVEY

Introductory Note

This is our report of responses to a survey of jury trials in tort litigation against the media arising from communication content or newsgathering activity. This report covers cases concluded after September 9, 2002 and before September 10, 2004.

The reports in paragraphs A through U below are survey responses prepared by defense counsel. We provided a light edit and some additions and clarifications based upon follow-up telephone interviews. In the cases summarized briefly in sections V.1 through V.9, defense counsel were unwilling or unable to participate in the survey. These summaries are based upon court documents, news reporting, and similar sources.

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

A. **Case Name:** *AAA All City Heating, Air Conditioning & Home Improvement, Inc., et al. v. New World Communications of Ohio, Inc., et al.*
Court: Cuyahoga Cty., Ohio Court of Common Pleas (Brian J. Corrigan, J.)
Case Number: 369034
Verdict rendered on: May 15, 2003

1. Name and Dates of Publication:

"Furnace Repair or Scare," February 13, 1996.

2. Profile:

a. Print _____; TV _X_; other _____.
b. Plaintiff: public _____; private _X_.
c. Newsgathering tort: _X_; Publication tort _X_.

3. Case Summary:

Defendant TV station's "I-Team" conducted a hidden camera investigation into heating contractors using scare tactics to exploit public concern over carbon monoxide poisoning to sell consumers new furnaces when they were not needed. Hidden camera video of plaintiff was featured in the two-part report and plaintiffs (heating company and individual contractor) sued for both defamation and newsgathering torts.

4. Verdict:

Unanimous defense verdict rendered. Jury interrogatories on truth, fault, and damages were unanimously answered in favor of defendants.

5. Length of Trial: Nine days.

6. Length of Deliberation: 1½ hours.

7. Size of Jury: Eight.

8. Significant Pre-Trial Rulings:

Summary judgment granted on all non-publication tort claims other than fraud, including invasion of privacy, intentional infliction, and wiretap claims. Defense motion *in limine* granted on the eve of trial barring testimony from plaintiffs' libel expert, Andrew Benson, a former reporter (and brother of the individual plaintiff).

9. Significant Mid-Trial Rulings:

Directed verdict on plaintiffs' fraud claim granted at the close of plaintiffs' case.

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

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

Focus group mock trial conducted.

12. Pretrial Evaluation:

Defense counsel felt they had a strong case on truth, lack of negligence, and lack of damages. Hidden camera video seemed to support the substantial truth of the broadcast, defendants had relied upon a reputable contractor to inspect the furnace at issue numerous times and plaintiffs' evidence of proximate cause was not seen as strong.

13. Defense Juror Preference During Selection:

Jurors with non-technical backgrounds who would identify with consumers.

14. Actual Jury Makeup:

Six women and two men.

15. Issues Tried:

Fraud, truth, negligence, and damages.

16. Plaintiffs' Theme(s):

Plaintiffs argued the broadcast was false because the furnace at issue was actually dangerous, and that individual plaintiff's conduct was appropriate because he sincerely believed that the furnace should be replaced immediately. Plaintiffs also argued that it was defendants who were deceitful and untrustworthy by using hidden cameras and engaging in unfair editing to make plaintiff look worse than he was.

17. Defendants' Theme(s):

Defendants argued that the hidden camera video confirmed that plaintiff used scare tactics and that the broadcast, therefore, was substantially true. Defendants also argued that they were not negligent because they relied upon a reputable expert to ensure that the furnaces being used in the hidden camera investigation were in good working order.

Defendants presented evidence of plaintiffs' prior bad reputation to negate plaintiffs' claims that their business and reputations were hurt by this broadcast.

18. **Factors/Evidence:**

a. **Pre-existing attitudes of the venire towards the plaintiffs, defendants, or issues:**

The defendant I-Team reporter is well known and popular in the area.

b. **Sympathy for plaintiffs during trial:** None apparent.

c. **Proof of actual injury:**

Plaintiffs submitted financial documents and an expert to demonstrate loss of business, but evidence linking the loss of business to the subject broadcast was not strong.

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

Plaintiffs argued that defendants picked the wrong furnace and should have used a different consultant once plaintiffs pointed out an apparent flaw in the furnace that defendants' consultant had overlooked.

The outtakes did contain some favorable evidence for the plaintiffs, but the jury was ultimately unpersuaded by the plaintiffs' unfair editing arguments.

e. **Experts:**

Furnace and damages experts were presented by both sides. Plaintiffs had endorsed Andrew Benson as a journalism expert; defendants had retained Virgil Dominic, a retired but still well-known Cleveland reporter, anchor, and news director. The testimony was disallowed pursuant to defendants' motion.

f. **Other evidence:**

A Better Business Bureau representative testified about plaintiffs' negative record with the BBB. Over plaintiffs' objection, the court allowed the jury to see a previous negative broadcast about plaintiff on the issue of prior bad reputation. In-house counsel for FOX testified about company policy regarding the use of hidden cameras and why she approved their use in this investigation.

g. **Trial dynamics:**

i. **Plaintiffs' counsel:** Sole practitioner.

ii. Defendants' trial demeanor:

Three local attorneys, and in-house counsel present at the trial table. The I-Team reporter, who is no longer employed by the station, was present for about half of the trial.

iii. Length of trial:

Defendants made a conscious effort to streamline the presentation of their case.

iv. Judge:

Brian J. Corrigan. Fair, not a factor; apparently his first libel trial.

h. Other factors:

Defendants' exhibits were on CD-ROM, including key video clips to avoid pausing and rewinding of a VCR. Summation and Trial Director were used to highlight key documents.

19. Results of Jury Interviews, if any:

No apparent sympathy for plaintiffs. The jurors seemed to identify with the homeowners instead, and seemed to base their verdict on plaintiffs' words and conduct as captured on hidden camera.

20. Assessment of Jury:

Initially engaged, but may have lost interest as the trial went on.

21. Lessons:

Bias against use of hidden cameras by the media can be overcome if the misconduct caught on hidden cameras is clear.

22. Post-Trial Disposition: Appeal pending.

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B. **Case Name:** *Joe H. Anderson, Jr. v. Gannett Co., Inc., Multimedia, Inc., d/b/a Pensacola News Journal*
Court: First Judicial District in and for Escambia Cty. (Pensacola), Florida
Case Number: 2001-CA-1728, Div. J
Verdict rendered on: December 12, 2003

1. Name and Dates of Publication:

Pensacola News Journal, December 14, 1998.

2. Profile:

a. Print __X__; TV _____; other _____.
b. Plaintiff: public __X__; private _____. (The newspaper contended plaintiff was a public figure, the defendant denied it, and the court never ruled on the issue, thinking it irrelevant.)
c. Newsgathering tort: _____; Publication tort __X__.

3. **Case Summary:**

This lawsuit was originally filed by plaintiff, Joe H. Anderson, Jr., and a road building company he founded, Anderson Columbia, Inc. Plaintiffs challenged the publication of more than twenty stories that were part of a five-day series that looked into the company's activities as well as Joe Anderson's and his family's activities, and the role that the Department of Environmental Protection and the Department of Transportation had in monitoring their compliance with rules and regulations, and whether those agencies were properly performing their responsibilities in terms of rule and regulation enforcement.

Early in the case most of the counts dealing with the five-day series were dismissed based on Florida's two-year libel statute of limitations. When the trial began, either the court had dismissed or the plaintiffs had dismissed all claims except for one individually for Joe Anderson dealing with a December 14, 1998 article, entitled "Company Pursues Political Clout." That count had originally been fashioned as a libel claim, but before the hearing on the statute of limitations, it was recast as a false light/invasion of privacy claim, which carries a four-year statute of limitations. Anderson Columbia at the trial dropped its claim for libel having to do with environmental problems associated with an asphalt plant located on one of Florida's Outstanding Rivers.

When the trial began, the single plaintiff was Joe Anderson, Jr., and the defendants were Gannett, Co., Inc., Multimedia Holdings Corp., d/b/a *The Pensacola News Journal*, and Multimedia, Inc. The individual reporters, Amie and Scott Streater, who wrote the series, were dropped at the beginning of the trial.

The series ran between December 13 and December 17, 1998. It was the December 14, 1998 article entitled "Company Pursues Political Clout" that formed the basis of the false light claim brought by Joe Anderson, Jr. That count alleged false light/invasion of privacy through mention, in a series of paragraphs, of the 1998 shooting death of Joe's then-wife, Ira Anderson, by Joe Anderson, Jr., while hunting in Dixie County, Florida. The plaintiff agreed that statements contained within the article were true. Nevertheless, under the authority of *Heekin v. CBS*, a Florida intermediate appellate decision, the case proceeded to a jury trial on the theory that even though everything stated in the article was true, there was an implication of falsity created by the way in which the article was structured and the facts which it included. The court declined to follow a 1976 Florida Supreme Court case, *Fletcher*, which would have required proof of a false statement within the article.

The portion of the article which plaintiff claimed portrayed him as a murderer in the December 14, 1998 article, having previously discussed Anderson's paving contract bribery conviction and federal probation, stated these true facts:

> In 1998, while still on probation and before his conviction was reversed, Anderson shot and killed his wife, Ira Anderson, with a 12-gauge shotgun.

The death occurred in Dixie County just north of Suwannee, where days before the shooting Joe Anderson had filed for divorce but then had the case dismissed.

Law enforcement officials determined the shooting was a hunting accident.

A federal judge ruled that by having the shotgun, Anderson violated his probation, and the judge added two years to Anderson's probation.

Capt. Bob Stanley of the Florida Game and Fresh Water Fish Commission was one of the officials who went to the scene of the shooting.

Anderson said that he and his wife were deer hunting when she walked one way down a road and he walked the other way, Stanley recalls. A deer ran between them and Joe Anderson fired twice. One shot hit the deer, the other hit his wife.

"One buckshot pellet hit her under the arm and went through her heart," Stanley said.

When investigators arrived on the scene, he said, they found that the other people in the hunting party had taken the deer back to the hunt club and were cleaning it.

"You have to understand, it's Dixie County," he said. "Back then, they shut down the schools for the first week of hunting season."

He said Anderson had stayed behind at the shooting scene, and he described Anderson as looking "visibly upset" after the shooting.

The plaintiff conceded at trial that the article, including the segment at issue, was entirely true. He also conceded it was a violation of his probation for him to have had in his possession and use the 12-gauge shotgun.

The reason given by *The Pensacola News Journal* for the inclusion of these facts was that the story was about the company and its founder's political clout and how it made substantial contributions to political candidates, and that Anderson in fact had made an illegal bribe to a Hillsborough County, Florida County Commissioner in return for road paving contracts in the mid-1980s. Joe Anderson pled guilty, was placed on three years' probation, and was at the time of the shooting incident described in the story, prohibited from bearing modern firearms. The use of the 12-gauge shotgun which resulted in the accidental death of his wife was a violation of his probation, which resulted in extending his probation, and

which tied into the story on political clout because of the bribery. Anderson's mail fraud conviction was later reversed on appeal based on case law holding that mail fraud cannot be used in cases of political corruption.

The plaintiff called "journalistic experts," including James Head, John Van Gieson, and a professor by the name of Joe Ritchie, who testified that the journalism was substandard and gave the reader the impression that Joe Anderson murdered his wife and got away with it because of his political clout.

4. Verdict:

The jury returned a verdict for compensatory damages for slightly in excess of $18 million to Joe Anderson, to compensate him for reputational damages that he claimed resulted in a significant delay in the construction of a cement plant in Florida. He claimed that the story, accusing him of murder, caused the Department of Environmental Protection to delay his permit. The jury awarded the plaintiff nothing for his mental anguish, pain, and suffering. The $18 million was awarded for economic injury to a corporation not a party to the suit.

The jury was also asked to consider whether punitive damages should be awarded. It deadlocked on that issue, the jury was dismissed, and the punitive damages aspect was mistried by the court.

5. Length of Trial: Two weeks.

6. Length of Deliberation: Six hours.

7. Size of Jury: Six.

8. Significant Pre-Trial Rulings:

a. There were many pre-trial rulings. Significant among them, the court denied defendants' motion to dismiss the false light claim under Florida and U.S. constitutional law, that for a false light/invasion of privacy claim to proceed, there had to be a statement that was false contained within the story. The plaintiff admitted that all statements in the story were true.

b. Denial of the defendants' motion for directed verdict for the lack of any evidence of actual malice on the part of either of the reporters as well as on the part of Gannett and Multimedia. The only evidence to support plaintiff's claim, which defendants urged was legally insufficient, was the testimony of experts that the journalism was substandard, and created in the reader's mind the impression plaintiff murdered his wife.

c. A significant amount of information about the shooting was developed during discovery; facts that, had they been published, would have made the story more

negative than it was. The court prevented defendants from revealing any of the information learned in discovery, on the basis that it was not in the story and the reporters did not know these facts in 1998. At trial, the judge reiterated this ruling, declaring, "[I]t wasn't tried in 1988, and it's not going to be tried today."

d. The trial court also granted plaintiff's motion *in limine* and prohibited defendants from offering evidence as to the truth of the article and its implications, on the rationale that the plaintiff agreed that the article was true.

9. Significant Mid-Trial Rulings:

a. In addition to renewing various motions that were made before the trial to dismiss the case, motions for directed verdict were made at the close of all the evidence, making the same arguments.

b. In addition, because the plaintiff put on no evidence that the corporate defendants had any knowledge that would have satisfied the actual malice standard, nor any evidence to connect Gannett Co., Inc. from a liability standpoint, motions were made to dismiss Gannett and Multimedia, which were denied.

c. All of the damage for which the jury verdict compensated the plaintiff was sustained by a corporation, Suwannee Cement, LLC, which was not a party to the case, and in which the plaintiff himself held less than 1% of the stock. Nevertheless, the court denied defendants' motion to dismiss the damage claim attributable to Suwannee Cement, LLC.

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

The court bifurcated the compensatory and punitive damages aspects of the case. The jury was instructed to first decide the false light issue and compensatory damages, then to decide whether there was sufficient evidence to support a punitive damages award, and if they reached that decision in plaintiff's favor, they would then return for a trial on the amount of punitive damages. The jury deadlocked on the threshold question of punitive damages and thus never reached the other issue of amount.

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

A demographic study was done and focus groups were impaneled, but since an appeal is pending it would be inappropriate to discuss the details.

12. Pretrial Evaluation:

The defendants at all times believed, and to this day believe, that there was no legally sufficient basis for taking the case to trial, let alone to sustain the verdict. Although the risk of an adverse verdict was always appreciated, no effort to place a monetary value on the claim was ever made, and no offer to settle was made.

13. Defense Juror Preference During Selection:

Newspaper readers, non-hunters, intelligent, married women.

14. Actual Jury Makeup:

Five women and one man, ages ranging from early 30s to early 60s.

15. Issues Tried:

Whether the December 14, 1998 story placed Joe H. Anderson in a false light by implying, though not stating, that he murdered his wife and got away with it. In addition, the issue of actual malice was presented to the jury.

16. Plaintiff's Theme(s):

Plaintiff's theme was that the newspaper is part of a large corporate media conglomerate with the power to change lives and injure reputations, that writes sensational stories to sell newspapers. The shooting was irrelevant to the story and added only to "sex up" the article with an element of violence. The account was presented in a way that made it appear that Joe Anderson intentionally killed his wife. The newspaper "had to know" that the story was written in such a way as to suggest that Joe Anderson murdered his wife and got away with it.

17. Defendants' Theme(s):

The story was a relevant part of an overall series that was important for the public to read and know about. The portion having to do with the shooting was logically relevant to the bribery conviction which in turn was logically relevant to the political clout aspect of the story. The story was entirely true, and could hardly be said to suggest murder when in fact it stated "law enforcement determined the shooting was a hunting accident." The plaintiffs' alleged business losses were the result of the company's poor record on environmental issues.

18. Factors/Evidence:

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

Several jurors during jury selection, as well as one who was on the jury, revealed that they do not believe much of what is printed in newspapers.

b. Sympathy for plaintiff during trial:

Anderson testified, "They said I shot and killed my wife, period." He also testified he refused the paper's offer to run a rebuttal for free because it reserved the right to edit. He editorialized, "I had all the editing I could stand from the *Pensacola News Journal*, free."

The defendants do not believe that plaintiff was particularly well liked by the jury, but nevertheless they gave the plaintiff a verdict because they believed the story was written to convey the impression that he murdered his wife. If the jury had liked the plaintiff, they would have awarded pain and suffering damages, which they did not do.

c. Proof of actual injury:

Joe Anderson called his comptroller as well as an economist to testify to the damages caused by the delay in construction of the cement plant. The evidence was contradictory on whether the permit delay was caused by the account of the shooting incident or Anderson Columbia's poor record on environmental compliance. The damages for the delay were placed by witnesses for plaintiff at $52 million, and $18 million was awarded. One witness testified to having the initial impression that Anderson murdered his wife from reading a Lexis Nexis version of the article but two weeks later realized the shooting was an accident when he read the *Pensacola News Journal* story. Defendants called a Lexis Nexis witness who testified that the article was not available in its database at the time the claimed by the witness.

d. Defendants' newsgathering/reporting:

The reporter, Amie Streater, had by the time of trial moved to the Forth Worth newspaper, a Knight Ridder publication. She was also pregnant with twins and close to delivery when the trial occurred. Thus, her testimony was presented by videotaped deposition. Her testimony revealed significant efforts to interview public officials and gather public records in order to document her story. Her newsgathering, however, was attacked by the plaintiff during the trial, claiming that she had simply clipped from other newspaper stories and failed to attribute her story to other newspapers. Defendants do not believe that the evidence supported that attack.

e. **Experts:**

The plaintiff retained three experts to testify on journalism standards not being met, to support the claim that the reporter must have known, if she did not in fact know, that the story created a false light: former *Tampa Tribune* Editor Jim Head, Florida A&M University Professor Joe Ritchie, and former reporter John Van Gieson.

The defendants did not call an expert, though Peter Weitzel had been retained. The defendants opposed the use of experts for the purpose for which they were offered because the actual knowledge, knowing falsity/high degree of awareness of probable falsity standard is a subjective one and cannot be sustained alone by proof that the reporter should have known based on the way the story was written.

The plaintiff also called an expert economist to testify to special damages resulting from the delay in the construction of the cement plant.

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

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

Willie Gary. He is a very high profile, successful plaintiffs' lawyer. National reputation. He argued the case much the way a preacher would deliver a sermon to a congregation. Mixed reaction from courtroom spectators as to whether he was effective, but he did get a verdict. Bruce Rogow, a professor and media lawyer, assisted.

ii. **Defendants' trial demeanor:** Calm and professional.

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

iv. **Judge:**

The trial judge was T. Michael Jones, Circuit Judge. His rulings seemed to favor the plaintiff.

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

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

None. In Florida, counsel may not approach jurors after a trial to question them about the case.

20. **Assessment of Jury:**

Obviously somewhat hostile to the defendants.

21. Lessons:

Do everything possible to get the case dismissed based on the law, and prevent the case from going to a jury if at all possible. Jurors may not be too affectionate towards media defendants.

22. Post-Trial Disposition:

A multiple-ground motion for judgment notwithstanding the verdict and multiple-ground motion for new trial were filed, argued, and on March 1, 2004 were denied. The court ordered a new trial limited to punitive damages to occur June 21, 2004. In an immediate ruling on appeal to the First District Court of Appeal, the court determined not to assume jurisdiction at this stage, but remanded the case to the trial court on the question of punitive damages. The June 21 retrial of punitive damages then proceeded but resulted in another mistrial due to a juror problem. Another retrial has been set for October 11, 2004.

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C. **Case Name:** *Harold Armour v. Federated Publications, Inc., d/b/a The Lansing State Journal, and John Schneider*
Court: Ingham Cty. Circuit Court, Michigan (Brown, J.)
Case Number: 01-93328-NZ
Verdict rendered on: Directed Verdict, November 20, 2002

Court: Court of Appeals
Case Number: 245361
Decision: Waiting for Oral Argument

1. Name and Dates of Publication:

Lansing State Journal columns authored by John Schneider on May 16, May 18, and May 22, 2000.

2. Profile:

a. Print _X_; TV _____; other _____.
b. Plaintiff: public _____; private _X_. We argued that plaintiff was limited purpose public and public official.
c. Newsgathering tort: _____; Publication tort _X_.

3. Case Summary:

Plaintiff, who is a master plumber and the City of Lansing's chief plumber, claimed that certain columns written about his former plumbing firm's work on an elderly woman's toilet accused him of being a thief and charging an excessive fee. Defendants asserted that columns were substantially true and protected as opinion and that plaintiff suffered no injury.

4. Verdict:

The Ingham Circuit Court granted directed verdict in favor of defendants on November 20, 2003.

5. Length of Trial: Eight days.

6. Length of Deliberation: N/A.

7. Size of Jury:

Ten jurors were selected; probably only six would have served.

8. Significant Pre-Trial Rulings:

The Circuit Court dismissed plaintiff's counts of negligent infliction of emotional distress, intentional infliction of emotional distress, and invasion of privacy. The Circuit Court also denied as untimely plaintiff's request to add his firm as a party plaintiff. The Circuit Court also ruled that plaintiff could not recover alleged losses suffered by his corporate business or alleged non-economic damages unless actual malice was demonstrated.

9. Significant Mid-Trial Rulings:

The Circuit Court directed a verdict for defendants.

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

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

Defendants worked with a jury consultant.

12. Pretrial Evaluation:

A mediation panel returned an award of $175,000 for plaintiff which defendants rejected.

13. Defense Juror Preference During Selection:

Educated jurors and jurors familiar with plumbing.

14. Actual Jury Makeup:

Five men; five women. *See* ¶ 7 above.

15. Issues Tried:

Whether columns were untrue and defamatory, whether columns were protected as opinion, and whether plaintiff suffered damages.

16. Plaintiff's Theme(s):

Plaintiff claimed that three columns about his firm's plumbing services for an elderly lady accused him of being a thief and charging excessive fees.

17. **Defendants' Theme(s):**

Defendants argued that columns were truthful, that the columns contained protected opinion as to whether the charges of plaintiff's firm were excessive, and that plaintiff suffered no damages.

18. **Factors/Evidence:**

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

We do not know, except a few prospective jurors knew Harold Armour and one juror who was excused said she could not be impartial about a matter involving Mr. Armour.

b. **Sympathy for plaintiff during trial:** Do not know.

c. **Proof of actual injury:**

We argued that no actual injury occurred. The Circuit Court in directing a verdict apparently agreed.

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

Defendant columnist defended his reporting when called to testify.

e. **Experts:** None testified.

f. **Other evidence:**

g. **Trial dynamics:**

i. **Plaintiff's counsel:**

ii. **Defendants' trial demeanor:** Good.

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

iv. **Judge:**

Judge Brown is an experienced Circuit Court jurist.

h. **Other factors:**

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

20. Assessment of Jury: N/A.

21. Lessons:

Preparation was key to successful defense thus far.

22. Post-Trial Disposition:

Matter is on appeal. Defendants, as a precaution, filed a cross-appeal because of the Circuit Court's denial of summary disposition based on plaintiff's alleged status as a public figure and public officer.

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D. Case Name: *Arnzen and Bryden Pawnshop, Inc. v. Fisher Broadcasting, Inc., et al.*
Court: Second Judicial District of the State of Idaho, Nez Perce Cty.
Case Number: CV 02-02832
Verdict rendered on: May 4, 2004

1. Name and Dates of Publication:

December 19, 2000.

2. Profile:

a. Print _____; TV __X__; other _____.
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

The plaintiff, Michael Arnzen, the owner of Bryden Pawn Shop, sued the station over an error made in a December 19, 2000, KLEW-TV news broadcast, on claims of defamation and false light invasion of privacy. During the broadcast, the anchor read an accurate script describing the dismissal of criminal charges against Steve's Pawn Shop owner Steven J.

Taulbee and his two sons. However, during the 73-second story, the station aired 55 seconds of video of a different pawn shop, Bryden Pawn Shop, owned by the plaintiff.

Arnzen never demanded a retraction from the station, instead filing suit for defamation and related tag-along theories days before the two-year statute of limitations expired.

Plaintiff asked the jury to award him between $349,000 and $1.5 million, claiming that his pawn shop lost profits as a result of the broadcast. He claimed that the broadcast made him look like "a crook." He furthermore claimed that he suffered significant emotional distress as a result of the broadcast. He calculated his "damages" by multiplying the number of KLEW's potential audience members by $1 to $5.

The pre-trial motions by the defendants primarily consisted of the defendants making a motion for summary judgment on the basis that the gist and sting of the broadcast in question was not of and concerning the plaintiff. Rather, it was of and concerning Steven J. Taulbee and his two sons, and, as such, it was factually accurate. The defendants also argued that it was not defamatory by its very nature because the thrust of the broadcast was that the criminal charges had been dismissed against Steven Taulbee and his sons, which again was factually accurate, and the mere juxtaposition of the pictures of the plaintiff and his shop were not by their very nature defamatory. This motion was denied.

Additionally, the motion for summary judgment was made seeking to establish that the plaintiff had to prove actual malice on the basis of the fact that the defendants were reporting on a judicial proceeding, reporting on the comments of a public official (defendants were relating what the prosecutor was stating as to the dismissal of the criminal charges against the Taulbees), and that the plaintiff was a limited purpose public figure. Again, the judge denied this motion and ruled that the plaintiff was a private person and that he merely had to establish negligence.

The station called only three witnesses, the former news director, a financial expert, and Steven Taulbee, the actual subject of the news story. The station successfully defended itself by demonstrating that Arnzen's pawn shop actually lost no money because its business turned down when its largest competitor, Steve's Pawn Shop (the subject of the dismissed criminal charged) began operating in competition against it again. In fact, financial evidence (*i.e.*, the plaintiff's tax returns) showed that the plaintiff actually generated a greater gross profit the year after the broadcast.

The trial started on a Monday and the plaintiffs' case went through Friday and a small portion of the following Monday morning. In defense, my three witnesses were on and off the stand within three hours. The plaintiffs' witnesses consisted of a CPA who testified that the Bryden Pawn Shop was enjoying a 20% growth from 1998 through the year 2000, and that as a result of the broadcast, it failed to enjoy that continued 20% growth per year for the years 2001 through 2003. Additionally, the plaintiffs called a video expert who freeze-

framed the broadcast to focus upon those snippets that included Mike Arnzen individually or signage from the Bryden Pawn Shop or inventory of his store in an attempt to imply that the entire focus was directed toward the plaintiff and/or his shop. Also, the plaintiffs called multiple witnesses who were friends, relatives, or friendly acquaintances of the plaintiff who testified as to the various ways that the plaintiff's reputation had been negatively impacted in the community. The plaintiffs had intended to call a media expert who would have testified that the acts and actions of the defendants essentially constituted negligence and/or actual malice. Her testimony was presented in the form of an affidavit in support of a pretrial motion by the plaintiffs and the defendants relied upon that affidavit and made a motion *in limine* to exclude her testimony. The judge granted the motion *in limine* essentially on the basis that her testimony would invade the province of the jury, and it was up to the jury to determine the ultimate factual issues of negligence and/or actual malice, if need be.

The jury returned a special verdict and found that there was no liability whatsoever in regard to defamation and/or false light, and as a result did not go to the next question which would have them contemplate damages.

In discussing the situation with some of the jurors, it appears that their entire deliberations took less than 55 minutes, and perhaps more like sixteen minutes. They did not look at one exhibit of the many exhibits that had been submitted during the trial, and simply gathered around the table and discussed the situation fairly briefly, deciding that neither Mr. Arnzen nor Bryden Pawn Shop was defamed (or placed in a false light) and thus Mr. Arnzen had also not been damaged.

In closing argument, I argued that KLEW-TV made an "honest mistake" and inadvertently included the video footage of Arnzen, his shop, and his inventory in the broadcast for which they were genuinely sorry. But, that was far different than having defamed Mr. Arnzen or Bryden Pawn Shop.

In discussing the matter with the jurors, it appeared that they felt genuinely uncomfortable with the plaintiffs' convoluted interpretation of the broadcast and, in addition to that, felt uncomfortable with his allegation that the broadcast caused the tremendous damages to which he was laying claim.

4. Verdict:

It was a twelve-person jury with a unanimous defense verdict. The jury found for defendants by answering the first question submitted, "Were the Defendants' broadcasts defamatory as to Plaintiffs?" in the negative. The jury also found for defendants on the false light claim, similarly answering the question, "Did the Defendants' broadcasts constitute Invasion of Privacy by False Light as to Plaintiff Mike Arnzen?"

5. Length of Trial: Seven days.

6. Length of Deliberation:

Probably as little as sixteen minutes but no longer than one hour.

7. Size of Jury: Twelve.

8. Significant Pre-Trial Rulings:

The plaintiff was a private figure and it was not appropriate to request punitive damages from the jury. (Also see discussion above.) The court excluded testimony of the plaintiffs' journalistic practices expert, Marilyn Lashner.

9. Significant Mid-Trial Rulings:

Nothing of significance, but jurors were allowed to ask written questions of witnesses.

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

The judge allowed the jurors to submit one question each after each witness, and did ask most of the questions, permitting each side follow-up questions.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries): Nothing.

12. Pretrial Evaluation:

The defense had genuine concern due to the fact that an error had occurred and the plaintiff was a private figure and that, during pre-trial motions, the judge would not accept any of our arguments that a reckless disregard standard applied. The defense thought it likely that the plaintiffs' overreaching on damage issues would backfire, but this was far from certain. As a result, bona fide offers of settlement were made, even to the extent of a mediation which occurred.

13. Defense Juror Preference During Selection:

The defense obviously sought to eliminate people with media bias, and sought people who were of a more conservative bent and who did not like outrageous jury verdicts that they had heard about in the news over the years.

14. Actual Jury Makeup:

The defense was able to eliminate or avoid people who had any apparent media bias and was able to obtain six to eight jurors who, in one manner or another, had voiced reservations about large jury verdicts. There were six women and six men, all Caucasian

with one Native American exception. Almost all of the jury would be described as blue-collar type workers, who are hard-working, want to be fair, and want to feel good about themselves when they finish their duty.

15. Issues Tried:

Whether or not the broadcast was libelous as to the plaintiff, or constituted false light invasion of privacy, and whether or not it caused the damage alleged to the plaintiff.

16. Plaintiffs' Theme(s):

Of the 73 seconds of broadcast, 55 of those seconds focused upon the plaintiff, the signage on the outside of his pawn shop, or the interior of his building. Thus, the plaintiff was improperly and in an unwarranted manner directly associated with criminal charges that had been pending against Steve Taulbee, a pawn broker who had criminal charges brought against him for an approximate eighteen-month time period, and those criminal charges had been dismissed. However, in the interim, there had been a tremendous amount of local publicity concerning the bringing of the charges and the handling of the various judicial hearings for the eighteen-month time period.

17. Defendants' Theme(s):

The inclusion of the footage of the plaintiffs was an "honest mistake" and that the plaintiffs' efforts to claim damages between $349,000 and $1.5 million was ridiculous. Further, the plaintiff's past attempts to obtain VA benefits and his past successful effort to sue his previous employer for wrongful discharge showed that he knew how to play the system to his benefit, and he was attempting to do the same here.

18. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiffs, defendants, or issues:

Almost all of the jurors knew about the underlying charges as against Steve Taulbee, the competing pawn shop owner as to whom criminal charges had been brought. They were all vague as to the specifics but knew that it continued on for some time period and was really messy.

b. Sympathy for plaintiff during trial:

Initially, there was sympathy for the plaintiff during the trial. However, the more friends and acquaintances that he called to establish how he had been damaged and outraged by the broadcast in question, the more his case lost energy and momentum.

c. Proof of actual injury: See discussion in (e) below.

d. Defendants' newsgathering/reporting:

It appeared that the error occurred in more of a mechanical manner. That is, archive footage concerning a past positive piece about the plaintiff was inadvertently included in the news broadcast concerning the dismissal of charges against Steve Taulbee.

e. Experts:

The plaintiff offered a psychologist to try to establish the allegation that he had been psychologically and emotionally impacted by the broadcast in question. He also offered an accountant to project out his loss of income as a result of the broadcast and how it impacted his business for approximately three years thereafter. The plaintiff also offered a video expert, John Glenn Hall of Boise, who testified how the videotape should have been edited so as to exclude reference to the plaintiff in the broadcast but include other footage which the video expert felt was more appropriate. Also during a pre-trial motion, the defendants were able to exclude the possible relevance by the plaintiff of a media expert (the well-known Marilyn Lashner) who was to have testified how the defendants' actions constituted reckless disregard of the worst sort.

f. Other evidence:

A majority of the lay evidence consisted of the plaintiff, friends, and acquaintances testifying about how the broadcast impacted the plaintiff on an emotional and psychological level based upon their observations and experiences with him.

g. Trial dynamics:

i. Plaintiffs' counsel:

Good, solid, competent trial attorney.

ii. Defendants' trial demeanor:

The defendants only called three witnesses. One was Steve Taulbee, who was the individual charged with the underlying criminal charges and the plaintiffs' competitor. (*See* discussion above.) The second was an expert witness to counter the plaintiffs' accountants as to the projection of damages. The third was the news editor in charge on the night of the broadcast who essentially testified that they were not able to reconstruct what exactly did happen on the night of the broadcast because the plaintiff did not let them know about his complaint until approximately two years after the broadcast when he filed his lawsuit.

iii. Length of trial: Seven days including deliberations.

iv. **Judge:**

A young, fairly inexperienced judge who did an excellent job in handling the courtroom situations which arose, and the jury took a definite liking to him as the trial progressed.

h. **Other factors:**

19. Results of Jury Interviews, if any:

Generally speaking, the jurors felt that the plaintiff had overreached, but overreached to such a dramatic extent that they did not feel inclined or compelled to award any monies to him whatsoever.

20. Assessment of Jury:

Good, honest, hardworking people who were trying to do what was fair for both sides in the case and didn't come to the matter with any preconceived biases.

21. Lessons:

Don't over-try your case whether you are the plaintiff or the defendant.

22. Post-Trial Disposition:

The plaintiff agreed to waive his right to an appeal on any and all issues if the defense would waive the recovery of costs which amounted to approximately $3,000.

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E. **Case Name:** *Jeffery Cammerino v. The Scranton Times*
Court: Court of Common Pleas of Lackawanna Cty., Pennsylvania
(Terrence Nealon, J.)
Case Number: 01 CV 6408
Verdict rendered on:

1. Name and Dates of Publication:

Scranton Tribune, February 16, 2001.

2. Profile:

a. Print __X__; TV _____; other _____.
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

Scranton Tribune mistakenly printed that plaintiff, a Pennsylvania Fish and Boat Commission officer, had been arrested for assault, resisting arrest, and other crimes, when in fact he was one of the arresting officers.

4. Verdict:

$15,000. It was a general award.

5. Length of Trial: Two days.

6. Length of Deliberation: Two hours.

7. Size of Jury: Twelve jurors.

8. Significant Pre-Trial Rulings: None.

9. Significant Mid-Trial Rulings: Plaintiff was a private figure.

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

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

12. Pretrial Evaluation:

From a defense perspective, I thought we had a good chance of a defense verdict. The news article in question identified the correct person who was arrested in four other places in the article.

13. Defense Juror Preference During Selection:

I wanted intelligent, preferably college educated, jurors. I prefer jurors who are not in unions. In this case, I wanted to avoid people in law enforcement.

14. Actual Jury Makeup:

Six men; six women.

15. Issues Tried:

(1) Did article defame plaintiff;
(2) Was defendant negligent in publishing article;
(3) Was negligence a substantial fact in bringing harm to plaintiff;
(4) What were plaintiff's damages.

16. Plaintiff's Theme(s):

Defendant published an erroneous and confusing story due to negligent writing and negligent editing. Plaintiff was ridiculed by people he ran into through his work due to the mistake.

17. Defendants' Theme(s):

It was a simple yet innocent mistake. Most readers who read the whole article understood who really was arrested. Plaintiff suffered no damage to his reputation.

18. Factors/Evidence:

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

Did not detect any.

b. Sympathy for plaintiff during trial:

Not really. It was a low verdict.

c. Proof of actual injury:

The girlfriend testified that plaintiff was upset. Plaintiff is only person really to testify about damage to his reputation.

d. Defendants' newsgathering/reporting:

Review of a civil complaint.

e. Experts:

Plaintiff called George H. Hammerbacher, Ph.D., Prof. of English, Kings College, Wilkes-Barre, who testified how he thought an average person would tend to understand the article.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Mike Roth, experienced and able counsel.

ii. Defendants' trial demeanor:

Managing editor was good. Reporter and primary editor were only fair.

iii. Length of trial: Two days.

iv. Judge: Terrence Nealon.

h. Other factors: None.

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

20. Assessment of Jury:

I believe the jury rendered a low award not really to compensate the plaintiff but to send a message to the newspaper that this was a mistake that should not have happened.

21. Lessons: None.

22. Post-Trial Disposition:

Judgment for $15,000 was paid. No appeal.

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F. **Case Name:** *William J. Clark v. Connecticut Magazine, et al.*
Court: Superior Court, J.D. of Stamford at Stamford (John Downey, J.)
Case Number: CV-98-01683845
Verdict rendered on: March 8, 2002

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

Connecticut Magazine, October 1996.

2. **Profile:**

a. Print __X__; TV _____; other _____.
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. **Case Summary:**

Connecticut Magazine published an article that was featured on the cover that reported on restraining order proceedings brought by Clark's ex-wife and the stalking behavior that gave rise to it. The article was entitled "Him: The Story of a Stalker." Clark claimed he was libeled by the cover of the October 1996 issue and the photo and article about him in that issue; that the article portrayed him in a "false light"; that the author and editor of the article intentionally inflicted emotional distress upon him; and that the author defrauded him by falsely stating she would portray him in a favorable light. Clark demanded a retraction, which the magazine did not accept; the newspaper did publish an edited version of the demand letter as a "letter to the editor."

4. **Verdict:** For defendant on all claims.

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

6. **Length of Deliberation:** Approximately four hours.

7. **Size of Jury:** Six jurors, plus two alternates.

8. Significant Pre-Trial Rulings:

Clark was held to be a limited purpose, local public figure. Defense summary judgment motion not addressed.

9. Significant Mid-Trial Rulings:

That previous news articles about Clark and his ex-wife's successful attempt to obtain injunctive relief against him as a stalker, would be admissible to show lack of reputation.

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

Judge requested jury instructions and jury interrogatories from parties.

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

12. Pretrial Evaluation:

No settlement offer was considered. Clark's personality and reputation made the risk of significant plaintiff's award unlikely. However, defendants were unable to get a hearing on the merits of their summary judgment motion.

13. Defense Juror Preference During Selection:

Prospective jurors are subject to individual *voir dire*. Preference was given to those who seemed educated and not hostile to the press.

14. Actual Jury Makeup:

Mix of professionals and home-persons; one Hispanic female.

15. Issues Tried:

Defamation, false light, actual malice.

16. Plaintiff's Theme(s):

That the article unfairly described him as a relentless stalker of his ex-wife.

17. Defendants' Theme(s):

The article was extensively researched and fairly portrayed the findings of the author; the story was corroborated at trial by author Karon Hallor and others.

18. Factors/Evidence:

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

Plaintiff was well known in local community – had served as local official – had been involved in public disputes re police conduct, his activities with respect to his ex-wife and her friends.

b. Sympathy for plaintiff during trial:

A few of plaintiff's friends attended some proceedings, but none testified.

c. Proof of actual injury:

None. The defense showed that plaintiff's stalking and harassment exploits had been the subject of massive publicity in the major local newspapers, in numerous articles that included quotations from letters Clark had sent his ex-wife's church.

d. Defendants' newsgathering/reporting:

The article was supported by extensive interviews and reviews of extant pertinent official data.

e. Experts: None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff appeared *pro se*; argumentative.

ii. Defendants' trial demeanor:

Responsive, informative.

iii. Length of trial: Seven days.

iv. Judge: Hon. John Downey.

h. Other factors:

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

20. Assessment of Jury:

By the end of Clark's first day of testimony, he had lost the jury's attention. As a *pro se* with a long history of unfavorable press comments, he was not a sympathetic plaintiff.

21. Lessons:

It is easier and faster to try a public figure libel case against a well-represented plaintiff than against an emotionally-disturbed *pro se*.

22. Post-Trial Disposition:

None. Plaintiff did not appeal, but sued defense counsel and *The Greenwich Post* for its coverage of the case, suit pending.

Plaintiff's Attorneys:

pro se

Defendant's Attorneys:

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G. 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 9, 2004

1. Name and Dates of Publication:

Various issues of *Spawn* comic book dating back to 1993; Season 1 of HBO's animated series, *Todd McFarlane's Spawn* (originally aired in 1997).

2. Profile:

a. Print __X__; TV __X__; other _____.
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

This is a right of publicity claim brought by Tony Twist, a former NHL hockey player, against the creators and publishers of *Spawn* comics (and the HBO series), which featured a fictional New York mobster named Antonio "Tony Twist" Twistelli.

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." Twist was recognized in some national sports publications as being perhaps the best fighter in the National Hockey League. Beyond their names and that each could be seen as an "enforcer" in their respective trades, there were no similarities between the two "Twists."

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 the 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.

A first trial of the claim appropriation of trade name occurred in July 2000. A jury awarded $24.5 million, roughly 20% of the gross revenues derived from the comic book series. [The first trial is reported in this survey for 2001.] The trial judge granted a judgment N.O.V., and the court of appeals affirmed. The Missouri Supreme Court reversed on the grounds that there was evidence (largely anecdotal and speculative) to support the conclusion that in using the name, McFarlane was motivated primarily by and fulfilled his commercial interest in attracting comic book purchasers, and remanded for trial on that issue.

4. Verdict:

$15 million for lost revenues.

The jury found in favor of plaintiff and against the creators (Todd McFarlane Productions and Todd McFarlane personally). The jury found against the plaintiff and in favor of the publisher (Image Comics) and two related McFarlane companies, McFarlane Toys and McFarlane Entertainment.

5. Length of Trial: Four weeks.

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

7. **Size of Jury:** Twelve.

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

The court allowed Mike Brooks, a retired beer executive, to testify as an expert witness on the loss future income plaintiff would suffer as a result of the fictional Twist character. Although Mr. Brooks did not know what the plaintiff's endorsement income had been (in fact never more than $16,000/year) and had never reviewed a hockey endorsement deal, he was allowed to opine that Mr. Twist would suffer lost future endorsement income in the range of $3 to $50 million.

Plaintiff also called Brian Trill, Professor of Marketing at St. Louis University, who testified, as he did at the first trial, that *Spawn*'s use of Twist's name was worth 15-20% of its gross revenues.

The most significant pre-trial ruling was the Missouri Supreme Court decision reversing the prior grant of judgment notwithstanding the verdict and ordering a new trial under a First Amendment standard in conflict with the First Amendment standards adopted in other states. That decision is *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003).

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

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

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

12. **Pretrial Evaluation:**

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

14. **Actual Jury Makeup:**

15. **Issues Tried:**

Appropriation; principally whether McFarlane used Twist's name primarily for the purposes of exploiting the market for his worth.

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

Used plaintiff's name without his consent as the name of an evil character.

17. Defendants' Theme(s):

No commercial intent. The principal reasons for using the name was that it had artistic merit as used in the comic books because: (1) the name is distinctive, which is good for a relatively minor evil character, (2) the word "twist" is symbolic in its verb form ("to twist") and adjectival form ("twisted"), both of which are effective allusions for a gangster who "twists" people's lives and is somewhat "twisted" himself, (3) the name is an Americanization of an ethnic name, and thus evokes the familiar pattern of immigrants trying to fit into their new country, (4) the name is alliterative, and thus joins a rich comic book tradition of alliterative names (Lex Luther, Dr. Doom, Otto Octavious, Lois Lane, Peter Parker, Bruce Banner), and (5) the name echoes back to a pair of real mobsters from earlier eras, both known as "Kid Twist" and one of whom was a character in the motion picture *The Sting*.

18. Factors/Evidence:

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

Plaintiff was a popular local sports figure during his playing years; a visible presence in local charities.

b. Sympathy for plaintiff during trial:

c. Proof of actual injury: Virtually none.

d. Defendants' newsgathering/reporting:

e. Experts:

Damages expert on both sides; defendants presented two experts on artistic merits (Prof. Gerald Early and Prof. Wayne Fields, both of Washington University in St. Louis).

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

ii. Defendant's trial demeanor:

iii. Length of trial:

iv. Judge:

h. Other factors:

19. Results of Jury Interviews, if any:

Reportedly, some jurors indicated they had little idea of how to compute damages and averaged their respective opinions to reach a "quotient verdict."

20. Assessment of Jury:

21. Lessons:

The principal lesson is the importance of First Amendment protection in this area. The key bad fact – use of the plaintiff's name without his consent – overrode all other considerations. Indeed, lawyers unfamiliar with the law had the same reaction as the jurors, namely, you can't use someone's name without their consent.

22. Post-Trial Disposition:

Post-trial motions filed and pending.

Plaintiff's Attorneys:

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Blitz Bardgett & Deutsch

Defendant's Attorneys:

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H. Case Name: *Linda Erickson v. Jones Street Publishers, LLC*
Court: Court of Common Pleas, Charleston Cty., South Carolina
(Roger M. Young, J.)
Case Number: 02-CP-10-259
Verdict rendered on: March 30, 2004

1. Name and Dates of Publication:

Charleston City Paper (free weekly newspaper), January 19, 2000.

2. Profile:

a. Print _X_; TV _____; other _____.
b. Plaintiff: public _X_; private _____. Limited purpose public figure.
c. Newsgathering tort: _____; Publication tort _X_.

3. Case Summary:

Libel lawsuit brought by a private guardian *ad litem* against weekly newspaper.

4. **Verdict:** Directed verdict for defendant.

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

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

7. **Size of Jury:** Twelve.

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

Another judge hearing motions ducked ruling on the status of the plaintiff as a private or public figure-plaintiff by ruling that the status of a private guardian *ad litem* was a novel issue in this state and should be decided by the trial judge after the introduction of testimony and evidence. Invasion of privacy and negligence causes of action were dismissed prior to trial.

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

Trial judge denied directed verdict motion at the end of the plaintiff's case at the end of the fifth day of trial by finding the guardian *ad litem* was a private figure plaintiff. He later reversed himself.

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

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

12. **Pretrial Evaluation:**

The defendant was of the opinion the private guardian *ad litem*, for purposes of a libel action against the newspaper, was a public official *and* a public figure. There was no evidence of the constitutional actual malice. Defendant thought there was a chance the trial judge would also find the statements were not false and defamatory.

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

Plaintiff served as guardian *ad litem* for minor children in a divorce/custody action. She recommended termination of visitation between the children and the grandmother. Defendant wanted mothers and grandmothers.

14. Actual Jury Makeup:

Twelve men. Most unusual circumstance defendant's attorney has ever faced in a trial. Only two women were in the final jury pool of 23 names. Defendant struck the wife of an attorney. The plaintiff struck the other woman.

15. Issues Tried:

Defamation, falsity, fault.

16. Plaintiff's Theme(s):

Newspaper article destroyed plaintiff's life. Became depressed. Stayed in bed for over a year. Could no longer work. Her dream of opening an office to conduct private counseling of clients was no longer possible after publication of the article.

17. Defendant's Theme(s):

Pound home the power and authority guardians *ad litem* have over the lives of private citizens. GALs have immunity, so private citizens should have the right to criticize the manner in which GALs carry out their duties and responsibilities. The statements made about the unnamed guardian *ad litem* were true or substantially true.

18. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

If there was any sympathy for the plaintiff at any point during the trial, defense attorney believes it dissipated when the psychologist who conducted the custody evaluation report was called as the defendant's second witness. The defendant called the plaintiff back to the stand as his first witness to get her to admit certain matters having to do with the psychologist. The psychologist then took the witness stand and several pages of his 26-page report were enlarged on a screen over his head. He then testified about the plaintiff's intrusion into the custody evaluation process, which the plaintiff had just denied doing.

c. Proof of actual injury:

Plaintiff and her 19-year live-in boyfriend (plaintiff would lose military benefits from deceased husband if she remarried) testified to her depression and other emotional distress caused by the article.

d. Defendants' newsgathering/reporting:

The defendant's newsgathering reporter attempted to contact the guardian *ad litem* for her comments on the article. However, other evidence showed that she had refused to talk to the press when the press had tried to contact her to question her credentials. She had an unlisted number. The reporter's efforts to contact her through acquaintances were unsuccessful.

e. Experts:

Plaintiff called a media expert, a retired journalism professor at the University of Georgia. He was inexperienced in giving testimony as an expert witness. Defense attorney did not believe he needed an expert witness, so he did not retain one.

f. Other evidence:

Defendant entered into evidence some 45 documents from the years of litigation between the mother and father for whom the plaintiff was private guardian *ad litem* of their children. The private GAL personally filed several petitions to hale the mother and her father into court. She gave the psychologist false information which led to negative statements about the minor children's mother and grandmother in his report. The report was heavily biased against the mother and grandmother. The psychologist was reprimanded by the board who oversees his practice because of a conflict of interest with the GAL. Defendant also introduced news articles and a photograph published in the newspaper showing a group of people protesting with picket signs the family court they contended was corrupt. Defense introduced evidence of the qualified immunity given to private GALs previously. There is more than enough evidence for the appellate court to rule the plaintiff was also a public official because of the power and authority she possessed that went virtually unchecked by the family court judge.

g. Trial dynamics:

i. Plaintiff's counsel:

Never tried a defamation case against a media defendant to defendant's knowledge. Our state supreme court had previously ruled that private GALs in two cases had carried out their investigation duties in custody cases so negligently that their recommendations to the court had denied the mothers in both cases their constitutional rights to due process. Defense attorney could not convince the plaintiff's attorney or the court that even a private figure cannot deny someone's constitutional rights.

ii. Defendant's trial demeanor:

Three owners of newspaper attended pretty much the entire trial. Defendant's attorney tried to remain calm and respectful, but it was not always possible given the

circumstances. It can be painful when a judge is given a libel case he knows nothing about an hour before the trial is to commence. This is especially so when he had no experience in defamation cases. Add a plaintiff's counsel who also did not understand libel law and it will make your hair hurt.

iii. Length of trial:

Longer than necessary, but not a factor in the result of this trial that ended in a directed verdict.

iv. Judge:

Had never before heard a defamation trial. The judge was assigned the case an hour before opening statements. He was relatively new to the bench. In a social conversation several months before the trial, he told the defense attorney, whom he knew represented the local newspaper, that he had voted against the reporter's shield law when it came before the state legislature. (It passed.) That did not give the defense attorney a lot of comfort. On the other hand, a friend of both the defense attorney and the judge called to say the judge was smart, fair, and would get it right in the end. To his credit, he did.

The judge's law clerk was missing during the first week of the trial for medical reasons. Defense attorney was told the judge relied on his clerk for research during trials. Thankfully, the law clerk returned on Monday when the defendant began putting up its case at noon. The defendant was making a record for the appellate court because of the judge's previous ruling that the plaintiff guardian *ad litem* was a private figure plaintiff. Defense attorney did not have a lot of faith that further evidence would convince the judge to change his ruling at the end of defendant's case.

During the plaintiff's cross-examination of defendant's second witness, the psychologist, the judge called for a break and asked the attorneys to come back to his chambers. Based on the chambers conference, when the trial resumed, the defendant rested its case and renewed its motion for directed verdict. It was granted on the grounds that the judge had changed his mind and had determined the plaintiff was a limited purpose public figure. There was no evidence of constitutional actual malice to go to a jury.

h. Other factors:

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

20. Assessment of Jury:

Defense does not believe they were buying the plaintiff's story, but there have been rumors to the contrary.

21. Lessons:

Plaintiff's attorneys who do not understand libel law can waste a lot of time and money.

22. Post-Trial Disposition:

The plaintiff filed a motion for new trial, which was denied without a hearing. The plaintiff then filed and served a notice of appeal on June 4, 2004.

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I. Case Name: *Franklin Prescriptions, Inc. v. The New York Times Co.*
Court: U.S. District Court, E.D. Pennsylvania (Cynthia Rufe, J.)
Case Number: 01-CV-145
Verdict rendered on: March 22, 2004

1. Name and Dates of Publication:

October 25, 2000, in E-Commerce Special Section (Sec. H) of *The New York Times*, at p. 20.

2. Profile:

a. Print _X_; TV _____; other _____.
b. Plaintiff: public _____; private _X_.
c. Newsgathering tort: _____; Publication tort _X_.

3. Case Summary:

Franklin, a Philadelphia drug store specializing in fertility medications, claimed that it was defamed by *The Times*' use of a picture of part of its web page advertising drug prices in connection with an e-commerce article about the benefits and dangers of using the Internet to purchase prescription drugs. Franklin advertises online, but does not take orders online. Upon learning that fact, *The Times* published a correction that explained that Franklin

requires that drugs be purchased by phone or FAX. Franklin nevertheless sued, claiming that the use of a picture of its web page in connection with the article implied that it was one of the illicit or unscrupulous online drug stores mentioned in the article in connection with dangers of online purchasing.

4. **Verdict:**

For defendant. There was a special verdict form. The jury answered the first five questions (whether plaintiff proved by a preponderance of the evidence that (1) the article "contained a defamatory implication(s) about Franklin," (2) readers understood the defamatory implication(s) and (3) that they "applied to Franklin," (4) "the defamatory implication(s) was/were substantially false, and (5) *The New York Times* "acted intentionally, recklessly, or negligently") in favor of the plaintiff, and the sixth question – did Franklin prove that it "suffered actual harm that was substantially caused by the article" in favor of *The Times*. The jury did not reach the damages questions on the verdict form.

5. **Length of Trial:** Five days, plus an extra day for charging conference.

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

7. **Size of Jury:**

Eleven (a twelfth juror was removed for cause following the first day of trial).

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

Invasion of privacy claim dismissed on R. 12 motion; summary judgment denied as to newspaper, with holding that plaintiff was private figure and Pennsylvania law would apply; summary judgment granted to author of text of article.

Motion *in limine* preventing any reference to Jayson Blair issues granted. Motion *in limine* precluding plaintiff from mentioning emotional harm to sole proprietor of corporate plaintiff granted. Motion *in limine* precluding plaintiff's journalism expert from testifying about the state of mind *The Times*' editors granted.

Motion to dismiss granted in part, 2001 U.S. Dist. LEXIS 12216; 20 Media L. Rep. 2497 (2001).

Motion for summary judgment as to newspaper and certification of interlocutory appeal denied, 267 F. Supp. 2d 425; 2003 U.S. Dist. LEXIS 10617 (2003).

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

Directed verdict motion based on lack of evidence that any person other than plaintiff read article in defamatory way and on lack of evidence of actual harm denied.

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

Special verdict form used; punitive damages amount bifurcated, but jury form did have questions dealing with liability for punitive damages (jury never reached that issue)

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

Small focus groups to read and react to article.

12. Pretrial Evaluation:

Difficult case because it was an implication case under a negligence standard, where the newspaper had already published a correction acknowledging that it had made an erroneous implication about the plaintiff (though not the one about which plaintiff sued).

13. Defense Juror Preference During Selection:

Internet-savvy, newspaper readers.

14. Actual Jury Makeup:

Juror No. 11 was an African-American woman from Philadelphia; all others were white males from suburban or rural counties.

1. shift supervisor for a crop seed company
2. locomotive engineer
3. retail assistant manager
4. mechanical maintenance supervisor
5. IT manager
6. medical practice administrator
7. production manager
8. screen printer
9. roofing and siding estimator
10. collector for Dun & Bradstreet
11. retired, former psych. tech. working with mentally challenged

15. Issues Tried:

Defamatory meaning, defamatory understanding, understanding of application to plaintiff, fault (negligence), actual harm, common law and actual malice (for purposes of claimed punitive damages). Verdict form asked about actual malice after findings of damages, and jury never got to that question.

16. Plaintiff's Theme(s):

The Times "cut off" the bottom of its website from the picture of the web page shown, thereby depriving readers of information on bottom of page that would show that plaintiff was not the type of unscrupulous pharmacy discussed in parts of article. Editors engaged in "slip-shod journalism" and did not communicate enough, so that there was no knowledge across the board about nature of article and use of a picture from the website in connection with article. *Times* was "arrogant" in publishing "puny" and insufficient correction. A large media corporation had callously disregarded the rights and reputation of a small local business.

17. Defendant's Theme(s):

Picture of web page was exact duplication of what is seen on computer screen and illustrated positive parts of article. Newspaper exercised care, overseen by editor responsible for the article, to present a fair article. Newspaper intended the use of plaintiff's website as part of a positive, not negative, art presentation to accompany the article. No one recognized the alleged defamatory implication and no one should have recognized it (no reader came forward saying they recognized it either). It would be improper to impose liability where defamatory implication was not foreseen. Since no one read the article in a defamatory way, there was no actual harm caused by it. None of the evidence of harm to reputation demonstrated a causal connection with the article.

18. Factors/Evidence:

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

Jurors that expressed a dislike of the press were not selected. No pre-existing attitudes were evident.

b. Sympathy for plaintiff during trial: None was evident.

c. Proof of actual injury:

None. Plaintiff's evidence sought to show a decline in hits on its website, a decline in shipments to out-of-state patients, and a decline in business form patients of out-of-state doctors, but there was no evidence of a causal connection, and in fact plaintiff's sales increased after the article, rather than decreased.

d. Defendants' newsgathering/reporting:

There was an issue about the originality of the reporter's work, but that was disproved in discovery and excluded on a motion *in limine*. The main issue was the propriety of the

graphics editors' selection of the portion of the plaintiff's web page as an illustration of the article.

e. Experts:

Each side had a journalism expert. Plaintiffs called Jonathan Kotler, Assoc. Prof. of Journalism, USC and Annenberg School of Communications. Defendants called Glen Guzzo, former editor of *The Denver Post*. Neither seemed to have much of an impact. The jury equated the newspaper's mistake and "oversight" with negligence without considering industry standards or how a reasonably prudent editor would have acted under the circumstances.

f. Other evidence:

Deposition testimony read into the record on lack of actual harm.

g. Trial dynamics:

i. Plaintiff's counsel:

George Bochetto. Very aggressive, tenacious, but not unlikable during jury proceedings.

ii. Defendant's trial demeanor:

Witnesses very conscientious, credible, worked to do good job.

iii. Length of trial: Five days.

iv. Judge:

Judge Rufe was fair; she was hampered by unclear Pennsylvania defamation law.

h. Other factors:

19. Results of Jury Interviews, if any:

All agreed article was defamatory. They did not see any malice or deliberate wrongdoing, and thought there was an honest mistake for which plaintiff should be compensated for any resulting harm. However, after reviewing evidence, the jurors could find no evidence of harm caused by article.

20. Assessment of Jury:

Well informed, conscientious.

21. Lessons:

Special interrogatories are essential.

In Pennsylvania, the standard jury instructions are very confusing and a great deal of time must be spent getting a proper charge. We were unsuccessful in eliminating references to "recklessly," which was used in the charge and on the jury verdict form in three ways – did defendant act "intentionally, recklessly, or negligently," was there reckless indifference to interests of Franklin for purposes of common law malice, was there reckless indifference to the truth for purposes of actual malice.

22. Post-Trial Disposition:

Post-trial motions denied, 2004 U.S. Dist. Lexis 15342. Notice of appeal filed August 19, 2004.

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J. Case Name: *Clinton G. Hewan v. Fox News Network, LLC*
Court: U.S. District Court, E.D. Kentucky (David L. Bunning, J.)
Case Number: 01-125
Verdict rendered on: July 24, 2003

1. Name and Dates of Publication:

Fox News Channel website, located at www.foxnews.com. Article entitled: "Prof's Kill-a-Cop Comments Prompt Outcry at College Near Cincinnati."

2. Profile:

a. Print _____; TV _____; other __X__ (Internet).
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

Plaintiff Clinton G. Hewan commenced his action against Fox News in June 2001. Hewan claimed that he had been defamed by the publication of a news article on the Fox News website, foxnews.com, titled "Prof's Kill-a-Cop Comments Prompt Outcry at College Near Cincinnati." The article reported on statements that Hewan allegedly made at a student forum on race relations on the campus of Northern Kentucky University in April 2001. The forum took place shortly after the shooting of Timothy Thomas, an unarmed black man, by a white police officer in Cincinnati, Ohio – an incident that caused riots and civil unrest in downtown Cincinnati (just minutes from the NKU campus).

As first reported by the NKU student newspaper, *The Northerner*, Hewan spoke at the forum on the topic of the recent shooting and riots in Cincinnati. His remarks were reported as follows:

> "I do not advocate any violence as an initiate," he said. "But in the case of willful murder, the family should go out and get that policeman."
>
> Hewan said the family of Timothy Thomas, as an acceptable way to stand up for themselves, should "quietly stalk that S.O.B. and take him out."

Hewan's statements at the forum, as reported in *The Northerner*, created a controversy both on the NKU campus and beyond. His statements were reported widely by many media outlets, including the Associated Press, *The Cincinnati Enquirer*, and other local newspapers. The statements were also covered by the local television stations in the Cincinnati and Covington areas, and they were disseminated over the Internet. Seven days after *The Northerner* article appeared, Fox News reported on the controversy in its article that included comments from Hewan's attorney and from NKU administration.

In Hewan's action against Fox News, he claimed that he had not said the words as reported by *The Northerner*. Hewan also complained that the headline and the lead paragraph in the Fox News article defamed him. The lead paragraph in the Fox News article characterized Hewan's comments as a call for "deadly vigilante justice."

4. Verdict:

Judge David L. Bunning declared a mistrial on July 24, 2003. The jury was deadlocked with seven jurors finding in favor of Fox News, and one juror finding in favor of the plaintiff.

5. Length of Trial:

The trial lasted five days: July 14, 2003 through July 17, 2003, and July 21, 2003. In order to complete the trial under this tight, court-imposed schedule, the court often required jurors to arrive before 9:00 a.m., and the trial often continued past 5:00 p.m.

6. Length of Deliberation:

The jury began its deliberations on the afternoon of July 21, 2003. The jury then deliberated on July 22, 23, and 24, finally deadlocking on July 24, 2003. In all, the jury deliberated for a total of approximately three full days.

7. Size of Jury:

The jury was comprised of eight jurors. There also were two alternates.

8. Significant Pre-Trial Rulings:

Prior to trial, the court denied in part Fox News' motion for summary judgment. As to the libel cause of action, the court ruled that Hewan was neither a limited purpose public figure nor a public official. Therefore, a negligence standard applied, and the court ruled that this issue was one for the jury. The court, however, dismissed Hewan's claim for false light invasion of privacy. Under Kentucky law, to recover on such a claim, the plaintiff must prove constitutional malice. The court determined that there was insufficient evidence as a matter of law for Hewan to prove constitutional malice. This ruling also precluded Hewan from recovering punitive damages on his libel cause of action.

Prior to trial, there was only one motion *in limine*. Fox News moved to exclude the testimony from Hewan's family members as to their personal reactions to the article. The unopposed motion was granted by the court.

Additionally, the court agreed with Fox News in denying Hewan's request to present a journalism expert to the jury at trial. The court determined that questions involving the reasonableness of a reporter investigating facts or verifying a story do not involve questions of highly technical knowledge or competency. The court concluded that because Hewan needed only to show simple negligence on the part of Fox News, expert testimony would do nothing but confuse the jury. As such, experts did not testify during the trial. The court later denied Hewan's motion for reconsideration on this matter.

9. Significant Mid-Trial Rulings:

Fox News made a motion at the close of Hewan's case for a directed verdict. Fox News argued that the article was substantially true, that Hewan should be a limited purpose public figure, and that there was no evidence of negligence. The court denied Fox News' oral motion for a directed verdict, and reiterated its view from its summary judgment decision that Hewan was not a limited purpose public figure.

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

The court did not issue mid-trial jury instructions, but rather saved all of its instructions until the close of the trial.

The court did employ a special verdict form. The court presented five interrogatories, instructing the jury that they were to progress to the next interrogatory only if they answered yes, and to stop if they answered no to any of the questions. The jury was directed to announce its determination on each question before proceeding to the next one. The interrogatories were:

(1) Do you find by a preponderance of the evidence that the article about the plaintiff published by defendant on May 2, 2001 at Foxnews.com was defamatory?

(2) Do you find by a preponderance of the evidence that the article published by defendant on May 2, 2001 at Foxnews.com is not substantially true?

(3) Do you find by a preponderance of the evidence that defendant failed to exercise reasonable care and caution in checking on the truth or falsity and the defamatory character of the communication about the plaintiff before publishing it?

(4) Do you find by a preponderance of the evidence that the article published by defendant on May 2, 2001 at Foxnews.com directly caused injury to plaintiff's reputation?

(5) What sum of money will fairly and reasonably compensate plaintiff for the loss of earnings, opportunities in his employment, embarrassment, humiliation, and mental anguish you believe from the evidence he has suffered or is reasonably certain to suffer in the future by reason of the article published by defendant?

By presenting the special verdict in this format, the court required the jury to take each question sequentially, arrive at a conclusion on that issue, and then move on. The jury decided the first interrogatory in favor of the plaintiff, but deadlocked on the second question, 7 to 1 in favor of defendant, and so the other questions were never addressed. Before the jury stated it was deadlocked, defendant requested, but plaintiff refused, to stipulate that a less than unanimous verdict would be acceptable.

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

Prior to trial, we compiled as much information as possible about the prospective jurors from the jurors' surveys. We did not have any mock trial exercises, but rather primarily relied on our knowledge, and local counsel's knowledge regarding the kind of juror that might be sympathetic to our case.

12. Pretrial Evaluation:

We felt that our strongest arguments were the fact that the article was substantially true, and that Fox News had not acted negligently. The reporter of the article had spoken with the president of NKU – Hewan's employer – and in fact had talked to Hewan's attorney (who was Hewan's attorney at trial as well). In short, the reporter had interviewed the appropriate sources, and accurately reflected their views.

13. Defense Juror Preference During Selection:

We obviously first and foremost were looking to eliminate people who had a natural bias against Fox News. This bias could take the form of a general media bias or a bias against the Fox News Channel. Further, we preferred jurors who we believed would agree that Hewan's remarks at the student rally were highly inflammatory.

14. Actual Jury Makeup:

The jury was comprised of eight jurors and two alternates. We had nine women and one man on the jury. The jurors ranged in age from 26 (one of the alternates) to 68, with an average age of 44. Five of the ten had children. The jurors' occupations included administrative assistant, teacher's aide, registered nurse at a nursing home, homemaker, CAT scan technician, IRS clerk, retired cashier, photo lab manager, education coordinator, and one unemployed juror.

15. Issues Tried:

As the special verdict form indicates, we tried four primary issues:

(1) Was the article defamatory?
(2) Was the article substantially true?

(3) Was Fox News negligent in compiling and reporting the article?
(4) Was Hewan damaged by the article, and if so, by how much?

16. Plaintiff's Theme(s):

Hewan's main theme was that the article completely mischaracterized Hewan's comments. Although the student newspaper reported almost the same information reported in the Fox News article, Hewan's counsel focused on the headline and the first sentence of the article as much as he could. These two items, in isolation, contained some strong language. The headline was "Prof's Kill-a-Cop Comments Prompt Outcry at College Near Cincinnati," and the first sentence read: "A college professor's call for deadly vigilante justice against the Cincinnati police officer whose shooting of an unarmed 19-year-old boy sparked several days of riots in April is sending shock waves across the Cincinnati-area university where he works."

Hewan's counsel tried to present Hewan as a serious, distinguished professor who would never make "kill-a-cop" comments or suggest "deadly vigilante justice." In addition, Hewan's counsel tried to suggest that the student newspaper incorrectly quoted Hewan, and that Hewan was actually presenting a hypothetical at the rally, a "what-if" question. Hewan claims he said "what if" the family of Timothy Thomas had gone out and stalked the "S.O.B." police officer and "taken him out," would that be right, what would society's reaction have been?

17. Defendant's Theme(s):

The defense focused on showing that the article as a whole was not defamatory, the article was substantially true, that Fox News was not negligent in its reporting, and that the article did not have a harmful impact on Hewan's reputation. We focused on getting witnesses to testify that Hewan's quotes as presented in the Fox News article were actually stated at the rally. Further, we emphasized all of the steps the reporter took in putting together the article, indicating that he had taken significant measures to produce an accurate article. Finally, we focused on the plethora of reporting on this incident in other Cincinnati-area media that was the same as what was reported by Fox News. Through close scrutiny of other articles, we noted that Hewan's reputation could not have been any further damaged by the Fox News article, which was posted a week after the controversy first began and after several other similar articles had already been published.

18. Factors/Evidence:

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

The eight jurors seemed fair and impartial throughout the trial. There did not seem to be any apparent pre-existing attitudes from these jurors against the plaintiff, defendant, or the incident at Northern Kentucky University in general. It was very difficult during the trial to

discern what each juror was thinking, and for the most part the jurors stayed fairly attentive, presenting an unbiased air.

b. Sympathy for plaintiff during trial:

There was no obvious sympathy for Hewan during the trial, primarily because he is not a particularly sympathetic figure. He was combative on the stand, and did not appear to be a wronged, defamed individual.

c. Proof of actual injury:

The general lack of sympathy for Hewan was compounded by the fact that the plaintiff's side hardly presented any evidence tending to indicate his reputation was actually harmed in any way by the Fox News article. In short, evidence of damages was severely lacking, mainly consisting of e-mails that he received both before and after the Fox News article was posted on its website. Several colleagues testified that they did not change their impression of Hewan, and that his personality was such that any impression of him, one way or another, was developed long before Fox News published its article.

d. Defendant's newsgathering/reporting:

Fox News put the reporter on the stand, and also designated testimony from his editor's deposition. The Fox News reporter detailed the steps he took in compiling the article. His preparation included reviewing previous Fox News articles regarding the Timothy Thomas incident and reviewing articles about Hewan's comments, including a *Cincinnati Enquirer* article. The reporter also attempted to contact Hewan by phone and e-mail. The reporter investigated Hewan's background on the Internet and the background of his attorney. The reporter e-mailed and then spoke with the president of Northern Kentucky University, and he spoke at length with Hewan's attorney. Finally, the reporter also called the local ACLU, where Hewan was a board member, and spoke with the director.

e. Experts:

The court's pre-trial ruling that experts were not needed prevented the parties from having to utilize the journalism experts each side had retained. The plaintiff had retained Sandra Davidson, Assoc. Prof. (also Adjunct Prof. of Law), Missouri School of Journalism. The defendant had retained Dwight Teeter, Prof., School of Journalism and Public Relations, University of Tennessee, Knoxville.

f. Other evidence:

The evidence consisted mainly of testimony from individuals at the rally (including the reporter for the student newspaper), individuals who talked to Hewan about his comments at the rally, the Fox News reporter, and Hewan. The physical evidence was primarily limited to other news articles about the rally, e-mails Hewan received, and notes and other materials

the reporter relied on in preparing the article. There was some documentation from plaintiff showing his adversarial working relationship with other professors at NKU.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's lead counsel was an experienced trial lawyer who represents people who believe that their civil rights have been violated. He is a well-known advocate on belief of the interests of the ACLU. His associate was a very capable attorney.

ii. Defendant's trial demeanor:

Defendant had only one live witness from the company: the reporter who wrote the article in question. He was an experienced journalist who made a very effective presentation on the witness stand.

iii. Length of trial:

The trial lasted five days. It was a short timeframe in which to conduct this trial, and there were some witnesses that were cut out because the judge was not willing to go beyond five days. The trial probably could have lasted an additional day, which would have shaved up to an hour off each of the other trial days, thus perhaps increasing the jurors' attentiveness.

iv. Judge:

The judge was David L. Bunning. He had not been on the bench very long when we held the trial, and his trial experience as a judge had been mainly in the criminal area. However, Judge Bunning tried exceptionally hard to maintain an unbiased, fair, and impartial attitude towards the attorneys, the parties, and the case. He did not take himself too seriously, but was very focused on the task of plowing through the evidence and getting the case to the jury. He also was willing to listen to argument from both sides before ruling. However, at times he was a bit hesitant with his decisions. In the end, he attempted to gently prod the jurors to come to a decision.

h. Other factors:

Because of scheduling and other factors, several witnesses could not be at the trial. As a result, the parties had to rely on deposition testimony. One of those witness' testimony was on videotape, but two other witnesses had their deposition testimony read into the record. One of these witnesses was the student reporter who wrote the initial article in *The Northerner* detailing Hewan's comments at the forum. It would have been beneficial to have this individual's live testimony.

19. Results of Jury Interviews, if any:

Jury interviews were not conducted by the attorneys, as they were prohibited by the court.

20. Assessment of Jury:

For the most part, the jury was comprised of attentive individuals who listened patiently to all of the evidence. There was a slight issue at times with one juror who appeared to be dozing off during testimony, but this did not happen frequently enough to warrant a comment from the judge.

21. Lessons:

It is very helpful in a document-oriented case to be able to use sophisticated video delivery to the judge and jury. You avoid the distractions and disruptions of passing around hard copies for the jury to use.

22. Post-Trial Disposition:

The case was resolved.

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K. **Case Name:** *H. Gerald Hosemann v. Paul Kelley Loyacono, Katherine Loyacono, Pamela Turner, Eddie Robinson, Travis T. Vance, Jr., Charles Mitchell, and The Vicksburg Printing & Publishing Co., d/b/a The Vicksburg Post*
Court: Warren Cty., Mississippi Circuit Court
Case Number: 02-0127-CI
Verdict rendered on: October 31, 2003

1. Name and Dates of Publication:

Vicksburg Post, Vicksburg, MS; December 13, 16, 17, 23, 24, 28, 30, 2001; January 3, 6, 8, 2002; March 14, 17, 2002.

2. Profile:

a. Print __X__; TV _____; other _____.
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

Plaintiff was a County Court and Youth Court Judge in Warren County, Mississippi. He engaged in an adulterous affair with his court reporter. In early December 2001, the court reporter was found severely beaten on the plaintiff's property. As a result of her injuries, she was hospitalized for several weeks in very critical condition. When she was able to speak, she accused plaintiff of causing her injuries. Plaintiff was arrested and charged with aggravated assault. He refused to give up his position on the bench and was eventually suspended by the Mississippi Supreme Court. After plaintiff was indicted by the grand jury, mysteriously the court reporter recanted and the district attorney elected to reduce the charges to a misdemeanor (disturbing the peace). The court reporter demanded a retraction in July 2002; the newspaper declined, although it conceded that some of the stories may have implied that the court reporter signed the statement naming Hosemann, when it was actually signed by a police investigator who had interviewed her. In November 2002, plaintiff ran for re-election but was handily defeated. The plaintiff sued two deputy sheriffs for false arrest/malicious prosecution, the local newspaper for libel, the managing editor of the newspaper for slander, and the attorney and attorney's wife who had represented the girlfriend prior to the recantment for slander and malicious prosecution. (The attorney and his wife settled immediately prior to trial.) Defense motions for summary judgment were denied, except the motion of the newspaper's managing editor. The case went to trial in mid-October 2003, against the sheriff's deputies and the newspaper.

4. Verdict:

For defendant newspaper.

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

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

7. **Size of Jury:** Twelve with two alternates.

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

Claims against Managing Editor Charles Mitchell, individually, for slander were dismissed on motion for summary judgment.

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

Court allowed the plaintiff to introduce articles not pleaded as libelous to argue that the pleaded statements, while perhaps not defamatory standing alone, were defamatory in context of other coverage by the paper.

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

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

Judge allowed extensive pre-selection questionnaire.

12. **Pretrial Evaluation:**

We felt we could convince the jury that plaintiff brutally assaulted his girlfriend and that everything printed was substantially correct. We also believed that plaintiff, a public figure, could not prove malice on the part of the newspaper reporters or management.

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

Females of any age and older males.

14. **Actual Jury Makeup:**

Two males, ten females (two alternates were females).

15. **Issues Tried:**

Defamatory meaning, "of and concerning," falsity, actual malice.

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

1. The newspaper rushed to judgment.

2. Plaintiff was convicted of the assault in the newspaper without sufficient evidence.
3. The newspaper coverage was politically motivated.
4. Sources relied upon were not reliable, the newspaper was aware that the information was not reliable, and printed matters that were concocted.
5. Plaintiff did not cause his girlfriend's injuries. He tried to convince the jury that the injuries were the result of drug and/or alcohol overdose.

17. Defendants' Theme(s):

1. Plaintiff brutally assaulted his girlfriend.
2. The public had a right to know about plaintiff's acts.
3. Plaintiff wanted the newspaper to conceal his crime.
4. The matters claimed to be libelous were true.
5. Newspaper was legally privileged to print the information claimed to be libelous.
6. Plaintiff was a public figure and plaintiff could not prove malice.
7. Statements claimed to be libelous were not reasonably susceptible of a defamatory meaning.
8. Some of the statements claimed to be libelous did not refer to or concern the plaintiff.
9. Plaintiff could not prove damage to his reputation since his reputation was ruined by his own acts.

18. Factors/Evidence:

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

We found some prejudice against the plaintiff in the venire, but generally the panel appeared to be neutral.

b. Sympathy for plaintiff during trial:

Plaintiff was not a sympathetic figure. Plaintiff also insisted on examining witnesses which turned out to be disastrous for him, and this clearly contributed to the defense verdict.

c. Proof of actual injury:

None. We emphasized that plaintiff offered no significant evidence of damage to reputation attributable to the publication.

d. Defendants' newsgathering/reporting:

We think the jury believed that the reporters used appropriate care in reporting the story.

e. Experts:

Numerous medical and forensic experts testified regarding whether or

f. Other evidence:

Significant evidence included tape of girlfriend's interview with sheriff's investigators wherein she clearly named plaintiff as her assailant.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel did a very credible job with difficult facts and a difficult client. Plaintiff likely would have had a better opportunity for success if he had allowed his counsel to manage the prosecution of the case. Plaintiff insisted on questioning some critical cases (including the paper's managing editor), did a very poor job, and we are convinced this cost him any jury sympathy that he might have had otherwise.

ii. Defendants' trial demeanor:

This is a family owned newspaper. The publisher attended all sessions with his wife and/or daughter. We think their presence and support was important and effectively bolstered the testimony of the young reporters who worked this story and who testified in the defense.

iii. Length of trial: Two weeks.

iv. Judge:

Retired Circuit Judge specially appointed by Supreme Court. We believed that he exhibits a bias toward the plaintiff.

h. Other factors:

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

20. Assessment of Jury:

Better than average jury for this venue. There were many calculated efforts to mislead this jury which were unsuccessful.

21. Lessons:

At least two of the sources for the newspaper's stories subsequently denied that they had provided the information attributed to them by the newspaper. Although this is certainly not a new experience for seasoned newspaper reporters, the young reporters involved in this case were poignantly reminded, particularly in high profile cases, to preserve the best evidence obtainable relating to statements by sources. Absent a tape recording of interviews with sources, the reporters are reminded by the facts in this case that preservation of well documented notes are an absolute essential.

22. Post-Trial Disposition:

The trial court overruled plaintiff's motion for judgment notwithstanding the verdict.

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L. Case Name: *Jeffrey K. Jenkins v. Advance Magazine Publishers, Inc., Condé Nast Publications, Inc., and Mary A. Fischer*
Court: U.S. District Court, W.D. Oklahoma (Stephen P. Friot, J.)
Case Number: CIV-03-243-F
Verdict rendered on: August 25, 2004

1. Name and Dates of Publication:

Article entitled "Cover-Up in Cell 709A" in the December 1997 issue of *GQ* magazine.

2. Profile:

a. Print __X__; TV _____; other _____.
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. **Case Summary:**

On August 21, 1995, an inmate named Kenneth Michael Trentadue was found hanging in his cell at the Federal Transfer Center, a prison operated by the U.S. Bureau of Prisons in Oklahoma City. The BOP declared the death a suicide, refused to let an investigator for the State Medical Examiner into the cell, and cleaned and sanitized the cell before any investigative agency could inspect it. When the body of the inmate was transported to the medical examiner's office, Dr. Fred Jordon, the state medical examiner, discovered that the body was bloody, had three deep wounds to the head, a slashed throat, and bruises that were inconsistent with a suicide. After conducting an autopsy, Jordan listed the cause of death as traumatic asphyxia and the manner of death as "pending" (later changed to "unknown"); and he and his chief investigator (Kevin Rowland) concluded that the death was likely a homicide. The investigator called the FBI and told agents that the death should be treated as a homicide.

The plaintiff, Jenkins, was the initial case agent for the FBI in the investigation. Despite instructions from the medical examiner that the death should be treated as a homicide, he did very little investigation in the days immediately following the death; and, overall, the FBI's investigation for more than two months after the death was minimal. About two weeks after the death, Jenkins called Rowland and asked how to get the smell of a decomposed body out of his car. Jenkins had failed to turn in evidence another agent had picked up from the medical examiner's office, and instead left bloody Trentadue evidence in his car, allowing it to putrefy. (Later, a report from the FBI lab in Washington determined that the bloody sheet was unsuitable for serological examination.) Another FBI agent was assigned to assist Jenkins in the investigation in December 1995, and a few months later Jenkins was removed from the investigation and reassigned to another squad.

Rowland informed others at the medical examiner's office about the call from Jenkins (the Chief of Operations for the MEO, Ray Blakeney, overheard the call) and later told another FBI agent and Jenkins' superiors in the Oklahoma City office about the smelly-evidence-in-the-car call. Jenkins' superiors reviewed the Trentadue investigation file, determined that Jenkins had indeed turned evidence in late to the evidence room, but initially treated his mishandling of evidence as a performance matter that did not warrant discipline.

The government's investigation of Trentadue's death continued at a modest pace for two years. A federal grand jury ultimately concluded in October 1997 that no BOP personnel had committed any criminal offense.

In the meantime, Trentadue's family, especially his brother Jesse, a Salt Lake City trial lawyer, maintained that Kenneth had been murdered. Jesse Trentadue wrote hundreds of letters to various public officials in the Department of Justice, the FBI, the Bureau of Prisons, and to Congress contending that the facts showed that Kenneth's death was a homicide and complaining that the government was covering up the murder. Among those who took an interest in the Trentadue case was U.S. Sen. Orrin Hatch, who requested (but got little)

information from Attorney General Janet Reno, called her to task about the case in a Senate Judiciary Committee hearing in April 1997, and publicly said the death appeared to him to be a murder that the government was covering up. During 1997, the state medical examiner in Oklahoma, frustrated that he was getting little information from the FBI from which to make a statutorily-mandated determination about the manner of death, likewise went public with his opinion that Trentadue was likely murdered and that the government was engaged in a cover-up. Both Sen. Hatch and Dr. Jordan appeared on an NBC *Dateline* program broadcast in April 1997 and opined that the death was likely a homicide and the government was covering up a murder.

GQ Magazine, a publication of Condé Nast Publications, Inc. (a division of Advance Magazine Publishers, Inc.), published two articles about Trentadue's death. Both articles were written by Mary A. Fischer, a Los Angeles-based senior writer for *GQ*. The first, entitled "A Case of Homicide?", was published in the September 1996 issue. The first article focused on the known objective facts about Trentadue's death and the family's belief that the death was not a suicide as the BOP claimed. The second article, called "Cover-Up in Cell 709A," published in the December 1997 issue of *GQ*, focused more on the government's response to the death. The second article concluded that the FBI botched the investigation from the beginning; and that the BOP initially, and later the FBI and Department of Justice, treated the death like it was a clear-cut case of suicide and engaged in conduct that could be described as a cover-up. The opinions of Sen. Hatch (and the chief investigator for the Senate Judiciary Committee, Mike Hubbard) and Dr. Jordan were prominently featured in the article.

The second article mentioned the phone call from Jenkins to Rowland about smelly evidence in Jenkins' car, and otherwise described Jenkins' investigation as lacking serious effort. The article also described actions of other FBI agents (after Jenkins was no longer involved in the Trentadue investigation) in trying to persuade the state medical examiner to change his "unknown" determination of the manner of death to "suicide."

Jenkins sued originally in state court for defamation, false light invasion of privacy, and intentional infliction of emotional distress based on the December 1997 article. The case was removed to federal court. In 2001, Jenkins voluntarily dismissed his suit. A year later, after retaining new counsel, he re-filed his suit in federal court, asserting the same claims. (The suit was re-filed after *GQ* and Fischer settled two other cases – one by another FBI agent and the other by a FTC prison guard – which were also based on the second *GQ* article.)

While Jenkins' first suit was pending, the Department of Justice Office of Inspector General conducted an internal investigation into how the BOP and the FBI had handled the Trentadue investigation. It issued a blistering report in November 1999 that concluded, among other things, that Jenkins mishandled Trentadue evidence on three occasions (including leaving evidence in the trunk of his car, as Rowland had claimed) and that he had lied to a federal grand jury and to OIG investigators about it. The FBI Office of Professional

Responsibility (OPR), following the OIG investigation, conducted an inquiry of its own and arrived at the same conclusion. Jenkins was terminated from employment with the FBI in September 2001 for lying under oath.

4. **Verdict:**

The court submitted defamation and false light claims to the jury. The jury returned a verdict for the defendants on both claims.

5. **Length of Trial:** Eight days.

6. **Length of Deliberation:** About three hours (including a lunch break).

7. **Size of Jury:** Eight.

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

The court granted the defendants' motion for partial summary judgment with respect to the plaintiff's status as a public official, ruling that as the FBI agent initially in charge of the Trentadue investigation, Jenkins was a public official subject to the *New York Times* standard.

The court denied the defendants' summary judgment motion on the merits, concluding that on the record presented he could not say as a matter of law that the plaintiff had no claim of defamation, false light invasion of privacy, or intentional infliction of emotional distress. At the time the Rule 56 motion was filed in early 2004, the defendants had compiled an extensive documentary record about the FBI's Trentadue investigation and specifically Jenkins' conduct, but they had not yet been granted access to FBI witnesses under so-called *Touhy* regulations, 28 C.F.R. §§ 16.1, *et seq.*, which required Department of Justice approval to depose (or get an affidavit from) current or former DOJ employees. As a result, the defendants did not have affidavits or deposition testimony from key FBI witnesses, and the court denied the summary judgment motion in response to the plaintiff's arguments that many of the FBI internal documents which supported the defendants were hearsay or otherwise inadmissible. (After nearly a year of negotiation with the government, the defendants finally began receiving *Touhy* approval in May 2004. The defendants then took depositions of numerous FBI witnesses; several of those depositions were read at trial.)

The court granted the defendants' motion *in limine* to exclude the testimony of the plaintiff's proposed journalism expert, Dr. Fred Blevens. The court did not go so far as to say that expert testimony could never be admissible in a *New York Times*-governed case, but the court concluded that Blevens' testimony was not relevant and reliable under a *Daubert/Kumho Tire* test because Blevens did not demonstrate in his Rule 26 pre-trial report how his views about the purported investigative failings of the defendants (including word choice, reliance on particular sources, and unsuccessful effort to obtain comment from Jenkins) were relevant to the defendants' state of mind.

The court denied the defendants' motion *in limine* to confine the plaintiff's case to those statements in the article that were statements of fact about him. The court said it would confine the issues submitted to the jury to those which, under the facts and law, might be actionable; but as an evidentiary matter, he would not confine the plaintiff to putting on proof only with respect to statement about Jenkins that the plaintiff claimed to be false, because evidence about other statements in the article might bear on the actual malice issue.

9. Significant Mid-Trial Rulings:

The court granted the defendants' Rule 50 motion for judgment as a matter of law in part at the close of the plaintiff's case-in-chief. The court dismissed the intentional infliction claim. The court also ruled that certain statements in the article were not actionable as a matter of law. The court said that the statements (or implications) about Jenkins could be divided into two groups: (1) statements or implications to the effect that Jenkins had botched the investigation and (2) the implication that Jenkins had consciously participated in an effort to suppress or destroy evidence in order to steer the investigation a certain way or to cover-up a murder. The court ruled as a matter of law that the "botched investigation" contention would not go to the jury, because there was not clear and convincing evidence of actual malice and because that contention was essentially a matter of opinion. The court ruled that there was enough evidence to send the "cover-up contention" to the jury. The court's jury instructions tracked his Rule 50 decision.

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

The court (at the defendants' request) pre-instructed the jury about the elements of the plaintiff's three claims. The pre-instruction included giving each juror a copy of the article and presenting a 45-minute audio-visual presentation of the article before opening statements.

The court often gave Rule 105 limiting instructions that certain evidence (regarding the OIG and OPR investigations) was being admitted with respect to the truth of the article but not with respect to the state-of-mind issue.

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

12. Pretrial Evaluation:

The defendants' assessment of the case was that Jenkins was unlikely to prevail at trial. There was significant evidence that the statements about him were substantially true and there was little, if any, evidence of actual malice.

13. Defense Juror Preference During Selection:

Highly-educated, well-read jurors.

14. Actual Jury Makeup:

The jury consisted of eight women. The jury foreperson was a young physician. Four jurors were public school teachers, three of whom had masters degrees. All but one of the jurors had a college degree. The plaintiff is African-American; one of the eight jurors was black. Two African-American women were among the fourteen veniremen called at the start of jury selection. The defendants peremptorily challenged both African-American women (one was divorced, as was the plaintiff for a time, she had the least education of any of the panel, and during *voir dire* she seemed preoccupied and disinterested; the other was a paralegal who had worked in the same office building as plaintiff's counsel). The plaintiff made a *Batson* challenge (under *Batson v. Kentucky*, 476 U.S. 79 (1986)) to the defendants' peremptory challenges. The court determined that the defendants had non-pretextual grounds to challenge the two potential jurors; but the court expressed concern about appearances and overruled one of the defendants' challenges, leaving one African-American on the jury.

15. Issues Tried:

Defamation, false light invasion of privacy, and (until the end of the plaintiff's case-in-chief) intentional infliction of emotional distress.

16. Plaintiff's Theme(s):

The plaintiff adamantly denied that he had mishandled evidence in the Trentadue investigation or that he had lied about it. He claimed that he never talked with Kevin Rowland, and denied that he called him to discuss getting the smell of a decomposed body out of his car. He contended that FBI management had made him a scapegoat because he was a "whistle-blower" and that evidence-handling problems resulted from the incompetence of an evidence technician rather than his errors. He claimed that all the negative statements about him in the article (and other statements as well) were false, and that he had suffered emotional distress because of the article.

17. Defendant's Theme(s):

The defendants contended that the article was substantially true (with respect to statements of fact about Jenkins and others) and was otherwise an expression of opinion (whether there had been a murder and whether the federal government had engaged in a cover-up). They contended that the article was as well-sourced as possible (in 1997 no one in the government would comment about the Trentadue investigation) and the writer and editors believed what was published based on the sources they had (primarily Dr. Jordan and Kevin Rowland in the state medical examiner's office and Sen. Hatch and his staff). The defendants also contended that any damage suffered by Jenkins resulted from the OIG and OPR

investigations, his termination from the FBI, and other media coverage (*e.g.*, the April 1997 *Dateline* program, although not mentioning Jenkins by name, quoted Sen. Hatch, who talked about an FBI agent who left evidence in his car, allowing it to spoil).

18. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

None apparent. It appeared that the jury did not relate well to the plaintiff. The defendants were able to paint Jenkins as not credible (the judgment of him by OIG and OPR), and he was caught in several inconsistencies in his trial testimony.

c. Proof of actual injury:

The plaintiff presented no evidence of actual loss of reputation (the court rejected his argument he was entitled to presumed damage and instructed that Jenkins had to prove actual harm to reputation caused by a false statement about him in the article). The bulk of the plaintiff's damages evidence was his own testimony about emotional distress and physical problems which he said were caused by the article. (Much of his testimony lacked credibility because his medical records showed most of the conditions he testified about to have begun long before the publication of the article.) His personal physician talked about Jenkins' multiple medical problems but admitted in cross-examination that Jenkins never mentioned the *GQ* article as a basis for his medical or mental difficulties.

d. Defendants' newsgathering/reporting:

The plaintiff complained that he was not contacted for comment (although he said he would not have commented about the Trentadue investigation even if he had been contacted). Reporter Fischer testified that, as stated in the article, she tried numerous times to get official comment from DOJ, BOP, and FBI officials but was always rebuffed.

e. Experts:

The court excluded the plaintiff's expert journalism witness prior to trial and the defendants elected not to call a journalism expert (although Sharon Bass, a professor of journalism at the University of Kansas had been retained and submitted a Rule 26 report). The plaintiff called an economics professor to testify about damages, but the court struck his testimony because he had not done any independent analysis and had simply run calculations based on numbers supplied by the plaintiff about which he had no knowledge.

f. Other evidence:

The court permitted the defendants to introduce the report of the OIG investigation and the communications with Jenkins from the OPR resulting in his termination. Those documents were highly critical of Jenkins, supported the truth of the statements about him in the article, and concluded that he had lied under oath to a federal grand jury. All that evidence was admitted pursuant to Federal Rule of Evidence 803(8).

g. Trial dynamics:

i. Plaintiff's counsel:

The plaintiff's trial team consisted of three African-American lawyers. Roland Combs, originally lead counsel, seemed to become disinterested in the case as it progressed toward trial and the defendants refused to settle. He turned much of the trial preparation over to a young associate, Cynthia D'Antonio, who was very dedicated to her client but lacked substantial litigation experience. About three weeks before trial, Aletia Timmons, an experienced litigator (she had about a dozen years as an assistant district attorney before going into private practice), was added to the plaintiff's team. She took a lot of the responsibility at trial for examination of witnesses and seemed to be the lead counsel at trial. Combs attended the trial but did not examine any witnesses.

ii. Defendant's trial demeanor:

Mary Fischer attended the trial, as did Gary Van Dis, Vice President, Corporate Creative Director, Condé Nast Publications. Both testified.

iii. Length of trial: Eight trial days.

iv. Judge:

United States District Judge Stephen P. Friot. Judge Friot was very involved in the case. He did much of his own research and analysis on motions, and his instructions were as detailed and precise as any we have seen. The court spent about three hours with counsel in an instructions conference.

h. Other factors:

19. Results of Jury Interviews, if any:

None. Local rules prohibit counsel from contacting jurors.

20. Assessment of Jury:

The defendants were relatively satisfied with the jury on completion of jury selection. The jury was very attentive during the trial and often took notes. The defendants did not perceive any clues by the jurors about their thinking during the trial.

21. Lessons:

This case was very document-intensive (the defendants had about 175 exhibits, the plaintiff about 100). Litigation support (provided by a company called Legal Graphics) was critical to the jury's understanding of the underlying facts that supported the substantial truth of a long and complex article. The plaintiff's counsel, although inexperienced (and having no previous experience in a defamation case), were enthusiastic in their representation of Jenkins. The defendants had some concern that the jury would buy into their arguments (even though from our perspective they lacked legal merit) simply because they seemed to believe in the value of what they were arguing. Having an informed and active judge was also critical to the outcome of the case.

22. Post-Trial Disposition:

The plaintiff did not file any post-trial motion but the time to appeal has not yet expired. The defendants do not expect the plaintiff to appeal.

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M. **Case Name:** *Schlieman v. Gannett Minnesota Broadcasting, Inc., et al.*
Court: State of Minnesota, Hennepin County, District Court (Gary Larson, J.)
Case Number: 00-2843
Verdict rendered on: July 11, 2003

1. Name and Dates of Publication:

May 11, 1999 – lead story on 6:00 p.m. local news broadcast on KARE-TV.

2. Profile:

a. Print _____; TV __X__; other _____.
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

Plaintiff is a police officer who responded to a 911 call about a man who had shown up at his neighbor's home covered in blood, carrying a Bible, and talking about blood sacrifice. After arriving at the man's home, plaintiff reported that the man came toward him with a knife and then plaintiff shot him five times, killing him. KARE-TV sent one of its senior news reporters, Dennis Stauffer, and a photojournalist to cover the story.

Stauffer arrived at the scene and spent about five minutes interviewing the neighbors who made the 911 call. These witnesses told Stauffer they were surprised by the incident because they "had never seen any aggressive tendencies" on the deceased's part. Afterwards, Stauffer proceeded with his investigation, interviewing police officials, contacting the County Attorney, and attempting to gather additional information. He also tried to contact the neighbors again to get them on camera but they were not at home.

That night, Stauffer reported live from the scene and stated, "Today friends and neighbors left flowers where Hartwig was killed and declined to speak on camera, but two people say they witnessed the shooting and that Hartwig was not being aggressive." Several months later, KARE reported plaintiff's exoneration in the matter. Plaintiff never contacted the news station about the original broadcast, but then sued the station and Stauffer, claiming that the statement was false, defamatory, and made with "actual malice."

The case was first tried to a jury in 2001 (reported in the 2001 version of this survey). That jury found the statement in question, plus two others, were not capable of a defamatory meaning. Plaintiff appealed and the Court of Appeals held that the defamatory meaning (which directed the jury not to consider implied meaning) and "of and concerning" jury instructions were erroneous and remanded for a new trial. The appellate court also held that

the two other allegedly defamatory statements in the broadcast were incapable of a defamatory meaning. The second jury trial took place in July 2003.

4. **Verdict:**

$110,000 – jury found the statement to be false, defamatory, and made with actual malice.

5. **Length of Trial:** 3½ days.

6. **Length of Deliberation:** Approximately five hours.

7. **Size of Jury:** Seven. No alternates.

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

The court declined to give a preliminary instruction on "actual malice" as recommended by the state jury instruction guide. The court also decided to use the standard jury instruction for "actual malice" instead of a more detailed and substantive instruction as suggested by both plaintiff and defendant. Throughout the trial, both parties abided by the rulings made in the first trial of the case. In connection with the first trial, the court ruled the plaintiff police officer was a public figure and that plaintiff could not seek punitive damages.

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

Judge denied defendants' motion for a directed verdict at the close of plaintiff's evidence and at the close of all evidence.

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

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

12. **Pretrial Evaluation:**

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

14. **Actual Jury Makeup:**

Three middle-aged individuals with families, and four single individuals in their early to mid-20s. Four female and three male. Several did not have a regular news source.

15. **Issues Tried:**

Falsity, defamatory meaning, actual malice, and emotional distress damages.

16. Plaintiff's Theme(s):

Plaintiff focused on the events leading up to the shooting, the statement given to the police by the neighbor quoted in the news story, and plaintiff's later exoneration.

Plaintiff maintained that Stauffer knowingly lied in his news broadcast or should have known to doubt the witness statement he received. Plaintiff also implied the statement may have been included to boost news ratings.

Plaintiff loves being a police officer and takes great pride in his work. He felt the broadcast portrayed him as a "cold-blooded killer" and worried about what people would think when they saw his name badge.

17. Defendant's Theme(s):

Defendants reminded jurors that what *actually* happened during the events leading up to the shooting is not the question. The case is about what was known *at the time of publication*, not months afterwards when the investigation was complete. Stauffer had no way of knowing that information and the police would not share it with him when he investigated. He did not have access to witness statements given to the police. At worst, he misunderstood what the witness meant to say.

Defendants did not draw a conclusion in the broadcast about what actually happened. Rather, they presented a balanced report about an unfolding event. When a government official kills a citizen it is an important story and the press cannot wait until the end of the investigation to report on it.

Plaintiff suffered no actual damages – he could point to no one who thought less of him or any adverse action taken related to his employment.

18. Factors/Evidence:

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

Respect for police officers.

b. Sympathy for plaintiff during trial:

c. Proof of actual injury:

Plaintiff had no evidence of actual injury. He was not punished in any way for his actions during the shooting and he testified that no one at work treated him any differently

after the shooting. Instead, plaintiff focused on emotional distress. Plaintiff and his wife and sister testified that he was upset about the broadcast.

d. Defendants' newsgathering/reporting:

Defendants presented evidence that Stauffer took the following steps during his investigation of the shooting: (1) interviewed the neighbors who called 911; (2) interviewed a police official; (3) tried unsuccessfully to obtain additional evidence from the police; (4) tried unsuccessfully to get a statement from the Bureau of Criminal Affairs, the entity investigating the shooting; (5) returned to the scene to get the neighbors to make an on-camera statement, but they were not at home; (6) tried to find more neighbors to interview; and (7) kept in touch with his news producer throughout the day to report his findings.

e. Experts: No experts were used.

f. Other evidence:

The neighbor who spoke to Stauffer and said that the deceased was not aggressive testified at trial that she meant her neighbor was not generally an aggressive person, not that he was not being aggressive at the time of the shooting. She claimed she made this distinction clear to Stauffer, but both Stauffer and the photojournalist with him understood her to mean that the deceased was not being aggressive at the time of the shooting.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff used the same counsel as in the first trial and he presented virtually an identical case in the second trial. Plaintiff's counsel is an experienced trial attorney who has had multiple cases against media defendants.

ii. Defendant's trial demeanor:

Stauffer and a representative from KARE were present during the entire trial. Defendants' witnesses were appropriate and professional.

iii. Length of trial: 3½ days.

iv. Judge:

Gary Larson is a well-respected judge who has served on the bench for many years.

h. Other factors:

19. Results of Jury Interviews, if any:

Counsel spoke informally with four of the seven jurors. They indicated that all the questions – falsity, defamation, and particularly actual malice – were difficult for them and the deliberations were acrimonious. The jurors felt that because there were two conflicting stories, both must be in substantial doubt.

20. Assessment of Jury: See above.

21. Lessons:

22. Post-Trial Disposition:

The trial judge granted defendants' motion for judgment notwithstanding the verdict, finding that "actual malice" had not been shown as a matter of law and that the jury instruction given on "actual malice" was inadequate.

The Minnesota Court of Appeals reinstated the jury verdict for plaintiff, holding that the jury instructions were adequate and "credible" (versus clear and convincing) evidence existed for the jury to find "actual malice." Defendants have petitioned the Minnesota Supreme Court for review.

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N. Case Name: *Janna Schwimmer v. Meredith Corporation, d/b/a KCTV-5*
Court: U.S. District Court, W.D. Missouri (Ortrie Smith, J.)
Case Number: 02-CV-00451-ODS
Verdict rendered on: September 30, 2003

1. Name and Dates of Publication:

KCTV-5, 6:00 p.m. news on April 2, 2002.

2. **Profile:**

a. Print _____; TV __X__; other _____.
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. **Case Summary:**

Defamation case by elementary school principal who was falsely accused of having been personally involved in strip search of students at her school. Actual facts were that the principal was out of the building at the time of the search. The offending broadcast was a follow-up report on the strip search and an upcoming school board meeting. In the follow-up report, the producer who wrote the report mistakenly believed that because the principal had been suspended pending an investigation, the principal was personally involved in the strip search.

4. **Verdict:** Defense verdict using general verdict form.

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

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

7. **Size of Jury:** Six persons.

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

Trial court ruled that plaintiff was an involuntary limited purpose public figure on a matter of public interest, and as such was required to prove actual malice under Kansas law. The court found that Kansas law applied – even though the strip search occurred in Missouri – because plaintiff lived in Kansas at the time and, as a result, would have felt damages in Kansas. The station was also based in Kansas and the producer who wrote the mistaken report worked in Kansas.

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

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

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

Several mock juries showed that most powerful evidence of the station's lack of actual malice was the fact that the station had correctly reported the principal's role in earlier reporting on the strip search. Those same mock juries showed that the best evidence of that fact was to simply let the jurors watch a half-hour videotape which showed all the earlier stories, none of which contained the subsequent error accusing the principal of personally

participating in the strip search. The tape was also powerful evidence of the fact that the principal's reputation had already been damaged long before the offending broadcast by simply being linked to the strip search.

12. Pretrial Evaluation:

The plaintiff never made less than a $200,000 settlement offer. Accordingly, she made it easy to try the case. We felt comfortable with our case both on the actual malice side and on the lack of damage side. Accordingly, we were willing to try the case, believing that even if we got hit, the verdict would not be astronomical.

13. Defense Juror Preference During Selection:

Typical defense juror.

14. Actual Jury Makeup:

White collar jury.

15. Issues Tried:

The case was submitted on a general verdict form, so all issues (defamation, falsity, actual malice) were tried, though the station conceded that the statement that plaintiff herself had participated in the strip search was false.

16. Plaintiff's Theme(s):

The station was out to hype its coverage of this event and did not care if it got the facts right or wrong – it was only interested in ratings. Plaintiff tried to make this a case about the media, not the plaintiff.

17. Defendant's Theme(s):

The defense had two themes. First, the producer who wrote the follow-up report made an honest mistake based on the fact that the principal had been suspended pending an investigation and had not been reinstated; the producer therefore assumed that the principal had been personally involved. Second, while the station regretted the mistake, everyone should be happy – both the principal and the station – that the mistake was "lost in the noise" of all the other, accurate, reporting on the elementary school strip search and therefore did not cause the plaintiff any damage.

18. Factors/Evidence:

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

The particular school district where the strip search occurred has a terrible reputation for mismanagement, fraud, etc. We never figured out if that helped or hurt us. None of the venire knew the principal herself.

b. Sympathy for plaintiff during trial:

Not obvious. Something curious occurred during the trial: when plaintiff's mother testified, the plaintiff turned her back to her the entire time. Counsel did not observe this, but several jurors noted it afterwards.

c. Proof of actual injury:

None. This was a key for us. We knew that the principal had already decided not to renew her contract prior to the station's mistaken report. Accordingly, we felt confident that she would not be able to prove actual loss income. The plaintiff did testify in her deposition about seeing a doctor, but her testimony in her deposition indicated she saw the doctor about the trauma of the whole event, not just because of the mistaken report.

d. Defendants' newsgathering/reporting:

The reporter was a friendly, innocent-looking pregnant woman who exuded empathy when she testified she felt terrible for making a mistake.

e. Experts: None.

f. Other evidence:

We were able to introduce evidence that the plaintiff had been reprimanded in the past for asking an elementary student to lift her shirt in order for the plaintiff to see if the girl was pregnant. The principal did this after being instructed not to ask the girl if she was pregnant, but to leave that issue to school counselors.

g. Trial dynamics:

i. Plaintiff's counsel:

Seasoned, former state court felony prosecutor. Tried the case as such.

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

We elected to have the innocent-looking producer be our corporate representative for the entire trial.

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

iv. **Judge:** Ortrie Smith.

h. **Other factors:**

Perhaps the key testimony in the case came from the station's former executive producer who wrote the clarification after the station learned of the mistake. In explaining how he came to learn of the mistake, he testified that he was surprised at the mistake because the producer who made the mistake was such a conscientious person. This testimony – from a former employee who had no axe to grind – helped confirm that the mistake had to be an honest one.

19. Results of Jury Interviews, if any:

The jurors wanted desperately to find for the plaintiff. They believed that the media in general were arrogant self-righteous fools who deserve to be punished for any wrongdoing. The jurors talked repeatedly about how what the station did to the plaintiff was wrong. They explained, however, that they felt compelled to follow the judge's instructions and they could not find that the station acted with actual malice. They said they did not get to the other issues of the verdict form because they started at the top and the first issue (after falsity – which the station had admitted) was actual malice. When pressed about the issue of actual damages, they indicated they did not believe that they would have found for plaintiff on that issue, but that they never formally voted on that topic.

20. Assessment of Jury:

White collar jury. Two of the jurors were elementary school teachers. We debated about whether to keep them on or not, ultimately deciding that they were the lesser of two evils when we look at the other options for our peremptory challenges.

21. Lessons:

Don't try the case if the jury can, based on the facts, go against you just because you believe you were in the right. I cannot emphasize enough how our jurors told us afterwards that they wanted to "get the media."

22. Post-Trial Disposition:

Plaintiff's counsel mounted a lengthy post-trial effort to get the trial court to reconsider his pre-trial ruling that a publication of matters of public interest triggered the actual malice test. Plaintiff even went so far as to ask the district court to certify the question to the Kansas Supreme Court, something the district court refused to do.

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O. Case Name: *SeaChange International, Inc. v. Jeffrey O. Putterman; Lathrop Investment Management Corporation; Concurrent Computer Corporation; John Doe No. 1; John Doe No. 2; and John Doe No. 3*

Court: (Willard Proctor, Jr., J.)
Case Number:
Verdict rendered on:

1. Name and Dates of Publication:

Various Internet message board postings by an individual and a commercial firm.

2. Profile:

a. Print _____; TV _____; other __X__ (Internet message board).
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

Defendant Putterman posted numerous messages under several aliases on message boards devoted to plaintiff SeaChange and its competitor, defendant Concurrent. SeaChange alleged libel on 26 separate posts by Putterman and alleged, further, a conspiracy to defame between defendant Putterman and defendant Concurrent.

4. Verdict:

Do you find that Jeffrey Putterman defamed SeaChange International, Inc.?
Ans: No.

(This finding resulted in a defense verdict for Concurrent as well, who was alleged to be a co-conspirator with Putterman.)

5. Length of Trial: 5½ weeks.

6. Length of Deliberation: 1½ days.

7. Size of Jury: Twelve (two alternates).

8. Significant Pre-Trial Rulings:

Summary judgment was initially granted in favor of Concurrent on the conspiracy claim, but the Arkansas Court of Appeals found the existence of disputed facts. *SeaChange v. Putterman*, 79 Ark. App. 223, 86 S.W.3d 25.

9. Significant Mid-Trial Rulings:

The court found plaintiff to be a limited purpose public figure.

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

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

Jury consultant assisted in selection of jury.

12. Pretrial Evaluation:

60% chance of defense verdict.

13. Defense Juror Preference During Selection:

Internet-savvy jurors; market investors.

14. Actual Jury Makeup:

Three Ph.D.s; several jurors were familiar with message boards.

15. Issues Tried:

Whether Putterman libeled plaintiff in postings on the message boards.
Whether Putterman conspired with Concurrent to libel plaintiff.

16. Plaintiff's Theme(s):

Putterman and Concurrent pursued a devious scheme to drive down the price of SeaChange stock and to increase the price of Concurrent stock.

17. Defendants' Theme(s):

The action is brought by SeaChange to prevent fair competition from Concurrent.

No reasonable person can understand obviously biased posting on message boards to be objective, reliable statements of fact.

No evidence anyone thought less of company as a result of the postings.

18. Factors/Evidence:

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

Defense was concerned with prejudgment of a "Martha Stewart"-like conspiracy.

b. Sympathy for plaintiff during trial: Very little.

c. Proof of actual injury: Very little.

d. Defendants' newsgathering/reporting:

e. Experts:

Defendant Concurrent presented an economist who reviewed postings and stock prices to conclude no effect on the stock price of either company by the postings giving rise to the litigation.

f. Other evidence:

Numerous other posters made similar statements on the message boards.

The investor relations director for plaintiff posted under aliases on the boards; the investor relations person "corrected" misstatements and posted negative statements about Concurrent.

Putterman posted an apology in which he admitted the statements were untrue.

Putterman talked on several occasions with Concurrent's CEO.

g. Trial dynamics:

i. Plaintiff's counsel:

Extremely aggressive.

ii. Defendants' trial demeanor:

Putterman's counsel embraced aggressively the right of investors to question management and to assert their opinions.

Concurrent's counsel contended the company was sued because SeaChange did not want fair competition.

iii. Length of trial: 5½ weeks.

iv. Judge: Judge Willard Proctor, Jr.

h. Other factors:

Jury was initially told this would be a two-week trial and several jurors were angry as the trial continued into the third and fourth weeks.

19. Results of Jury Interviews, if any:

The foreperson thought plaintiff's counsel was very aggressive, but never proved its case. He was of the opinion that Putterman would have been in trouble if Concurrent and its counsel had not been in the case, and he found no evidence of a conspiracy or any damage to the reputation of plaintiff.

20. Assessment of Jury:

One of the most diligent, good humored juries I have ever seen. During deliberations there was a little friction as jurors debated whether to award Putterman damages on his counterclaim for breach of contract and fraud in procuring an apology, but jurors were by and large extremely diligent.

21. Lessons:

Did not need to spend time placing each allegedly defamatory post in the context of the thread/discussion. The jury understood the concept very early.

22. Post-Trial Disposition:

Judgment entered for defendants. No appeal anticipated.

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P. Case Name: *Jesse Roger Sheckler v. Virginia Broadcasting Corporation*
Court: Circuit Court of Albemarle Cty., Virginia
Case Number: CL02-60
Verdict rendered on: May 23, 2003

1. Name and Dates of Publication:

WVIR-TV/Channel 29, Charlottesville, Virginia. Publication in April and October 2001.

2. Profile:

a. Print _____; TV __X__; other _____.
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication __X__.

3. **Case Summary:**

In March of 2001, Sheckler was named in one count of a multi-count multi-party federal indictment for cocaine trafficking. Sheckler was alleged to have loaned Sam Rose, who was ultimately convicted of possession and distribution of cocaine for sale and other charges, $37,000 to finance a drug buy. Sheckler claimed he was unaware of Rose's drug activity, and was ultimately acquitted of conspiracy to distribute cocaine. In April, WVIR-TV reported the indictment, and, over video image of Sheckler's house and garage in Standardsville, Green County, Virginia, reported that federal and local drug agents had raided the house and found 50 grams of crack cocaine and 500 grams of powder cocaine. In fact, there had been no raid, and no drugs found on Sheckler's premises; Sheckler had been arrested but not at his home. The station's reporter claimed that the information concerning the finding of cocaine at Sheckler's residence was provided by the A.U.S.A. handling the case; the A.U.S.A. denied providing this information to any reporter. Sheckler's defense lawyer left a voice mail with the station over the weekend following this Friday night broadcast, complaining of the false statements. The reporter did not respond, but left a message for the Green County beat reporter, "Sheckler's attorney wants you to call her on Monday." The beat reporter received a call from Sheckler's attorney Monday, who added to the prior message that she had inquired of the A.U.S.A. handling the case, who denied providing the false information on the finding of cocaine at Sheckler's premises. The beat reporter told Sheckler's attorney that any problem with the story should be taken up with the original reporter. These complaints were brought to the attention of the station manager and its news director, but did not result in further follow-up. No record of these complaints was made for future reporting.

When Sheckler's trial began in late October 2001, WVIR assigned yet another reporter to cover the trial. During the opening statement, the government told the jury regarding Sheckler, "he did not sell or distribute [cocaine], . . . as a matter of fact, there won't be any evidence in this case that the defendant ever possessed or handled drugs." However, the new reporter did not get to the trial in time to hear this, and relied solely upon his review of the prior newscasts and what he heard in the courtroom; there were no new interviews of anyone else with knowledge of the case. In the evening newscast, the station reported that "authorities found crack cocaine and powder cocaine at [Sheckler's] residence." The newscast during the trial also included file footage of a man (not Sheckler) being arrested in front of his house (not Sheckler's), with the words "drug bust" superimposed. There were no complaints about the trial coverage during trial, but shortly after Sheckler was acquitted he hired counsel who contacted the station and suggested that a retraction was in order. According to this lawyer, the station manager told him "we don't retract and we support our reporters. We stick by our story." Plaintiff sued for defamation, claiming that persons in his conservative and law abiding community had come to believe that he was in fact guilty, from the fact that cocaine had been found at his premises, and that he had likely been acquitted on the basis of a technicality or the work of a good defense lawyer.

4. Verdict:

$10 million in compensatory damages reduced to $1 million upon remittitur by trial court.

5. Length of Trial: Three days.

6. Length of Deliberation: Three hours.

7. Size of Jury: Seven.

8. Significant Pre-Trial Rulings:

Motion to exclude plaintiff's journalism experts denied.

9. Significant Mid-Trial Rulings:

The trial court dismissed the claim of punitive damages, finding that plaintiff had not sustained his burden of proof regarding *New York Times* malice.

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

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

Two mock juries were conducted, each with seven jurors. A slight majority of the jurors found for the plaintiff. The largest amount any plaintiff's mock juror awarded the plaintiff as damages was $26,000.

12. Pretrial Evaluation:

Defendant felt it was likely the plaintiff would recover damages, but felt they were unlikely to exceed $250,000.

13. Defense Juror Preference During Selection:

Well-educated, employed persons at least middle-aged or older.

14. Actual Jury Makeup:

All but one fit the preference of the defendant noted in ¶ 13.

15. Issues Tried: Negligence.

16. Plaintiff's Theme(s):

The defendant hired unqualified, incompetent reporters and failed to provide appropriate editorial supervision, including failure to follow-up on complaints filed by the plaintiff's attorney.

17. Defendant's Theme(s):

Our reporter accurately reported what her reliable source told her; the story stopped running before plaintiff complained; no retraction or apology was requested.

The plaintiff was injured by his indictment arrest on a federal felony charge of conspiracy to distribute cocaine.

18. Factors/Evidence:

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

The case was tried in Albemarle County (Charlottesville), not Green County, a rural county in which citizens share conservative values and distrust of outsiders.

b. Sympathy for plaintiff during trial:

There was some sympathy apparent at trial. The amount of the verdict suggests that there may have been considerably more sympathy than was apparent.

c. Proof of actual injury:

Some injury to reputation and considerable emotional damage.

Plaintiff testified that many people told him they knew the broadcast was true "because they showed signs of someone breaking and entering my house on the TV. And they said it's got to be true if it's on TV."

Plaintiff called a number of former friends and acquaintances who declared that they had terminated their relationships with the plaintiff because of the broadcast. One said that he believed the broadcast, notwithstanding the acquittal, because "with drugs being found at his place, he's got to have – he's got to have done something very, very bad. And I resolved to sever our friendship. And I resolved to have nothing more to do with him. And that's what I did." Another said "as good a friend I was with Jesse, I really believed he was guilty when I seen it when they confiscated drugs."

Plaintiff offered testimony of mental health professionals who urged that these aspects of the broadcast caused the plaintiff to suffer depression and post-traumatic stress disorder.

Defense experts noted that the depression had been diagnosed before the incident, and that the subsequent and continuing problems were the result of being indicted, arrested, and publicly tried on felony conspiracy charges.

d. Defendant's newsgathering/reporting:

Jury was probably persuaded defendant was negligent.

e. Experts:

Over defendant's objection, a "media malpractice expert" was permitted to testify.

Plaintiff submitted reports from journalism Assoc. Professors Ted J. Smith III, VCU School of Mass Communications, Richmond, and Jeff Sonth, same. Defendant did not present an expert but determined it would not help and weaken the defendant's position on appeal.

f. Other evidence:

The reporter testified that she had spoken to the A.U.S.A. who was her source only by telephone. The A.U.S.A. testified that the reporter had come to his office in person and lied to his assistant, saying the A.U.S.A. had given her permission to look through a confidential case file. When the A.U.S.A. and the assistant confronted the reporter, the former testified, she broke down and cried. However, the defense called a reporter for *The Charlottesville Daily Progress*, who testified that it was she, not the TV reporter, who had the tearful confrontation with the A.U.S.A. in the federal building and gave a different version of that incident. In later testimony, the A.U.S.A. acknowledged that the newspaper reporter was probably telling the truth. The defense also called another reporter who claimed to have received inaccurate information from the A.U.S.A. concerning the Sheckler case, although it was not the same nor as damaging as the information concerning finding crack and powder cocaine at Sheckler's home.

g. Trial dynamics:

i. Plaintiff's counsel:

Very emotional and probably inflamed the jury to award $10 million, the amount he requested.

Plaintiff's counsel succeeded in infuriating the jury and persuading them to ignore the court's instructions and award, in effect, an award of $10 million, for reasons other the injury compensation. It was this aspect of the plaintiff's counsel's presentation that caused the court to remit the award to $1 million,

In opening statement, counsel asked the jury to require the defendant television station to pay an "enormous sum of money to clear Mr. Sheckler's good name." He alluded to "spreading poison in a pool" as a guiding metaphor for the effect of the defamatory broadcast, and in summation, plaintiff's counsel continued the metaphor: "poison, ladies and gentlemen, dropped in the corner of a pool, eventually poisons all of the life in the pool." Then, referring to defendant's failure to retract, counsel continued the metaphor:

> If the retraction had been dropped in the pool the same day, or the next day, the retraction would have spread just the same way that the poison has spread. But for 25 months now, that poison has laid in the pool and it's been very, very hard to dislodge a two-year belief.

Counsel then told the jury, "the only way to restore Jesse's good name in this community it for a jury of neutral citizens, just like yourself, to say a reputation like Jesse's is of enormous value, a good name is priceless." Counsel continued, "the law requires an amount of money to compensate for that harm to be as enormous as the harm was to Jesse's good name," and that "a verdict less than enormous will let 29 escape its responsibility to make up for all the harm that it did." He told the jury that if the verdict "is less than enormous," the station manager and news director will "high-five one another, and who knows will happen next." The Jayson Blair incident was discussed. After evoking cataclysmic images of defendant being allowed to run amuck if not hit with a huge verdict, counsel admonished the jury as follows:

> If you return a small verdict, ladies and gentlemen, like a million dollars, a small verdict, people will conclude that a good man's reputation just isn't worth very much. They may conclude that the story could have been true.
>
> But an enormous verdict will clear the poison from the pool. A $10 million verdict will travel just as far, and just as wide and just as deep as the lies, the poisonous lies spread by 29.
>
> If your verdict is enormous, then Jesse will be able to hold his head up and walk the street again, and everybody will know 29 was wrong.
>
> The restoring of his good name is in your hands, and the only way to restore his good name is to award him enough money to make it absolutely clear that what 29 did to him was enormous harm. Your verdict has to be as big as the harm, it has to balance the wrong that was done to him. 29 did $10 million worth of damage to him. You will balance the harm with a $10 million verdict. That is why the case is so important.

* * * *

Only one way to solve this, ladies and gentlemen. He's a good man. He's a good man. The poison that they put in the pool in which he has lived for 52 years has spread long, far, wide, and deep. The only way you will get the poison out of the pool is with a verdict so big that everybody will hear about it, everybody.

ii. Defendant's trial demeanor:

Considerable tearfulness may have influenced the jury.

iii. Length of trial: N/A.

iv. Judge: N/A.

h. Other factors:

This case just happens to contain many of the blunders that are common in the broadcast news business. However, to the extent that the jury was focused on liability issues, the principal problem was the dispute in testimony between the A.U.S.A., who insisted he had given no reporter information concerning seizure of crack cocaine at plaintiff's residence, and the reporter, who was equally adamant that she had received this information from the A.U.S.A. Because of the A.U.S.A.'s stature as an experienced attorney for the government, and the plaintiff's position as a just out of journalism school reporter, the playing field was not exactly level.

19. Results of Jury Interviews, if any: Not significant.

20. Assessment of Jury:

Probably persuaded plaintiff was a "little guy" victim of a large uncaring media organization that was staffed by less than competent reporters.

21. Lessons:

Statements of regret and willingness to correct the records should be done promptly; there should be a systematic method of reporting and follow-up on complaints regarding news stories.

22. Post-Trial Disposition:

Case settled for the remitted sum.

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Q. **Case Name:** *Alan K. Silberstein v. Philadelphia Newspapers, Inc.*
Court: Court of Common Pleas, Philadelphia Cty. (Biester, J.)
Case Number: 98-60 2632. June Term 1998
Case settled on June 19, 2003 after three weeks of trial

1. Name and Dates of Publication:

Philadelphia Daily News, August 6, 1997

2. Profile:

a. Print _X_; TV _____; other _____.
b. Plaintiff: public _X_; private _____.
c. Newsgathering tort: _____; Publication tort _____.

3. Case Summary:

Philadelphia Daily News reported on two lawsuits involving Judge Alan K. Silberstein, then President Judge of Municipal Court. *The Daily News*' front page was headlined "Chamber of Horrors?" and had the Judge's photograph. One of the lawsuits involved an investigation the Judge had conducted when his top administrator committed suicide after a female contractor to the courts accused the administrator of forcing her to have oral sex. In the course of the investigation, the Judge interviewed, under oath and before a court reporter, two of the woman's former employers and asked explicit questions about the woman's sexual practices. The woman, who was fired by the Judge, sued and the transcripts from the interviews, which contained graphic questioning, were disclosed in discovery and were reported by *The Daily News*. The paper also reported on a sex discrimination case brought by another woman based on her pregnancy. The Judge took issue with much of the reporting and especially the "Chamber of Horrors?" headline.

4. Verdict: See above.

5. Length of Trial: Three weeks.

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

7. **Size of Jury:** Twelve.

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

Court disallowed defendants' journalism expert, Glenn Guzzo, on the grounds that he did not think a journalism expert would be helpful.

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

Court withheld ruling on whether he would allow testimony from judicial ethics expert.

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

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

12. **Pretrial Evaluation:**

Case would, in large part, depend on whether the jury thought the Judge's conduct was inappropriate.

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

Intelligent jurors who were employed, and did not have hidden (or overt) bias against *The Philadelphia Daily News*.

14. **Actual Jury Makeup:**

50% men, 50% women. About half graduated from high school. 70% African-American.

15. **Issues Tried:**

Never went to jury.

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

The article unfairly painted the Judge as being involved in salacious conduct, while he was, to the contrary, doing what he should be doing.

17. Defendant's Theme(s):

We argued that while the publication questioned (and criticized) the propriety of the Judge's questions, *i.e.* they were not appropriate subjects of inquiry, it did not in any way portray him as himself engaging in any sexually deviant behavior. Further, we directly attacked the propriety of the judge's conduct and the impact it had on the women involved. We focused on the Judge's conduct and not the newspaper's right to publish.

18. Factors/Evidence:

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

Many of the venire admitted to bias against the media.

b. Sympathy for plaintiff during trial:

c. Proof of actual injury:

Judge had a number of witnesses testify about effect of article on his reputation; cross-examination effective relating to other news coverage.

d. Defendant's newsgathering/reporting:

e. Experts: No experts testified.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel: William Murphy.

ii. Defendant's trial demeanor:

iii. Length of trial: Three weeks.

iv. Judge:

Judge Beister, senior out-of-county judge, was smart, thoughtful, and pushed settlement.

h. Other factors:

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

20. Assessment of Jury: N/A.

21. **Lessons:**

22. **Post-Trial Disposition:** N/A.

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R. **Case Name:** *Stewart v. The Oklahoma Publishing Co., Griffin Television OKC, L.L.C., NewsOK, L.L.C., and Donna Taylor*
Court: District Court of Creek Cty., Oklahoma (Donald Thompson, J.)
Case Number: CJ-02-490
Verdict rendered on: September 18, 2003

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

Data from the Oklahoma Department of Corrections Sex Offender Registry available on-line at www.NewsOK.com from August 2001 until February 2002.

2. **Profile:**

a. Print _____; TV _____; other __X__ (Internet).
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. **Case Summary:**

News OK, L.L.C. (a limited liability company owned by The Oklahoma Publishing Co., publisher of *The Oklahoman*, and Griffin Television OKC, L.L.C., operator of KWTV, Channel 9 in Oklahoma City) operated an interactive website at www.NewsOK.com. Both *The Oklahoman* and KWTV contributed content to the website, but the editorial control over the site was maintained by the management of NewsOK. From August 2001, when the website became active, until February 2002, News OK made available on-line the sex offender registry ("SOR") maintained by the Oklahoma Department of Corrections ("DOC"). The DOC would e-mail periodic extracts of data from the SOR with instructions to replace the previous data with the update. The DOC sent the last relevant data update in January

2002. NewsOK uploaded the data on its server without alteration. Visitors to the website could search the data by certain criteria such as name, address, or ZIP code.

Sex offenders were required to register with the Department of Corrections. In 2002, approximately 4,500 offenders were registered on the SOR. One such offender, named Ron Wesley Lyon, registered at 351 South Ave. F, Collinsville, Oklahoma. At the time he registered, that address was a house owned by his sister. Lyon's sister sold the house to the plaintiff in the spring of 2001. Lyon did not inform the DOC of a change of address until May 2002. Throughout the time NewsOK made the SOR available to the public on-line, Lyon's verified registered address on the SOR maintained by the DOC was the South Ave. F address in Collinsville, and that address was supplied to NewsOK by the DOC in its data extract.

In February 2002, a resident of Collinsville, co-defendant Donna Taylor, was interested in finding out if any sex offenders were registered as living in her neighborhood. Taylor found the NewsOK site, searched the DOC's SOR, and located thirteen offenders registered in her ZIP code. The entry for Lyon reflected an address fairly near her home. Taylor took the DOC number for Lyon, obtained more information about him, including a color photograph, from the DOC's own website (the DOC had an "Offender Lookup" on all convicted felons in Oklahoma, but at the time it did not have the SOR available on-line). During her on-line research, Taylor read the Oklahoma statute about sex offender registration, did other general research on sex offender-related sites, and read the FAQ page on NewsOK's site.

A couple of weeks later, Taylor took the printout of the thirteen registered sex offenders and the photograph of Lyon to seven neighbors. She told them that a sex offender named Lyon was registered in their neighborhood. She showed the photo to most of the neighbors with whom she spoke. At trial, all of the neighbors testified that they did not know the plaintiff and they did not believe either that he was Lyon or that he was a sex offender.

Taylor also called the Collinsville Code Enforcement Office to report that the house she believed was 351 South Ave. F did not have visible house numbers as required by ordinance. As a result of that call, a police officer visited that address and inquired if Ron Wesley Lyon lived there. The plaintiff's wife was present when the officer visited the house. She told the officer that Lyon did not live there and then called the plaintiff at work to tell him what happened. The plaintiff and his wife claimed to be upset by the visit, and the plaintiff alleged that he worried that neighbors would think he was a sex offender. Neither the plaintiff nor his wife contacted Taylor to dispel any belief she had about whether a sex offender lived at the South Ave. F address, but they did contact KTUL, a Tulsa television station, and the Collinsville newspaper. Both reported that a neighbor had circulated information about an alleged sex offender living in the neighborhood and that the plaintiff was not a sex offender.

During the first few days of February 2002, the DOC contacted NewsOK several times by e-mail and instructed NewsOK to make a few changes in the date that had been sent in January (mostly address changes and removing names of offenders whose registration time expired). Then on February 12, the DOC informed NewsOK that the data extract sent in January had some incorrect addresses in it (the address for Lyon was not among them) because of a data processing error at the DOC. NewsOK took down the SOR page from its website on February 13, 2002. The DOC added its version of the SOR to its own website in July 2002.

The plaintiff sued NewsOK (and The Oklahoma Publishing Co. and Griffin Television OKC as the alleged "alter egos" of NewsOK) and Donna Taylor for defamation, false light, and intentional infliction of emotional distress. Although the plaintiff and Taylor lived in Tulsa County and the media defendants were headquartered in Oklahoma County, the suit was filed in Creek County, Oklahoma, a relatively rural county near Tulsa that is a notorious plaintiff's venue.

The plaintiff's theory, in general, was that NewsOK (and the other defendants) knew or should have known from previous reporting in *The Oklahoman* that the SOR had a significant number of erroneous addresses (because sex offenders often failed to report address changes); that Lyon's address was "false" because he no longer lived at the address at which he registered with the DOC; and that NewsOK and its alter egos were liable for making false information available on-line, at least without some kind of warning about the purported inaccuracy of the addresses in the SOR. The plaintiff contended that the information about Lyon available through NewsOK was defamatory to him because he now lived at the address listed for Lyon, and Taylor told one of her neighbors that Lyon may have changed his appearance from what appeared in the DOC photograph by growing longer hair and a beard. At the time, the plaintiff had long hair and a beard.

The defendants filed a motion to dismiss and a motion for summary judgment, both of which were overruled by the trial court. Both motions challenged venue and raised a number of defenses, primarily that NewsOK was privileged to "publish" the SOR, which was a public record, and it was immune from liability under § 230 of the Communications Decency Act. There was no dispute of fact that at all material times, the information about Lyon was exactly the same information maintained by and available to the public from the DOC.

4. <u>Verdict:</u>

The case was tried to a Creek County jury from September 8-18, 2003. The plaintiff settled with Taylor on the morning the trial began. The jury (by a 10-2 vote) found all three media defendants liable for defamation, false light, and intentional infliction and awarded the plaintiff $200,000 in actual damages. The jury also answered a special interrogatory that all the defendants had recklessly disregarded the truth. In a second-stage proceeding, the jury (by a 9-3 vote) awarded $3.5 million in punitive damages after the trial judge made a specific finding that the defendants' conduct was "life-endangering to humans," a finding necessary

to lift the cap on punitive damages. (Absent such a finding, the jury should have been limited to an award of punitive damages no greater than $200,000.)

5. **Length of Trial:** Nine days.

6. **Length of Deliberation:**

Approximately four hours on liability, two hours on punitive damages.

7. **Size of Jury:**

Twelve. Under Oklahoma law, the verdict required the agreement of nine jurors.

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

The trial court overruled the defendants' motions to dismiss and for summary judgment (from all appearances without having read the briefs). After the motion to dismiss was denied, the defendants sought an extraordinary writ in the Oklahoma Supreme Court to change venue and to order dismissal on grounds of privilege and immunity. The plaintiff opposed the writ on the ground that, according to the allegations in the petition, the information available on-line through NewsOK was not the same as that maintained by the DOC, that is, the publication was not privileged because it was not a "fair and true" report of an official proceeding or document. The Supreme Court denied the writ application without a written decision.

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

The trial court denied the defendants' *Daubert* challenge to the plaintiff's journalism expert and overruled a motion *in limine* and trial objections to testimony about the difficulty the DOC had in keeping accurate address records on sex offenders. One of the plaintiff's themes was that it was dangerous to make available to the public sex offender information whose currency could not be guaranteed by the DOC, despite federal and state law that required the information to be made public. The trial court overruled all defense objections to testimony of that kind and excluded two witnesses proffered by the defendants (women whose children were kidnapped and murdered by sex offenders who unbeknownst to them lived in their neighborhood) who would have testified about the history, reasons for, and value of community notification provisions in sex offender laws.

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

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

12. Pretrial Evaluation:

The defendants assumed that given the venue and identity of the trial judge (who is well known to favor plaintiffs), the outlook for trial was bleak. The media defendants refused to settle and approached the trial with a view to hope for the best and preserve the record for appeal.

13. Defense Juror Preference During Selection:

The defendants naturally looked for well-educated, well-read jurors who would likely understand the evidence and argument that the SOR available through NewsOK was substantially true and privileged because it was a public record that was exactly the same as the information supplied by the DOC. The defendants had a slight preference for women, believing they would more likely appreciate the value of sex offender information regardless of its currency.

14. Actual Jury Makeup:

Eight men, four women. The jury was primarily blue-collar: two aviation mechanics, a shipping/receiving supervisor, a construction supervisor, a subcontractor, a plumber, a payroll supervisor, the chief of operations for a small town, a social worker, a school teacher, a college registrar, and a full-time college student.

15. Issues Tried:

Defamation, false light, and intentional infliction.

16. Plaintiff's Theme(s):

The plaintiff's theme was that address data about sex offenders maintained by the DOC was not current; that making outdated address information available to the public could be harmful to others if it resulted in mistaken identity of someone as a sex offender; that the plaintiff was mistaken (or worried that he would be mistaken) for a sex offender; and that the media defendants were negligent and recklessly disregarded the truth by making the SOR available on-line when they knew or should have known that SOR address date tended to be out of date.

17. Defendants' Theme(s):

After the trial court denied summary judgment and demonstrated little interest in the law of privilege or immunity, the defendants' theme became that Congress and the Oklahoma legislature, fully aware of the inadequacies of sex offender registries, had nevertheless required that the SOR be made public; that the information accessible through NewsOK was exactly the same as that maintained by the DOC; and that NewsOK was not negligent and had not recklessly disregarded the truth by making the SOR available to the public through

its website. The defendants argued that the SOR was content supplied by a third party and that as an interactive computer service (a point the plaintiff conceded), NewsOK was immune from liability even if an outdated address for Lyon in the SOR was somehow defamatory to the plaintiff.

18. Factors/Evidence:

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

None was apparent during *voir dire*.

b. Sympathy for plaintiff during trial:

The jurors appeared attentive and did not seem to favor one side or the other during the presentation of evidence. There were no obvious incidents of body language or non-verbal communications with the parties that were clues to the jury's thinking.

c. Proof of actual injury:

There was no evidence that the plaintiff suffered any actual loss of reputation. The evidence of injury was that he suffered emotionally worrying about whether people might think him to be a sex offender. There was no evidence of actions taken toward the plaintiff that would support his belief. His treating psychiatrist testified that the plaintiff suffered from mild depression but that his concern about what others thought of him was "over-valued."

d. Defendants' newsgathering/reporting:

The evidence was undisputed that the SOR data available through NewsOK – having been transmitted by e-mail and uploaded onto NewsOK's server without alteration – was identical to that kept by the DOC. Nevertheless, the plaintiff's journalism "expert" testified that it was negligent to put outdated information on the Internet (regardless whether it was a public document), and that she would not have done so at all or, if compelled or permitted by law to do so, would have at least attached some disclaimer or warning about the lack of currency of address information. The defendants presented expert testimony that it was not negligent to make public data available to the public, even if there were knowledge about the inaccuracy of the public data. Both of the defense witnesses said the data should be presented without change as a public record, and the issue of the currency of the data should be addressed, as it was, in other reporting.

e. Experts:

The plaintiff's journalism expert was Lisa Jones, a former anchor for a Tulsa television station who currently works as a corporate trainer. In her résumé, she describes

herself as an expert "against the media." The defendants' outside journalism expert was Charles Ely, the managing editor and prime-time anchor for KTUL (Channel 8 in Tulsa). Kelly Dyer, the general manager of NewsOK, who has extensive journalism experience, also provided expert testimony.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

The plaintiff was represented initially by Steve Chlouber, a trial lawyer from a small Tulsa firm. Shortly after the litigation began, Doug Stall, a Tulsa lawyer who has sued Griffin Television several times, joined Chlouber. Stall was the "lead" counsel for the plaintiff during the trial. Chlouber was not a very effective examiner and advocate for the plaintiff, but Stall (who seemed little bothered by ethical limits and knew the judge would let him do whatever he wanted) was very good in front of the jury.

ii. Defendant's trial demeanor:

All three media defendants were represented at trial by members of upper management. From all appearances, they were well-received by the jury.

iii. Length of trial: Nine days.

iv. Judge:

Judge Donald Thompson is notorious as favoring plaintiffs in his courtroom. He sustained most objections by the plaintiff and overruled most objections by the defendants. He exercised little control over the plaintiff's counsel. Since the trial concluded, the Oklahoma Attorney General has sought Thompson's removal from the bench and Thompson is currently awaiting trial before the Court on the Judiciary. Among the allegations is that Thompson frequently masturbated while on the bench during jury trials.

h. Other factors:

Venue was a critical factor. The filing of the case in Creek County meant that the plaintiff would have the advantage of a pro-plaintiff judge and a jury selected in a county that rarely gave defense verdicts. Despite having raised the issue of fair report privilege throughout the litigation, the court refused to instruct the jury on the issue as requested by the defendants, saying that, as he saw the case, it was simply a question whether the defendants were negligent for failing to put a "warning" on its website.

19. Results of Jury Interviews, if any:

Most jurors believed that it was not inappropriate for NewsOK to make the SOR available on-line, but they bought into the plaintiff's theory (because the judge did not instruct on privilege) that NewsOK should have put a disclaimer or warning on the website that the DOC's information on sex offenders' addresses might not be current. Several jurors expressed the view that had they been instructed about the fair report privilege, they would have found in favor of the defendants. None of the jurors were especially angry at the defendants and they felt (as indicated by the actual damages verdict, which was relatively low for Creek County) that the plaintiff had not been significantly harmed. Two jurors (an aircraft mechanic and the college student) were strong advocates for the defendants in jury deliberations but were unable to persuade others to their views. One additional juror (the construction supervisor) refused to go along with an award of punitive damages. The defendants were somewhat surprised that the social worker, teacher, and grandmotherly college registrar were strongly in favor of the plaintiff.

20. Assessment of Jury:

The jury was very attentive during the trial. Had the court confined the evidence to that which was relevant and instructed properly, the defendants would likely have prevailed.

21. Lessons:

Stay out of Creek County, Oklahoma.

22. Post-Trial Disposition:

The defendants did not file post-trial motions, believing that they would be a waste of time. The case is currently on appeal to the Oklahoma Supreme Court (Case No. 100099) but has already been assigned for initial decision to a panel of the Oklahoma Court of Civil Appeals. The defendants filed their opening appeal brief on July 9, 2004, supported by an *amicus* brief by the Reporters Committee for Freedom of the Press, the Oklahoma Press Association, and FOI Oklahoma, Inc. Briefing will be completed in early September 2004, and a decision is expected sometime early in 2005.

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S. **Case Name:** *Francis E. Sweeney v. The New York Times Co., et al.*
Court: U.S. District Court, N.D. Ohio (Donald C. Nugent. J.)
Case Number: 1:00CV2942
Verdict rendered on: May 23, 2003

1. Name and Dates of Publication:

The New York Times, April 13, 2000.

2. Profile:

a. Print __X__; TV _____; other _____.
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

This lawsuit arose out of a report by *The New York Times* of the jury verdict in the case brought by the estate of Dr. Sam Sheppard to have him declared "innocent" of the murder of his wife on July 4, 1954. (Dr. Sheppard had originally been convicted of murder, but the United States Supreme Court overturned the conviction on a writ of *habeas corpus* based upon massive, prejudicial pre-trial publicity. When Dr. Sheppard was retried in 1966, he was acquitted.) A finding of innocence in the civil suit was a necessary prerequisite to a claim against the state for damages on behalf of Dr. Sheppard's estate for the time he spent in prison. Dr. Sheppard's son, Sam Reece Sheppard, who had argued for decades that his father was innocent and the victim of overzealous and unfair prosecutors, was the driving force behind the lawsuit.

The Sheppard case had become somewhat of a *cause celebre* for the Cuyahoga County Prosecutor's Office, and John T. Corrigan, the prosecutor who retried Dr. Sheppard in 1966 and who served in that office for many years, was a powerful local figure who always maintained that Dr. Sheppard was guilty. The case had remained controversial in the Cleveland community, and the civil suit spawned battling opinion pieces by columnists in the local newspaper over whether Dr. Sheppard actually was innocent.

When the *Times*' reporter prepared his story about the jury refusing to find Dr. Sheppard "innocent," he included the statement that "Mr. Sheppard and his supporters maintained that some of the earlier generation of prosecutors had brought pressure on those

currently involved. For example, Francis Sweeney, who was an assistant prosecutor in Dr. Sheppard's second trial, is now a justice on the Ohio Supreme Court. He voted unsuccessfully last year to block Mr. Sheppard's lawsuit from going forward in court. Despite his involvement in the earlier case, he declined to recuse himself."

The essence of the statements about Justice Sweeney had previously been reported in articles published in March and October 1998. During discovery, it developed that Justice Sweeney had been employed as an assistant prosecutor at the time of Dr. Sheppard's second trial, but had not participated in the trial. Sweeney also claimed not to have watched any of the trial, although it was a major attraction at the time, and not to have done any work at all on the case, although the prosecutor's office was relatively small at the time.

Before the civil case went to trial, the then-Cuyahoga County prosecutor attempted to block it from proceeding by filing a writ of prohibition in the Ohio Supreme Court arguing that the trial court had no jurisdiction to hear the case because the statute of limitations had expired. The Ohio Supreme Court voted 4-3 to allow the case to proceed, finding that prohibition was not the appropriate remedy to challenge the lower court's ruling with respect to the statute of limitations. Sweeney voted with the minority, which would have precluded the case from even going to trial. While that prohibition proceeding was pending before the Ohio Supreme Court, the lawyer for the Sheppard Estate wrote a letter to Justice Sweeney asking him to recuse himself from hearing the case. (The Sheppard Estate was not a party to the prohibition proceedings, which involved only the State of Ohio and the Common Pleas judge. Accordingly the Sheppard Estate had no standing to file a formal motion to disqualify Justice Sweeney.) Justice Sweeney claimed he never got the letter, although the Assistant County Prosecutor, who was copied with the letter, obviously received the letter because he responded to it. Justice Sweeney claimed he never received the response from the Assistant Prosecutor either. (Justice Sweeney also claimed that the only means by which a judge could be asked to remove himself was the filing of a formal motion to disqualify, and no such motion had been filed.)

During the course of his reporting for the 1998 stories, the reporter had attempted unsuccessfully on two occasions to reach Justice Sweeney, and his notes reflected Sweeney's phone number and these attempts. Justice Sweeney denied he ever received a message that the reporter had called.

Sweeney also maintained that he had never spoken with the current prosecutors (involved in defending the civil suit) about the civil action, that it would be a violation of professional ethics to do so, and that accusing him of speaking to them was tantamount to accusing him of committing a crime. The reporter's notes plainly reflected that Sam Reece Sheppard had stated more than once his belief that prior members of the prosecutor's office who had attained positions of power and influence in the Ohio judiciary were encouraging the current prosecutors to vigorously contest his civil case in order to protect the legacy of John T. Corrigan. At one point, Sam Reece Sheppard had specifically stated that of the former prosecutors "one is an assistant justice on the Ohio Supreme Court."

The issues thus became: (1) Was it false and defamatory to say Justice Sweeney was "an assistant prosecutor in Dr. Sheppard's second trial," when he was merely an assistant prosecutor in the prosecutor's office at that time? (2) Was it false and defamatory to say that despite Justice Sweeney's "involvement in the earlier [criminal] case, he declined to recuse himself" in the prohibition proceedings? (3) Was it false and defamatory of Justice Sweeney to say that "Mr. Sheppard and his supporters maintained that some of the earlier generation of prosecutors had brought pressure on the current team of prosecutors?" (4) Was there actual malice?

Sweeney made no demand for correction. After suit was filed, and efforts to negotiate correction and the dropping the suit failed, *The Times* published an "Editor's Note" that noted and corrected the error in Sweeney's history and clarified with respect to implications claimed by him.

4. Verdict:

The jury, by special verdict, found that the publication was (a) false, (b) defamatory, but that (c) it had NOT been published with actual malice.

5. Length of Trial:

The trial began on Monday, May 12, and ended on Friday, May 23. Coincidentally, the first day of trial was the day the issue of *Newsweek* with the cover story about Jayson Blair appeared.

6. Length of Deliberation: About five hours.

7. Size of Jury: Twelve.

8. Significant Pre-Trial Rulings:

A. In an effort to complicate the case and bring pressure on the defendants, plaintiff sought to take the deposition of *The Times*' in-house counsel who handled the lawsuit initially and attempted to resolve the case with plaintiff's counsel by publication of a correction of the error about Sweeney's involvement in the Sheppard trial. Over objection, the court allowed the deposition to go forward. (The reading of the deposition excerpts became a non-event at the trial when the court sustained many objections, and the result was a flat, relatively disjointed reading of testimony.)

B. The court overruled defense motions to exclude plaintiff's expert witnesses on the subject of journalism standards and on so-called linguistic aspects of the publication at issue.

C. The court overruled a defense motion to preclude any interrogation of witnesses concerning the preparation of the Editor's Note beyond the mere fact of publication, or other post-publication conduct of defendants.

D. The court overruled a defense motion to preclude questioning of the reporter concerning minor disciplinary matters that were over ten years old contained in his personnel file.

9. Significant Mid-Trial Rulings:

The court refused to allow plaintiff to introduce evidence of his attorneys' fees or costs incurred in prosecuting his claims.

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

The court utilized a special verdict form as requested by the defendants. There were no mid-trial instructions, bifurcation, etc.

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

The defendants retained a jury consultant and conducted a mock jury presentation with three separate juries. This was somewhat helpful in determining an appropriate juror profile, but more helpful in identifying or confirming themes that appeared to resonate with the mock jury. Plaintiff also used a jury consultant, who was present in court during jury selection.

12. Pretrial Evaluation:

So long as the reporter held up under an anticipated aggressive cross-examination and did not appear arrogant or offensive to the jury, we were cautiously optimistic that we would obtain a defense verdict.

13. Defense Juror Preference During Selection:

Based on our research, we concluded that we preferred educated jurors (but not too educated, all those with post-graduate degrees were pro-plaintiff); jurors who appeared to be more liberal; jurors who had not been featured themselves in a news story, and did not know anyone else who had been; and jurors who were less involved politically or in their community. Middle-aged jurors were also more pro-defendant. Finally, in an unanticipated twist, jurors who "didn't know" whether Dr. Sheppard had killed his wife were far more favorable than jurors who had made up their mind either way.

14. Actual Jury Makeup:

The actual jury consisted of seven men and five women. Most of them were in the age range that our studies reflected were most favorable to the defense. Most knew little or nothing about the Sheppard case, and little about the plaintiff beyond his name. None had heard of Jayson Blair.

15. Issues Tried:

Were the statements complained of (a) false, (b) defamatory, and (c) published with actual malice.

16. Plaintiff's Theme(s):

Plaintiff argued to the jury that the reporter utilized the information about Justice Sweeney in an effort to hype a routine story by suggesting a long-running cabal to wrongfully convict Dr. Sheppard and to cover up that plot. At one point, plaintiff suggested the motivation for this was an attempt to win another Pulitzer Prize, which the reporter had shared early in his career. (The theme fell flat because of the almost casual mention in the story of Sweeney's role, and its placement at the end of the jump page of a fairly lengthy story.)

17. Defendants' Theme(s):

The reporter was "just doing his job" and letting people know what had happened and how the people involved had reacted to what had happened. One of those reactions was Sam Reece Sheppard's complaint that prior prosecutors had pressured the current team to vigorously contest the case. The reporter was simply reporting what happened. (Thankfully, he also reported the reaction of former Prosecutor Corrigan's son, himself an appellate judge, in recapping the verdict.) The subsidiary theme was that everything the reporter wrote was backed-up by his notes, hundreds of pages of which had survived.

18. Factors/Evidence:

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

The prevailing attitude of jurors was that the defendant was a "good paper." Beyond that, they did not appear to have much of an attitude toward *The Times*. Justice Sweeney's reputation was casually known by some of the jurors, and the attitude was essentially that he was a "good judge," without much more information.

b. Sympathy for plaintiff during trial:

Plaintiff did not appear to be a very sympathetic figure during trial. He was aloof and cold. On the stand, he was somewhat evasive during cross-examination.

c. Proof of actual injury:

None. Other than Justice Sweeney's lawyer/friend who drew the article to his attention, plaintiff produced no one in Ohio who had even read the article. Indeed, plaintiff was re-elected to the Ohio Supreme Court in 1998 shortly after virtually this same information had appeared in a prior issue of *The Times*. During that re-election campaign, his opponent never brought this up as a reason to vote against him, undercutting the notion that anyone was paying attention to what *The New York Times* had to say about Justice Sweeney.

d. Defendants' newsgathering/reporting:

The reporter had copious notes dating back several years that he had prepared during multiple interviews as he followed the unfolding of the civil suit. He even had notes reflecting attempts to reach various persons involved in the prior Sheppard criminal cases, and whether he was successful or not in reaching them. His notes generally supported what had been written, and when they did not match exactly, they were close enough that the substitution of a different preposition would make them literally true. Looking at the notes altogether, it was easy to see how a source in a later interview may have misspoken, or the reporter may have misheard, on the issue of whether Justice Sweeney was a prosecutor "at" the second trial, or simply "in" the prosecutor's office when it happened.

e. Experts:

Plaintiff called David Jamison, a professor of media law, as an expert. His lack of practical experience as a journalist, coupled with his consistent record of always testifying on behalf of plaintiffs in libel cases, seriously undercut his credibility with the jury.

Defendants called Jack Doppelt from Northwestern's Medill School of Journalism as an expert on journalism standards. The jury found Doppelt's background and opinions considerably more persuasive.

Plaintiff had also listed Dr. P.K. Saha of Case Western Reserve University as an expert in linguistics. Defendants were prepared to counter Dr. Saha with Professor Ronald F. Butters of Duke University. Plaintiff made a tactical judgment toward the end of trial to forego calling a linguist, so defendants did not do so either.

f. Other evidence:

Defendants called attorneys Terry Gilbert and Gordon Friedman, who represented the Sheppard Estate in the civil litigation, as well as attorney Niki Schwartz, who was involved in the prohibition proceedings on behalf of the judge who was sued by the prosecutor. All were very effective witnesses. Gilbert was given an opening during cross-examination to tell the entire Sheppard saga, and spoke for approximately ten minutes while the jury – many of whom knew only small portions of the story – sat spellbound by his testimony. He also established quite clearly that he was a serious lawyer, and sincere in his belief that Dr. Sheppard was innocent. Attorney Schwartz, who has impeccable credentials, was especially helpful on the issue of recusal, indicating that (a) the methodology of sending a letter to a judge was appropriate and something that he had done many times, and (b) he too had considered requesting Justice Sweeney's recusal in the prohibition proceedings on behalf of his client, the trial judge.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel, Don C. Iler, conducted an extremely aggressive, lengthy, and accusatory cross-examination of the reporter, who engaged Mr. Iler effectively, and refuted his accusations. He and his co-counsel from time to time could not find documents, asked the court's indulgence while they hunted for them, and appeared somewhat disorganized. Nonetheless, Mr. Iler is an effective trial lawyer who knows all the courtroom tricks and tried them with the key witnesses. Plaintiff's co-counsel, John Hallbauer, appeared somewhat less comfortable in the courtroom and played a relatively minor role in trial.

ii. Defendant's trial demeanor:

The reporter did a superb job of walking the fine line between answering unfair questions aggressively during cross-examination and being obnoxious during cross-examination. He came across very well, knew the facts cold, and never appeared arrogant, notwithstanding his impeccable background and credentials. The jury appeared to like him personally.

iii. Length of trial: Two weeks.

iv. Judge:

Hon. Donald C. Nugent. (Somewhat ironically, Judge Nugent attended the same high school, the same college, and the same law school as Justice Sweeney. He also worked in the Cuyahoga County Prosecutor's Office, as did Justice Sweeney, and then served on the Cuyahoga County Common Pleas bench as did Justice Sweeney. They are about fifteen years apart in age.) Judge Nugent is well regarded on the federal bench, and has the reputation of a judge who will "let the lawyers try their cases." The only time he did much to

restrict counsel was during the relatively gentle cross-examination of plaintiff, which he sharply restricted for no apparent reason.

h. Other factors:

19. Results of Jury Interviews, if any:

Counsel were instructed not to contact the jurors, and did not. Based on information obtained from other sources, however, it appeared that the jury felt some sympathy for the plaintiff because they believed that he had been injured and his family had been distressed. However, the fact the plaintiff never demanded a correction made them question the validity of his claims. They also felt that despite their sympathy, there was "nothing to give him money for."

The jury was far more sympathetic toward the reporter. The jury was particularly impressed with how well he held up during very harsh questioning. The jury was not influenced by the smears plaintiff attempted over minor items in the reporter's personnel files, and accepted the argument that there was no way defendants were trying to sensationalize a story with a couple final paragraphs about an obscure judge. The absence of any reference to plaintiff in the headline, and the fact the information about him was buried deep in the story, undercut any claim that the reporter intentionally defamed the plaintiff. The jury also believed that similar information had appeared eighteen months earlier, and the reporter had heard no objection.

The jury went through the special verdict question by question, and voted initially about 9-3 for plaintiff on falsity and defamation, and 10-2 for defendants on actual malice. The jury felt that the correction in the editor's note pretty much settled the issue of falsity. The jury did not understand the difference between preponderance of the evidence and clear and convincing evidence, but they felt that actual malice was not hard to understand. One juror felt they would have reached this result even without the special verdict, but another felt the special verdict was helpful.

Jurors also mentioned that they found it very effective that almost every witness admitted at the end of his examination that he had never seen the article. The jurors also felt the plaintiff's journalism expert was a "hired gun with no real journalism experience," while the defense expert was very helpful. They also were impressed by the attorneys involved in the Sheppard case who were called as defense witnesses.

20. Assessment of Jury:

Defendants were generally pleased with the jury. It was reasonably well educated, and did not appear to have any obvious anti-media bias. Except for one juror, we would have had a verdict in two to three hours.

21. Lessons:

The reporter had been prepared to apologize for the factual error of saying that Justice Sweeney was involved "in" the second criminal trial at the earliest opportunity. At the end of a fairly heated exchange during plaintiff's case, the reporter added that there was "just one more thing" he wanted to add. While we held our collective breath, he beautifully worked in an apology for the mistake he had made. You could have heard a pin drop in the courtroom as the judge called for a recess.

The plaintiff was hurt because he did nothing for six months after he learned of the publication at issue. He never called to complain, he never wrote and demanded a retraction, he never contacted a lawyer. This seriously undercut his claim that this publication had damaged him to the tune of around $15 million, according to his lawyer's closing.

22. Post-Trial Disposition:

The judge awarded costs to the defendants as the prevailing party. Because of the number of depositions, including out-of-state depositions, costs were potentially fairly substantial. We offered not to collect our costs if the plaintiff did not pursue an appeal. Plaintiff accepted that offer, and the judgment became final.

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T. **Case Name:** *James D. Weaver v. Clear Channel Communications, Inc., a/k/a Clear Channel Worldwide, d/b/a KLIX-1310 AM Radio; and Citicasters Licenses, Inc., a/k/a Citicasters Co.*
Court: U.S. District Court, D. Idaho
Case Number: CIV 02-0116-S-BLW
Verdict rendered on: August 8, 2003

1. Name and Dates of Publication:

Broadcasts aired on or about 10/29/01, 10/30/01, 10/31/01, and 11/1/01, and Internet stories ran on or about 10/31/01 and 11/1/01.

2. Profile:

a. Print _____; TV _____; other __X__ (radio broadcasts and Internet stories).
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort: _____; Publication tort __X__.

3. Case Summary:

The plaintiff was a public official, a county sheriff in the State of Idaho, who brought a defamation claim against a radio station which broadcasts and website had stated the following:

> LEAD: SOURCES IN JEROME COUNTY ARE SAYING JEROME COUNTY SHERIFF JIM WEAVER WAS INVOLVED IN A TRAFFIC ACCIDENT RECENTLY . . . HERE'S AM IDAHO'S SUZANNE JUSST . . . (SUZANNE1)
>
> RELIABLE SOURCES SAY SHERIFF WEAVER WAS IN A COUNTY CAR WHEN HE WAS INVOLVED IN THE ALLEGED ACCIDENT -- AND ALCOHOL -- AND AT LEAST ONE OTHER VEHICLE MAY HAVE BEEN INVOLVED. REPEATED PHONE CALLS TO THE JEROME COUNTY SHERIFF'S DEPARTMENT YESTERDAY – RESULTED IN BUSY SIGNALS – AND ONE CALL WAS DISCONNECTED. CAPTAIN DAVE NEIL WITH IDAHO STATE POLICE SAYS ISP IS LOOKING INTO THE MATTER. ACCORDING TO LAW ENFORCEMENT OFFICERS IT IS CUSTOMARY FOR ACCIDENTS INVOLVING LAW ENFORCEMENT AGENCIES TO BE INVESTIGATED BY ANOTHER AGENCY. SOURCES SAY THIS ACCIDENT WAS INVESTIGATED THROUGH THE JEROME COUNTY SHERIFF'S DEPARTMENT. THE EXACT LOCATION OF THE ACCIDENT HAS NOT BEEN CONFIRMED

HOWEVER – SOURCES SAY IT MAY HAVE HAPPENED ON INTERSTATE 84.

The plaintiff in the case, Sheriff Weaver, claimed that the broadcasts were an absolute falsehood and fabrication. A separate broadcast, two days later, essentially retracted the above broadcasts.

The reporter relied upon confidential sources. In pre-trial motions, the plaintiffs argued that they had established the requisite foundation, despite the Reporter's Privilege in the State of Idaho, to know the identity of the reporter's sources. The judge agreed. The reporter still refused, and, thus, the judge entered an order followed by jury instructions which directed the jury to assume that the reporter did not, in fact, have confidential sources available to her prior to making the broadcasts.

There were two other non-confidential sources who testified that they, too, had heard similar information concerning the surrounding events regarding the plaintiff which were consistent with what was set forth in the above broadcasts.

4. Verdict:

Mistrial declared due to a hung jury. The eight jurors could not get past the question of liability and never even began to address the issue of damages. At 10:00 p.m. on the first day of deliberations, the judge ordered the jury back for further deliberations the following morning. Due to the fact that we could tell by the jurors' questions during the evening that they were still struggling with liability issues and not damage issues and the real possibility for a hung jury, the plaintiff sought out and accepted the pre-trial offer which had been made in the matter.

5. Length of Trial: Four days.

6. Length of Deliberation: Approximately ten hours.

7. Size of Jury: Eight.

8. Significant Pre-Trial Rulings:

As discussed and implied above, the defendants' motion for summary judgment on the basis of a public official who would be unable to establish a reckless disregard of the truth was denied. The judge also granted the plaintiff's motion to allow punitive damages to go to the jury and granted the plaintiff's motion that slander *per se* had occurred and, thus, damages were presumed. The jurors still had to apply the reckless disregard standard.

9. Significant Mid-Trial Rulings: Nothing of significance.

10. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):** Nothing of significance.

11. **Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries):** Nothing.

12. **Pretrial Evaluation:**

Due to the judge's ruling in denying defendants' motion for summary judgment and then indicating that he was going to instruct the jury concerning the confidential source, a pre-trial offer of $65,000 was made to the plaintiff. This was also made, in part, due to the fact that it was felt that the judge, a very honorable, good judge, and decent human being, was also very plaintiff-oriented.

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

I simply tried to avoid jurors who had an anti-media bias but also jurors who had a pro-law enforcement officer bias.

14. **Actual Jury Makeup:**

Eight very decent people who were very hardworking in nature. Essentially a middle-class makeup.

15. **Issues Tried:**

Whether the defendants acted with actual malice and whether the broadcasts caused any damage to the sheriff.

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

The plaintiff was outraged and humiliated by the false broadcast.

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

During the course of discovery, it was found that Sheriff Weaver had, indeed, been stopped for allegedly throwing a beer bottle out of his vehicle striking the windshield of a following car. The occupants of the vehicle then called the police. A deputy of Sheriff Weaver's was called by Sheriff Weaver on his cell phone to come investigate the matter. Both Sheriff Weaver and his deputy confronted (my verbiage) or discussed (their verbiage) the situation with the two complaining citizens at approximately 10:00 p.m. At that time, the citizens decided not to pursue the complaint against the plaintiff. The Idaho State Police were not called in to investigate the matter nor were any other independent law enforcement agencies of any type.

The plaintiff argued that this alleged incident concerning Sheriff Weaver did not occur until approximately one week after the broadcasts. The defendants were not able to show with certainty the exact time of the incident that was revealed during discovery. However, during the trial, the defendants argued that there were so many blatant similarities between the two separate events (the one described in the broadcasts and the one that occurred at a later date) that the similarities could not be ignored.

18. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

Yes, during trial, the plaintiff presented himself well.

c. Proof of actual injury:

There was no proof of any type of financial loss to the plaintiff. His damages essentially revolved around his being outraged and ashamed by the broadcasts in question.

d. Defendants' newsgathering/reporting:

Yes, the focus of the plaintiff's case, and, actually, the defendants' defense in the matter was the reporter and the work that she did or did not do in gathering her information, talking to her sources, and making the broadcast.

e. Experts: None.

f. Other evidence: Nothing of significance.

g. Trial dynamics:

i. Plaintiff's counsel:

The plaintiff's counsel was an excellent trial lawyer, very experienced, and very aggressive. He was also assisted by a very sharp, competent attorney.

ii. Defendant's trial demeanor:

The defendant was Clear Channel Communications (the largest owner of radio stations on the planet, as testified to repeatedly during the trial), but the female reporter became the face of Clear Channel Communications for purposes of the trial. She came across as very conscientious, intelligent, and a person wanting to do the right thing for the right reasons.

iii. **Length of trial:** 3½ days (not including deliberations).

iv. **Judge:**

A very competent and good judge with a definite plaintiff leaning.

h. **Other factors:**

19. Results of Jury Interviews, if any:

After the mistrial was declared, the judge allowed both counsel, with the judge being involved, to interview jurors right from the jury box. They were very conscientious about the entire matter. Some of them were definitely sympathetic toward the sheriff and felt that the story which had been broadcast was unfair and harmful to him. However, it appeared that a majority of the jurors were very concerned about the other incident that was revealed during discovery and why there were such gross similarities between it and the details of the broadcasts.

20. Assessment of Jury: *See* #19 above.

21. Lessons:

Don't assume you have the case won because the plaintiff is a public figure. Don't assume you have lost the case because you have jury instructions that declare that three of your reporter's sources are deemed not to exist.

22. Post-Trial Disposition:

As indicated above, after the jury indicated that they were hung, the judge recessed them for the evening, and, during that time period, the plaintiff chose to accept the pre-trial offer of $65,000 which was down significantly from the offer that was made by the plaintiff prior to the trial in the amount of $300,000.

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U. **Case Name:** *Yeager v. Daily Record, Peggy Wright, and Joseph Ungaro*
Court: Superior Ct. of New Jersey, Law Division, Morris Cty. (W. Hunt Dumont, J.)
Case Number: MRS-L-312-01
Verdict rendered on: November 20, 2003

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

Daily Record (Gannett), Morristown, New Jersey, January 4, 2001.

2. **Profile:**

a. Print __X__; TV _____; other _____.
b. Plaintiff: public _____; private __X__.
c. Newsgathering tort: _____; Publication tort __X__.

3. **Case Summary:**

This case involved a claim of defamation by a private individual. *The Daily Record* published an article concerning the arrest of an individual for bias/harassment at a local methadone clinic. The individual, who clinic officials identified as Joseph Overko, left the clinic before police arrived. When the police ran that name and other information provided by the clinic through the NCIC, it reported that Overko's real name was Daniel J. Yeager. The incident report and criminal complaint that were prepared later named "Daniel J. Yeager, a/k/a Joseph Overko," and the case was processed through the criminal system under that name. The defendants' initial "blotter" story on the incident accurately identified Overko. In addition, other news outlets had printed articles correctly identifying the arrestee as "Joseph Overko." A later full story on the incident, by a different reporter who relied the police and court records reported that the defendant was Daniel J. Yeager. It was determined several months later that the arrestee's true name was Joseph Overko who, when stopped for speeding in the 1980s had told authorities (falsely) his name was Daniel J. Yeager, a former classmate. Yeager had attempted to clarify the confusion at the time, but his name remained in the National Crime database as Overko's "real name."

The plaintiff sued the newspaper, the reporter, and the editor for defamation and tortious interference with existing and prospective employment opportunities and economic advantage.

4. **Verdict:**

For defendants by directed verdict at the close of all the evidence, based on absence of negligence and fair reports privilege.

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

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

7. **Size of Jury:** Eight.

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

The most significant pre-trial ruling was that a negligence standard of fault would be applied in the trial. This ruling was contrary to New Jersey precedent and provided grounds for reversible error. Also significant was the variety of *in limine* motions filed, including:

(1) To Amend the Prior Rulings of This Court;
(2) To Dismiss Plaintiff's Defamation Claim;
(3) To Dismiss Plaintiff's Claim of Defamation for Lack of Expert Testimony;
(4) To Dismiss Plaintiff's Claim for Loss of Current and Prospective Economic Advantage;
(5) To Bar Plaintiff's Claim for Emotional Distress;
(6) To Bar Plaintiff's Claim for Special Damages;
(7) To Bar Plaintiff's Punitive Damages Claim;
(8) To Limit Plaintiff's Witnesses;
(9) To Preclude Testimony and Argument Concerning the Failure to Look Up Plaintiff's Name in a Telephone Book;
(10) To Bar Any Testimony and Argument by Plaintiff as to the Reason for His Termination;
(11) To Preclude Evidence of Plaintiff's Alleged Alcohol Abuse and/or Treatment;
(12) To Preclude Testimony and Argument Concerning Plaintiff's Inability to Work Due to His Psychological Condition;
(13) To Admit Testimony and Pictorial Evidence that Plaintiff was a Male Stripper/Dancer.

Most were denied initially (all but nos. 4 and 8), but helped to educate the court as to the issues that would arise later; when those issues did arise, the motions were renewed and often succeeded (nos. 6, 7, 11 and 12).

Defendants moves for (1) dismissal (denied) and reconsideration (denied), (2) interlocutory appeal (denied), (3) summary judgment (denied), and (4) interlocutory appeal (denied.).

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

Court denied plaintiff's motion to bar evidence of petty criminal convictions and other bad acts as refutation of reputational injury. The court also reversed an initial ruling that the plaintiff need not show actual harm.

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

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

12. Pretrial Evaluation:

The defense believed strongly in its ability to obtain a verdict in their favor based upon the undisputed facts of record.

13. Defense Juror Preference During Selection:

Older individuals with a career/established work history. Gender, race, and socio-economic status were neutral factors.

14. Actual Jury Makeup:

All jurors fit the profile we sought.

15. Issues Tried:

Substantial truth, fair report privilege, negligence, reputational injury.

16. Plaintiff's Theme(s):

By virtue of the original blotter item correctly reporting the arrestee's identity, the defendants necessarily had to be negligent in later incorrectly reporting the arrestee's identity.

17. Defendants' Theme(s):

Defendants' theme throughout the case was that the newspaper and its reporter reported the true and accurate facts known to it and the law enforcement community at the time of publication. The defense did not shy away from the uncontroverted fact that the published information was in error; rather, we asserted that the error originated with the official government sources utilized by the reporter. The arrestee was arraigned and presented at the bail hearing under the name Daniel Yeager, and was known throughout the criminal record system, locally and nationally, as Daniel Yeager. Thus, not only was the article at issue not "of and concerning" the plaintiff, the article was true and protected by the fair report privilege (both common law and statutory). Finally, defendants contended that plaintiff had failed to demonstrate any reputational injury.

18. **Factors/Evidence:**

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

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

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

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

The defendant reporter, who was not involved in the earlier blotter publication, had done an exceptional job in both gathering and corroborating information. The defense produced most of the reporter's original sources as trial witnesses as well as documentary evidence, all of which confirmed the belief of the original sources in sworn testimony that the arrestee at the time of the publication in question was "Daniel Yeager," as reported.

e. **Experts:**

Neither side retained an expert in this litigation.

f. **Other evidence:**

Plaintiff had a fairly significant history of petty crimes and other bad acts which the defense was able to utilize in refuting any reputational injury.

g. **Trial dynamics:**

Plaintiff was shaken on cross-examination several times, and had implausible responses in attempting to rehabilitate himself. The defense source-witnesses were very strong.

i. **Plaintiff's counsel:**

Jennifer Bozniak, Esq.

ii. **Defendants' trial demeanor:**

Solid testimony, but upset/defensive on cross-examination by plaintiff's counsel.

iii. **Length of trial:** Two weeks.

iv. **Judge:** Hon. W. Hunt Dumont, J.S.C.

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

19. Results of Jury Interviews, if any:

No interviews permitted under New Jersey Court Rules.

20. Assessment of Jury:

From appearances alone, the jurors did not seem favorably inclined toward plaintiff. However, one juror repeatedly submitted written questions after direct- and cross-examination of witnesses (permitted under New Jersey rules), which tended to show an inability to follow the evidence. This may have been the subject matter of a later motion to recuse, but obviously never got to that point.

21. Lessons:

Pre-trial summary judgments motions are undoubtedly the better place to win!

22. Post-Trial Disposition:

No post-trial motions filed.

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V. SUMMARY REVIEWS

The following reviews have been prepared in summary form, because defense counsel declined to participate and only limited information was available.

1. **Case Name:** *Adams v. Los Angeles Unified School District*
Court: Los Angeles Superior Court
Case Number: BC 235667
Verdict rendered on: March 8, 2002

a. Name and Date of Publication:

Underground newspaper, *Occasional Blow Job*, 2000.

b. Profile:

(1) Print __X__; TV _____; other _____.
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: _____; Publication tort __X__.

c. Case Summary:

During the 1999-2000 school year, this underground newspaper published by high school students attacked teacher Janice Adams. This school administration banned distribution of the publication, suspended and transferred five of its students to other schools, and suspended six other students. Adams sued the school district for harassment, claiming that the school did little to prevent the newspaper from defaming her.

d. Verdict:

$4.35 million, $3.5 million for emotional distress, $1.1 million for lost earnings while on leave of absence after the incidents.

e. Length of Trial: Unknown.

f. Length of Deliberation: 3½ hours.

g. Size of Jury: Unknown.

h. Issues Tried:

Fault of the school district in failing to prevent defamation.

i. Notes:

j. Post-Trial Disposition:

Motion for new trial granted, June 7, 2002.

Plaintiff's Attorneys:

Defendant's Attorneys:

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2. **Case Name:** *Bagwell v. WDBJ-TV*
Court: Virginia Circuit Court, Roanoke (Jonathan Apgar, J.)
Case Number: CL 0100 0943-00 (Va. Cir. Ct.)
Directed verdict entered: December 16, 2003

a. Name and Date of Publication:

WDBJ-TV, Roanoke, Virginia, June 1996.

b. Profile:

(1) Print _____; TV __X__; other _____.
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: _____; Publication tort __X__.

c. Case Summary:

WDBJ covered Crenshaw TV & Appliance's purchase of Holdren's Electronics chain and its five stores, in which the buyer did not assume seller's liabilities, including extended service contracts. In 1998, Crenshaw's reached an agreement with then-Attorney General Mark Early. The coverage focused on customers upset that extended warranties purchased from Holdren's were not being honored by Crenshaw's. Crenshaw and its owner sued for defamation, claiming that the article created a false impression by failing to report that Crenshaw bought only the assets from Holdren's, and did not assume liabilities. The claim was filed in June 1997, shortly after WDBJ-TV sued Crenshaw for almost $50,000 in unpaid advertising bills, in which the stations prevailed prior in 1999.

d. Verdict:

Directed verdict. In granting the motion for directed verdict, the court noted that although nothing reported was incorrect, the claim based on negligent reporting could

survive on the basis that it was incomplete; however, the court ruled that the claim should be struck because the plaintiff had produced no hard evidence of actual damages.

e. Length of Trial:

f. Length of Deliberation:

g. Size of Jury:

h. Issues Tried:

i. Notes:

j. Post-Trial Disposition:

Plaintiff's Attorneys:

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3. Case Name: *Board of Trustees of South Suburban College and Frank Zuccarelli v. Southland Community Newspaper, Frank Giglio, William Shaw, and Ray Hanania*
Court: Cook Cty. Circuit Court (Carol McCarthy, J.)
Case Number: 01-L-1828
Verdict rendered on: September 3, 2004

a. Name and Date of Publication:

Southland Community Newspaper, 2001.

b. Profile:

(1) Print __X__; TV _____; other _____.
(2) Plaintiff: public __X__; private _____.
(3) Newsgathering tort: _____; Publication tort __X__.

c. Case Summary:

The column that formed the basis of the suit was prepared by Ray Hanania, a former *Chicago Sun Times* reporter, now a freelancer, and published in *The Southland Community Newspaper*, owned by defendant William Shaw, president of Dalton Village, Illinois. The column was critical of Frank Zuccarelli, president of South Suburban College, and the College's Board of Trustees, for allegedly deciding to sell thirteen acres of land to a developer for $250,000 without seeking bids. The column opined that the property could have been sold for more than was actually received. Frank Giglio, a former state representative, was a source for the column. Both Shaw and Giglio were political rivals of Zuccarelli within the Democratic Party. According to local news coverage, the plaintiffs' trial evidence showed that the acreage sold was fifty, not thirteen, acres, and that sale price was $1,250,000, not $250,000.

d. Verdict:

For plaintiff, $400,000, $150,000 compensatory, $250,000 punitive, split evenly among the four defendants. ($300,000 vs. media defendants ($112,500 compensatory, $187,500 punitive)).

e. Length of Trial: Unknown.

f. Length of Deliberation: Two hours.

g. Size of Jury: Twelve.

h. Issues Tried:

Defamation, falsity, actual malice.

i. Notes:

Zuccarelli had been a bitter opponent of Giglio and Shaw in seeking a Democratic committee office in 2002.

j. Post-Trial Disposition:

Motions for JNOV and new trial expected.

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4. **Case Name:** *Downing v. Abercrombie & Fitch*
Court: U.S. District Court, C.D. California
Case Number: 99-CV-4612
Mistrial declared on: May 17, 2002

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

Abercrombie & Fitch brochure.

b. **Profile:**

(1) Print __X__; TV _____; other _____.
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: _____; Publication tort __X__.

c. **Case Summary:**

This case was the trial of the misappropriation claim over Abercrombie & Fitch's use of a photograph of a 1965 surfing tournament that included both editorial content and information regarding clothing which could be ordered. The Ninth Circuit overturned the initial grant of summary judgment, 265 F.3d 994 (9th Cir. 2001), *reh'g denied* (9th Cir. Oct. 31, 2001).

d. **Verdict:**

Mistrial declared. The judge declared a mistrial after one of the plaintiffs was interviewed by *The Los Angeles Times* and mentioned the damages he expected to recover, in violation of the judge's admonition not to "try their cases in the press."

e. **Length of Trial:**

f. **Length of Deliberation:**

g. **Size of Jury:**

h. **Issues Tried:**

i. **Notes:**

Case settled before retrial. Defendants believed they were ahead in the trial because the judge had determined to give a favorable charge on key points.

j. **Post-Trial Disposition:** N/A.

Plaintiff's Attorneys:

Defendant's Attorneys:

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5. **Case Name:** *Havon, Inc. v. Chesapeake Television, Inc.*
Court: N.C. Superior Court, Buncom Cty. (Andy Cromer, J.)
Case Number: 01 CVS 3 705
Verdict rendered on: December 22, 2003

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

WLOS-TV, Asheville, North Carolina, July 2001 news report.

b. **Profile:**

(1) Print _____; TV __X__; other _____.
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: __X__; Publication tort _____.

c. **Case Summary:**

Defendant's reporter, Amy Davis, at midnight on May 2, 2001, was permitted entry to the Pleasant Cove Assisted Living Center in Chandler, North Carolina. In preparing a report on the treatment and condition of patients in the home, the station used footage obtained by Davis while inside the home. The images of patients' faces, medical records, prescription bottles, and other identifying information were blurred. The plaintiff did not dispute the truth of the broadcast, but sued for trespass. Davis, accompanied by a former Pleasant Cove employee, was allowed into the home by a nursing assistant cooperating with the reporter's investigation. Davis was escorted through the home and into patients' rooms by the former employee, while she used a hand-held video camera. Plaintiff also claimed that Davis and a cameraman trespassed two months later when they briefly entered the home's parking lot, the plaintiff having barred the reporter from the premises after learning of the first entry when showed portions of the video during an interview for the report. Plaintiff initially named several patients as co-plaintiffs, and as defendants named two employees who cooperated with the reporter, but dropped these additional parties before trial.

The plaintiff's lawyer told jurors that the main issue in the case was "whether the media is excused from abiding by the laws that the rest of us have to abide by." Plaintiff repeated this theme in closing, describing the issue as "whether the press has special privileges when they gather news." WLOS defended on the grounds that its reporter had permission to enter the home and videotape patients for its report on conditions there. Testimony at the trial focused on how Davis obtained access to the facility. Melissa Forester, who was a nursing assistant and supervisor in charge at the home at the time, testified that she let Davis and former employee Stephanie Parker into the facility and that she had authority to do so. Forester testified that she told Davis she should not bring in a camera, she acknowledged that she did not object when Davis entered with a camera and began videotaping. She said she quit the next day because she knew she would be fired for allowing Davis inside, but felt it was more important that the conditions of residents be exposed.

d. **Verdict:** For defendant.

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

f. **Length of Deliberation:** Nine hours.

g. **Size of Jury:** Unknown.

h. **Issues Tried:**

Consent and whether plaintiff's agent had apparent authority to provide consent.

i. **Notes:**

The judge instructed the jury that if a reasonable person would believe that Forester had authority to consent, no claim for trespass would lie.

j. **Post-Trial Disposition:**

No post-trial motions or appeal.

Plaintiff's Attorneys:

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6. **Case Name:** *Helen Popovich v. The Daily News Publishing Co.*
Court: Allegheny Cty. Pennsylvania Superior Court
Case Number: GD99-6343 PA (C.P. 2004)
Verdict rendered on: July 14, 2004

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

McKeesport Daily News, June 16, 1998.

b. **Profile:**

(1) Print __X__; TV _____; other _____.
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: _____; Publication tort __X__.

c. **Case Summary:**

The plaintiff, spouse of Pennsylvania Superior Court Judge Zoren Popovich, was involved in a two-car automobile accident on June 9, 1998. On June 16th, *The Daily News* published a story by reporter Harry Bradford that reported that police said that Popovich was going to be cited in the accident. The article also stated that "police said there was no contraband in the Popovich vehicle or any indication that she may have been driving under the influence of a controlled substance." The article added that the police were still investigating the accident. Bradford had relied on interviews with police officers in preparing the article, although he twice requested a copy of the police report on the accident and was refused. Judge Popovich, a former McKeesport mayor and Allegheny County Common Pleas Court judge then, and now a senior judge on the Pennsylvania Superior Court, made an angry phone call to the newspaper's managing editor, Pamela Kotter, in which he declared that the police report, of which he said he had a copy, stated that the other driver was to be cited.

Following up, Bradford again was refused the accident report by the police department, but was able to get one for a fee from the town clerk. The report Bradford obtained from the clerk said the other driver was going to be charged, so on June 25th the newspaper published a "clarification" stating that Helen Popovich was not going to be charged. As it turned out, the town clerk's report was in error; the final police report in fact cited Helen Popovich for failing to yield to oncoming traffic and failure to stop at a stop sign. She was found guilty on both charges and fined.

Incredibly, Mrs. Popovich sued, claiming that the article falsely implied that she used illegal drugs. Her husband joined in the suit, claiming loss of consortium. The judge submitted the case to the jury on the plaintiff's claim that the "no contraband," coupled with the statement that police were still investigating the accident, falsely implied illegal drug use.

d. Verdict:

For defendants. The jury was unanimous in finding that the statement did not defame Mrs. Popovich.

e. Length of Trial: Unknown.

f. Length of Deliberation: Unknown.

g. Size of Jury: Unknown.

h. Issues Tried: Defamatory meaning.

i. Notes:

Both sides had prepared expert witnesses to testify about the article, but none were called.

j. Post-Trial Disposition: Unknown

Plaintiff's Attorneys:

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Defendant's Attorneys:

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(412) 281- 2089 (FAX)

7. Case Name: *Shepard v. The Daily Clintonian*
Court: Indiana Circuit Court, Vermillion Cty.
Case Number: 83C01-0208-CT-32
Verdict rendered on: January 22, 2004

a. Name and Date of Publication:

Clinton Indiana Daily Clintonian, April 28, 2002 (political advertisement).

b. Profile:

(1) Print __X__; TV _____; other _____.
(2) Plaintiff: public __X__; private _____.
(3) Newsgathering tort: _____; Publication tort __X__.

c. Case Summary:

The newspaper published the political ad entitled "Abuse of Office is a Criminal Offense," which was signed only with the phrase "Concerned Citizens." The ad alleged that Mayor Ron Shepard of Clinton abused his office when he refinanced a city fire truck and did not renegotiate rates with the Clinton Township Water Company, a water utility run by the newspaper's publisher. The newspaper and its publisher defended by arguing that the allegations in the ad were substantially true and there was no actual malice. In his deposition, Carry said that he and his wife, who edits the newspaper, believed that Shepard had acted illegally when he refinanced the bond issue. However, the publisher refused to identify the sponsors of the ad during the two-day trial, although in his deposition he had said that he knew one of the individuals behind the ad. He denied being one of the authors.

According to local press reports, former employees of the newspaper testified that Carry and his wife routinely made derogatory comments about Mayor Shepard and had instructed photographers covering city events to exclude Shepard from photographs to reduce his exposure.

d. Verdict: $235,000 ($225,000 compensatory, $10,000 punitive)

e. Length of Trial: Unknown.

f. Length of Deliberation: Unknown.

g. Size of Jury: Six.

h. Issues Tried: Falsity, actual malice.

i. Notes:

The jury consisted of four women and two men.

j. Post-Trial Disposition:

Appeal pending, *sub nom* 83A 01-0403 CV-00097, Indiana Court of Appeals.

Plaintiff's Attorneys:

Eric A. Frey
Terre Haute, IN

Defendant's Attorneys:

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Skiles Hansen Cook and DeTrude
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8. **Case Name:** *Sound Environments, Inc. v. Liddy*
Court: Arizona Superior Court, Maricopa Cty.
Case Number: CV 1998-000129
Verdict rendered on: February 27, 2003

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

June 6, 1997 nationally syndicated radio program.

b. **Profile:**

(1) Print _____; TV _____; other __X__ (radio).
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: _____; Publication tort __X__.

c. **Case Summary:**

On January 6, 1997, G. Gordon Liddy made use of his nationally syndicated radio program to voice his frustrations with a local electronics store, Jerry's Audio, regarding installation of an audio system in his Scottsdale, Arizona home. Liddy blasted Jerry's Audio for its poor performance and joked about "Jerry's incompetence," saying "Jerry does not know how to install anything. He couldn't install himself on a toilet." Jerry and his company sued Westwood One Radio Networks, Inc., Liddy and his wife Frances, and a few local radio stations, but stipulated to the dismissal of Westwood and several of the stations before trial. The court ruled that the line about Jerry and the toilet was rhetorical hyperbole and not actionable, and dismissed plaintiffs' false light claim.

d. **Verdict:**

For defendant (6-2). The six jurors specifically found that the statements were substantially true.

e. **Length of Trial:** 2½ weeks.

f. **Length of Deliberation:** 5½ hours.

g. **Size of Jury:** Eight.

h. **Issues Tried:** Falsity, fault.

i. **Notes:**

During the trial the court precluded plaintiff from making any references to Watergate, or Liddy's conviction or disbarment, or to use of statements from Liddy's books. Jury fees of nearly $2,000 were assessed against the plaintiffs.

j. Post-Trial Disposition:

None requested.

Plaintiff's Attorneys:

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Jaburg & Wilk, P.C.
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David Farin
Phoenix, AZ

Defendant's Attorneys:

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9. Case Name: *Zelnick v. Paxson Communications*
Court: California Superior Court, Los Angeles Cty.
Case Number: BC2742 99
Verdict rendered on: July 1, 2003

a. Name and Date of Publication:

Candid Camera, filmed June 15, 2001.

b. Profile:

(1) Print _____; TV __X__; other _____.
(2) Plaintiff: public _____; private __X__.
(3) Newsgathering tort: __X__; Publication tort _____.

c. Case Summary:

In this newsgathering case, in a segment filmed for *Candid Camera* on June 15, 2001 (but not aired) in Bullhead City, Arizona, an airport security official instructed the plaintiff to climb atop an authentic-looking, but phony, X-ray scanner machine (identical in appearance to scanners reserved for carry-on luggage). One of the thirteen passengers who traveled through the fake machine was 35-year-old personal fitness trainer Phillip Zelnick, who claimed that he was injured by a pen in his pocket that punctured his leg. Paxson Communications claimed it was not responsible for the filming and settled before trial. Trial on plaintiff's claims for battery, negligence, false imprisonment, misrepresentation, infliction of emotional distress were tried against Candid Camera, Inc. and Funt. The segment was never broadcast.

d. Verdict:

For plaintiff, $2,600 in compensatory damages, and $300,000 in punitive damages.

e. Length of Trial: Four days.

f. Length of Deliberation:

Unknown. The punitive damage phases of the trial were bifurcated.

g. Size of Jury: Unknown.

h. Issues Tried:

i. Notes:

Zelnick's counsel contended in pre-trial statements to the press that while Zelnick's wounds were not deep, "anxiety, distress, and humiliation" were the principal after-effects of Zelnick's experience. "This was forcing someone to do something he didn't want to do. It was an attempt to humiliate [Zelnick] openly, so that people could laugh at him on TV, for person profit and gain."

In response to a *New York Times* article published before trial alleging that host Peter Funt "did not express particular sympathy" for Zelnick, the company expressed a "relative lack of sympathy for a legal action that seeks to exaggerate and alter the facts of the incident."

j. Post-Trial Disposition:

Motions for JNOV and new trial denied, appeal pending, *sub nom Zelnick v. Paxson Communications*, No. B170975 (Cal. Ct. App. 2d Dist.).

Plaintiff's Attorneys:

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Defendant's Attorneys:

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DNVR1:60274135.01

2004 MLRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL TRIALS

By Tom Kelley

September 27, 2004
Boulder, CO

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

A. INTRODUCTION

The methodology and results of this biennial survey of jury trials of publication and newsgathering tort claims against media defendants are reported in Part I of this survey. This Part II discusses the trends and common factors observed in the results of the cases tried during the two years covered in Part I and also the cases surveyed in the special 2002 edition that covered the one-year period from August 24, 2001 to September 9, 2002. In the discussion below I will cite past surveys. If you do not have them and want them, e-mail tkelley@faegre.com.

There is much I associate with the month of September. Viewing aspen in the Rocky Mountains as they turn gold, trying to find new recipes for the ripe tomatoes in our garden before they turn to mush, sending our kids back to college while our university town fills with them, watching news clips of hurricanes blowing patio furniture off lanais in South Florida, stocking up on Benadryl. Most significantly, in Septembers of even-numbered years (odd-numbered years until 9/11 made us skip a year, to which extent the terrorists have won), I look forward to sharing war stories with our colleagues who have defended libel cases to juries and preparing this survey.

The most consistent lesson to emerge over the eight times I have done the survey is the simple and relatively useless irony that "truth is stranger than fiction." Take this September's harvest of trials: Publications in which there is arguably no falsity (*Anderson*, *Stewart*) give rise to the highest plaintiffs' verdicts, and the best results come from cases in which the falsity is clearest (*Arnzen*, *Franklin Prescriptions*). The judge presiding over one of the high plaintiff's verdicts, unquestionably guilty of this transgression in a metaphoric sense, was accused (shortly after the trial concluded) by his staff of literally masturbating while on the bench during trials with the aid of a pneumatic device (*Stewart*). While most of us continued to fret over having the best computer software to aid in communicating with the factfinder, the most unlikely victory (favorable settlement after hung-jury mistrial) of the cases surveyed occurred in one in which defense counsel went to trial with no exhibits, no

documents, no timelines, no graphic displays, and thus no need for anything electronic (*Weaver*).

B. SUMMARY OF RESULTS AND COMPARISON TO PRIOR STUDIES

This summary covers trials concluded from August 24, 2001 through September 9, 2004. During the three-year period covered by this survey, 43 trials, 35 jury verdicts (the other eight culminating in three directed verdicts, three mistrials, one completed bench trial, and one settlement during trial) were identified. The results, which do not reflect post-trial relief unless so indicated, were as follows:

CASE	MEDIUM	VERDICT
AAA All City Heating, Air Conditioning & Home Improvement, Inc., et al. v. New World Communications of Ohio, Inc., et al. Cuyahoga Cty., Ohio Court of Common Pleas Case No. 369034 May 15, 2003	TV	For defendants
Adams v. Los Angeles Unified School District Los Angeles Superior Court Case No. BC 235667 March 8, 2002	print	For plaintiff $4,350,000
Joe H. Anderson, Jr. v. Gannett Co., Inc., Multimedia, Inc., d/b/a Pensacola News Journal First Judicial District in and for Escambia Cty. (Pensacola), Florida Case No. 2001-CA-1728, Div. J December 12, 2003	print	For plaintiff $18,000,000
Harold Armour v. Federated Publications, Inc., d/b/a The Lansing State Journal, and John Schneider Ingham Cty. Circuit Court, Michigan Case No. 01-93328-NZ November 20, 2002 (directed verdict)	print	For defendants
Arnzen and Bryden Pawnshop, Inc. v. Fisher Broadcasting, Inc., et al. Second Judicial District of the State of Idaho, Nez Perce Cty. Case No. CV 02-02832 May 4, 2004	TV	For defendants

CASE	MEDIUM	VERDICT
Lois J. Ayash, M.D. v. Dana-Farber Cancer Institute, Globe Newspaper Co., & Others Suffolk Superior Court, Boston, MA Case No. 6-0565-E February 12, 2002	print	Default judgement for plaintiff on liability Damages: $4,200,000 ($2,100,000 against Globe defendants, $2,100,00 against Dana-Farber defendants)
Bagwell v. WDBJ-TV Virginia Circuit Court, Roanoke Case No. CL 0100 0943-00 (Va. Cir. Ct.) December 16, 2003	TV	Directed verdict for defendant
Board of Trustees of South Suburban College and Frank Zuccarelli v. Southland Community Newspaper, Frank Giglio, William Shaw, and Ray Hanania Cook Cty. Circuit Court Case No. 01-L-1828 September 3, 2004	print	For plaintiff $400,000 ($150,000 compensatory, $250,000 punitive) ($300,000 against media defendants ($112,500 compensatory, $187,500 punitive))
Rod Brown v. Des Moines Heart-Argyle Television Inc. (KCCI-TV) Iowa District Court for Polk Cty. Case No. CL000084214 December 18, 2001	TV	For defendant
Jeffery Cammerino v. The Scranton Times Court of Common Pleas of Lackawanna Cty., Pennsylvania Case No. 01 CV 6408 April 9, 2003	print	For plaintiff $15,000

CASE	MEDIUM	VERDICT
Carpenter v. Alaska Broadcast Communications, Inc. and Westwood One Alaska Superior Court Case No. 00-1153 CI February 7, 2002	radio	For plaintiff $155,042 (on spoliation claim only, not invasion of privacy and emotional distress) ($5,042 compensatory, $150,000 punitive)
Chee-Mok Chan, D.D.S. v. Shafter Press California Superior Court, Bakersfield, CA Case No. 242190 SPC August 30, 2001	print	For plaintiff $8,620
William J. Clark v. Connecticut Magazine, et al. Superior Court, J.D. of Stamford at Stamford Case No. CV-98-01683845 March 8, 2002	print	For defendants
Jane Doe v. Merck & Co. and Harrison & Star, Inc. Supreme Court of the State of New York, Suffolk Cty. Case No. 10786-98 September 28, 2001	print	Summary judgment for plaintiff on liability Damages: $3,001,000 ($1,001,000 compensatory, $2,000,000 punitive) (of punitive damages, $1,750,000 against Merck, $250,000 against Harrison & Star
John Doe (Tony Twist) v. TCI Cablevision, Inc., et al. Circuit Court of City of St. Louis, Missouri Case No. 972-09415 July 9, 2004	print	For plaintiff $15,000,000
Downing v. Abercrombie & Fitch U.S. District Court, C.D. California Case No. 99-CV-4612 May 17, 2002	print	Mistrial

CASE	MEDIUM	VERDICT
Linda Erickson v. Jones Street Publishers, LLC Court of Common Pleas, Charleston Cty., South Carolina Case No. 02-CP-10-259 March 30, 2004	print	Directed verdict for defendant
Kevin Farmer v. Lake Park Post, Inc., Al Parsons and Charles Moore Superior Court of Lowndes Cty., State of Georgia Case No. 2000-CV-308 June 21, 2002	print	For plaintiff $225,000 ($65,000 compensatory against each defendant ($195,000 total compensatory), $10,000 punitive against each defendant ($30,000 total punitive))
Ferrara v. Farrel & WPBR-AM, Lantana, FL Florida Circuit Court, 15th Cir. Case No. CL-007753-AJ May 30, 2002	radio	For defendant
Franklin Prescriptions, Inc. v. The New York Times Co. U.S. District Court, E.D. Pennsylvania Case No. 01-CV-145 March 22, 2004	print	For defendant
Havon, Inc. v. Chesapeake Television, Inc. N.C. Superior Court, Buncom Cty. Case No. 01 CVS 3 705 December 22, 2003	TV	For defendant
Clinton G. Hewan v. Fox News Network, LLC U.S. District Court, E.D. Kentucky Case No. 01-125 July 24, 2003	website of TV network	Mistrial
Holley v. WITI Fox 6 Milwaukee Cty. Circuit Court, Milwaukee, Wisconsin Case No. 00CV002193 October 2, 2002	TV	For defendant (bench trial)

CASE	MEDIUM	VERDICT
H. Gerald Hosemann v. Paul Kelley Loyacono, Katherine Loyacono, Pamela Turner, Eddie Robinson, Travis T. Vance, Jr., Charles Mitchell, and The Vicksburg Printing & Publishing Co., d/b/a The Vicksburg Post Warren Cty., Mississippi Circuit Court Case No. 02-0127-CI October 31, 2003	print	For defendant
Jeffrey K. Jenkins v. Advance Magazine Publishers, Inc., Condé Nast Publications, Inc., and Mary A. Fischer U.S. District Court, W.D. Oklahoma Case No. CIV-03-243-F August 25, 2004	print	For defendants
Helen Popovich v. The Daily News Publishing Co. Allegheny Cty. Pennsylvania Superior Court Case No. GD99-6343 PA (C.P. 2004) July 14, 2004	print	For defendants
Rappalyea v. WDBJ Television, Inc. Virginia Circuit Court Case No. CL00001031_00 November 16, 2001	TV	For defendant
Robinson v. Snapple Beverage Corp. and Turner Broadcasting System U.S. District Court, S.D. New York Case No. 99 Civ.344 (GEL) December 14, 2001	TV	For plaintiff $2,965,000 ($165,000 compensatory against both defendants, $2,800,000 punitive against Snapple)
Schlieman v. Gannett Minnesota Broadcasting, Inc., et al. State of Minnesota, Hennepin County, District Court Case No. 00-2843 July 11, 2003	TV	For plaintiff $110,000
Janna Schwimmer v. Meredith Corporation, d/b/a KCTV-5 U.S. District Court, W.D. Missouri Case No. 02-CV-00451-ODS September 30, 2003	TV	For defendant

CASE	MEDIUM	VERDICT
SeaChange International, Inc. v. Jeffrey O. Putterman; Lathrop Investment Management Corporation; Concurrent Computer Corporation; Circuit Court, Pulaski Cty., Arkansas Case No. 99-5384 March 2, 2004	Internet	For defendants
Jesse Roger Sheckler v. Virginia Broadcasting Corporation Circuit Court of Albemarle Cty., Virginia Case No. CL02-60 May 23, 2003	TV	For plaintiff $10,000,000 reduced to $1,000,000 upon remittitur by trial court
Shepard v. The Daily Clintonian Indiana Circuit Court, Vermillion Cty. Case No. 83C01-0208-CT-32 January 22, 2004	print	For plaintiff $235,000 ($225,000 compensatory, $10,000 punitive)
Alan K. Silberstein v. Philadelphia Newspapers, Inc. Court of Common Pleas, Philadelphia Cty. Case No. 98-60 2632. June Term 1998 Case settled on June 19, 2003 after three weeks of trial	print	Settled mid-trial
Sound Environments, Inc. v. Liddy Arizona Superior Court, Maricopa Cty. Case No. CV 1998-000129 February 27, 2003	radio	For defendant
Stewart v. The Oklahoma Publishing Co., Griffin Television OKC, L.L.C., NewsOK, L.L.C., and Donna Taylor District Court of Creek Cty., Oklahoma Case No. CJ-02-490 September 18, 2003	website of TV station and newspaper	For plaintiff $3,700,000 ($200,000 compensatory, $3,500,000 punitive)
Francis E. Sweeney v. The New York Times Co., et al. U.S. District Court, N.D. Ohio Case No. 1:00CV2942 May 23, 2003	print	For defendants
Tayar v. Palmer Communications, Inc. (KFOR-TV), Anthony Foster, Brad Riggan, and Melissa Klinzing District Court of Oklahoma Cty., Oklahoma Case No. CJ-97-2237 December 14, 2001	TV	For plaintiff $700,000 ($350,000 compensatory, $350,000 punitive)

CASE	MEDIUM	VERDICT
James D. Weaver v. Clear Channel Communications, Inc., a/k/a Clear Channel Worldwide, d/b/a KLIX-1310 AM Radio; and Citicasters Licenses, Inc., a/k/a Citicasters Co. U.S. District Court, D. Idaho Case No. CIV 02-0116-S-BLW August 8, 2003	radio	Mistrial
Wells v. Liddy U.S. District Court, D. Maryland Case No. JFM-97-946 July 3, 2002	speech	For defendant
Charmaine West and First Alternative Probation and Counseling, Inc. v. Media General Operations, Inc. d/b/a WDEF-TV 12 U.S. District Court, E.D. Tennessee Case No. 1:00-CV-184 December 4, 2001	TV	For plaintiff $310,000 (defamation claim only, not false light and invasion of privacy claims; no punitive damages) ($190,000 for West, $120,000 for APC)
Yeager v. Daily Record, Peggy Wright, and Joseph Ungaro Superior Ct. of New Jersey, Law Division, Morris Cty. Case No. MRS-L-312-01 November 20, 2003	print	Directed verdict for defendants
Zelnick v. Paxson Communications California Superior Court, Los Angeles Cty. Case No. BC2742 99 July 1, 2003	TV	For plaintiff $302,600 ($2,600 compensatory, $300,000 punitive)

As always, I will provide some statistics, but with my usual expression of despair over how meaningless the numbers are, given the disparate and unique circumstances of each case, which makes even more questionable the value of tabulations based upon such a small sample. In the stats that follow, I omit the bench trial, the mistrials, the directed verdicts, and the pre-verdict settlement. The defendants won 17 of 35, or 48.6% of the completed jury trials. The results compare to prior surveys as follows: 2001 - 49.9%; 1999 - 34.6%; 1997 - 35.5%; 1995 - 35.7%. If you delete the damage only verdicts returned after default judgment (*Ayash*) or summary judgment on liability (*Doe*, *Robinson*) from the 2004 results, defendants won 17 of 32, or 53.1%. The higher success rates of the last five years suggest that we are improving at something, but I cannot say whether it is vetting, litigating, trying, settling, or simply avoiding controversy in the first place.

The average of the plaintiffs' awards was $3,032,067, as compared to $3,732,867 for the 2001 survey, $2,545,875 for the 1999 survey. The median verdict was $505,000, as compared to $1,975,000 in 2001, $450,000 in 1999, $280,000 in 1997, and $300,000 in 1995. The high median in 2001 was apparently an aberration.

Continuing a counterintuitive trend that began in the 1999 survey, television media enjoyed a greater success rate than print. Print media won 9 of their 19 cases, or 47.4%. Electronic media won 8 of their 15 cases, or 53.3% (the sample includes three radio cases, *Carpenter*, *Ferrara*, *Sound Environments*). I still do not have a good explanation for the better success rate enjoyed by the electronic media, but I continue to suspect that these organizations have become more willing to settle the marginal cases.

The clear trend in past surveys showed television media to be at greater risk of large loss than print media, but that has been reversed in the past three years. The average electronic media verdict was $791,800, and the median was $310,000. The average print media verdict was $4,457,691, and the median was $3,001,000.

I did not include *Wells* (involving motivational speeches) in any of the media specific calculations. I treated the two Internet defendants (*SeaChange*, *Stewart*) as print media. Since one was a win (*SeaChange*) and the other a loss (*Stewart*), they did not significantly affect the results.

These results are not quite as optimistic as those produced by the LDRC staff in its annual reports on trials and damages, but the LDRC statistics include directed verdicts and bench trials. As in the past, the plaintiffs who won big money were private businesses, businesspersons, professionals, and celebrities, although the road was rocky for plumbing, heating, electrical, and roofing contractors. For the first time, none of the judicial plaintiffs enjoyed any success. Police officers experienced mixed results, but cases like *Schlieman* show that attacking the "thin blue line" can be troublesome. Working-class persons who were perceived as victims cashed in in *Doe v. Merck*, *Sheckler*, and *Stewart*. The following is a graph of winners and losers, showing the relevant background of each (as always, giving the plaintiff the benefit of the doubt) and the standard of liability.

Case		Plaintiff's Background	Fault Standard for Liability
Successful Plaintiffs/Recovery (000's)			
Adams	$4,350	high school teacher	negligence
Anderson	$18,000	principal of road building company	actual malice
Ayash	$4,200	physician	liability by default
Bd. of Trustees and Zuccarelli	$300	college president and Democratic Party boss	actual malice

Case		Plaintiff's Background	Fault Standard for Liability
Cammerino	$15	harbor patrol officer	negligence
Carpenter	$155	writer of letter to radio station	intentional tort/spoliation
Chan	$8.6	dentist	negligence
Doe (v. Merck)	$3,001	HIV positive mother	liability established on summary judgment
Doe (Twist)	$15,000	retired hockey player	appropriation/commercial purpose
Farmer	$225	deputy sheriff	actual malice
Robinson	$2,965	rap group members	appropriation determined on summary judgment
Schlieman	$110	police officer	actual malice
Sheckler	$10,000 reduced to $1,000	auto repair shop owner	negligence
Shepard	$235	small town mayor	actual malice
Stewart	$3,700	blue collar homeowner	negligence
Tayar	$700	restaurateur	negligence
West	$310	owner of probation counseling firm	actual malice
Zelnick	$302.6	personal trainer/Candid Camera victim	intentional information gathering tort
Unsuccessful Plaintiffs			
AAA All City Heating		plumbing/heating contractor	negligence
Armour		plumbing contractor	negligence
Arnzen		pawn shop owner	negligence
Bagwell (directed verdict)		appliance store chain	negligence
Brown		construction contractor	actual malice
Clark		ex-husband and alleged stalker	actual malice
* Downing	(mistrial)	surfers	appropriation
Erickson (directed verdict)		court appointed GAL	actual malice
Ferrara		school board candidate	actual malice
Franklin Prescriptions		pharmacy chain	negligence
Havon, Inc.		assisted living center	trespass/consent
** Hewan	(mistrial)	college professor	negligence
Holley	(bench trial)	day care provider	negligence
Hosemann		juvenile judge	actual malice
Jenkins		FBI agent	actual malice
Popovich		judge's wife	negligence
Rappalyea		toy store employee	negligence
Schwimmer		elementary school principal	actual malice
SeaChange		publicly traded company	actual malice

Case	Plaintiff's Background	Fault Standard for Liability
** Silberstein (settled before verdict)	municipal court judge	actual malice
Sound Environments	audio systems installer	negligence
Sweeney	supreme court justice	actual malice
*** Weaver (mistrial)	county sheriff	actual malice
Wells	former Democratic National Committee secretary	negligence
Yeager (directed verdict)	ordinary guy (actually, he was a male stripper, but that fact was not in evidence)	negligence

* settled on a confidential but likely favorable basis after mistrial
** settled mid-trial on a confidential but likely favorable basis
*** settled for defendants' last pre-trial offer after mistrial

Continuing an inexplicable absence of any trend: In cases in which the jury determined liability for publication/publicity torts, the defendants prevailed in 8 of 14 cases (57.1%) when the standard of liability was negligence, and in 8 of 14 (57.1%) when the standard of liability was actual malice. I did not include the two misappropriation cases (*Downing*, *Twist*) in these statistics. In comparison to past surveys, this stat continues to be erratic (2001 – 33.3% in negligence cases, 33.3% in actual malice cases; 1999 – 26.8% in negligence cases, 50% actual malice cases; 1997 – 35.5% in negligence cases, 26.66% in actual malice cases). I omitted the cases in which liability was determined by summary or default judgment. Over the past fifteen years, the MLRC damage studies indicate that defendants have enjoyed a slightly greater degree of success in actual malice cases than negligence cases.

In cases involving newsgathering conduct, the defendant won in two cases and lost one. In both cases that involved serious newsgathering as opposed to video prankster-ism (*Zelnick*), the defendants won despite aggressive newsgathering conduct that involved a hidden camera (*AAA Heating*) and an arguable trespass (*Havon*).

C. ANALYSIS

The opinions that follow draw on my experience as a trial lawyer, but in most cases reflect no special knowledge of the cases discussed beyond what you can read in Part I of this survey.

1. The Greater the Truth, the Greater the Libel

This set of cases included the usual number of unmitigated media blunders. A TV news story about the acquittal of a pawn shop included footage of a competing but otherwise

uninvolved pawn shop (*Arnzen*); a clip from a portion of the plaintiff pharmacy chain's website (which did not sell prescription drugs on-line) to illustrate an article that focused on unethical companies that did (*Franklin Prescriptions*); an article naming an arresting officer as the arrested perpetrator (*Cammerino*); an article mistakenly naming the plaintiff as an individual charged for a disturbance at a methadone clinic (*Yeager*). The defendants prevailed in these cases largely because it appeared to the judge or jury that the mistake was honest, no real harm was done, and that the plaintiff was overreaching. It seems that when the mistake is clear, it is easier for the defendant to focus the defense not upon truth or falsity at all, but simply the defendant's good faith or absence of knowing or reckless falsity in publishing.

2. He Said-She Said and Liars' Poker

Conversely, the more difficult cases are the ones where the defendant adds complexity to the defense by urging that the defendant got it right; even if she didn't, she did her best and is not guilty of fault or recklessness in departing from the truth. I am not saying that such a defense theme is always a loser. To the contrary, over the years, many defense counsel have sworn that the substantial truth test that fails but just barely so is the best way to win on actual malice. My favorite example is *Stokes* from the 1999 survey. This works best when there is no "he said-she said" between the defendant and her source, and the source is still supportive at trial, as in *Stokes*. In this survey, see *Hewan*. The lesson I take away from my own cases and those tried by colleagues over the years is that the question of whether a truth defense will help or hurt can be very subtle, and that the answer depends upon a constellation of factors, including, likeability of the plaintiff, the extent to which the defendants overall conduct appears fair, the perception of the defendant media organization in the community, etc.

In cases like *Hosemann*, the defendant's proof on truth was strong enough to make denial by sources insignificant. On the other hand, this survey provides some interesting case studies of "he said-she said" problems that proved very significant in the results.

a. *Sheckler*

This case presented the biggest rift between reporter and source. The reporter heard her AUSA source to say that the plaintiff had been arrested at his home where 50 grams of crack cocaine and 500 grams of powder cocaine were found, the source denying the statement (and the fact) altogether. The source was adamant, so was the reporter. More often than not in such circumstances, most of us would rather hear the reporter say that she could have been mistaken and apologize for it, than take on an experienced prosecutor, whom most jurors are more likely to believe. Defense counsel stood by the witness, and thought he had well-leveled the playing field by forcing the source to admit on cross (after being dead sure about his memory on direct) that he mis-remembered some of the conversations concerning the case and has mis-reported things about it to other media. The $10 million

verdict is a reminder of how impeachment that would be a home run in most ballparks can ground out when the media is at bat.

b. *Schlieman*

The reporter claimed that he heard a neighbor who lived in the vicinity of the police shooting and knew the victim say that the victim was not behaving aggressively at the time of the shooting. The source insisted that she said that she did not know the victim to have behaved aggressively on any occasion before that of the shooting, but that she did not have information about what happened at the shooting, and that she made both points clear to the reporter. The cameraperson on the scene (who did not tape the statement) backed the reporter's story. The jury nonetheless apparently sided with the source, although post-verdict interviews indicated that they found the question difficult (and the small verdict would indicate that this was not a very angry jury). The problem was that both the source and the two journalists professed to be of clear and certain memories, making it difficult to argue that there may have been a misunderstanding or an honest mistake.

In the first trial of this case (*see* 2001 Survey), the defendants called the leader of the reporter's church, as well as a past source, both of whom testified to their belief in the reporter's honesty. That jury found for the defendant, but without reaching the issue of actual malice (having found for defendant on the basis of absence of defamatory meaning – on an instruction that limited consideration of implications that later became the basis for reversal and the second trial). At the second trial, the church leader was not called, and the prior source was presented by deposition. One has to wonder whether this difference is related to the different outcome. [The testimony concerning the plaintiff's character for veracity was admitted under RE 404(a)(1) on the rationale that an allegation of actual malice is similar to a criminal charge. Do not try this without carefully considering the potential cross-examination.]

c. *Sweeney*

The reporter understood sources to say that Justice Sweeney – who did not recuse himself from a related case 35 years later – had actually participated in the second prosecution of Sam Shepherd in 1966, when the truth was that he was merely in the prosecutor's office at the time and not involved. Although the defense was able to argue that some of the alleged errors in the story were not false, it was easy for the newspaper and the reporter to bring themselves to admit the falsity of this statement, since it had been the subject of an "editor's note" that, in effect, admitted the error and corrected it. The reporter did well on the witness stand both in demonstrating his meticulousness and care, and in apologizing for the error. Indeed, the defense strategy was to treat him as though he had been placed on criminal trial by the Justice, his professional reputation in jeopardy. That possibly explains the difference in results between *Sweeney* and *Schlieman*.

It may be that the most convincing demonstration of the reporter's care and absence of motive to defame were the reams of thorough notes and research materials that the reporter had kept and used to demonstrate his veracity. As counsel reported, "Looking at the notes all together, it was easy to see how a source in a later interview may have misspoken, or the reporter may have misheard, on the issue of whether Justice Sweeney was a prosecutor 'at' the second trial, or simply 'in' the prosecutor's office when it happened."

In any event, it is clear that when there is a head-on disagreement between a source with no apparent reason to lie, and a reporter, the reporter stands a good chance of losing. Defense counsel needs to find a way to soften the "he said-she said" aspect of such cases.

3. Fault Without Falsity and Libel by Implication

In *Stewart v. NewsOK*, a plaintiff's-leaning judge in plaintiff-hospitable Creek County, Oklahoma permitted a $4 million judgment against a newspaper website that published the state's sex offender registry in a computer file that the state e-mailed the defendant for purposes of making the list available to the public as required by statute. The information concerning the plaintiff's address reported was accurate at the time of input, since the offender registered at his sister's residence. Since then, however, the perp's sister moved from the listed addressed and the plaintiff and his family moved in. Some neighbors became aware of the listing of the address in the offender registry. The judge and the jury found fault with the defendant for not publishing a disclaimer concerning what the evidence showed was a 12% possibility of error due to aging of the information. While this does not seem the stuff of a defamation judgment that will stand up on appeal, the use of a disclaimer in such a situation is probably not a bad idea.

The poster boy for libel by implication in this survey has to be Joe Anderson, who recovered $18 million against Gannett's *Pensacola News Journal*. The single article in issue was among twenty in a five-day series that discussed the political influence – despite trouble with the law – of Anderson's companies and related businesses and persons. The article mentioned that Anderson had "shot and killed" his wife on a hunting trip, and mentioned, not in the same one-sentence graf, nor the one-sentence graf immediately following it, but in the second one-sentence graf following the statement, that the shooting had been determined to be a "hunting accident." Everything reported was true. However, the term "shot and killed" suggests criminality in the minds of many; that, and the two-sentence delay in reporting the official finding of "accident" gave the plaintiff something to talk about. Of course, the real problem was that the theme of the article, Anderson's ability to manipulate official favor, suggested that the newspaper was not buying Anderson's official absolution. The emerging law of libel by implication is that an un-negated inference of wrongdoing permitted by the facts is okay, so long as the publisher did not endorse it. Did this publisher endorse the implication that the plaintiff murdered his wife? You can read the article in Part I, but I think not. The trial judge permitted the case (in a set of breathtaking evidentiary rulings) to be tried as though a charge of murder was the implied meaning of the piece, which allowed the plaintiff's lawyer to credibly harp on the theme that the "shot and killed reference" was

injected merely to "sex up" the article. Indeed, the manner in which the case was tried by plaintiff's counsel would lead one to believe that it was more about insult, paying mere lip service to harm to reputation (which I believe to be true of most of the morality plays we call libel trials). Yet the jury awarded $18 million in economic losses that were really suffered by a corporation in which Anderson owned a mere minute fraction of the equity, and awarded nothing for pain and suffering and general damage to reputation. The case is an enigma, yielding no useful lessons, except that this particular trial judge should be avoided at all costs. (Note my conclusion in the 2001 and 1999 surveys that libel by implication cases are difficult to win without a helpful jury charge delivered mid-trial as well as at the end of the evidence.)

The other libel-by-implication case (*Franklin Prescriptions*), in which a page from plaintiff's website was used to illustrate unscrupulous on-line pharmacies, seemed an easy sell for the plaintiff on defamatory meaning, of and concerning the plaintiff, and falsity.

The problem of omitted material did not play a prominent role in any of the trials reported in Part I. In past surveys, I have noted the difficulty of dealing with outtakes, in which the jury sees in larger-than-life, living color, the material that the defendant chose not to include that might have portrayed the plaintiff more favorably. *See* 1999 Survey. In this survey, the hidden camera footage in *AAA Heating* that showed the plaintiff engaging in phony scare tactics with their customer regarding the need to deal with a carbon monoxide problem carried more weight with the jury than the plaintiff's not unfounded claims that favorable material had been omitted. Then again, all of the plumbing, heating, contractors, and roofing contractors that brought suit over TV articles and programs that suggested they were predatory or incompetent failed.

4. Mental Lapse

In *Schwimmer*, the producer who wrote the false statement into the news report in issue simply misinterpreted prior reports of a high school strip search incident to indicate that the plaintiff principal was actually involved in the strip search as opposed to merely on watch. Through mock trial exercises, the defense learned that the most convincing proof of the absence of malice (common law or constitutional) was the numerous reports before and after the one in issue that correctly reported the plaintiff's involvement.

5. Hidden/Unauthorized Cameras

Hidden camera cases are hard to win. Yet, in this reporting period, a television station prevailed in an exposé of heating contractor scare tactics in a classic hidden camera set-up/sandbag. *AAA Heating*. Another prevailed in a trespassing case in which the jury determined in favor of plaintiff the issue of whether a night nurse, who permitted the defendants to enter a nursing home at midnight, with camera which the nurse had told them not to bring (although she did not object when it came in), had apparent authority to allow

consent for the facility. *Havon, Inc.* The good results in both cases seems best explained by the clear evidence of bad conduct that was demonstrated and exposed by the video.

6. Jurors

Little was added by this Survey to what we already seem to know about good and bad jurors in media defamation cases (*see* 2001, 1999, 1995 Surveys). In many cases, counsel looked for jurors who identify with the class of persons likely to be victimized by the plaintiff. *E.g.*, housewives and others with non-technical backgrounds that would identify with homeowner consumers in *AAA Heating*, women in *Hosemann* (judge alleged to have battered mistress). It is not clear that such criteria prove useful in real time evaluation of panelists during jury selection. When you do not learn much about jurors' views of the parties or the issues, you have to rely on something normative. But my experience is that a juror's background or station in life are not nearly as important as basic common sense, self-esteem, and security. My favorite example of this principle at work is the housewife juror in *Food Lion* – the ideal juror by background – who declared from the bandwagon (post-trial interview with the jurors as a group), "I don't need them [ABC] to tell me how to buy my meat."

Further to the same point, a very interesting jury study came out of the *Sweeney* case tried in Cleveland. Defense counsel's demographic study found that intelligent people were to be preferred, to a point; those who had pursued their education to advanced degrees usually did not prove favorable. So too, the attitude studies showed that jurors who had not formed opinions as to the guilt or innocence of Shepard, but learned to live with the absence of satisfying answers, were the better defense jurors. I tend to agree that jurors who can accept ambiguity and uncertainty make the best defense jurors in libel trials.

One of the challenges many of us face is preparing for the selection of a jury in a state or federal court in a distant and unfamiliar venue. Anyone who is about to undertake this for the first time could do well to consult with Slade Metcalf, who did an excellent job of using all available resources to size-up the folks in a jury wheel in Kentucky.

In past surveys, many defense counsel have expressed a bias against schoolteachers as jurors. Such jurors were found okay for the defense in a case brought by a school principal (*Schwimmer*) and another brought by a terminated FBI agent (*Jenkins*).

7. Expert Witnesses

Plaintiffs continue to bring on expert witnesses to testify to the standard of care. In cases in which the standard was actual malice, expert testimony was disallowed in *Jenkins*, but allowed in *Cammarino*, *Johnson*, and *Sweeney*. In cases in which negligence was the standard, experts were disallowed in *Arnzen* and *Hewan*, but allowed in *Brown*, *Franklin Prescriptions*, *Scheckler*, and *Tayar*. In a twist, the defendants offered standard-of-care experts that the court allowed in *West* but disallowed in *Silberstein*.

8. Retraction Demand

The absence of a retraction demand in several of the cases seemed to be a factor in the jury's skepticism of the plaintiff's damage claims in *Sweeney*. A TV station's inattention to such a demand proved lethal in *Scheckler*.

9. Thin Blue Line

I have a good friend who defends police officers against tort claims who almost never loses. Even without the post-9/11 reverence for police officers, there is a strong tendency among most jurors to respect and support them. This was very much a factor in *Schlieman*. In *Weaver*, the sheriff was shown to be enough of a scofflaw to overcome any presumption in favor of law enforcement. The same for laziness and ineptitude of an FBI agent in *Jenkins*.

10. Judicial Umbrage

This time around, three cases were brought by judges, *Hosemann*, *Silberstein*, and *Sweeney*. Counsel found their presiding trial judges to be plaintiff-leaning in *Hosemann* and *Sweeney*, and in *Silberstein*, counsel were unwilling to comment because of a settlement agreement. There seems to be something of a bond among judges based upon the perception that judges are unusually vulnerable to defamation in the media because of their inability to comment on pending cases. None of the three judges prevailed (defense verdicts in *Hosemann* and *Sweeney*, mid-trial settlement in *Silberstein*). Judges have rarely proven to be hugely sympathetic plaintiffs, even when they are successful.

11. Irate on the Internet

SeaChange involved a suit over strongly-worded Internet postings concerning a company's management allegedly orchestrated by a competitor. Defense counsel was able to convince the jury of the "grain of salt" with which most Internet travelers treat those postings. Concerns about association with Martha Stewart-like corporate foul play proved manageable.

12. Origin of Story

In the wake of the Jayson Blair scandal, several plaintiffs attempted to show that reporters put their story together relying upon old file and wire service stories as opposed to their own work, without attribution. Even though the AP subscription agreement permits members to utilize copy with or without credit, it is not hard to find a journalism professor who will condemn a defendant for using prior journalists' work without attribution. In *Franklin Prescriptions*, *The New York Times* succeeded in keeping out both any reference to the Jayson Blair scandal and any claim of lack of originality, by simply demonstrating that it did not happen. In *Anderson*, the plaintiff was permitted to make the argument (along with

just about every other argument the plaintiff wanted to make), and it is not clear what role it played in the bad result. Jayson Blair was a part of the plaintiff's closing argument in *Sheckler*, but not in support of a claim of lack of originality (rather, one of too much originality). While it is questionable that reliance upon prior reporting without attribution has anything to do with bad faith or carelessness as to the truth, such evidence, coupled with condemnation by a journalism expert, can poison the defendant's well, and counsel should be vigilant to avoid it.

13. Right of Publicity Pitfalls

Claims for misappropriation and right of publicity infringement, when considered by juries in cases brought by celebrities, can be very dangerous, as demonstrated in *Doe* (Twist) and *Robinson*. Unless the defendant's use of the plaintiff's name or likeness rings of deserved satire or other form of poetic justice, juries seem very willing to make or keep a celebrity rich. When the use is in a national medium, the numbers can add up.

14. Reporter's Notes – Keep 'Em or Pitch 'Em?

In *Hosemann*, the defendants won a case brought by a most unsympathetic judge who had been accused of battery of his mistress. The reporters had discarded their notes of these interviews after publication. Several of the newspaper's sources denied providing information attributed to them, which would have made the case more problematic had the plaintiff been a bit more likeable. The fact is, sources rarely stand by the strength of the statements they made prior to publication unless they are confronted with a tape recording or detailed notes. *Sweeney* is an example of a case in which the reporter's note-taking and documentation, which had been preserved, was a factor in convincing the jury that no deliberate error had been made. Add these cases to the debate over what practices with respect to reporter's notes are best overall.

15. Jury Charge and Special Verdict Interrogatories

A clear jury charge on the element of actual malice and similar special verdict interrogatories continue to prove helpful. The best examples included a difficult case in which the jurors had no particular desire to find against the defendant (*Sweeney*), and another in which they did (*Schwimmer*).

D. CONCLUSION

Lest the point be not sufficiently emphasized, do not forget that the people we represent are not often very popular. To quote one of our colleagues who prevailed, "The jurors wanted desperately to find for the plaintiff. They believed that the media in general were arrogant, self-righteous fools who deserved to be punished for any wrongdoing." "I cannot emphasize enough how our jurors told us afterwards that they wanted to 'get the media.'" Enough said.