2006 MLRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL/PRIVACY JURY TRIALS

by Tom Kelley

PART I

CASE SURVEY

Introductory Note

This is my 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, 2004 and before August 17, 2006.

The reports in paragraphs A through N 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 O.1 through O.10, defense counsel were unwilling or unable to participate in the survey, or I learned of the trial too late to permit counsel to participate meaningfully. The latter reports presented in summary form are based upon court documents, news reporting, and helpful contributions from MLRC's Eric Robinson.

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.

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A. Case Name: *Bramlett v. Liberty Group Publishing, Inc.*

Court: Franklin County, Illinois
Case Number: 01-L-78
Verdict rendered on: June 10, 2005

1. Name and Date of Publication:

The 100 Greatest Crimes in Jackson County (Illinois), a stand-alone booklet published by *The Murphysboro American* newspaper in 2000.

2. Profile:

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

3. Case Summary:

Around the turn of the century, the *Murphysboro American* published a series of booklets, highlighting the accomplishments of the 1900's, including greatest local sports heroes, local heroes, and of course, the Greatest Crimes in Jackson County. To do this, they simply picked stories from their own pages, and edited them down for size. One of the crimes they picked involved Phillip Bramlett, who was arrested, along with his brother, on murder charges. Bramlett was released, having never been tried. His brother plead guilty, and was sentenced to 50 years in prison. In the booklet, the paper reported that both had been found guilty of capital murder, and were on death row, awaiting execution. We were not able to find any story that reported that Phil Bramlett had ever been convicted, been sentenced to die, or was on death row. The only story we found said charges had been dropped. The court file also indicated charges had been dropped.

4. Verdict:

Bench judgment for $25,000, compensatory damages.

5. Length of Trial:

2.5 days.

6. Length of Deliberation:

Bench trial.

7. Size of Jury:

N/A.

8. Significant Pre-Trial Rulings:

None.

9. Significant Mid-Trial Rulings:

Allowed Plaintiff's entire criminal history (convictions, arrests, other reports) to be used to impeach Bramlett, given his failure to truthfully answer discovery requests about same.

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:

Prior to final trial preparation, we offered $27,500, simply to avoid the costs of trial. Liability looked bad, as the original clips didn't support the published statement that the plaintiff had been convicted and was on death row, it was unclear who wrote and/or edited statement, and some newspaper staff knew plaintiff to be a free man who hadn't been convicted of murder. However, plaintiff's meager income increased after publication and no one who read one of the several dozen booklets that were distributed believed it to be true, so damages were in dispute.

13. Defense Juror Preference During Selection:

None.

14. Actual Jury Makeup:

N/A.

15. Issues Tried:

Liability (although for obvious reasons we did concentrate on this), and the lack of damages.

16. Plaintiff's Theme(s):

He had been called a capital murderer, on death row through gross negligence; that's got to be worth a lot.

17. Defendant's Theme(s):

We made a mistake, immediately issued a correction, and the plaintiff has no damages.

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. Plaintiff's wife cried, but without impact.

c. Proof of actual injury:

None. Plaintiff had extensive reputation as a public drunk and intimidating thug, as did his whole family; said he had to move out of area to find new clients for contracting business, so income increased when moved to metropolitan area. Had difficulty pointing to anyone who believed publication and to anyone whose actions were known to have been taken because of the publication. He was a self-employed contractor, and his income went up each of the years following our publication. He could find no one who believed he was on death row, given that he was walking the streets. Of 500 books published, we were able to show that only 60 had hit the streets, and were able to show that about 30 of those were in the hands of his family members.

d. Defendants' newsgathering/reporting:

Terribly sloppy; unclear who wrote story; testimony that no one had time to edit it; reporter who was assigned to write story was a former secretary, with no formal journalism training who had been convicted for writing bad checks during her time as a reporter; courthouse where facts on plaintiff's murder charge could have been discovered was a block away; no evidence presented (or available) as to the source of the information for the

offending statements. We were unable to find any story upon which this excerpt could possibly have been based. We could not find any story in the daily paper to support this publication. Of the three people on the editorial side of this paper, each blamed somebody else. We could not get anybody to say that they had written this piece. Post-publication of the booklet, the paper ran a correction, clearing up that Bramlett was not on death row, but we never did correct the statement that he had been convicted of murder.

e. Experts:

None, and I doubt I could have found one if I looked.

f. Other evidence:

The best evidence we had in this case was the impeachment evidence, based on Bramlett's failure to truthfully answer discovery. We used every police report we could find, to show that Bramlett was simply a drunk and a thug. He then countered with evidence about how he had found the Lord, changed his life, etc., etc., which we were able to counter with testimony from folks in the village where he lives, including testimony about how he got drunk and abused his neighbors, soon before this trial was to start.

g. Trial dynamics:

i. Plaintiff's counsel:

Bob Schulhof, who works largely in bankruptcies and collections, trying what he described to me as his first and last libel case. He had a great liability case, but was just lacking a bit on the damages.

ii. Defendant's trial demeanor:

The publisher was present throughout the trial and presented better than might have been expected.

iii. Length of trial:

2.5 days.

iv. Judge:

Loren Lewis. Cases in circuit not assigned to a particular judge, so Judge Lewis first learned of this case the week before he presided over trial. Lewis seemed burdened by the case and wanted to move it along quickly; he repeatedly demonstrated a lack of patience toward both parties.

h. Other factors:

19. Results of Jury Interviews, if any:

N/A.

20. Assessment of Jury:

N/A.

21. Lessons:

Lack of opening statements from either side due to judge's eagerness to rush case probably a mistake, as parties failed to frame the evidence ahead of time. But biggest lesson is that no one but a defamation defense attorney likes the libel-proof plaintiff argument; even a guy with an extensive, violent, and public criminal record involving felony convictions who was actually charged with murder has a reputation apparently capable of being damaged to the tune of $25,000.

22. Post-Trial Disposition:

None.

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B. Case Name: *Stephen Columbus v. Globe Newspaper Company, Inc. and Walter V. Robinson*

Court: Middlesex Superior Court, Cambridge, Massachusetts
Case Number: 00-0724
Verdict rendered on: February 2, 2005

1. Name and Date of Publication:

The Boston Globe, September 5, 1999, "Home Sweet (Deal) Home."

2. Profile:

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

3. Case Summary:

The article sued on was published by the Globe's "Spotlight Team," the newspaper's investigative reporting unit, as part of a continuing series on municipal corruption, conflicts of interest, and favoritism. The article focused on vocational high school home building programs in which students built houses for lottery winners free of labor charges. A central thesis of the article was that rigorous eligibility requirements effectively excluded most average citizens from participating in the housing lotteries. To illustrate that thesis, the article reported on four lottery winners -- including the plaintiff Stephen Columbus -- each of whom had some type of political connection and were the only qualified applicants in the years in which they had won.

The article described the plaintiff as a local lawyer and real estate developer who was the son of the local building inspector previously fined for ethics violations for issuing building permits to his sons (including the plaintiff). The article reported that the plaintiff's father had "engineered a last-minute approval" of a building department certification required by the lottery program confirming that local zoning laws permitted the construction of a house on the plaintiff's property. The plaintiff's father had drafted the necessary document and then driven to a neighboring town to ask another local building inspector to issue the certification. The article described the father's conduct as an apparent violation of the conflict of interest laws. It also reported that (a) town officials had delayed the issuance of a building permit to the plaintiff because of questions concerning his winning the lottery; and (b) the house built by the students was twice as big as the school rules allowed. All of these facts were used to support the article's conclusions that lottery winners "appeared to have more than luck going for them," and that "favoritism was built into the rules" because of daunting hurdles placed in the way of those without "inside knowledge." The article also reported that the house built by the students had significant construction defects as a result of poor workmanship.

The plaintiff alleged that the article defamed him by implying that he had won the housing lottery as a result of corrupt insider connections and favoritism. He also brought a claim for intentional infliction of emotional distress based on the same facts. The plaintiff contended that his father's actions were authorized by a building code regulation permitting inspectors to appoint their own alternates in cases of conflicts of interest. Because there was no dispute that local zoning laws permitted the construction of a house on his property (and that he therefore was entitled to the certification he obtained), the plaintiff claimed that he had received no favorable treatment. He also denied that the town had delayed issuance of

his building permit, that the house was twice as big as school rules allowed, and that the students had completed the house before abandoning the project.

Before suit was filed, the Globe published a correction concerning two statements in the article. The correction reported that town officials had not delayed issuing the plaintiff's building permit but, rather, had caused a delay in construction of the house as a result of questions about the plaintiff's award. The correction also reported that the plaintiff's house was not twice as big as school rules allowed, an error that had been based on mistaken reliance on the rules of a different vocational school home building program.

4. Verdict:

The jury answered "NO" to the question: "Has the plaintiff proved that the article, read in context, asserted a false statement of fact about the plaintiff either directly or by innuendo?"

The jury also answered "NO" to the question: "Has the plaintiff proved a defendant or defendants intentionally inflicted emotional distress upon him?"

5. Length of Trial:

Nine full trial days.

6. Length of Deliberation:

Approximately four hours.

7. Size of Jury:

Fourteen (two alternates were allowed to deliberate).

8. Significant Pre-Trial Rulings:

A summary judgment motion as to liability was denied on the grounds that the case "presented the rare situation where it does not matter if the individual statements are true or false because the statements are combined in such a manner as to constitute a defamatory falsehood." The summary judgment decision also stated that the article created the defamatory implication that the plaintiff had an unfair advantage in the lottery process. A different judge presided over the trial and treated the issue of whether the article contained a defamatory implication as a jury issue.

The trial court judge denied a pretrial motion seeking to have the plaintiff declared a limited purpose public figure based on prior publicity in local papers about the conflict of interest caused by the plaintiff's father handling building department applications for his family.

The court denied three pretrial motions to compel the disclosure of confidential news sources.

The trial court judge granted *in limine* motions filed by the defense excluding any testimony that the reporter's sources had been the subject of a federal criminal investigation and excluding reference to confidential sources whose identities had been ruled irrelevant to the case.

9. Significant Mid-Trial Rulings:

The trial court refused to instruct the jury that intent is an element of a libel by implication claim.

The defense was allowed to present an expert on the state ethics law who testified that the plaintiff's father's participation in the building certification process was an apparent conflict of interest under state law.

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

The special verdict form gave the jury the option of answering the first question in a way that required entry of judgment for the defendant on the libel claim without requiring the jury to render special verdicts with respect to each of the 21 challenged statements in the article. The question, as noted above, was: "Has the plaintiff proved that the article, read in context, asserted a false statement of fact about the plaintiff either directly or by innuendo?"

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

None.

12. Pretrial Evaluation:

The potential exposure largely arose from the two statements in the article that were corrected prior to the suit being brought and from the undisputed fact that the plaintiff's application was properly processed by the school without outside intervention on his behalf and that the approval obtained with the assistance of the plaintiff's father was one to which he was entitled even if his father had no involvement in the process. No offer of settlement was made.

13. Defense Juror Preference During Selection:

Middle class homeowners without political connections.

14. Actual Jury Makeup:

8 male; 6 female; 7 college degrees; 3 masters degrees

15. Issues Tried:

Substantial truth, defamatory content, implication, negligence, damages.

16. Plaintiff's Theme(s):

The plaintiff's theme was that the article was a sensationalistic attempt to paint the plaintiff as a corrupt insider who benefited from inside connections when in fact he honestly won the lottery without breaking any rules and the certification his father assisted him in obtaining was one to which he was entitled.

17. Defendant's Theme(s):

The article was a substantially true account of a flawed governmental program that was written by an honest and experienced reporter.

18. Factors/Evidence:

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

N/A.

b. Sympathy for plaintiff during trial:

The plaintiff overstated his claims and his alleged damages, which likely hurt his credibility.

c. Proof of actual injury:

There was minimal, and questionable, evidence of economic harm. A forensic psychiatrist testified that the article caused the plaintiff severe emotional distress and led to a major depression. The plaintiff's wife testified as to the symptoms of his emotional distress, including agitation, depression and sleeplessness.

d. Defendants' newsgathering/reporting:

The plaintiff claimed that the reporter failed to identify himself as a newspaper reporter during the initial telephone interview. He also claimed that the reporter had been rude, accusatory, unprofessional and aggressive during all interviews. The reporter denied these allegations and it appears they were rejected by the jury's emotional distress verdict.

e. Experts:

James Beck, M.D., Boston, MA -- Harvard trained forensic psychiatrist testified for the plaintiff.

Albert Harkness, Ipswich, MA -- architect who testified for the defense on construction issues.

Carl Valvo, Esq., Boston, MA -- lawyer who testified for the defense concerning the state ethics law applicable to the plaintiff's father.

f. Other evidence:

Five months prior to the Globe article, the plaintiff asserted a claim against the school for negligent construction of the house. That claim alleged that he and his wife had suffered emotional distress, conscious pain and suffering, and loss of consortium at the hands of the school and before the article was published.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel pushed the envelope on the Court's evidentiary rulings, making references to items excluded by the Court's limine rulings. He had an affable, but somewhat disorganized, demeanor.

ii. Defendant's trial demeanor:

The reporter's demeanor was calm, respectful, but firm. His direct examination primarily consisted of a paragraph by paragraph review of the article using a power point presentation to blow-up individual paragraphs and reviewing the documents and interview notes that supported each statement. Comments by the jury foreperson (see below) indicated that they found him credible.

iii. Length of trial:

Nine full trial days.

iv. Judge:

Superior Court Judge Frank Gaziano. He was patient and even-handed. His instructions were on the whole helpful.

h. Other factors:

The defense was aided by the tendency of the plaintiff and certain of his witnesses to overstate their testimony in ways that were susceptible to impeachment. For example, the plaintiff testified that he had presented the reporter with a building code regulation that

allegedly authorized his father's conduct when, in fact, the regulation had not been adopted at the time of the events at issue. The plaintiff also denied suffering any emotional distress symptoms before publication of the article, but later admitted that he had asserted a claim against the vocational school for defective construction that included claims for emotional distress, conscious pain and suffering and loss of consortium. The plaintiff's only economic damages witness testified that he refused to hire the plaintiff to handle any litigation after the article because of concerns about the "baggage" the plaintiff carried from the article; in fact, the witness had retained the plaintiff after the litigation and was himself a disgruntled subject of an unrelated Globe article, raising further questions as to his credibility.

19. <u>Results of Jury Interviews, if any:</u>

A reporter covering the trial interviewed the jury foreperson. A summary of her comments are below:

The forelady, Barbara E. Proia, 44, of Framingham, said the jurors focused on what the Globe published, and as they did that, they concluded that the story was not as harmful to Columbus as Columbus claimed. She also said that the jurors accepted as truth Robinson's version of how the story was reported and then published by the Globe. "We didn't see the article was that damaging for him to put in all the claims," she said. "We think the house did it to him, not the story."

Proia said twelve of the fourteen jurors sided with the Globe and two voted in favor of Columbus. However, she said, even if the verdict went in Columbus' favor, the jury would only have awarded nominal damages because they don't feel he was hurt by the story. "The story didn't say he was a bad person," she said, adding the three other people focused on in the story were more harshly treated.

She said that the jury concentrated on what was published in the Globe and not how Columbus' witnesses described the newsgathering tactics used by Robinson and the Globe to prepare the story. "We didn't focus on that because they weren't in the article," she said. Proia said jurors were convinced by Robinson's testimony that his version of events was the most accurate. "We all felt what he said was real," Proia said. "He really knew what he was talking about...they were telling the truth. I really felt that they were telling the truth, the Globe. They did the best report they could with the information they had."

Proia said jurors were troubled by the involvement by Columbus' father in the application process, which she said jurors concluded was a violation of the state conflict of interest laws. She said that Columbus and his father should have followed the state ethics rules, and if they did so, he still would have met the application deadlines. "That was obviously an ethics violation," she said, adding if Columbus had followed the rules, he would not have been subject of a Globe story, and would have not had any reason to sue the Globe. She said there was no problem with the lottery, just how Columbus obtained the necessary building permit. "The stress of building a house, that's what put him over the edge. I don't think the story put him over the edge."

20. Assessment of Jury:

The jury was very attentive throughout the trial. They appeared to credit the reporter's testimony rather than the plaintiff's when their testimony conflicted.

21. Lessons:

The importance of continued review and discussion with the Court of the proposed special verdict form, which gave the jury an opportunity to return a verdict for the defense without answering questions as to each individual statement challenged in the article.

22. Post-Trial Disposition:

The plaintiff filed a notice of appeal, but has taken no action to pursue the appeal since then.

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C. Case Name: *Bobby Davis v. Marion Star*

Court: Circuit Court of Marion County, South Carolina
Case Number: 09-CP-33-372
Verdict rendered on: Directed verdict on May 3, 2005

1. Name and Date of Publication:

Marion Star, June 17, 1998

2. Profile:

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

3. Case Summary:

Plaintiff councilman claimed his statements at city council were intentionally reported incorrectly in the newspaper, causing him to be viewed as racially motivated.

4. Verdict:

Directed verdict for the defense due to an absence of proof of actual malice.

5. Length of Trial:

Two days.

6. Length of Deliberation:

N/A.

7. Size of Jury:

Twelve.

8. Significant Pre-Trial Rulings:

Plaintiff's motion to add new witnesses on eve of trial: Defendants opposed. (a) Some witnesses were character witnesses to bolster the reputation of the plaintiff. Plaintiff's character was not at issue. Defendants conceded he was an honorable public servant; (b) Some witnesses were opinion witnesses to be called to give their opinion about the effect of the published article. The witnesses were not relevant as the only opinion relevant in this defamation case was the subjective opinion of the author of the article at issue.

The court ruled in favor of defendants and excluded the witnesses.

Plaintiff's motion *in limine* to exclude evidence of offers to resolve matters following publication of the article, but prior to lawsuit: Defendants opposed on the basis that the publisher's attempts to get the plaintiff to clarify what he meant by statements he made, and offers to publish plaintiff's "clarification" verbation, and plaintiff's refusals tended to show that the article was substantially true. More importantly, it showed that the writer of the article never received information from plaintiff tat would cause the publisher to question whether the article was accurate.

The court denied plaintiff's motion.

9. Significant Mid-Trial Rulings:

Despite an unsuccessful summary judgment attempt in June 2000, at the close of the plaintiff's case, defendant moved for a directed verdict (judgment as a matter of law).

Defendants argued that plaintiff must prove by clear and convincing evidence that there was a high degree of awareness in the mind of the author of the article that the article was false. Further, defendants argued that no evidence had been presented that there was any ill will, or malice, between the plaintiff and defendants.

The court granted judgment as a matter of law in favor of defendants. In ruling, the court recognized the higher standard of proof when public officials are involved.

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:

The case had to be won on the law as plaintiff would likely have jury appeal in this rural county where he was respected by many of its residents.

13. Defense Juror Preference During Selection:

Educated; management.

14. Actual Jury Makeup:

Mainly blue collar.

15. Issues Tried:

Falsity; actual malice; damages.

16. Plaintiff's Theme(s):

Intentional and false material appeared in the newspaper and damaged his stellar reputation.

17. Defendant's Theme(s):

The news article was substantially correct; plaintiff refused to clarify his remarks for a follow-up article; any error by the newspaper was unintentional.

18. Factors/Evidence:

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

Positive for plaintiff.

b. Sympathy for plaintiff during trial:

Positive for plaintiff.

c. Proof of actual injury:

Subjective only.

d. Defendants' newsgathering/reporting:

e. Experts:

N/A.

f. Other evidence:

N/A.

g. Trial dynamics:

i. Plaintiff's counsel:

Not a positive for plaintiff.

ii. Defendant's trial demeanor:

Positive for the defense.

iii. Length of trial:

Two days.

iv. Judge:

Relatively young; bright; interested in First Amendment issues.

h. Other factors:

N/A.

19. Results of Jury Interviews, if any:

N/A.

20. Assessment of Jury:

N/A.

21. Lessons:

New York Times v. Sullivan continues to be a lifesaver for the press.

22. Post-Trial Disposition:

Appeal threatened but never filed.

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D. **Case Name:** *Darcie Divita v. John Zeigler and Clear Channel Broadcasting, d/b/a WHAS Radio 84, Louisville, KY*

Court: Jefferson Circuit Court (Louisville, KY), Division 13
Case Number: 03-CI-09214
Verdict rendered on: Tuesday, May 24, 2005

1. Name and Date of Publication:

The Radio Broadcast at issue: August 22, 2003 – "The John Ziegler Show" on 84 WHAS Radio.

2. Profile:

a. Print _____; TV _____; other __X__ (radio).
b. Plaintiff: public __X__; private _____.
c. Newsgathering tort _____; Publication tort __X__. (claims of defamation, invasion of privacy and intentional infliction of emotional distress)

3. Case Summary:

On May 24, 2005, a Jefferson County, Kentucky Circuit Court jury ruled against former WDRB-TV morning host, Darcie Divita, on every claim in her defamation and invasion of privacy lawsuit against Clear Channel Broadcasting d/b/a 84 WHAS Radio in Louisville and its former talk show host, John Ziegler. After a five day trial and just two hours of deliberation, the jury of eight women and four men returned a defense verdict on all claims in a case which resulted from certain "personal" on-air comments broadcast by Mr. Ziegler about Ms. Divita in August of 2003. *Divita v. Ziegler*, No. 03 CI 09214.

The Background – Louisville's "Reality Relationship"

The case involved a "Reality Relationship" – one that was widely publicized in Louisville – on television, on the radio, and in the newspaper. This Reality Relationship was played out in full for the public and the two participants in that Relationship made no distinction between their public lives and their personal lives. The Relationship was between a television morning show anchor – just new to Louisville – Darcie Divita, and a talk radio host on 84 WHAS Radio – John Ziegler.

The Relationship began with much fanfare amid substantial promotional splashes made by WDRB-TV 41 (FOX 41) trumpeting Ms. Divita's arrival to town, and on the Fox in the Morning show. Divita's picture was plastered on billboards around Louisville and she was promoted very heavily on local television and radio.

In fact, the Relationship actually began even before Divita's arrival in Louisville. After being hired by FOX 41 in late 2002, one of her new co-workers suggested to her that when she got to town she should go out on a date with John Ziegler, a highly rated radio talk show host. Divita enthusiastically agreed because she knew it would be good for promotions and for her ratings on Fox in the Morning.

The headline in the *Louisville Courier-Journal* on January 30, 2003 – Divita's first day on the show – proclaimed, "Fox in the Morning Signs Up New Co-Host." In that article, Divita was quoted as saying, "I have a desire to learn everything, try everything and go everywhere . . . I want to jump full feet into this community." And, as this case showed, she did just that – she jumped full feet into Louisville – not making any distinction between her public life – her life as a morning show anchor – and her personal life – when that was of benefit to her.

The other person in this Reality Relationship was John Ziegler. He was the host of The John Ziegler Show – a talk show on 84 WHAS Radio in Louisville, Monday–Friday from 9:00 a.m.–11:40 a.m., during which Ziegler would engage listeners, callers and guests on his show in talk and opinion about local, regional and national topics of interest. As listeners to the show also recognized, Ziegler also talked extensively about his personal life. The goal of his show was to present perspectives in a way that would both entertain and provoke thought. Every Friday, The John Ziegler Show also included a segment at the very end called "Ask John Anything" in which Ziegler allowed callers to ask him questions on any subject, and prizes were given to caller who asked "the best questions you can ask about me, my life, my career, my views on anything you haven't heard me express an opinion on that's been in the news . . . It's all pretty much fair game and we give away prizes to the best questions, comments or calls that we get during this hour." Nearly every one of Ziegler's shows on 84 WHAS also began with his credo – "This is the show where host says what he believes and believes what he says."

Within a few days of her heavily-promoted arrival to town – which was the first day of February sweeps – Ms. Divita was a guest on John Ziegler's show – not only to promote her Fox in the Morning show, but to talk about their upcoming date that weekend. As one would expect, the Relationship was then played out on the radio. Ziegler talked about their first date on his show on the Monday following their date, and then sent Divita an e-mail telling her that she should be "Thrilled!" Listeners and viewers responded. This Reality Relationship was right in their own town. Their e-mails showed that they wanted to know more. Divita enthusiastically promoted this personal relationship because it helped her public exposure to Louisville, which she thought would help her show. During her second full week in Louisville, she was a guest on the Terry Meiners Show, an afternoon talk show on WHAS. They talked about her show and about her first date with Ziegler. Divita also used her own Fox in the Morning show to promote the relationship. She talked about dating Ziegler on her show on Valentine's Day – February 14. The e-mails from listeners and viewers continued to flood in to both Ziegler and Divita, copies of which Divita provided to her news director to be kept in her personnel file at FOX 41.

On February 21, 2003, just three weeks into Divita's arrival in Louisville, Ziegler spent part of his talk show discussing the topic of the "dating scene" in Louisville. On his show that day was a guest who had written a song entitled, "I Like Darcie" to the tune of In-A-Gadda-Da-Vida. The guest sang the song on the radio. Divita was listening and called into the show:

Ziegler: "Alright. Well, actually, Darcie's on the phone, so let's get her reaction to this. . . . Darcie Divita from FOX 41, welcome back.

Darcie Divita: "Hi, how are you?"

Ziegler: "What do you think?"

Divita: "First of all, how spectacular . . . I mean, I'm truly swept off my feet. In all my years of dating, I don't think anyone's ever wrote a song about me. So thank you. It's great. . . ."

It was about this time, in late February/early March 2003, that Divita decided to begin dating other men – again, with the thought that these were the men who would help her in her career. She dated a highly successful plastic surgeon in town and later a local business man with a large auto dealership. Divita tried to keep these other dating relationships a secret from Ziegler – who believed that he and Divita had an exclusive, intimate relationship.

As March rolled around, Divita was able to arrange a trip to attend and cover the Academy Awards in California for Fox in the Morning. Still basking in all of the public exposure, she called in to The John Ziegler Show from California to relate her experiences, which included being ogled and harassed by actor Mickey Rourke who, she told the listeners of The John Ziegler show, was staring at the breasts of women, including her own.

By early April, Divita had only been on the air two full months in Louisville, but format changes were already underway for her Fox in the Morning show since the ratings were suffering. On April 8, Ziegler was invited to be a guest on her show. Afterwards, on his own radio talk show, Ziegler was critical of Fox in the Morning, giving his opinion that the show lacked chemistry between the main anchors, Darcie Divita, and her co-host, Darrin Adams. By that time, Ziegler had begun referring to Darcie and Darrin as "the dork and the devil."

The month of May rolled around and everyone knows that early May is Derby Week in Louisville, Kentucky. Divita covered the parties and fashions at the Derby for Fox in the Morning. She was also again a guest on the John Ziegler Show to talk about those parties and fashions.

The month of May is also a key sweeps period in the television industry and, as it turned out, the Fox in the Morning show lost forty percent of its viewers during that critical ratings month. As a result, format and personnel changes continued and the show fired Jim Bulleit, Divita's co-worker who had originally set her up on her first date with John Ziegler. Following his termination by WDRB-TV, Bulleit was a guest on The John Ziegler Show on June 20, 2003 and used that forum to criticize WDRB/FOX 41, its management, and the remaining Fox in the Morning show team. At that point, management at the local media companies stepped in to this Reality Relationship chronology. Bill Lamb, the general manager of WDRB, which happened to be a regular advertiser on the local Clear Channel radio stations, called Bill Gentry, the general manager at WHAS Radio, to complain about the treatment of his television station and its morning show team by John Ziegler. As a result, WHAS management felt it was time to pull the Reality Relationship off its air. In late June, both Bill Gentry and Kelly Carls, the program director at WHAS Radio, told Ziegler that he should stop talking about the personal lives of Darcie Divita and others at FOX 41 on his radio show. Meanwhile, WDRB management made additional personnel changes on the Fox in the Morning show and, as a result, the plug got pulled on Divita's reality career in Louisville. After only seven months on the air, Divita's employment was terminated by FOX 41.

The August 22, 2003 Broadcast – He believed what he said and said what he believed.

Friday, August 22, 2003 was Darcie Divita's last day on Fox in the Morning in Louisville. Again, the *Courier-Journal* headlines of the day preceded the events: "WDRB's Early Show Losing Two Personalities." The article went on to say, "She [Divita] signed on to be the host of more of an entertainment show," Lamb said, and she was concerned about the program's move toward more of a straight newscast. "Divita was never hired to be a news anchor, but the co-host role really didn't fit in the new format," Lamb said. Ziegler invited Divita to be a guest on his show on that Friday – her last day on the air. She did not come on the show. But Ziegler's listeners were interested and during a segment on his show that day Ziegler discussed the "demise of Darcie Divita." After mentioning that they went out on several dates, he said, "I believe Darcie to have a problem with the truth. I believe it's possible she may be pathological in her problems with telling the truth, especially when it comes to how many people she's dating and – where and when she is, and – and also things about her background and her history, which don't seem to jibe with what she says about herself, all of which, of course, basically, no matter how hot you are, makes you ineligible to date me, because you have to at least tell the truth. I mean, you can have the best fake breasts in the world, which Darcie does, by the way. Darcie has probably the best fake breasts. Whoever did her fake breasts deserves some sort of Nobel prize." After a brief interruption he stated, "We've bashed the morning show pretty good," and referred to Divita and her co-host Darrin as the "dork and the devil." "She was the devil, he was the dork." After a general discussion regarding FOX 41's ratings, Ziegler talked about other topics of interest that day.

At the conclusion of his show that Friday, during the "Ask John Anything" segment, the first caller asked about Divita and any additional reasons for her being fired by FOX 41. The caller also asked why Ziegler and Divita could not get along. Ziegler stated: "Well, because she's a liar and because she was dating a lot of the guys without being honest about it, none of which is very conducive to – to dating me – we had a good time. I mean, there's no question, she's a lot of fun. She's a lot smarter than she appears to be on the air. A lot smarter. She's a very smart person. Which is part of the reason why we referred to her the – as the devil. I mean, the devil is very conniving, very smart and crafty, and – Darcie definitely fits into that category."

The second caller asked Ziegler what Divita had against wearing dresses and skirts: "Every time you see the woman she's got slacks on." Ziegler responded, "I'm not exactly sure why that is. Although, I have a – theory as to why that might be. Because – oh man, peo – people are gonna – do you know where I'm going with this?"

Caller: "Well, go ahead."

Ziegler: "Darcie does not wear underwear."

Caller: "Holy Mackerel, I didn't know that."

Ziegler: "And – and – if she were to wear a skirt on the air with the – with the set the way that it is, that would create some dangerous circumstances. Although, depending on the lighting it would probably be very difficult to tell, if you know what I mean . . . because she's very well kept in that area. So I probably told way, way more than I should have, but you asked me the question. That's the best answer I can come up with."

Ziegler then indicated he would take one last call on the Divita subject. The next caller then asked if Divita was "ladylike or was she kind of a little on the trashy side?" Ziegler answered that Divita was "both a tease and – fairly easy at the same time," and that she would "let you into the ballpark . . . but – but to go all the way home was a lot more difficult."

There were four more callers to this segment of the show (none of which involved Divita), and none of the questions relating to Divita won the prize for the day.

Following Ziegler's broadcast of August 22, WHAS management did receive some complaints – including another complaint from Bill Lamb, the general manager at FOX 41. Prior to Ziegler's next scheduled show the following week, management of the radio station met with Ziegler and it was agreed that he would broadcast an apology to Ms. Divita. On August 26, 2003, Ziegler apologized "for going way too far" on his show regarding the

remarks he had made about Divita. 84 WHAS Radio also broadcast a separate station apology.

The next day, August 27, WHAS management decided to terminate the employment of John Ziegler on the grounds of insubordination – for failing to follow the directive of management which had been given to him at the end of June not to talk about personal matters concerning Ms. Divita. (Several months later, in December 2003, John Ziegler was hired by Clear Channel – Los Angeles. He continues to be employed by Clear Channel as a highly-rated talk show host on KFI-AM 640.)

The Complaint

Following the August broadcast, Divita retained high profile Louisville attorney Thomas E. "T" Clay to represent her. Clay filed a complaint on her behalf in October 2003, generally alleging claims against 84 WHAS and Ziegler for defamation, invasion of privacy, intentional infliction of emotional distress and negligent hiring/supervision. The parties conducted some discovery – primarily depositions of key individuals (Divita, Ziegler and WHAS management – Bill Gentry and Kelly Carls) – and motions for summary judgment were filed on behalf of both WHAS Radio and Ziegler. Judge Geoffrey Morris granted the motions in part and denied them in part.

The media defendants were frustrated by the denial of summary judgment on the defamation claim since the record established that many of Ziegler's statements about Divita were admittedly true, or were clear statements of his opinion provided in the talk radio context. In addition, the record established that there was no evidence of any constitutional actual malice – Divita, a public figure, did not present any evidence that Ziegler broadcast any statements about her with knowledge of falsity or with serious doubts as to the truth or falsity of those statements.

In addition, the media defendants were perplexed about the survival of the invasion of privacy claims since, under well-established Kentucky law, the right of privacy does not prohibit: 1) any publication of a matter which is of public or general interest; 2) the publication of a matter which is a privileged communication according to libel and slander law; 3) statements which are oral; and 4) a publication which is true. *McCall v. Courier-Journal and Louisville Times Company,* 623 S.W.2d 882, 887 (1981).

Accordingly, the media defendants tried again – filing motions for reconsideration on these grounds. Those motions were summarily denied.

Thereafter, the remaining claims – claims for defamation, false light invasion of privacy, public disclosure of private facts and intentional infliction of emotional distress – were then set for trial.

The Trial

Pretrial proceedings and trial preparation became a bit contentious as Divita's counsel submitted an initial witness list of over 60 proposed witnesses and over 120 proposed exhibits – which clearly reflected a trial strategy aimed at introducing evidence of "bad" character of Ziegler, and evidence that would only have been relevant to the claim for negligent hiring/supervision which had been dismissed by the court on summary judgment.

At the final pretrial conference, a few days before the trial was set to start, Judge Morris asked at one point, "Have you all attempted to settle this?" The *Courier-Journal*, which provided extensive coverage of the trial proceedings, reported the following exchange:

> The attorneys told the judge not to get his hopes up.
>
> Richard M. Goehler, a lawyer for Clear Channel, described a settlement demand from Divita's lawyer as "outrageous," adding: "Ms. Divita brought the case. She has not given any indication she wants to do anything but come to Louisville and tee it up."
>
> Clay said that he wasn't surprised that his initial offer would be termed "outrageous" by opposing counsel, prompting the judge to quip, "Mr. Clay, it probably was."

As the jury selection process began, Judge Morris told prospective jurors that, "this is not the average civil case" and that those selected for the jury would be "fascinated" by the evidence and deliberations. Attorney Clay's questioning of prospective jurors continued to show Divita's trial strategy – Plaintiff's case would be all about spite, ill will, and retaliation – Ziegler would be cast as the "spurned suitor" who used his 50,000 watt radio station to damage the reputation of Darcie Divita.

During his opening statement, Clay described Plaintiff's evidence of "actual malice" in the following way:

> Incidentally, you are going to hear about Mr. Ziegler's attitude about Louisville and the women in Louisville, which I think is – you'll agree with me is going to be somewhat degrading, but Mr. Ziegler did all this, ladies and gentlemen, and he did it – the Judge is going to give you a definition in a few minutes about actual malice.
>
> You are going to hear in this case overwhelming evidence that John Ziegler acted with actual malice toward Darcie Divita. He was a spurned suitor, and that's why he got mad. You are going to hear about the enemies list, that she got on the enemies list. You're going to hear what it takes to get on the enemies list.

Following the opening statements, Judge Morris did give a preliminary initial instruction on constitutional actual malice, but then, over repeated and continued objections from counsel for the Defendants, allowed Plaintiff to present evidence that went only to spite, ill will and in support of Plaintiff's trial theme that Ziegler was a "spurned suitor."

In one of the more dramatic moments of trial testimony, in tears on the witness stand with her voice shaking, Divita spoke directly to Ziegler about their relationship.

> "The girl you wanted didn't want you. I'm sorry about that. But you didn't have to make sure nobody else wanted her. I have to rebuild who I am."

In a post-trial interview with the media, the jury foreman said that the emotional testimony from Divita did not affect the jury's decision.

Certainly, more relevant, was Divita's testimony on cross-examination where she admitted that "John believed what he said on his radio."

The jury instruction process also proved to be a significant challenge for the media defendants. Kentucky civil practice generally provides for only very "bare bones" jury instructions – which clearly were at odds with a typical First Amendment-focused set of jury instructions in a case involving a public figure plaintiff asserting claims for defamation and invasion of privacy against media defendants. Judge Morris went back and forth on his decision concerning the appropriate application of the actual malice standard. At one point, the Judge indicted that he would apply the actual malice standard to all of Plaintiff's claims. Later, he indicated that he did not believe that *Hustler v. Falwell* controlled and said that he would not apply the actual malice standard to the intentional infliction of emotional distress claim. Thereafter, almost immediately prior to closing arguments, Judge Morris decided that he would apply the actual malice standard to the intentional infliction of emotional distress claim, but not to the public disclosure of private facts claim. The final set of jury instructions, therefore, applied actual malice to the defamation claim, the false light claim, and the intentional infliction of emotional distress claim against Mr. Ziegler. None of the media defendants' proposed instructions on the applicable defenses, including substantial truth, opinion, or proximate cause, were given.

During closing arguments, counsel for Divita stayed on theme, attacking Ziegler as the retaliating spurned suitor. Plaintiff's closing arguments made no real attempt to address the constitutional actual malice issue. Accordingly, a substantial amount of time was used during the closing for 84 WHAS Radio to explain to the jury the burden of constitutional actual malice and what that standard included (knowledge of falsity and/or serious doubts as the truth of the statements at the time of publication) and what constitutional actual malice did not include – spite, ill will, and hatred.

The Outcome – A Complete Defense Verdict

Fortunately, as the jury foreman indicated in his post-trial interviews with the media, the jury understood the concept of constitutional actual malice and followed the law. "It was offensive to everybody," said jury foreman, Paul Priddy. "But it all had to go back to the case of actual malice and that's where we stood." "They didn't prove any actual malice," Priddy said.

The verdict returned by the jury was unanimous on the defamation claim (12-0); unanimous on the false light claim (12-0); unanimous on the intentional infliction of emotional distress claim against Ziegler (12-0); and 10-2 in favor of Defendants on the public disclosure of private facts claim.

In his typical fashion, following the verdict, Ziegler said what he believed and he believed what he said, "I think the jury deserves an awful lot of credit for being able to see through an enormous amount of bull crap that was being piled their way by T Clay."

Divita says she will appeal. "We're not going to give up. We believe in what we said we believed in, fighting for – and I believed in fighting for – him crossing the line . . . ." *

[* A notice of appeal was filed by Darcie Divita on June 24, 2005. Appellate briefs have now been filed.]

4. Verdict:

Verdict was for the Defendants on all claims.

5. Length of Trial:

Seven days from jury selection process through verdict.

6. Length of Deliberation:

Two hours.

7. Size of Jury:

Twelve – eight women and four men.

8. Significant Pre-Trial Rulings:

The trial court granted Defendants' motions for summary judgment in part and denied in part, allowing Plaintiff's claims for defamation, false light, public disclosure of private facts, and intentional infliction of emotional distress to go to trial. Other significant pretrial

rulings involved several motions *in limine* by Defendants which, for the most part, were denied.

9. Significant Mid-Trial Rulings:

Most of the evidentiary rulings made by the judge during the course of the trial went in favor of the Plaintiff. A substantial amount of "bad" character evidence as to John Ziegler was admitted, and much of it concerning the claim for negligent hiring/supervision, which had been previously dismissed on the motions for summary judgment, was also admitted.

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

The court did give a preliminary instruction on constitutional actual malice following the opening statements of counsel. With respect to jury instructions, the court generally followed the traditional Kentucky practice of only "bare bones" jury instructions.

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

The Defendants retained a trial/jury consultant – DecisionQuest, based in Louisville, Kentucky.

12. Pretrial Evaluation:

Prior to trial, we believed that many of the jurors would likely be offended by the statements made by talk show host John Ziegler. The question ultimately would be whether we would be able to present the case in such a way that those jurors would not find Darcie Divita to be a sympathetic plaintiff and would put aside their personal beliefs or opinions about the statements made by Ziegler and follow the applicable law concerning truth, statements of opinion, and actual malice.

13. Defense Juror Preference During Selection:

Generally, we thought that a "preferred" defense juror would include any of the following:

Young men – particularly those who were familiar with and had been exposed to talk radio;

Professional women who probably would not find Darcie Divita to be a sympathetic plaintiff.

14. Actual Jury Makeup:

Mixed – eight women, four men

15. Issues Tried:

Plaintiff's claims for defamation, false light, invasion of privacy, public disclosure of private facts and intentional infliction of emotional distress were al tried to the jury.

16. Plaintiff's Theme(s):

The primary theme for Plaintiff's trial was that Defendant John Ziegler was a "spurned suitor" filled with hatred, spite, and ill will, and who was retaliating and seeking revenge against Darcie Divita.

17. Defendant's Theme(s):

First, as to talk show host Ziegler, Defendant Ziegler's local counsel tried to portray him as being brutally honest – but sometimes he said things that were in bad taste or offensive, but that he always believed that those statements were true.

As to 84 WHAS Radio, the primary theme was that in the talk show context, Ziegler's statements were either admittedly true or clear statements of opinion made without constitutional actual malice, and that Divita had voluntarily participated in all of the publicity and discussion.

18. Factors/Evidence:

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

Very difficult to ascertain at the start of the trial.

b. Sympathy for plaintiff during trial:

Seemed very weak. Divita did not make a particularly sympathetic plaintiff.

c. Proof of actual injury:

Almost nonexistent.

d. Defendants' newsgathering/reporting:

Really not applicable or at issue here in this talk radio context.

e. Experts:

There were no experts used by either side. This was a particularly critical mistake for the Plaintiffs who did not put on any expert witness concerning lost work opportunities or lost wages or salary.

f. Other evidence:

The Plaintiff's entire case consisted of evidence of spite, ill will, retaliation and the "bad" character of John Ziegler.

g. Trial dynamics:

i. Plaintiff's counsel:

Post-trial interviews with the jurors indicated that they did not like Plaintiff's counsel, T. Clay, who was combative and rude during the trial.

ii. Defendant's trial demeanor:

John Ziegler was on the witness stand for almost 11 hours total. His rambling and non-focused answers irritated the jurors at times.

iii. Length of trial:

Total of seven days from jury selection to verdict.

iv. Judge:

Circuit Judge Geoffrey Morris seemingly allowed all of the key decisions being made in favor of Plaintiff and Plaintiff's counsel.

h. Other factors:

This trial received substantial coverage by the local media in Louisville. Cameras were in the courtroom throughout and local television covered the jury verdict live in the afternoon of May 24. The existence of the camera in the courtroom seemed to have very little impact on any of the proceedings. The judge, the jury, the attorneys, and the witnesses all seemed very comfortable with the existence of the camera and it created no significant issues of any kind throughout the litigation.

19. Results of Jury Interviews, if any:

The foreman of the jury was interviewed at length by the local media. He indicated that all of the jurors were offended by the statements made by talk show host John Ziegler,

but they all found that in applying the law of actual malice, that the Plaintiff's claims should be dismissed.

20. Assessment of Jury:

This jury was very attentive throughout. As indicated, they were clearly offended by the statements made by Ziegler about Darcie Divita, but it was clear from the body language of the women on the jury that they also were not sympathetic to Darcie Divita.

21. Lessons:

Taking the time to carefully and thoroughly educate the jury on the applicable principles of the First Amendment defenses was critical.

22. Post-Trial Disposition:

Darcie Divita filed her notice of appeal on June 24, 2005. Appellate briefs have now been filed.

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E. Case Name: *Judy Johnson v. Lexington Pub. Co., Inc.*

Court: Richland County S.C. Court of Common Pleas
Case Number: 02-CP-40-6064
Verdict rendered on: July 2006

1. Name and Date of Publication:

Lexington County Chronicle and Dispatch News, a series of publications between August and November 2002.

2. Profile:

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

3. Case Summary:

Plaintiff was executive director the Babcock Center, a private not-profit corporation that received $40 million per year from the State of S.C. to provide residential and occupational care for persons with disabilities and special needs relating to mental retardation and spinal cord injuries. The newspaper published a series of articles and editorials describing instances of abuse, neglect and exploitation of the clients of Babcock after the paper received a copy of a critical audit performed by the state agency with oversight responsibility for the contract with Babcock. The plaintiff here sued contending that articles reporting allegations by the Babcock board chair that the plaintiff and other Babcock officials had failed or refused to report to the state ombudsman an incident that appeared to be the rape of a 78-year old resident by a 16-year old resident. The board chair was a co-defendant with the newspaper. In response to the newspaper's pre-trial motion the court ruled that the plaintiff was a limited purpose public figure.

4. Verdict:

A verdict was directed in favor of both defendants at the close of the plaintiff's case on grounds that as a matter of law the reports were either true or that the plaintiff had failed to prove actual malice on the part of either defendant by clear and convincing proof.

5. Length of Trial:

Three days.

6. Length of Deliberation:

None.

7. Size of Jury:

Twelve.

8. Significant Pre-Trial Rulings:

Plaintiff was a limited purpose public figure.

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):

None.

12. Pretrial Evaluation:

Plaintiff could not prove actual malice.

13. Defense Juror Preference During Selection:

The newspaper's preference was for middle-aged women with education.

14. Actual Jury Makeup:

Seven women, five men. Two of the men were far younger than I would have liked. The jury had slightly more white jurors than black jurors.

15. Issues Tried:

Were the publications false? Was there a showing of actual malice? Did the plaintiff have any compensable injuries?

16. Plaintiff's Theme(s):

Plaintiff contended that there was no legal requirement to report the incident, even after the board chair directed her to make the report. Plaintiff was an experienced, professional administrator with a sound reputation, but as a consequence of the publications she felt like she was unable to pursue prospective employment opportunities. She also claimed to have suffered from depression as a consequence of the publications although she never sought professional counseling.

17. Defendant's Theme(s):

The publications were either true or based on public records or comments made at a meeting of the board of directors of Babcock where important public issues were being discussed regarding the obligation to report to the state instances of attacks by residents on other residents. The state ombudsman had issued an opinion that said the attack by the 16-year old on the 78-year old "should" have been reported.

18. Factors/Evidence:

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

Unknown.

b. Sympathy for plaintiff during trial:

Not evident from jurors' posture.

c. Proof of actual injury:

None.

d. Defendants' newsgathering/reporting:

Based on a state audit and remarks at a public meeting.

e. Experts:

None.

f. Other evidence:

Report from state ombudsman.

g. Trial dynamics:

i. Plaintiff's counsel:

At times appeared frustrated and disorganized. Did not seem to understand what was required to prove actual malice.

ii. Defendant's trial demeanor:

The newspaper editor was present and appeared calm and interested. The co-defendant, a lawyer, was too animated and more involved in the defense of her case than I thought appropriate.

iii. Length of trial:

Three days.

iv. Judge:

Edward B. Cottingham, a retired but active judge with experience trying libel cases.

h. Other factors:

The Supreme Court of S.C. had recently issued an opinion spelling out the limited purpose public figure status proof requirements which gave the trial judge a sound basis to determine that the plaintiff was a limited purpose public figure.

19. Results of Jury Interviews, if any:

None.

20. Assessment of Jury:

I thought the jury would have been a good one. I didn't see any jurors nodding in agreement with any testimony from the plaintiff or her witnesses.

21. Lessons:

It always helps to get a judge who has tried libel cases. As this judge said in ruling on the public figure status motion, "This isn't my first rodeo."

22. Post-Trial Disposition:

I am anticipating an appeal.

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F. Case Name: *Thomas L. Knight v. Chicago Tribune Company, Ken Armstrong, and Maurice Possley*

Court: In the Circuit Court of Cook County, Illinois
Case Number: 2000-L-004988
Verdict rendered on: May 20, 2005

1. Name and Date of Publication:

Chicago Tribune, five-part series commencing January 12, 1999, "Prosecution on Trial in DuPage."

2. Profile:

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

3. Case Summary:

Plaintiff, Thomas Knight, is a former DuPage County (Illinois) State's Attorney who prosecuted three young men for the 1983 abduction, rape, and murder of a 10-year-old girl, Jeanine Nicarico. The 1985 trial prosecuted by plaintiff[1] resulted in two convictions and a hung jury as to the third defendant, Steve Buckley.

The two convictions were later reversed and those men were retried. One defendant, Rolando Cruz, was convicted and given the death penalty a second time – that conviction was

[1] Although plaintiff accepted a position with the United States Attorney's Office before the 1985 trial commenced, he was retained as a special prosecutor for the first trial. He participated in the second *Cruz* trial as a witness.

reversed and during a third (bench) trial in 1995, the court threw out the charges and acquitted Cruz when a police officer recanted prior testimony from the earlier trials. The trial judge then called for the appointment of a special prosecutor to convene a special grand jury to investigate the prosecution of the three trials emanating from the Nicarico murder. The special grand jury indicted seven law enforcement officials involved in the Nicarico murder investigation, including Knight, in 1996. The criminal indictments of the five sheriff's department officers and two prosecutors (known as the "DuPage 7") for prosecutorial misconduct was virtually unprecedented.

On January 12, 1999, one week before the DuPage 7 trial was scheduled to begin, *The Chicago Tribune* published a five-part series entitled "Trial and Error: How Prosecutors Sacrifice Justice to Win" addressing prosecutorial misconduct cases nationwide and locally, including the third segment of the series entitled "Prosecution on Trial in DuPage" about the upcoming DuPage 7 trial. The purpose of the article was to recount what the grand jury had heard that ultimately lead to the indictment of the DuPage 7, a story that was possible because *The Chicago Tribune* had previously been given a copy of the grand jury transcript by plaintiff's criminal counsel.

The DuPage 7 trial was continued for three months, in part because of the *Tribune* series. The DuPage 7 defendants were ultimately acquitted and almost one year to the day after publication, plaintiff sued *The Chicago Tribune* and the two reporters who co-authored the article for libel.

By the time of trial in this case in May 2005, the alleged libelous language in issue was narrowed to the following 29 words: "Gorajczyk told the DuPage grand jury that Knight told him to keep his mouth shut about his conclusion and not to tell anyone that there was no written report." This had to do with an exculpatory piece of evidence which the prosecutors did not disclose to the defense in the first *Cruz* case.

Plaintiff's complaint about the 29 words was two-fold. First, Gorajczyk, a DuPage County lab examiner, had not testified before the grand jury. Rather, the grand jury investigator testified about Gorajczyk's conversation with plaintiff. Second, the grand jury transcript did not use the words "keep your mouth shut" but instead recounted that Knight allegedly told Gorajczyk "not to discuss the matter with anyone about his negative findings and his failure to write a report."

In the grand jury transcript, the investigator testified about the interview he had had with the lab examiner Gorajczyk. When Possley originally drafted the article in the fall of 1998, he accurately wrote that "Gorajczyk recalled later" the conversation with Knight. The article when through multiple drafts with a series of editors. Very late in the process – months after Possley had reviewed and summarized the grand jury transcripts – an editor asked Possley the source of the "Gorajczyk recalled later" language. Possley said it had come from the grand jury. The editor suggested using the phrase "according to grand jury

transcripts" be inserted but the phrase had been used in the preceding paragraph. They then agreed that the sentence would be changed to "Gorajczyk told the DuPage grand jury."

After a three-week trial where plaintiff represented himself *pro se*, state district court judge, Robert Gordon, granted a motion for directed verdict as to defendant Ken Armstrong and the jury returned a verdict in favor of *The Chicago Tribune* and Maurice Possley, the principal author.

4. Verdict:

Verdict for the defense on the general liability question. Three special interrogatories were also answered: there was no actual malice and there was no defamation but the statement was false in a material way.

5. Length of Trial:

Three weeks.

6. Length of Deliberation:

Approximately 4½ hours.

7. Size of Jury:

Twelve jurors and two alternates. Court required a unanimous verdict.

8. Significant Pre-Trial Rulings:

Motions to dismiss and for summary judgment were denied. A second motion for summary judgment was filed on behalf of Ken Armstrong after the close of discovery and shortly before trial and was also denied. Interestingly, Judge Flanagan's order denying Armstrong's second motion for summary judgment stated in part, "[Armstrong] points out that it is undisputed that he had nothing to do with the portion of the article containing the defamatory language and there is no evidence that he knew about the falsity of the statement at issue. Further, *while the plaintiff does not dispute the lack of evidence against Armstrong* . . . the evidence in the record is sufficient to raise questions of fact *vis-à-vis* the issue of actual malice on the part of Armstrong, the extent of his knowledge of falsity of the statement at issue, and the extent of his participation in the creation of the complete article."

Motions *in Limine*: Plaintiff opposed defendants' collection of other media stories (books, television programs such as A&E and "60 Minutes," other newspaper coverage) about plaintiff's prosecution of the Nicarico murder, which became known as the "haystack." The court initially granted plaintiff's motion *in limine*, but informed the plaintiff that if he opened the door to his reputation, the court would reconsider the ruling.

Plaintiff also moved to bar evidence or comment that defendants in the Nicarico murder trial (Cruz, Buckley, an Hernandez) spent time in prison or that Cruz spent years on death row as irrelevant and highly prejudicial. According to plaintiff, "in fact, Buckley never was in prison or death row. He was held only as a pre-trial detainee." Buckley, whose boots were examined by Gorajczyk, had a hung jury in the 1985 trial (conducted by plaintiff) and was not released until 1988, after the State's key expert witness died from brain cancer and an FBI examiner came to the conclusion that the footprint on the Nicarico door could not have been caused by the Buckley boot. The court granted the motion.

Judge Gordon informed plaintiff, who was *pro se*, that he would not be permitted to give a narrative in his direct testimony and that he had to have another lawyer question him on direct. Plaintiff objected vigorously that he was the only one who knew his case, but eventually acquiesced and brought in a former judge to do the questioning.

Defendants filed motions *in limine* to exclude any testimony or evidence of economic damages or mental anguish because of plaintiff's refusal to provide discovery responses and documents evidencing same (based on his objections that it was a libel *per se* case and damages were presumed). These motions were granted and were significant as the trial proceeded.

9. <u>Significant Mid-Trial Rulings:</u>

Judge Gordon granted a directed verdict in favor of defendant Armstrong at the close of plaintiff's case.

Judge Gordon also modified his ruling on admission of the "haystack" evidence and permitted the defense to show limited excerpts from A&E and other news articles, that pre-dated the January 1999 publication date of the article and specifically addressed the issue of the experts' examinations of the Buckley boot that was the subject of the complained-of language.

Plaintiff also objected to the introduction of his website which touted his trial and settlement successes after the date of the publication as prejudicial and not relevant because, according to plaintiff, this was a libel *per se* case and damages were presumed and irrebuttable. When the court overruled the plaintiff's objections and his theory that presumed damages are irrebuttable, plaintiff then attempted to testify about his income and the expenses and portion of the settlements he received. The court sustained defendants' objections to such evidence on grounds that such information had been asked for in discovery but plaintiff had refused to produce same.

Another issue was plaintiff's introduction of *The Tribune*'s Stylebook over the defendants' vigorous objections. The court ultimately limited the exhibit to a redacted page that only contained the definition of "Fairness."

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

Defendants asked for and were granted three special interrogatories (actual malice, defamatory or not, and falsity) in addition to the general liability questions.

Defendants' request for a mid-trial definition of actual malice and falsity was denied.

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

Jurors were asked to fill out a 24-question Juror Questionnaire. The case was mock tried approximately seven months prior to trial and a shadow jury was used during trial.

12. Pretrial Evaluation:

While plaintiff's reputation had certainly been tarnished by the DuPage 7 indictment and trial, there was an admitted mistake of attribution in the complained-of sentence. The mistake, however, was not material and the paraphrase "keep your mouth shut" was the same thing as "told Gorajczyk not to discuss the matter with anyone about his negative findings and his failure to write a report."

13. Defense Juror Preference During Selection:

We were particularly interested in how the jurors answered the following questions on the questionnaire, although all the questions were considered important:

1. Indicate your level of trust in the following:
   a) Newspapers accurately reporting the news
   b) Television accurately reporting the news
   c) Area law enforcement agencies (police, prosecutors)
   d) Judicial system (judges, lawyers, juries)

2. How concerned are you about the following issues on a scale of 1 to 7:
   neighborhood crime
   freedom of the press
   individual rights
   right to a fair trial
   protecting one's own reputation
   imposing the death penalty
   innocent persons in jail

3. Which of the following situations do you consider to be the worst wrong?
   a) a guilty person goes unpunished; OR
   b) an innocent person goes to jail or prison.

Please explain.

We were obviously interested in persons who placed high value on freedom of the press and individual rights. Given the facts of the underlying DuPage 7 case and the charges of prosecutorial misconduct against plaintiff, together with the fact that the three young men spent years in jail before being exonerated, we were also concerned with the prospective jurors' views on wrongful convictions, law and order, and whether they would be sympathetic to the concept that the public has an interest in the criminal justice system and the newspaper's reporting on it. We were also interested in ferreting out those jurors who might have an "ends justify the means" attitude toward law enforcement and be sympathetic to the plaintiff.

14. Actual Jury Makeup:

Seven women and five men, four of whom were African Americans, one of Eastern European descent, and the remainder were Caucasian. The alternates were Caucasian women.

15. Issues Tried:

Defamation, falsity, actual malice, damages.

16. Plaintiff's Theme(s):

Plaintiff portrayed himself as an upstanding family man – his wife and family members were in court every day, although they sat in the gallery and were apparently instructed by him not to come inside the bar to assist him whenever the jury was around. This was noted by at least one of the jurors.

He was a victim of a "witch hunt" instigated by *The Chicago Tribune* and its reporters to put "prosecutors on trial." Every aspect of *The Chicago Tribune*'s five-part series – even the articles addressing the national survey on prosecutorial misconduct – was about "him."

Plaintiff did not dispute the lack of evidence against Armstrong other than to show that he was the author of the memo that said "let's put the prosecutors on trial." Plaintiff had a theory that Armstrong, as co-author of the article, could be held vicariously liable under a joint enterprise theory regardless of whether or not he knew the statement was false or entertained serious doubt as to its truth.

Plaintiff contended that the 29 words were defamatory *per se* and, therefore, not only were damages presumed, but defendants should be barred from presenting evidence to rebut or mitigate those damages.

Throughout the pre-trial motions, trial, the charge conference, and now in his post-trial motion for a new trial, plaintiff has maintained that: (1) he will overturn *New York Times v. Sullivan*, (2) the standard of proof for actual malice should be preponderance of the evidence rather than clear and convincing evidence, and (3) reckless disregard "should be revised to mean that the defendant engaged in highly unreasonable conduct constituting an extreme departure from standards of investigation and reporting."

Plaintiff contended that defendants acted with reckless disregard of the truth in relying on the grand jury testimony of the special prosecutor's investigator because they should have known that the investigator and the special prosecutor were biased and attempting to indict plaintiff for prosecutorial misconduct through the testimony about Gorajczyk's examination of the Buckley boots and plaintiff's alleged conversation with him. Plaintiff further contended that the reporters should not have relied on the grand jury testimony because it was hearsay, but instead should have researched court records and transcripts from the Nicarico murder trials that reached back over fifteen years.

17. Defendant's Theme(s):

This misattribution was a mistake that was not a material error. The paraphrase "keep your mouth shut" was not defamatory. The 29 words were not defamatory *per se*. Plaintiff's reputation was harmed by the DuPage 7 indictment, not the 29 words. Damages, if any, were mitigated by the other media articles on the same subject.

There was no actual malice. The 29 words were a fair paraphrase of the grand jury testimony. The 29 words were substantially true. Plaintiff's joint enterprise/venture theory against Armstrong was not pled and could not survive First Amendment scrutiny under *New York Times v. Sullivan*. The source of the grand jury transcript was plaintiff's own counsel, who did not indicate that there was anything unreliable in the testimony. The grand jury testimony was sworn and, therefore, reliable. The journalism that resulted in the subject series and succeeding series by *The Chicago Tribune* on matters of prosecutorial misconduct and wrongful convictions was on a serious matter of public concern and a public service.

18. Factors/Evidence:

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

See jury debriefing below.

b. Sympathy for plaintiff during trial:

See jury debriefing below.

c. Proof of actual injury:

None was offered by plaintiff. He relied solely on presumed damages.

d. Defendants' newsgathering/reporting:

Memos by Armstrong proposing the national, statewide, and local surveys and research into cases where there were appellate decisions finding prosecutorial misconduct, numerous drafts of the subject article, and reporter's notes were all introduced into evidence.

e. Experts:

No experts were called at trial, although some individuals designated as experts testified instead as fact witnesses.

f. Other evidence:

A limited amount of "haystack" evidence of news articles, television clips, and magazine articles was admitted for purposes of mitigating and rebutting damages.

g. Trial dynamics:

i. Plaintiff's counsel:

Knight appeared *pro se* without any assistance inside the bar. He sat alone at the trial table with one box of exhibits (no extra courtesy copies for defense counsel and repeatedly represented to the court in front of the jury that defendants had not provided him copies of their exhibits, even though he had a box of them in the courtroom) and his laptop.

ii. Defendant's trial demeanor:

Defendants *The Chicago Tribune* and Maurice Possley were represented at trial by Chip Babcock. Defendant Ken Armstrong was represented at trial by Nancy Hamilton. Local counsel was Patrick Morris of Johnson & Bell. Behind the counsel table sat defendants Possley and Armstrong and the Public Opinion Editor as corporate representative of *The Chicago Tribune*.

iii. Length of trial:

Three weeks.

iv. Judge:

All pre-trial motions were determined by Judge Kathleen Flanagan. Once the case was certified for trial, it was assigned to Judge Robert Gordon.

h. Other factors:

19. Results of Jury Interviews, if any:

Ten days after trial, the jurors were invited by defense counsel to a reception (with food and drinks) at one of the downtown Chicago hotels. Five of the "actual" jurors and one of the alternates attended. At the time of the verdict, the jurors met with the judge and bailiff but did not want to talk with the parties. They left by a private elevator.

The Alternate "Renegade" Juror: The two alternate jurors did not receive a copy of the charge and instructions and were sent to a different room instead of being discharged at the beginning of deliberations. One alternate with whom we have spoken said that she was pro-plaintiff and would have awarded him "several millions" for his time spent in developing and trying the case. (Note: she did not express any thought that he had been personally damaged, just that he should be compensated for his time in bringing the case to trial over a period of five years – her husband is an attorney.) She did not care for reporter Maurice Possley and was particularly offended by the paraphrase "keep your mouth shut." In her opinion, Possley should have quoted the statement verbatim from the grand jury transcript. She felt that *The Chicago Tribune* was negligent because the research on the series had begun 2½ years prior to the publication date and, therefore, there was no excuse for the misattribution mistake that Gorajczyk testified before the grand jury when it was admitted that he had not – even though it was explained that the change in attribution was a mistake that happened in the final editing just days before publication. She stated that it was a mistake that she would not have made and that there was simply no excuse that she would accept that would make her feel otherwise. She also stated, however, that her impressions were based on a negligence standard and that had she been given the charge and the instructions she would have followed them. This juror was also critical of one of the defense counsel's attempts to interject humor into the trial and thought he was smug and at times disrespectful of the plaintiff's case [the other jurors interviewed had exactly the opposite reaction to the very same issues]. During the defense's closing argument this same juror (who took copious notes throughout trial and was attentive and nodding to the plaintiff during his closing) closed her notebook and physically turned away from defense counsel.

The Foreman: The individual who was elected foreperson joked that he was chosen because he was in the restroom at the time of the selection. He also stated, however, that he had not disclosed to the court (because he was not asked about his prior employment) that he had been a paralegal with an intellectual property law firm in a previous job. The other jurors found out about his legal experience and often asked him questions about the trial process and rulings during the trial.

The deliberations on the general question took less than two hours. The special interrogatories caused a lot of discussion among them. One woman who the defense team

expected might be selected foreperson did "step-up" during deliberations and become a pro-defense leader.

The Plaintiff: The actual jurors stated they had no sympathy towards plaintiff appearing *pro se*. Some thought he couldn't get counsel to represent him and that he "put on an act" of being the little guy all by himself up against the *Chicago Tribune* Goliath. They thought he wore outdated and worn clothes on purpose, was unorganized, wasted time, and should have had someone help him but purposefully did not. Some stated they thought he had a "fool for a client." Some did, however, feel sympathetic towards him as the subject of the newspaper article just before his criminal trial. At least one juror thought that the plaintiff "clearly wants all the rules on his side."

Witnesses: All of the *Chicago Tribune* witnesses were viewed favorably. In particular, Possley had a great impact, as did the editor – both of whom admitted that a mistake in attribution was made, their participation in making the mistake, as well as their regret and remorse in doing so (interestingly, the pro-plaintiff alternate felt exactly the opposite about these two witnesses). All jurors were in agreement that defendant Armstrong, who co-authored the article but did not the write the portion about Gorajczyk, should not have been in the case and wondered why the judge did not release him earlier than at the close of the plaintiff's case.

Damages: The jurors interviewed all believed that there was no evidence that plaintiff was harmed by the publication.[2] There was never a discussion about awarding him anything. They believed that his reputation was harmed by the indictment of the DuPage 7. The jurors remarked that their decision was based in large part on plaintiff's own answers to some of the interrogatories about damages to his reputation and law practice caused by the article – to which he answered "none." They believed that he is a successful plaintiff's attorney who has tried and settled many cases to his advantage and that his professional reputation was intact – especially in light of his website which touts his successes. They were also troubled by the fact that plaintiff did not provide any witnesses who would attest to any personal or professional harm due to the article. They were also perplexed by the fact that in closing, plaintiff did not ask for a specific sum of money but left it to them – as well as his plea for substantial punitive damages – again without stating a number. Finally, they wondered why he only sued *The Chicago Tribune* when there had been so many other articles, books, and television stories about him and the Nicarico investigation and prosecution over the years. They felt he had singled out *The Chicago Tribune* and the two reporters.

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[2] This was a big issue with the jury. Plaintiff tried the case on the theory that the statement was libelous *per se* and that he did not have to present any evidence of damages to prevail. During discovery, he objected to and refused to produce documents and information regarding his mental state, finances, his law firm practice, and anything that would approach actual damages. He did, however, respond to some interrogatories asking whether there had been any harm to his reputation or career – which were displayed to the jury during trial.

Material Falsity Interrogatory: It was not entirely clear from the interviews, but it seemed that any mistake in a story that misreports the facts was going to be viewed as materially false. There did not seem to be any middle ground for a mistake without it also being false. They did not seem to place much stake in the "materiality" of the falsehood, just that it was a mistake.

Actual Malice: Plaintiff tried to set the stage for actual malice by using a memo written by Armstrong in February 1997 – just weeks after the DuPage 7 indictment – that stated "let's put the prosecutors on trial." Plaintiff characterized this memo as evidence of the "witch hunt" by *The Chicago Tribune* and its reporters to ruin him. According to the jurors, however, the statement had no impact. Possley's statements in any early draft of the article (that plaintiff's nickname was "the Black Knight") did influence some jurors to think that he was trying to portray plaintiff and the other members of the DuPage 7 in a negative way – which led to their negative feelings about the paraphrase "keep your mouth shut."

None of the jurors believed that the defendants acted with actual malice, which was defined for them as knowledge of falsity or reckless disregard; that is, the defendant in fact entertained serious doubts as to the truth of the statement. Interestingly, the pro-plaintiff alternate also stated that given that definition, she too would have had to have answered the actual malice question in the negative.

General Impressions: The jurors expresses a great deal of interest in the underlying facts of the case and the media coverage surrounding the trial [the courtroom gallery was filled to capacity nearly every day]. They reported saving newspapers and searching the Internet for information on the parties and lawyers once the trial was complete. *The Chicago Tribune* was viewed favorably before the trial, during the trial, and after the trial.

When asked about the obvious lopsidedness of the size of the defense trial team and use of electronic media for exhibits and depositions versus plaintiff's empty table and his clumsy use of the Elmo, jurors said they expected that *The Tribune* would have such representation and that the technology was beneficial in making their work in being attentive easier and more interesting.

Summary: The most influential dynamics leading to the verdict seemed to be: (a) no damages; (b) Possley and the editor's remorse about the mistake; (c) plaintiff's Lone Ranger trial strategy; and (d) absence of any negative perceptions toward the defense witnesses.

20. Assessment of Jury:

The jury was attentive throughout the trial. They seemed to bond early on and were often heard laughing and at times playing music in the jury room (which was just outside the box and within a few feet of the bench and witness stand). Some were openly demonstrative during trial: groaning, laughing, rolling their eyes, or showing outright disdain during some

of the testimony and closing arguments. In all, they were perhaps more educated than we expected in Cook County, which does not ask for level of education on the jury questionnaire. One woman, it was later learned, has a Masters Degree in psychology. She was perhaps the most pro-defense juror and was a leader in the deliberations.

21. Lessons:

We are still trying to figure out how to spot the "alternate juror" who, from her appearances and questions during *voir dire*, as well as her socio-economic background, appeared to be someone who would be anything but pro-plaintiff. After trial when we spoke with her, she also expressed surprise at herself that she found herself leaning so far to the plaintiff's side of the case. As she noted, she is politically conservative, from an upper-middle class background and neighborhood, against frivolous lawsuits, her husband is a lawyer, she is well read, educated, and worked before staying home to raise her children. She fit a defense juror profile, yet she certainly was not in this instance.

We also learned from the jury after trial that they appreciated the fact that Possley, the editor, and other *Tribune* witnesses not only owned up to the misattribution as a mistake, but were also sorry that the mistake happened. According to the jurors, it gave the witnesses more credibility and they could understand how mistakes happen. It also made the plaintiff look as though he was beating a dead horse for no apparent reason other than spite.

Very early in the case, the decision was made to rely on the reporters' privilege to not identify unnamed sources and to redact notes from interviews with unnamed sources. The motions judge, Flanagan, upheld assertion of the privilege and several defense documents were heavily redacted. As discovery proceeded, after denial of the summary judgments, it became apparent that plaintiff's own criminal counsel was going to testify on behalf of plaintiff and against defendants, yet he was one of the unnamed sources and he was the one who had provided the grand jury transcript. By resting on the privilege, defendants were in jeopardy of playing into several of plaintiff's themes because the defendants could not show they had indeed interviewed both sides in the DuPage 7 case (prosecution and defendants), contributing to the plaintiff's case of gross negligence and bias in the research, investigation, and reporting as well as his claim that the grand jury transcript testimony was based on an unreliable source. The decision was made then to waive the privilege and documents were produced in unredacted form and deposition questions answered where previously the privilege had been asserted.

The fact that *The Chicago Tribune* acknowledged the mistake in attribution but did not print a correction at the time troubled many of the jurors, although it did not have any bearing on their verdict. Also, this jury was not willing to regard the mistake as immaterial or inconsequential.

22. Post-Trial Disposition:

Plaintiff's post-trial motion for new trial was denied. He has filed an appeal.

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G. Case Name: *Ernest B. Murphy v. Boston Herald, et al.*

Court: Suffolk County (Massachusetts) Superior Court
Case Number: SUCV2002-02424
Verdict rendered on: February 18, 2005

1. Name and Date of Publication:

Over twenty publications in February and March, 2002, beginning with "Murphy's Law" and "Dump the Judge."

2. Profile:

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

3. Case Summary:

The Boston Herald ran a series of articles about Judge Murphy and about decisions that he had made while sitting as a judge in New Bedford (Bristol County), where he had

developed a reputation for being soft on criminals. Most of the articles were written by one reporter, David Wedge. Wedge had interviewed the District Attorney, a senior Assistant District Attorney, and a more junior Assistant District Attorney. They all told Wedge that Judge Murphy was unsympathetic to victims and had said of one 14-year-old rape victim, "she's 14, she got raped, she can't go through life as a victim, tell her to get over it," shortly after having sentenced the rapist to straight probation. The junior Assistant District Attorney told Wedge he was present and personally heard Judge Murphy make the "get over it" statement. During the course of the numerous articles in the series on Judge Murphy, that statement was repeated multiple times, along with several other statements that Judge Murphy ultimately claimed were defamatory.

Judge Murphy vehemently denied that he ever made that statement or any other statement that was unsympathetic to a victim.

4. Verdict:

$2,090,000 for loss of reputation and emotional distress, reduced through post-trial motions to $2,005,000.

5. Length of Trial:

Five weeks.

6. Length of Deliberation:

Five days.

7. Size of Jury:

13, including one alternate.

8. Significant Pre-Trial Rulings:

The judge denied in its entirety the defendants' motion for summary judgment. Defendants attempted without success to pursue an interlocutory appeal. Defendants also had made a motion shortly before trial to bifurcate liability and damages, which was denied.

9. Significant Mid-Trial Rulings:

The court allowed the plaintiff to introduce evidence of damage caused by a column written by one of the Herald's political columnists that was highly critical of Judge Murphy, even though the column had not been identified in the complaint.

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

The jury was given an extremely detailed 22-page set of special questions.

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

None.

12. Pretrial Evaluation:

Given the plaintiff's status as a public official, and the fact that the reporter had obtained information from three public officials, including at least one first-hand source, defendants expected to prevail on liability and did not believe plaintiff could sustain the burden to show by clear and convincing evidence that the defendants acted with "actual malice."

13. Defense Juror Preference During Selection:

The defense was looking for jurors who were reasonably intelligent and would follow the law on "actual malice," even if counterintuitive, so that they would be willing to deny recovery even for false statements published negligently. The defense also tried to avoid jurors who were skeptical of things published in the newspaper or who had negative opinions about either the Herald or any of its reporters or columnists.

14. Actual Jury Makeup:

A mixed bag. Plaintiff successfully challenged any juror who entered the trial with a favorable opinion of the Herald. Consequently, the jurors professed to have either no opinion of the Herald or a neutral opinion.

15. Issues Tried:

Falsity, "actual malice," opinion, and defamatory nature of publications.

16. Plaintiff's Theme(s):

Plaintiff presented himself as a hard-working lawyer who had grown up in a blue-collar neighborhood and always wanted to be a judge. He alleged that the articles and subsequent publicity in other media (including national television) caused him severe emotional and physical distress, including post-traumatic stress disorder from death threats that he received, and that what had previously been his dream job became a nightmare. He alleged that it was well known that the District Attorney disliked him and had made a number

of negative comments about him, comments which should have put the Herald reporter on notice not to trust reports emanating from the District Attorney's office.

17. Defendant's Theme(s):

Defendants adopted a three-fold approach. First, they sought to show that Judge Murphy had indeed made the statements attributed to him (Judge Murphy, in turn, denied making the statements and called a number of witnesses who claimed to have been present when they were allegedly made, but who did not hear the statements). Second, defendants argued that, whether the statements were true or not, the reporter had performed a reasonable investigation, by talking with at least three members of the District Attorney's office, among others. Defendants also introduced evidence tending to show that there was a sound basis to believe that the statements were true, including evidence of previous decisions and statements Judge Murphy had made in other cases, which had been the subject of articles and highly critical editorials in other newspapers published before the Herald articles. Third, the defense attempted to establish, on similar evidence, that the Herald reporters neither knew, nor even had reason to believe, that any of the statements they published were false (no "actual malice").

18. Factors/Evidence:

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

Unknown.

b. Sympathy for plaintiff during trial:

Plaintiff made a sympathetic impression. Although he is physically large and looks like an authority figure, he toned down that aspect of his persona during his testimony. His witnesses included his wife and some of his daughters, the youngest of whom was a teenager; and their testimony about the emotional distress and disruption that their family suffered was quite powerful.

c. Proof of actual injury:

The plaintiff's emotional distress was sufficiently severe that he had physical manifestations, mostly involving digestive problems. These symptoms were well documented by medical records.

d. Defendants' newsgathering/reporting:

The attention of the reporter, David Wedge, was called to Judge Murphy by a reporter at a small, local newspaper and by members of the Bristol County District Attorney's office. From those sources, Wedge first learned of Judge Murphy and also learned that he had been

criticized for a number of controversial decisions in Bristol County, primarily involving either light sentences given to rapists or release of rapists on personal recognizance without bail. Judge Murphy had especially been criticized in the local press for a very light sentence given to a defendant who had robbed and beaten an elderly victim. After doing some research, Wedge learned that Judge Murphy had issued controversial decisions not only when he sat in Bristol county, but also in other adjoining counties, Plymouth and Norfolk, where his leniency extended primarily to drunk drivers. While the local papers in each of those counties had criticized Judge Murphy's decisions, none had put together the entire pattern of apparent leniency. During the course of investigating the pattern, Wedge spoke with a senior Assistant District Attorney in Bristol County who had been a regular source of information, sometimes confidential and sometimes not, in the past. That assistant district attorney told Wedge about a number of the cases on which Judge Murphy had sat. He told Wedge that in one of the cases, involving a 14-year-old rape victim, Murphy had said in a lobby conference (outside the presence of the victim), "she's 14. She got raped. She can't go through life as a victim. Tell her, get over it." Wedge thought that that statement was newsworthy. Before publishing it, he asked the District Attorney himself whether he could confirm the accuracy of that report, and the District Attorney confirmed it. Wedge then asked the District Attorney if he could speak with the Assistant District Attorney who actually heard the statement. The District Attorney refused to disclose the name of the assistant who had heard the statement, because he was relatively junior. Wedge later learned from his initial source who the junior Assistant District Attorney was, and a meeting was arranged among Wedge, his initial source, and the more junior Assistant District Attorney who had heard Judge Murphy make the statement. A condition of the meeting was that Wedge not publish the name of the junior Assistant District Attorney. At the meeting, Wedge asked that Assistant District Attorney whether the quotation Wedge had been given was correct, and read from his notes. The Assistant District Attorney confirmed that the quotation was substantially accurate. He could not recall the exact words, but he did remember the gist of the quotation, including that Judge Murphy had said the words "get over it" in an unsympathetic manner. Dave Wedge testified that he tried to get a comment from the Judge. He never contacted the Judge directly, however, but rather asked a court officer if he could get a note to the judge, and the court officer said he could not do so.

Based upon the investigation described above, Dave Wedge and the Herald felt they had sufficient corroboration to publish the article. The first article was published on the front page on February 13, 2002. It was followed by another front-page article on February 14, and by a series of articles, sometimes amounting to three or four articles by different reporters in the same day's newspaper, through the next ten days to two weeks. There was conflicting evidence whether, during that entire period, Judge Murphy ever notified the Herald that there were any inaccuracies in anything it reported.

e. Experts:

Over the defendants' objection, the plaintiff was allowed to introduce testimony from Dr. Denni Elliot, a journalism professor from Florida who testified as an "expert" on

journalistic ethics and journalistic standards. Defendants objected to her testimony on the grounds that those subjects were irrelevant to any of the issues in the case and, in particular, to the issue of "actual malice." The judge nevertheless allowed her to testify.

f. Other evidence:

There was a major dispute, ultimately resolved in the plaintiff's favor, as to whether the plaintiff would be allowed to introduce postings on an internet "chat room," that contained physical threats against Judge Murphy and his family. The Herald hosted the chat room. The defendants objected to its introduction, on the grounds that (1) the chat room did not reference any Boston Herald articles, except for one article on which the plaintiff had not originally sued; (2) there was no evidence as to who posted the statement that appeared on the chat room, or whether the poster had every read any of the allegedly defamatory articles; (3) there was no indication that the posting related to any of the statements alleged to be defamatory, as opposed to a general perception of Judge Murphy as pro-defendant or even pro-rapist; and (4) imposing liability for the posting of an anonymous third party would violate the Communications Decency Act.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff was represented by an experienced trial lawyer in a firm that specializes in trial work. Additionally, plaintiff himself was a successful trial lawyer before he became a judge, and defendants suspect that he had a hand in many of the tactical decisions.

ii. Defendant's trial demeanor:

Defendants presented two witnesses from the Boston Herald, the reporter and the editor in chief. The editor in chief did not recall the details of how these particular articles were edited, but he described the editing process generally and the interactions between the reporters and the editors. He also explained the long-standing relationship between the newspaper and the senior members of the Bristol County District Attorney's office, and why the editors were comfortable with the reliability of the District Attorney's office as a source of information. He made a very knowledgeable and professional presentation.

The testimony of the reporter was somewhat less successful. He had discarded his notes shortly after writing the articles, and before being notified of any claim by the plaintiff, and therefore was unable to corroborate the exact statement that the Assistant District Attorney had given him. Without reference to his notes or the newspaper article, the reporter did not have an independent recollection of the exact words the Assistant District Attorney quoted to him. Also, while there was no evidence that the reporter had notice of the plaintiff's claim at the time he discarded his notes, the court both allowed extensive cross examination on the destruction of the notes, and also gave a jury instruction on spoliation.

iii. Length of trial:

Five weeks, long enough to contribute to the jury's sense of the importance of the case.

iv. Judge:

Although Massachusetts does not have an individual docket or calendar system, and different phases of a matter will often be heard by different judges, the plaintiff moved to have this case specially assigned to a single judge for all proceedings, which motion was allowed. Additionally, because the plaintiff is a sitting Superior Court judge, he requested that the case be specially assigned to a judge outside his court. Since the Superior Court is the trial court of general jurisdiction in Massachusetts, the only judges available were from lower courts, where most of the business is criminal, and libel cases are generally not brought. Despite those factors, the case was assigned to the Chief Judge of the Boston Municipal Court, Hon. Charles R. Johnson, a seasoned trial judge who nevertheless had had very little experience with libel trials before this case. Judge Johnson impressed everyone with his command of the courtroom, demeanor, and willingness to absorb a new area of the law.

h. Other factors:

There was a television camera in the courtroom for most or all of the trial. The trial was covered regularly on some of the evening news programs.

19. Results of Jury Interviews, if any:

Lawyers in Massachusetts are not allowed to interview jurors after a verdict. Two of the jurors were interviewed by reporters from another newspaper (The Boston Globe); and the jurors told the Globe that they found against the Herald because they felt the editors should have done more to supervise the reporter, and because they felt the Herald repeated the "get over it" statement excessively in a two-week series of articles. Given that the editors who supervised the reporter did not testify, and that the reporter did not remember, and therefore did not testify, as to his interactions with the editors, those statements suggest some lack of understanding on the part of the jury of the judge's instructions.

20. Assessment of Jury:

See previous answer.

21. Lessons:

The jury clearly did not appear to understand how a newspaper article is written. In retrospect, it probably would have made sense to introduce testimony not only from the editor in chief, but also from each person who had any involvement in creation of the articles.

One reason that that was not done was that, because the plaintiff waited over three months before making any formal complaint to the Herald about the articles, and none of the editors could recall the details of exactly what they did to put together the article by the time the plaintiff first threatened to sue.

22. Post-Trial Disposition:

Defendants filed a motion for judgment notwithstanding the verdict, which was denied except for a small reduction (from $2.1 million to $2.05 million) in the verdict. The defendants have appealed.

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H. Case Name: *Dr. Mark T. Reilly v. Boston Herald, Thomas Mashberg and Andrew F. Costello*

Court: Barnstable Superior Court
Case Number: 98-294
Verdict rendered on: November 4, 2005

1. Name and Date of Publication:

"Bereaved Pet Owners Doggedly Seek Justice." May 21, 1995

2. Profile:

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

3. Case Summary:

In May 1995, on the front page of its Sunday paper, below the fold, where the Herald at the time generally published "soft news" or "human interest" articles, the Herald published an article about a long-running dispute between the owners of a deceased terrier and the veterinarian, Dr. Mark T. Reilly, who had treated the dog during his final illness seven months earlier. About six months before the article was published, the dog's owners had complained about the veterinarian to the Board of Registration in Veterinary Medicine and had filed a veterinary malpractice action against him. Shortly before the article was written, the Board of Registration had found probable cause to refer the matter for formal disciplinary proceedings, based largely upon the owners' allegations. The article described those allegations, the proceedings before the Board of Registration, and a number of other things that had transpired during the course of the proceedings, including the mysterious disappearance of some of the dog's records and some threatening phone calls that the owners received. The plaintiff, Dr. Reilly, alleged that the article implied that he was responsible for both the missing records and the threatening phone calls as well as negligent treatment.

4. Verdict:

For plaintiff: $125,000 lost income and $100,000 emotional distress. To that amount, the court added interest of close to $200,000, plus attorneys' fees of about $100,000.

5. Length of Trial:

Two weeks.

6. Length of Deliberation:

Two days.

7. Size of Jury:

14, including two alternates.

8. Significant Pre-Trial Rulings:

The case was initially dismissed in its entirety on a motion for summary judgment, but the Massachusetts Appeals Court reversed the summary judgment and returned the case for trial on five of the approximately thirty statements that the plaintiff had originally alleged were defamatory. After the Appeals Court re-instated the case, the Superior Court allowed the plaintiff to amend his complaint, approximately seven years after it was filed, to add a count under the Massachusetts "unfair business practices" statute, which enabled the plaintiff to recover attorneys' fees if he prevailed on that claim.

9. Significant Mid-Trial Rulings:

The pet's owners, who lived outside of Massachusetts and were not subject to subpoena, did not attend the trial. Plaintiff attempted to introduce testimony that one of the owners had previously given before the Board of Registration and in his veterinary malpractice case, in both of which proceedings the veterinarian had had an opportunity to cross-examine the pet owner; but the Court refused to allow that testimony to be admitted.

Although the defendant sought to rely upon the privilege for fair and accurate report of governmental proceedings, the Court refused to admit into evidence the entire record of the governmental agency, but allowed only those parts of the record that the reporter actually had in his files when he wrote the article. The limitation proved to be problematic, because the reporter had relied, in part, on previously published articles that in turn had relied on the government records, but the Herald reporter did not personally obtain and review all of the records themselves.

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

The Court agreed to give detailed special questions, regarding each statement alleged to be defamatory and each element of defamation as it related to each such statement.

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

None.

12. Pretrial Evaluation:

The case had a number of potential problems from the outset, not the least of which was the dog's owner. Counsel interviewed the owner and concluded that if he did testify, he was not a particularly attractive witness and had an obvious bias and vendetta against the veterinarian. On the other had, without his testimony, there was a risk of being unable to present his side of the case. He had agreed to testify, but then failed to appear at trial, and was outside the court's subpoena power.

There were a number of settlement discussions, but they were unsuccessful, largely because the plaintiff believed his damages exceeded $2 million.

13. Defense Juror Preference During Selection:

The defense was looking for reasonably intelligent jurors who were not biased against the Boston Herald, were not enamored of veterinarians, and would understand the public interest behind allowing the fair and accurate reports of proceedings before government bodies such as the Board of Registration in Veterinary Medicine. Both sides were wary of

seating pet owners, not knowing whether they would be more sympathetic to the veterinarian or against the veterinarian because the dog did die while in his care.

14. Actual Jury Makeup:

The jury was largely middle class to upper middle class, predominantly white, and generally well educated, with some members having advanced graduate degrees.

15. Issues Tried:

Truth/falsity; opinion; the privilege for fair and accurate reports of proceedings of government bodies, and negligence.

16. Plaintiff's Theme(s):

The plaintiff alleged he was fired from his job at a veterinary clinic as a result of the Herald's publication, that he would have received a substantial salary increase if he had not been terminated, and that it took him several years of individual practice before his income even returned to what it was when the article was published. He alleged that the reporter and the newspaper were negligent in relying upon the dog's owner, obviously a biased source, and that no one made an effort to talk to him directly, despite his affirmative effort to communicate with the newspaper.

17. Defendant's Theme(s):

The defendants defended based on liability, privilege, and damages. With respect to liability, defendants attempted to show that many of the statements were true; and answers to special questions showed the defense was partially successful. Second, the defendants relied on the privilege to report on governmental proceedings, specifically the proceedings at the Board of Registration in Veterinary Medicine that led to the issuance of a finding of probable cause. Third, on damages, defendants argued that a number of other publications, including a local Cape Cod publication with a circulation many times that of the Herald, had published articles about the same dispute; and it was those articles, rather than the Herald's, that caused the plaintiff's alleged injury to reputation.

18. Factors/Evidence:

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

Most Cape Cod residents do not read the Herald and probably do not respect its reporting.

b. Sympathy for plaintiff during trial:

Plaintiff is an intelligent, reasonably good looking professional, who likes dogs and other small animals. The natural sympathy created by that profile was probably balanced by the fact that, in responses to pre-trial discovery, Dr. Reilly had made a number of statements that were clear exaggerations, particularly with respect to his damages. We were able to exploit the exaggerations, and to demonstrate a number of inconsistencies in them, when Dr. Reilly testified. The damage award would likely have been much higher otherwise.

c. Proof of actual injury:

The fact that the jury awarded the plaintiff damages for lost income suggests that they believed his claim that the Herald article caused him to lose his job. The article was published May 21, 1995; his last day at work was about a week later. There was, however, substantial conflict in the evidence as to why his employment ended. His employer had stated in pre-trial discovery that he did not fire the plaintiff; and the plaintiff had admitted in discovery that he had intended to leave that job, anyway, unless he was offered a partnership. At trial, both of those witnesses agreed that the plaintiff had discussed leaving his job before the Herald article, but they both testified that he had not made any definite decision to leave and might have stayed if it were not for the Herald article.

d. Defendants' newsgathering/reporting:

The reporter first learned of the dispute between the dog owner and the veterinarian about four months before the Herald published anything about it. During the intervening four months, several other newspapers, mostly local ones, wrote articles about the dispute. The Herald reporter relied heavily on those other published reports for many of the statements in his article, without doing independent research. For other parts of the article, he independently researched the records of the State Board in Veterinary Medicine. The statements on which the jury imposed liability were generally the ones that were based upon previously-published articles.

e. Experts:

Plaintiff proposed to call three experts: a veterinarian, an economist, and a journalism professor (Robert Zelnick, Boston U.). We moved to exclude the journalism professor, and the court agreed with our argument that since the issue of "negligence" is based upon a reasonable person, there was no basis for an expert to testify what a "reasonable journalist" would do. With respect to the economist, who had previously supplied a report with an estimate of over $2 million in damages, the court agreed that much of his report was based upon speculation unsupported by evidence, and hence excluded it. The economist ultimately gave no opinion on the plaintiff's lost income. The third expert, a veterinarian, testified that the plaintiff's treatment of the dog was entirely appropriate. He also testified, on cross examination, that some of the statements in the article, such as that Dr. Reilly did not offer to

hospitalize the dog, were not defamatory because the appropriate standard of care did not require hospitalization.

f. Other evidence:

The plaintiff had previously settled with a number of other news media that had published essentially the same information. Under Massachusetts law, the jury does not get to hear the amounts of those settlements. They were substantially less than the jury ultimately awarded the plaintiff.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's lead counsel was his younger brother. The brother graduated from law school around the time the article was published; this lawsuit was probably one of his first cases, and he matured with the case from 1998 through 2005. He was assisted by another lawyer who specializes in defending veterinarians and who had in fact represented the plaintiff, Dr. Reilly during the proceedings before the Board of Registration in Veterinary Medicine in 1995 and 1996.

ii. Defendant's trial demeanor:

The defendants called only one witness from the newspaper, the reporter who wrote the article. He was a bit nervous, and was concerned that each of his answers be perfect. Some of his best answers were on cross-examination, where he had not practiced the answers in advance.

iii. Length of trial:

Two weeks.

iv. Judge:

The judge had not been involved in any of the pre-trial proceedings, and defendants are unaware whether he had ever previously tried a libel case. He seemed quite interested in the issues and welcomed the parties to fax him mid-trial memos of law on issues likely to arise during the day's hearing, so long as he received them by approximately 8:00 a.m. the day the issue would arise.

h. Other factors:

None.

19. Results of Jury Interviews, if any:

None. Lawyers are not allowed to interview jurors, post trial, in Massachusetts.

20. Assessment of Jury:

See Section 14, above. The jury was attentive and engaged during the entire trial. They did not seem moved when the plaintiff cried on the stand when describing his damages. The only visible reaction from the jurors came when they learned that the plaintiff had made inconsistent statements in approximately five different lawsuits.

21. Lessons:

Reliance on reports previously published in other media can be dangerous. So can a failure to make a serious effort to contact the subject of a potentially defamatory publication.

22. Post-Trial Disposition:

The case settled shortly after entry of judgment for $540,000.

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I. Case Name: *Amelia Boynton Robinson v. American Broadcasting Companies, Inc., Walt Disney Pictures and Television, and Leah Keith*

Court: Circuit Court of Jefferson County, Alabama
Case Number: CV-99-6867
Verdict rendered on: November 18, 2004

1. Name and Date of Publication:

Selma, Lord, Selma – premiered on *The Wonderful World of Disney* in January 1999.

2. Profile:

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

3. Case Summary:

In January 1999, *Selma, Lord, Selma*, made its world premiere on *The Wonderful World of Disney*. A docudrama, *Selma* was based on a book by the same name which told the story of two little girls who grew up during the Voting Rights Movement in Selma, Alabama in the 1960s. Plaintiff, Amelia Boynton Robinson, an African-American civil rights pioneer who was depicted in the movie, claimed that she was wrongfully portrayed, and that her reputation was damaged.

While Plaintiff had many criticisms of the movie, she had two primary complaints. First, the movie showed her attempting to register to vote in the early 1960s. In reality, Plaintiff had been a registered voter since the 1930s, and had lead the movement to register other African-Americans and women. She is extremely passionate about the right to vote, and was deeply insulted that the movie showed her attempting to register when she had been a registered voter for nearly 30 years. Second, Plaintiff was portrayed in the movie as participating in a meeting following "Bloody Sunday." In fact, Plaintiff was severely beaten during the "Bloody Sunday" incident and was hospitalized for days thereafter preventing her from attending any such meetings. Plaintiff also had numerous secondary complaints including the failure to portray her leading role in the Civil Rights Movement, as well as being depicted as a "fat, Aunt Jemina, black mammy" type, whereas Plaintiff is an articulate, stately, educated woman. Plaintiff, who at the age of 95 still actively speaks around the world about her experiences, claimed that she was constantly barraged with questions about whether the movie was true.

4. Verdict:

Defense verdict.

5. Length of Trial:

Four days.

6. Length of Deliberation:

25 minutes.

7. Size of Jury:

Twelve.

8. Significant Pre-Trial Rulings:

Plaintiff's complaint brought counts of libel, false light, commercial misappropriation, negligence, and wantonness. Defendants moved for summary judgment on all counts, and the claims of libel, negligence, and wantonness were dismissed. Defendants also moved to have the production played in its entirety at the beginning of *voir dire*. The Court granted the motion to expedite the *voir dire* process by eliminating the need to question the jury as to their knowledge of each person portrayed and the events involved. The ruling was critical to Defendants' attempts to place Plaintiff's complaints in context.

9. Significant Mid-Trial Rulings:

One of the witnesses that Plaintiff planned to call was Ramsey Clark, the former Attorney General of the United States. Defendants were able to have him excluded as a witness because of Mr. Clark's insufficient knowledge of Plaintiff's depiction in the movie.

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

None. A general verdict form was issued and bifurcation was denied.

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

We conducted jury research prior to trial, which resulted in defense verdicts.

12. Pretrial Evaluation:

The case carried peculiar risks due to Plaintiff's heroic role in the Civil Rights Movement and the terrible events of Bloody Sunday that occurred less than 90 miles from the Courthouse. Defendants believed that the overall nature of the production, and its depiction of Plaintiff, were positive; however, Defendants had actual knowledge of the inaccuracies regarding Plaintiff's depiction before filming began. This presented the greatest risk and gave Defendants no more than a 50% chance of success. Plaintiff's pretrial demand was $10 million. Defendants offered a nominal sum.

13. Defense Juror Preference During Selection:

Educated jurors who embraced the Civil Rights Movement, but who themselves played no actual role.

14. Actual Jury Makeup:

8 women, 4 men. 3 African American jurors, 9 white jurors. The education level of the jury was lower than ideal, but the jurors selected had a positive view of the lead defendant, Walt Disney Pictures and Television.

15. Issues Tried:

The false light count was tried and made it to the jury.

16. Plaintiff's Theme(s):

First and foremost, Plaintiff tried to argue that the movie was made for commercial purposes, and Disney was only interested in making money. Second, Plaintiff identified several factual inaccuracies in the movie, in order to show that the defendants were sloppy and had no respect for the historical significance of the Voting Rights Movement. Finally, Plaintiff went to great lengths to show that she is an accomplished and important person, she worked her whole life to develop an outstanding reputation, and that Disney disregarded her reputation in making the movie.

17. Defendants' Theme(s):

Our primary theme was that the movie, which was shown on *The Wonderful World of Disney*, was made for kids. Obviously, a movie for kids cannot capture all the complexities of the Voting Rights Movement. Things have to be simplified, a movie has time constraints, it cannot have graphic violence, etc. The main idea was to give little kids an idea of what happened during that time. The movie accomplished that goal.

Because Plaintiff is a public figure, we also emphasized that malice was a required element in the case. We used the word malice repeatedly in closing argument, which registered with the jury.

We also emphasized that the movie was a docudrama, rather than a documentary, allowing for some degree of artistic license.

Finally, the movie producers called Plaintiff prior to the movie and asked her to visit the movie set. She declined and said she was "not interested." One of our major themes was that it was unfair for her to decline our invitation to be part of the movie, and then sue for millions of dollars.

18. Factors/Evidence:

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

We decided that we wanted the jury to see the movie before Plaintiff counsel had an opportunity to put his spin on it. The judge granted our request to show the entire movie to the panel at the beginning of *voir dire*. We believe the panel saw the movie exactly the way we wanted – a movie made for kids. We are convinced that before the trial even started, the jury members saw the movie in its proper context.

b. Sympathy for plaintiff during trial:

The jury had extreme respect and affection for the Plaintiff. She has an amazing history and has numerous accomplishments in the Civil Rights Movement. At the end of the trial, every jury member made a special effort to give her a hug.

c. Proof of actual injury:

The primary injury was mental anguish. Plaintiff said she had to defend herself all over the world because of the movie. She said that people called her a fraud, and that she suffered greatly. She had no out of pocket damages.

d. Defendants' newsgathering/reporting:

Fact checkers for Defendants confirmed that Plaintiff's depiction was inaccurate.

e. Experts:

While there were no official "experts" in the case, there were two witnesses who were the equivalent of experts. As the first witness in the case, Plaintiff called J.L. Chestnut, a prominent African-American civil rights attorney who lived through the Voting Rights Movement in Selma. Mr. Chestnut is a very charismatic gentleman with a very commanding presence. He has been good friends with Plaintiff since his childhood. He not only served as a character witness for Plaintiff, but he is an expert in the Voting Rights Movement, and he made it very clear that he thought the movie did not do it justice.

Second, Dr. Bernard Lafayette was a witness. Like Mr. Chestnut, Dr. Lafayette lived in Selma during the Voting Rights Movement and has been friends with Plaintiff for nearly 50 years. Dr. Lafayette was one of the original "Freedom Riders," and has been a leader in the Civil Rights Movement his entire adult life. He has a PhD in education from Harvard, and has served as a principal, college professor, and college president.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff counsel was the son of Plaintiff. He was a very likeable person who gained points from the jury as they saw him as trying to fight for his mother.

ii. Defendants' trial demeanor:

Defendant, Leah Keith, a Disney executive was the sole defense representative at trial. Her demeanor was impeccable.

iii. Length of trial:

Four days.

iv. Judge:

Tennant Smallwood.

h. Other factors:

19. Results of Jury Interviews, if any:

Jurors embraced Plaintiff, but agreed that Defendants' conduct did not rise to the level of false light. The jurors' positive view of *The Wonderful World of Disney* played a significant role. Their general perception was that, however flawed, the production was an attempt to educate children on the complex issues presented.

20. Assessment of Jury:

Average.

21. Lessons:

1) Viewing of the entire production at the beginning of *voir dire* was critical. It gave the jurors both the proper context and an understanding of Defendants' motivations in launching the project.

2) Plaintiff's leading role in the Civil Rights Movement could not be avoided. Defendants' position that Plaintiff was, indeed, a heroic figure who they were attempting to honor proved to be key. The issue of race, and the State of Alabama's abysmal record in that regard, was taken head on. Jurors, both in *voir dire*, and following the trial, expressed their appreciation for the frank discussion of racial issues.

22. Post-Trial Disposition:

New Trial Motions filed by Plaintiff denied. Appeal dismissed by Alabama Supreme Court

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J. Case Name: *Thermal Engineering Corp. v. Boston Common Press Limited Partnership and Cook's Illustrated*

Court: Court of Common Pleas for Richland County, S.C.
Case Number: 2004-CP-40-2202
Verdict rendered on: June 1, 2005

1. Name and Date of Publication:

Cook's Illustrated August 2003.

2. Profile:

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

3. Case Summary:

Magazine published a review of gas fired grills. Plaintiff is a manufacturer which thought its grill had been falsely characterized and unfairly compared to a less expensive grill. A libel suit ensued.

4. Verdict:

Directed verdict in favor of defendants.

5. Length of Trial:

Two days.

6. Length of Deliberation:

None.

7. Size of Jury:

Twelve.

8. Significant Pre-Trial Rulings:

Plaintiff was a public figure under South Carolina law requiring application *of New York Times* actual malice rule.

9. Significant Mid-Trial Rulings:

Verdict was directed for defendants at close of plaintiff's evidence.

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:

Based on plaintiff's likely status as a public figure, it was thought that proof of actual malice would not be possible

13. Defense Juror Preference During Selection:

Middle age and older jurors with post-high school education.

14. Actual Jury Makeup:

Eight women, four men. Slightly above-average education

15. Issues Tried:

Falsity and damages.

16. Plaintiff's Theme(s):

Testing on grill was not performed correctly and results were reported inaccurately which resulted in lesser demand for the grills in the market.

17. Defendant's Theme(s):

Testing was objective and article was supported by testing.

18. Factors/Evidence:

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

Unknown.

b. Sympathy for plaintiff during trial:

Not expressed.

c. Proof of actual injury:

Loss of sales claimed, but undocumented.

d. Defendants' newsgathering/reporting:

Testing done in conjunction with Consumer Reports.

e. Experts:

None.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Little if any libel trial experience.

ii. Defendant's trial demeanor:

Positive.

iii. Length of trial:

Two days.

iv. Judge:

John Breeden.

h. Other factors:

19. Results of Jury Interviews, if any:

None.

20. Assessment of Jury:

Solid jury.

21. Lessons:

All publications, even cooking magazines, need to develop procedures for responding to persons unhappy with articles. This suit was baseless, and maybe a conversation between the chief executive officer of the plaintiff and an editor might not have had any influence, but it might have been better to have had such a conversation.

22. Post-Trial Disposition:

Motion for new trial denied. Defendants' motion for attorney fees denied.

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K. Case Name: *Kent Trainor v. The Standard Times*

Court: Washington County Superior Court, Wakefield, Rhode Island
Case Number: WC/2003-295
Verdict rendered on: February 13, 2006

1. Name and Date of Publication:

The Standard Times Newspaper, March 15, 2001, Police Beat.

2. Profile:

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

3. Case Summary:

Newspaper articles reported plaintiff's arrest by Town of North Kingstown, Rhode Island police on a charge of driving after suspension of his license and then also on a warrant for failing to appear in court for a payment schedule on a prior charge of leaving the scene of an accident, death resulting. Plaintiff sued the newspaper for defamation and negligent infliction of emotional distress because the prior charge was leaving the scene of an accident injury/death resulting, with injury but no death involved.

4. Verdict:

Trial judge granted defendant newspaper's motion for judgment for defendant as a matter of law at the conclusion of plaintiff's case.

5. Length of Trial:

Four days.

6. Length of Deliberation:

N/A.

7. Size of Jury:

Eight.

8. Significant Pre-Trial Rulings:

Defendant's pre-trial motion for summary judgment was denied by another motion calendar judge on the grounds that Rhode Island courts had not yet ruled on the issue of qualified privilege.

9. Significant Mid-Trial Rulings:

Trial judge granted defendant newspaper's motion for judgment as a matter of law (or directed verdict) at the conclusion of plaintiff's 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):

N/A.

12. Pretrial Evaluation:

Defendant newspaper's defense counsel did not believe or feel that plaintiff had a strong case, because the newspaper article in question was a substantially accurate account taken from a North Kingstown Police Department police report of the incident.

13. Defense Juror Preference During Selection:

Older mature jurors with solid family backgrounds.

14. Actual Jury Makeup:

Four males, four females.

15. Issues Tried:

Libel, defamation, negligent infliction of emotional distress, damage.

16. Plaintiff's Theme(s):

Defendant newspaper was reckless and negligent in publishing that plaintiff had a prior arrest for leaving the scene of an accident, death resulting, when there was no death involved.

17. Defendant's Theme(s):

The newspaper article in question was a substantially correct report of a police department record to which a qualified privilege was attached.

18. Factors/Evidence:

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

b. Sympathy for plaintiff during trial:

c. Proof of actual injury:

Plaintiff could not prove any damages directly arising out of this publication, since he had been previously treated for psychiatric problems prior to the date of publication.

d. Defendants' newsgathering/reporting:

The newspaper article in question was based upon a police department report of the incident and arrest in question which was a substantially accurate account of the information in that police department report which was a matter of public record.

Plaintiff argued that once the newspaper reporter saw the word "death" in the police report, he had a duty or obligation to look further into the charge and the facts.

e. Experts:

Plaintiff presented an expert, Jonathan Klarfeld, a professor of journalism at Boston University, who testified that in his opinion that once the reporter saw the references to death in the police report, he should have inquired and pursued that allegation further and that the newspaper's failure to do so constituted a breach of journalistic standard of reasonable degree of care.

f. Other evidence:

Plaintiff presented medical reports and a psychiatric nurse practitioner to seek to substantiate his claim of psychiatric disorders arising directly out of this publication. In our opinion, because of plaintiff's prior psychiatric treatment before the date of publication of the article in question and the fact that most of his subsequent psychiatric consultations and treatment were distant in time with incomplete histories, plaintiff through his medical evidence and medical witness testimony as presented was unable to causally relate or connect the subsequent care, treatment, and condition to the newspaper article in question. (Court never got to the issue of damages.)

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff and plaintiff's counsel were at plaintiff's trial table.

ii. Defendant's trial demeanor:

Defendant had trial counsel and his associate at defendant's trial table with the publisher of defendant newspaper.

Defendant raised the defense of the qualified privilege of neutral and fair reporting of a matter of public record, *i.e.*, police report.

iii. Length of trial:

Four days.

iv. Judge:

Judge Rubine, in a detailed and well-reasoned decision, held that the newspaper and the reporter had a qualified privilege in the fair and neutral reporting of the content of the public police record and that the newspaper article was a substantially accurate reporting of the content of the police report and that there was no evidence of any ill-will or spite towards plaintiff on the part of the newspaper in the publication of this article.

h. Other factors:

19. Results of Jury Interviews, if any:

20. Assessment of Jury:

21. Lessons:

22. Post-Trial Disposition:

Plaintiff has filed an appeal to the Rhode Island Supreme Court.

Plaintiff's Attorneys:

Defendant's Attorneys:

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L. **Case Name:** *J.P. Turnbull, et al. v. American Broadcasting Companies, et al.*

Court: United States District Court, Central District of California
Case Number: CV 03-3554 SJO (FMOx)
Verdict rendered on: October 28, 2004

1. Name and Date of Publication:

ABC 20/20, "Pay To Play," aired on November 8, 2002.

2. Profile:

a. Print____; TV __X__; other_____.
b. Plaintiff: public____; private __X__.
c. Newsgathering tort __X__; Publication tort_____.

3. Case Summary:

The case arose out of an investigative report by Brian Ross about charges by the California Department of Labor against promoters of "acting workshops," where aspiring actors paid a fee to perform a short reading in front of a casting director. An associate producer for ABC with some acting experience, wearing a hidden camera, attended and participated in several workshops. Some of the footage was contained in a story broadcast on 20/20 in November 2002.

The thirteen actor plaintiffs alleged that ABC News's newsgathering efforts at the workshops amounted to unlawful eavesdropping under Penal Code § 632, common law intrusion, and physical and constructive intrusion under Civil Code § 1708.8. The fourteenth plaintiff owned and operated one of the workshops and alleged that ABC News had committed trespass.

4. Verdict:

Verdict for defense on all claims.

5. Length of Trial:

10 days.

6. Length of Deliberation:

4-5 hours.

7. Size of Jury:

Nine.

8. Significant Pre-Trial Rulings:

Summary judgment motion denied in an opinion that was harshly critical of ABC News and that was, unfortunately, published at 32 Media L. Rep. 2442 (2004).

As a result of motions *in limine*, plaintiffs were barred from introducing evidence or argument regarding other cases where ABC News had been sued for using hidden camera, and they were also barred from showing the jury any hidden camera footage that did not include at least one of the plaintiffs.

9. Significant Mid-Trial Rulings:

The Court declined to enforce a subpoena on a non-party (an independent cameraman) that: (1) was for a trial date that had passed; and (2) was not accompanied by travel expenses. The Court subsequently denied plaintiffs' request that they be permitted to supplement their pre-trial deposition designations to include video excerpts from the cameraman's deposition.

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

The Court imposed time limits on the parties (900 minutes per side) that frustrated plaintiffs' counsel, Neville Johnson.

Determination of the amount of punitive damages was bifurcated. As a result of a motion *in limine*, plaintiffs were barred from introducing evidence of ABC's net worth in support of their claim for punitive damages unless and until liability was established. Plaintiffs were also unable to put a damage figure on their alleged emotional distress when testifying because of their refusal to provide such figures in their Rule 26 initial disclosures.

The jury instructions the judge adopted showed a changed understanding of the legal issues from that reflected in the summary judgment ruling.

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

Nothing beyond some consideration of how particular plaintiffs might be viewed by particular jurors. Plaintiffs' counsel appeared to have as a goal the removal of Asian-Americans from the panel.

12. Pretrial Evaluation:

In light of the subject matter of the trial and the flamboyance and passion of plaintiffs' counsel, we anticipated that the trial was likely to be an entertaining roller coaster ride, and we hoped that the trial judge would change his mind about the merits of the parties' claims and defenses after seeing the evidence. We also believed that the plaintiffs had suffered no actual damages and would have difficulty maintaining their credibility if they testified to substantial emotional distress.

13. Defense Juror Preference During Selection:

We wanted to avoid angry people, and we were hoping for a fairly intelligent jury.

14. Actual Jury Makeup:

Five women, four men. Seven of the nine appeared to be Caucasians, and the remaining two women appeared to be Latinas. Seven of the nine were married; the remaining two were divorced. Two of the jurors appeared to be over 60 years old. The foreperson that the jury selected was a man who appeared to be Caucasian and in his late 40s to early 50s.

15. Issues Tried:

- Whether any of the plaintiffs had a reasonable expectation of privacy in their conversations and conduct at the acting workshops where the hidden camera taping occurred.
- Whether ABC actually and intentionally taped conversations or conduct that captured the plaintiff's personal or private affairs.
- Whether ABC intentionally recorded any of the plaintiff's conversations using an electronic device and, if so, whether a reasonable person would have expected that the conversation(s) may be overheard and/or recorded.
- Whether ABC's conduct would be highly offensive to a reasonable person.
- Whether ABC's conduct was a substantial factor in causing harm to any of the plaintiffs.
- Whether clear and convincing evidence shows that ABC was guilty of malice, fraud, or oppression in its conduct.

16. Plaintiff's Theme(s):

Plaintiffs' intended theme was that ABC was a "serial abuser of the right to privacy." The defense was successful in using a motion *in limine* to prevent plaintiffs from introducing evidence or argument about other instances where ABC had been sued for using hidden camera. At trial, plaintiffs' actual theme appeared to be that ABC's hidden camera taping and the manner in which it had edited the footage in the broadcast were intended to humiliate the plaintiffs in order to boost ABC's ratings. Plaintiffs pointed, for example, to ABC's decision to use footage of one of the plaintiffs performing an imitation of a chicken, while another plaintiff appeared to stumble during her audition.

17. Defendant's Theme(s):

We demonstrated that ABC was acting in the public interest in investigating the workshops in order to resolve a conflict between the California Department of Labor, which had declared them to be unlawful paid auditions, and the workshop owners, who had denied the charges and asserted that the workshops contained substantial teaching. We showed that the hidden camera was a tool that Brian Ross and his team were justified in using because the known presence of a camera would have changed what happened at the workshops and prevented the public from finding out the truth.

18. Factors/Evidence:

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

A number of the jurors identified themselves during *voir dire* as regular watchers of TV news. No perceived bias in any direction, but the *voir dire* was minimal.

b. Sympathy for plaintiff during trial:

No obvious signs were noted. Plaintiffs' counsel reported at one point that one of the jurors was mimicking him during his examination of his clients.

c. Proof of actual injury:

The only compensatory damages plaintiffs sought were for emotional distress. No medical expert or treating physician testified on behalf of any of the plaintiffs. No significant others or friends testified to corroborate the plaintiffs' individual claims of emotional distress, although some had been named on plaintiffs' witness list. A few of the plaintiffs testified that their dosages of the anti-depressants they had already been taking were increased in the wake of the ABC broadcast.

d. Defendants' newsgathering/reporting:

We were able to demonstrate that ABC News had taken steps to avoid taping private conversations or images.

e. Experts:

For the plaintiffs, Earl Robert Lissit, Professor of Broadcast Journalism, Northwestern U. (Medill Sch. of J.). Professor Lissit testified that ABC News was not justified under accepted principles of journalistic ethics in using a hidden camera in this case, but he acknowledged that hidden cameras are appropriate tools in some circumstances and that he had once used surreptitious photography when he was an NBC producer in Chicago.

Steve Weinberg, Professor of Magazine Journalism, MO School of Journalism, rebutted the testimony of plaintiff's expert for the defense.

f. Other evidence:

Much hidden camera footage was shown. Each plaintiff testified about his or her humiliation in seeing the footage. The judge barred plaintiffs from showing hidden camera footage that did not show any of the plaintiffs. The judge allowed use of clips from other media that showed that plaintiffs were not careful about the public display of their images and voices.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' counsel, Neville Johnson, tried to incite the jury to anger at ABC News, primarily for the use of a hidden camera, and he was overtly antagonistic to the ABC witnesses and counsel. Johnson is known as a crusader against hidden cameras, *e.g.*, Saunders, Med Labs, Hornberger.

ii. Defendant's trial demeanor:

Defense counsel sought to undermine the credibility of the plaintiffs without appearing mean-spirited. Brian Ross was a fabulous witness who provided a powerful defense of the journalistic need for hidden camera techniques.

iii. Length of trial:

Ten days.

iv. Judge:

The Honorable S. James Otero, U.S. District Court for the Central District of California

h. Other factors:

The jury instructions contained several significant and useful instructions that were not contained in form books or that differed from the form instructions. The instructions are on file with the MLRC.

19. Results of Jury Interviews, if any:

No jury interviews were conducted.

20. Assessment of Jury:

They seemed fair and balanced.

21. Lessons:

Roller coasters can be fun. While an average juror may dislike or distrust the media at some level, he or she may be willing to support a strong, articulate journalist whose work demonstrates care and thoroughness.

22. Post-Trial Disposition:

Plaintiffs relinquished their right to appeal the judgment in exchange for a waiver by ABC News of the costs the Court had ordered plaintiffs to pay.

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M. Case Name: *Thomas Workman v. Eric Serrano and Chanhassen (MN) Villager*

Court: Carver County (MN) District Court
Case Number: 10-CV-03-579
Verdict rendered on: December 22, 2004

1. Name and Date of Publication:

Chanhassen Villager editorial, "The Right Foot," January 23, 2003.

2. Profile:

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

3. Case Summary:

Plaintiff Tom Workman is a prominent elected official in the southwest metropolitan area of the Twin Cities. In November of 2002, he was elected to the Carver County Board, took his seat in January of 2003, and was elected chairman of the Board. At the first substantive meeting Workman and two other board members voted to fire the long-time county administrator without any debate.

Defendant Eric Serrano, editor of the weekly Chanhassen Villager, wrote an editorial blasting the move, questioning whether the firing was the result of past actions by the county in a lawsuit filed against a company that employed Workman. Workman took offense and sued for libel, alleging that this editorial and other articles written about him were actionable. Two statements in the editorial ultimately were at issue: First, the editorial erred in the way it described the lawsuit. Second, the editorial contended that, if the board members continued to reach consensus outside the board room, they could find themselves defendants in a lawsuit alleging they violated state open meeting laws.

In September of 2004, Judge John Connolly dismissed all of Workman's claims except the two arising out of the editorial. The case proceeded to trial in December of 2004.

4. Verdict:

$225,000 awarded to plaintiff for past injury to reputation.
$200,000 awarded to plaintiff for future injury.
$200,500 awarded to plaintiff for punitive damages.

5. Length of Trial:

Six days.

6. Length of Deliberation:

One day.

7. Size of Jury:

Six jurors, one alternate.

8. Significant Pre-Trial Rulings:

Judge Connolly denied defendants' motion for summary judgment as to the two statements in the editorial.

Judge Connolly said that a jury could find that the two statements in the editorial were statements of fact, and that enough evidence existed to support a finding that the statements were published with actual malice. Based on this evidence, Judge Connolly also ruled that plaintiff could seek punitive damages. Finally, Judge Connolly ruled that plaintiff could present expert testimony as to defendant's lack of professional care.

9. Significant Mid-Trial Rulings:

During trial, Judge Connolly ruled that Workman and his supporters could testify that others, not in court, voiced concerns about his reputation. That testimony was the only testimony he presented on damages.

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

There were no major management issues. The punitive damage phase began as soon as the jury returned its first verdict. Since the jury was not aware that this second phase might be used, the consequential damage awards may have been higher because of a "punishment" factor.

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

None.

12. Pretrial Evaluation:

At trial, Serrano changed his testimony from that he gave during his deposition about what articles he reviewed prior to preparing his editorial. Had he read certain articles, he would have been made aware of facts that would have contradicted what he wrote. Just

before trial, Serrano informed counsel that his deposition testimony was not accurate. At that point, the evaluation of the ultimate chance of success for defendant was very bleak.

13. Defense Juror Preference During Selection:

Carver County skews older and is very conservative. The jury panel picked for this case was very young. Defendants didn't have enough strikes to remove the youthful jury members.

14. Actual Jury Makeup:

Except for one retired juror in his 60's, the jurors were under 30, hourly workers, unsophisticated and minimal media users.

15. Issues Tried:

Truth, actual malice, damages.

16. Plaintiff's Theme(s):

Plaintiff's theme was that he was a hard working public servant done in by a reckless editor who disagreed with plaintiff's politics and "had it in for him."

17. Defendant's Theme(s):

Defendants' theme was that a good faith mistake was made, which was corrected, and that the underlying criticisms in the editorial were legitimate.

18. Factors/Evidence:

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

None.

b. Sympathy for plaintiff during trial:

There was less real sympathy for plaintiff than there was antipathy for the editor.

c. Proof of actual injury:

Plaintiff had no real proof of actual injury. He was allowed to testify to hearsay comments by third parties.

d. Defendants' newsgathering/reporting:

Defendants' newsgathering was sloppy, the editor's preparation of the editorial was very sloppy or worse and his editorial was overwritten.

e. Experts:

Plaintiff's expert, Michael Cowling, U of WI Oshkosh, testified over objection that the editor's preparation and writing of his editorial did not conform to professional standards. He had no opinion on the editor's reckless disregard for the truth.

f. Other evidence:

The change of testimony with respect to what the editor knew when he wrote the editorial was devastating.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel was the state senator for that jurisdiction. She was emotional, but tried a fairly conservative case.

ii. Defendant's trial demeanor:

The editor came across as unprofessional. The jury made up its mind as soon as he was finished.

iii. Length of trial:

The trial ended just before the Christmas holiday. The jury really wanted the case to be over. While speculative, the jury's impatience may have affected the damage award.

iv. Judge:

The judge made mistakes on matters of law, but was not a factor in trial dynamics.

h. Other factors:

The jury found liability quickly, but struggled on damages. The high numbers seem to underscore the difficulties in assessing libel damages.

19. Results of Jury Interviews, if any:

None.

20. Assessment of Jury:

The jury found fault from a common sense standpoint. It had no guidelines from the court with respect to damages, and went high rather than low. The jury had no appreciation for the "public policy" points raised by defendants.

21. Lessons:

This was an unusual case as a matter of fact, and little can be learned from this trial, expect that jurors do not, and will not, get the concept of actual malice. Instructions are inadequate to explain the importance of the standard.

22. Post-Trial Disposition:

The Minnesota Court of Appeal ruled that the editor's erroneous statement suggesting that plaintiff's firing of the county commissioner was caused by bad feelings from a prior lawsuit was defamatory, and could have been published with actual malice. The Court of Appeals threw out plaintiff's claim that he was defamed by the statement in the editorial that reaching consensus outside the county boardroom could bring about a lawsuit. Because the trial court did not separate the statements on the special verdict form, the Court of Appeals ruled that causation and damages were found to exist by the jury with respect to the single remaining statement. The case was returned to the trial court for further proceedings.

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N. Case Name: *George Young v. WKYC TV, Inc., Gannett Co., Inc., Richard Russ and Timothy White*

Court: Lake County, Ohio Court of Common Pleas
Case Number: 02CV0974
Verdict rendered on: February 17, 2006

1. Name and Date of Publication:

February 20 and 21, 2002 broadcasts on WKYC TV, Inc., Channel 3 in Cleveland

2. Profile:

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

3. Case Summary:

Plaintiff was employed by the Painesville City Board of Education as head custodian/lunchroom monitor at an elementary school. In February 2002, plaintiff was involved in two separate incidents that led to allegations of the use of excessive force in disciplining students in the lunchroom. A concerned parent contacted WKYC, alleging that plaintiff "was manhandling students in the lunchroom."

A WKYC reporter investigated the accusations and interviewed parents and several children who confirmed the allegations. One child interviewed on camera claimed plaintiff "lifted him up by the neck." The other child alleged that he was "choked up" when the plaintiff picked him up by his shirt.

The reporter then met with school officials and was told that they were investigating the matter. The school officials indicated that there were some "inconsistencies" between the children's stories and what they believed occurred, but did not elaborate on any details. The same day, the reporter attempted to interview the plaintiff outside his home. The plaintiff refused to be interviewed on camera, but gave the reporter a short interview, including a general denial that he used any excessive force with the students.

The next day, one of the children's parents called the police, and a police officer interviewed her son in the principal's office. According to the police officer, the child "recanted" his allegation that he had been picked up by the neck during his altercation with the plaintiff and admitted that he made this up to avoid getting into trouble for his bad behavior.

The school principal, who was present for the police officer's interview of the child, testified in deposition (and at trial) that she told the reporter about the child's recantation prior the broadcast. She also stated that the reporter disregarded her statements because he "wanted to believe the children" and "was not looking for the truth." The reporter and the school district's superintendent (who was present at the reporter's meeting with the principal where she alleged she told him of the police officer's interview) both denied that the principal told the reporter about the police officer's interview of the student.

Later that day, the school district sent a letter home to the parents informing them that "the local media is investigating an allegation against one of the staff members at the [school]." The letter also indicated that the school district was opening a formal investigation and that during the investigation the staff member would be temporarily reassigned to an

assignment that did not involve direct contact with students. The same parent who initially called the TV station sent the reporter a copy of the school district's letter that evening.

That night WKYC broadcast the first of two reports on the matter. The report described the alleged incidents involving the children, noted that the school was investigating and included plaintiff's denial of the allegations.

The next day, the reporter accompanied the parents of the child who had not previously been interviewed by the police to the police station where they made a formal complaint. While at the police station, the reporter was denied access to the police officer and therefore was not told of the other child's alleged "recantation."

That night WKYC aired another story with the by-line "abuse allegations." The second story reported on the parent's filing of the criminal complaint against the plaintiff. The second report again included plaintiff's denial of the allegations.

During the next several days, the police concluded their investigation and determined that no charges would be filed against plaintiff. About three weeks later, the school completed its investigation and concluded that plaintiff had not engaged in unlawful or excessive behavior. On March 13, 2002, the school district sent another letter home to parents informing them of the police department's and school district's findings. The reporter obtained a copy of this letter and prepared a follow up; however, the follow up was not broadcast.

4. Verdict:

Defense verdict on truth.

5. Length of Trial:

Two weeks.

6. Length of Deliberation:

About five hours.

7. Size of Jury:

Eight.

8. Significant Pre-Trial Rulings:

In August 2003, the trial court granted summary judgment. Although the trial court found the plaintiff was a private figure, it also determined that plaintiff could not sustain its

burden on the issue of negligence: i.e. there was no genuine issue of material fact that the reporter was not negligent in his investigation.

In June 2005, a divided court of appeals reversed, and reinstated the case. *Young v. Russ,* 2005 WL 1538103, 33 Media L. Rep. 2159 (Ohio App. June 30, 2005). The appellate court found a genuine issue of fact existed over whether the reporter knew prior to broadcast that one child recanted his allegations against plaintiff. The appellate court affirmed summary judgment for Gannett and WKYC's anchor.

On remand, the trial court made a number of important evidentiary rulings. First, it granted defendants' motion *in limine* to exclude all evidence related to defendants' non-publication of a follow up or retraction. Plaintiff's counsel repeatedly challenged this ruling, and during trial the court issued a short opinion reaffirming its ruling. In its ruling, the court explained that plaintiff could offer post-broadcast evidence to prove falsity, but not negligence, because libel is temporal in nature and post-broadcast conduct is not relevant to negligence at the time of broadcast.

Defendants also moved to exclude expert testimony on the standard of care because the Ohio Supreme Court has explicitly rejected a professional standard of care for reporters, and adopted ordinary negligence. The court denied defendants' motion relating to expert testimony.

9. Significant Mid-Trial Rulings:

The court denied motions for directed verdict on all claims, including the punitive damages, at the close of plaintiff's case and at the close of the evidence.

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 for defendants. Plaintiff used a jury consultant during voir dire.

12. Pretrial Evaluation:

Pretrial settlement talks were not fruitful as the gap between the parties was in excess of seven figures.

13. Defense Juror Preference During Selection:

Well educated, experienced with primary education and media.

14. Actual Jury Makeup:

Two primary education administrators were struck by plaintiff. Jury consisted of six women and two men.

15. Issues Tried:

Trial Court accepted defendants' jury interrogatories on defamation, including the following elements: (1) truth; (2) negligence; (3) actual malice; (4) damages. Because the jury returned a defense verdict on truth, they did not reach other issues.

16. Plaintiff's Theme(s):

Plaintiff's theme was that the defendants' broadcast accused him of the criminal offense of child abuse without a proper investigation, and in the face of the school principal's testimony that she told the reporter about one of the children's "recantation." Plaintiff focused on the unreliability of the children who were interviewed and the reporter's alleged failure to find adult sources (other than the plaintiff) and the testimony of the school principal relating to her conversation with the reporter. Plaintiff also called the reporter, the station's producer of the broadcast and executive producer on cross-examination to attempt to establish the station's lack of supervision.

17. Defendant's Theme(s):

Defendants focused on the reporter's professional and extensive investigation of the story, including numerous interviews and follow up, and his general credibility. Defendants also focused on the information supplied by the school district and the status of the school district's investigation prior to the broadcast. The testimony of the school district's superintendent, who was an extremely credible witness, was pivotal in this regard. The superintendent also supported the reporter's testimony relating to the conversation with the school principal.

18. Factors/Evidence:

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

None in particular

b. Sympathy for plaintiff during trial:

Plaintiff was a sympathetic witness. He did not greatly overstate the case in testimony, but counsel's arguments in this regard were hyperbolic.

c. Proof of actual injury:

Virtually none (three days of sick leave). In addition to plaintiff, his wife, sister, brother in law and the school principal testified about his emotional damages, and non-economic difficulties at work after the broadcasts. In closing argument, plaintiff's counsel requested $5 million in compensatory damages and $5 million in punitive damages, despite the lack of any economic damages.

d. Defendants' newsgathering/reporting:

Defendants emphasized the reporter's extensive investigation, which included five trips for witness interviews.

e. Experts:

Professor Kent Collins of the University of Missouri School of Journalism testified on behalf of the plaintiff, and Virgil Dominic, the former anchor, news director and general manager of WJW in Cleveland, testified on behalf of defendants.

f. Other evidence:

As part of Mr. Collins' testimony, plaintiff introduced ethical guidelines promulgated by the Radio-Television News Directors Association (RTNDA) over defendants' objection. The Court admitted the guidelines, but included a limiting instruction in the jury instructions that:

> "[RTNDA] guidelines were not promulgated or mandated by any governmental agency, and there is no binding legal effect to the guidelines with respect to establishing what ordinary care means under the circumstances of this case. Certain aspects of ordinary care may be contained within the guidelines, and the guidelines may contain standards that exceed ordinary care or that are below ordinary care. It is solely your province to determine what the standard of ordinary care means under the circumstances of this case. Ordinary care, as you determine it to be, may require more care or less care than that degree of care contained in the guidelines."

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel was a successful and seasoned plaintiff's trial attorney with significant experience trying defamations cases. His cross-examinations were extremely argumentative and aggressive. Plaintiff's counsel's daughter sat second chair.

ii. Defendant's trial demeanor:

Professional.

iii. Length of trial:

Approximately two weeks.

iv. Judge:

Eugene Lucci. First defamation case. Hard working, conscientious and able; however at times he had difficulty reigning in plaintiff's counsel.

h. Other factors:

19. Results of Jury Interviews, if any:

Jury believed both plaintiff and defendant were credible and sympathetic. They were not impressed with plaintiff's expert.

20. Assessment of Jury:

Jury was attentive and professional.

21. Lessons:

No trick to this win except very thorough preparation.

22. Post-Trial Disposition:

Plaintiff's appeal pending.

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O. SUMMARY REVIEWS

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

1. Case Name: *Mark Adams v. Fox Interactive Television, LLC*

Court: U.S. Dist. Ct., D. Mass
Case Number: 01-10523
Verdict rendered on: November 11, 2003

a. Name and Date of Publication:

Amateur videotape submitted and aired on Fox program "You've Gotta See This," circa March 2000.

b. Profile:

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

c. Case Summary:

Mark Adams, Sr. was assisting the coach of his son's youth hockey team during a game on February 22, 2000. While Adams was helping to clear the ice after some pushing by various players, one of the opposing players fell to the ice after an altercation with Adams. Adams claimed that he stopped the player from hitting his son from behind, causing the player to fall. A videotape of the incident was submitted to the Fox Sports program "You've Gotta See This," and was shown on the cable channel and on the channel's website. Plaintiff claimed that the video had been manipulated to make it seem that he attacked the player, and that the program's narration called him an "out of control madman" who "blindsided an eight-year-old child with a blistering blow."

d. Verdict:

For plaintiff, $1 million compensatory damages.

e. Length of Trial:

Five days.

f. Length of Deliberation:

Unknown.

g. Size of Jury:

Unknown.

h. Issues Tried:

Libel, falsity, negligence, damages.

i. Notes:

j. Post-Trial Disposition:

Defense motion for JNOV denied, motion for new trial denied on condition that plaintiff accept a remittitur to $350,000 (D. Mass. Aug. 16, 2004). Plaintiff accepted the remittitur, there was no appeal.

Plaintiff's Attorneys:

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John E. Sutherland
Brickley Sears & Sorett, P.A.
Boston, MA

Defendant's Attorneys:

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2. Case Name: *Aficial v. Mantra Films*

Court: Virginia Circuit Court, Virginia Beach, VA
Case Number: CL04003288-00
Directed verdict entered: June 29, 2005

a. Name and Date of Publication:

"Girls Gone Wild" video issued in the early 2000s, entitled "Girls Gone Wild: The Seized Video."

b. Profile:

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

c. Case Summary:

Plaintiff Debbie Aficial was at a bar in Norfolk, Virginia, when she and her friend, Aimee Davalle, were approached by cameramen for Mantra Films, producer of the "Girls Gone Wild" video series. Aficial gave verbal permission for them to film her and Davalle kissing, which ended up in the video. Aficial filed under Virginia's "right of publicity" statute, Va. Code § 8.01-40, which requires written consent for use of an individual's likeness for commercial purposes and was deemed applicable. Apparently no nudity was involved.

d. Verdict:

For plaintiff: $150,000 compensatory damages, $60,000 punitive damages.

e. Length of Trial:

Two days.

f. Length of Deliberation:

Two hours.

g. Size of Jury:

Unknown.

h. Issues Tried:

Amount of compensatory damages and entitlement and amount of punitive damages.

i. Notes:

The plaintiff was shown on video providing verbal consent, but this was deemed inadequate under Virginia law. Davalle, who removed her top and was shown on the cover of one edition of the video, as well as on a television advertisement, filed a separate suit under the statute, outcome unknown.

j. Post-Trial Disposition:

No post-trial motions were filed, an appeal was commenced October 26, 2005 (No. 052174).

Plaintiff's Attorneys:

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Stallings & Bischoff
Virginia Beach, VA

Defendant's Attorneys:

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3. Case Name: *Adolfo Krans Bell v. Santarrosa*

Court: PR Super. Court
Case Number: KDP 2002-0545
Bench ruling rendered on: March 7, 2006

a. Name and Date of Publication:

Gossip program, "Super Xclusivo," hosted by a puppet dubbed "La Comay," the creation of puppeteer Antulio "Kobbo" Santarrosa, August 3, 2001.

b. Profile:

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

c. Case Summary:

On the August 3, 2001 program, the puppet, "La Comay" (Spanish slang for "godmother") alleged that Adolfo Krans, who at the time was married to then-Governor Sila Caldarone, was having an extramarital affair, and had given his paramour gifts, including a car and a ring worth $5,000. "La Comay" also displayed a videotape that the puppet claimed proved that the allegations were true. In the suit, Krans and his children sued for defamation, infliction of emotional distress, and outrage. They asked for $5.5 million in damages, a figure based in large part on losses suffered by Adolfo Krans' insurance company, Adolfo Krans & Associates. Santarrosa admitted that the tape did not in fact show Adolfo Krans with another woman. However, Santarrosa claimed that the information was provided to him

by La Comay's (human) co-host on the program, Leo Fernandez, who assured him that the information was true. In discovery, Fernandez, who then worked for a competing program, claimed that he warned Santarrosa about the veracity of the information. (Fernandez was excused from testifying during the trial because he was undergoing treatment for depression and anxiety at a mental institution.)

d. Verdict:

For plaintiff, for $260,000, consisting of $180,000 in compensatory damages to Adolfo Krans and $20,000 to each of his four children (who were not named in the broadcast). The court dismissed Krans' claims for economic damages, even though he had presented three expert witnesses in an attempt to show that he and his insurance company sustained such losses.

e. Length of Trial:

Unknown.

f. Length of Deliberation:

N/A.

g. Size of Jury:

N/A.

h. Issues Tried:

Judge Awilda Mejias Rios ruled that the reputation of a public figure was entitled to more protection than that of a private plaintiff, and that Santarrosa was a journalist and was entitled to the protections that the law gives to members of the press. The court found that Santarrosa violated basic journalistic principles and published the statements about Krans with actual malice.

i. Notes:

There were no experts on journalistic standards.

In refusing to allow economic damages, Judge Mejias determined that there was no causation proven, since in fact the Governor had announced her divorce from Krans.

This was the second-largest libel award after trial in Puerto Rico, after the $1.8 million trial award in *Iris Meléndez Vega v. Elvosaro de Puerto Rico* (now on appeal).

j. Post-Trial Disposition:

The decision has been appealed by all parties to Intermediate Court of Appeals. Televicentro is appealing the finding of liability on the outrage claim and arguing that damages were excessive; Santarrosa challenges the finding of actual malice; plaintiffs claim error in refusing to award economic damages.

Plaintiff's Attorneys:

Anjel Tapia Flores
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Defendant's Attorneys:

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4. Case Name: *Rebecca Brandewyne v. Author Solutions, Inc., d/b/a AuthorHouse*

Court: District Court, Sedgwick County, Kansas
Case Number: 04CV4363
Verdict rendered on: May 8, 2006

a. Name and Date of Publication:

Book entitled *Paperback Poison: The Romance Writer and the Hit Man*, written by Gary D. Brock, Brandewyne's ex-husband, and Brock's current wife, Debbie. The book was published by the defendant, a vanity publisher.

b. Profile:

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

c. Case Summary:

The plaintiff alleged that this book accused Brandewyne of child abuse, adultery, racism, plagiarism, and hiring a hit man to try to kill her ex-husband. It also allegedly revealed private information about other family members.

The defendant is a vanity publisher that maintains a website that claims authors can "bypass the rejection letters and literary agents" and "take advantage of AuthorHouse's comprehensive suite of book promotion tools." AuthorHouse apparently only published 74 copies of the book. Only 3 were sold, but 21 copies were allegedly distributed by Gary

Brock in Kansas. The remaining 50 were pulled by AuthorHouse after Brandewyne complained.

Brandewyne and three other members sued AuthorHouse and the Brocks for libel, publication of private facts, and the tort of outrage. The claims against Gary Brock were stayed after he filed bankruptcy, and those against Debbie Brock were settled.

d. Verdict:

$230,000 compensatory damages, $200,000 for Brandewyne, $10,000 for each of three children, and a determination of liability for punitive damages. Punitive damages were later awarded by the court in the sum of $240,000, $200,000 for Brandewyne and $20,000 each for two of the children.

e. Length of Trial:

Unknown.

f. Length of Deliberation:

Unknown.

g. Size of Jury:

Unknown.

h. Issues Tried:

The court apparently held the plaintiff was a private figure for purposes of her defamation claims, and the jury received a negligence instruction on liability. The jury also determined that actual malice exists and thus that the plaintiffs were entitled to punitive damages. Under Kansas procedure, the amount of punitive damages is later determined by the court. In its ruling awarding punitive damages, the court did not require proof of actual malice under *Gertz* and did not explain why not.

i. Notes:

Plaintiffs presented company records that showed that Brock told AuthorHouse that another publisher had rejected the transcript due to libel concerns, and evidence that AuthorHouse still took no steps to vet the content. AuthorHouse defended in part on the basis of a contractual provision in which they author assumed full responsibility for content. On the private facts claims, the jury apparently agreed that the book contained personal information about the plaintiffs that did not involve any matters of public interest.

j. Post-Trial Disposition:

Post-trial judicial determination of amount of punitive damages under Kansas statutory procedure is made by the court. A hearing on punitive damages was held by the court on May 25, 2006. Judgment was rendered August 11, 2006, finding defendant liable for $240,000 in punitive. Defendants are considering an appeal.

Plaintiff's Attorneys:

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Wichita, KS

Defendant's Attorneys:

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Bernie Keller
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Eldon Boisseau
Wichita, KS

5. Case Name: *Brittany Lowry and Lezlie Fuller v. Hastings Entertainment, Inc., Mantra Films, Inc., The Musicland Group, d/b/a Sam Goody and Sun Coast Motion Picture Co.*

Court: 211th Judicial District Court, Denton County, Texas
Case Number: 2003-30333-211
Verdict rendered on: June 26, 2006

a. Name and Date of Publication:

"Girls Gone Wild" video, released in September 2002.

b. Profile:

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

c. Case Summary:

Plaintiffs were in Panama City, Florida on spring break vacation in March of 2002 when a cameraman, who was working as an independent contractor for Mantra Films, the creator of "Girls Gone Wild," offered "Girls Gone Wild" T-shirts if they exposed their breasts for the camera for three seconds, which they both did voluntarily. Although they were both seventeen at the time, the plaintiffs both signed consent forms stating that they were over eighteen years old. The cameraman told them that their images would not be

televised, an agreement that was memorialized by the two plaintiffs writing "no TV" on the forms. Nevertheless, the footage of Lowry and Fuller appeared in a "Girls Gone Wild" video that was released in September of 2002. Plaintiffs sued for intentional infliction of emotional distress, invasion of privacy, misappropriation, negligence *per se*, unjust enrichment, *quantum meruit*, and intentional and negligent representation. The claims for infliction of emotional distress, invasion of privacy, negligence *per se*, unjust enrichment, *quantum meruit*, and claims brought by the girls' parents were dismissed on summary judgment.

d. Verdict:

For defendants, but the jury rejected the defendants' request for attorneys' fees in the sum of $160,000.

e. Length of Trial:

Six days.

f. Length of Deliberation:

Two hours.

g. Size of Jury:

Twelve.

h. Issues Tried:

Whether Mantra's reliance on the plaintiffs' representation of their ages was reasonable, and whether Mantra committed fraud against plaintiffs by promising that their images would not be televised and allegedly representing that the video would be for private use.

i. Notes:

Musicland was removed from the suit when it filed for bankruptcy, and the claims against Hastings Entertainment were dismissed after no discovery was conducted.

Although the plaintiffs are Texas residents, Judge L.D. Shipman determined that Florida law should apply under the "most significant relationship" test. However, the court apparently ignored Florida law insofar as it arguably permits videotaping of underage persons on public property.

Plaintiff called as experts: Steven Seidman, former porn star and current producer of XXX movies, who testified to alleged inadequacy of defendants' procedures for age verification, and John A. Gray, publisher of XXX magazines, who testified on the same

subject matter to the same effect. Much of the testimony raised the question of the relevance of 18 U.S.C. § 2257 and procedures required thereunder for verifying ages of models for sexually explicit material.

Defense counsel commented to the media after the verdict, "The plaintiffs knew what they were doing; the jury realized there were no drugs, alcohol, or coercion involved in what they did."

j. Post-Trial Disposition:

Plaintiffs have indicated they will appeal.

Plaintiff's Attorneys:

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Denton, TX

Herbert W. Fortson III
Fortson Frasier Siegrist
Houston, TX

Defendant's Attorneys:

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6. Case Name: *Marc Mandell v. The Boston Phoenix, Inc.*

Court: U.S. Dist. Ct., D. Mass.
Case Number: 03-10687
Verdict rendered on: December 17, 2004

a. Name and Date of Publication:

Article, *Boston Phoenix* newspaper and website, circa 2002, entitled "Children at Risk," appearing under the subheading, "Losing Custody to a Child Molester."

b. Profile:

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

c. Case Summary:

An article that appeared in *The Boston Phoenix* newspaper and on its website on custody disputes detailed Sarah Fitzpatrick Mandel's fight over custody of her two children, and described her ex-husband, Marc Mandel, as "a man who Baltimore, Maryland, child protection workers believe is a child molester." The article also stated that the Baltimore

court department of social services had determined that Mandel had assaulted his daughter from a previous marriage. Mandel sued *The Phoenix* for libel in April of 2003.

d. Verdict:

For plaintiff: $950,000 compensatory damages. The jury found that three of the four statements that Mandel complained of were false, and that *The Phoenix* had acted negligently regarding two.

e. Length of Trial:

Ten days.

f. Length of Deliberation:

2½.

g. Size of Jury:

Unknown.

h. Issues Tried:

Defamation, falsity, negligence, damages.

i. Notes:

The trial court (Hon. E. F. Harring, Sr. Judge) determined that the plaintiff was a private figure in a written opinion rendered at the summary judgment stage, *Mandel v. The Boston Phoenix, Inc.*, 322 F. Supp. 2d 39 (D. Mass. 2004). Defendant requested and received an incremental harm instruction but did not prevail on that issue.

j. Post-Trial Disposition:

Defense motions for judgment NOV and new trial denied (D. Mass. Jan. 19, 2005). Case reversed and remanded for new trial by the First Circuit Court of Appeals on July 11, 2006, on the grounds that the plaintiff was erroneously determined to be a private figure on an inadequate summary judgment record. Case No. 05-1230.

Plaintiff's Attorneys:

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Steven J. Cullen
Miles & Stockbridge
Towson, MD

Marilyn Alys Azzarito
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Defendant's Attorneys:

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7. Case Name: *Monroe Y. Mann v. Bernard Abel*

Court: N.Y. Sup. Ct., Westchester Cty.
Case Number: 14180/2003
Verdict rendered on: October 20, 2005

a. Name and Date of Publication:

Column written by defendant published in August 22, 2003 issue of *Rye Brook Westmore News*.

b. Profile:

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

c. Case Summary:

Mr. Mann, in addition to maintaining a private law practice, served as appointed town attorney for the Town of Rye and for the Rye Town Park Commission. The column said that when Mann was a member of the Port Chester School Board, he "was one of the most instrumental" in excluding students from a neighboring district, whose parents paid tuition. "It took the Port Chester school system over ten years to recover from Mann's destructive

actions." The column continued, "Will the town ever recover from Monroe Mann? Is the power behind [Rye Town Supervisor Robert] Morabito's throne leading the Town of Rye to destruction? I think it is." Mann sued for defamation.

d. Verdict:

Bench judgment for plaintiff: $75,000 in compensatory damages and $30,000 in punitive damages.

e. Length of Trial:

Three days.

f. Length of Deliberation:

N/A. This was a bench trial, before New York State Supreme Court Justice Linda S. Jamieson.

g. Size of Jury:

N/A.

h. Issues Tried:

Defamation, falsity, actual malice, compensatory damages, punitive damages.

i. Notes:

Plaintiff's counsel argued for compensatory damages between $300,000 and $500,000.

j. Post-Trial Disposition:

No appeal.

Plaintiff's Attorneys:

pro se, with Francis B. Mann, Jr.
Mann & Bent, P.C.
White Plains, NY

Defendant's Attorneys:

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8. Case Name: *Tuttle, et al. v. Marvin*

Court: U.S. Dist. Ct., D. S.C.
Case Number: 04-00948
Verdict rendered on: January 30, 2006

a. Name and Date of Publication:

Book entitled *Expendable Elite: One Soldier's Journey Into Covert Warfare*, published 2003.

b. Profile:

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

c. Case Summary:

In 2003, Trine Day, a small Oregon-based publisher specializing in conspiracy theory books published this work, written by retired Special Forces officer Daniel Marvin. The book purports to tell of a secret CIA mission in the mid-1960s to assassinate Cambodian Crown Prince Nordum Sihanouk, how Marvin aborted the mission, and how he evaded the CIA's effort to kill him and his team for foiling the plot. Marvin, the book publisher, and book distributor Chicago Review Press were sued by South Carolina resident William Tuttle. The book claims that Tuttle, Marvin's commanding officer in Viet Nam, sent Marvin on the mission. Six former Special Forces soldiers who served under Marvin also joined in the suit. The defendants counter-sued for libel.

The complaint alleged that the book defamed plaintiff by falsely saying that they participated in violations of international law and the Uniform Code of Military Justice. Several plaintiffs later acknowledged that they had cooperated with Marvin by supplying him with recollections of events in Viet Nam, but thought that Marvin was writing a work of fiction. Some testified that they received a copy of the book prior to publication and still believed it was a work of fiction.

d. Verdict:

The jury found that neither side had shown defamation by a preponderance of the evidence.

e. Length of Trial:

Seven days.

f. Length of Deliberation:

Two hours.

g. Size of Jury:

Eight.

h. Issues Tried:

Defamation, falsity, negligence.

i. Notes:

j. Post-Trial Disposition:

No post-trial motions, no appeals.

Plaintiff's Attorneys:

David Collins
Mt. Pleasant, SC

William Mark Koontz
Smith Collins Newton & Koontz
Charleston, SC

Benjamin Deever
Bobby Deever
Deever & Deever
Washington, NC

Defendant's Attorneys:

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9. Case Name: *John Raymond Wiggins v. Wilson Mallard, et al.*

Court: Ala. Cir. Ct., Escambia Cty.
Case Number:
Verdict rendered on: October 27, 2005

a. Name and Date of Publication:

Newspaper article published in *The Brewton Standard* on August 9, 2000.

b. Profile:

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

c. Case Summary:

John Raymond Wiggins ("Raymond") and his son John Raymond Wiggins II ("John") lived together at 2474 Bradley Road near East Brewton, Alabama. The defendant's article reported that a "Raymond Wiggins" of 2724 (sic) Bradley Road" had been arrested on drug charges. The article was based on a phone interview of East Brewton Police Chief Wilson Mallard by the *Standard* managing editor John Wallace, during which Mallard read from a police report about the arrest of three individuals. One of those arrested was a man named Clinton Keith Wiggins. Wallace claimed that Mallard told him that the arrestee's name was "Raymond Wiggins" and that he resided at 2474 Bradley Road. Chief Mallard claimed that he correctly identified "Clinton Wiggins."

Raymond Wiggins, who had been defeated in a campaign for county commissioner the previous month, contacted both Chief Mallard and Editor Wallace the day that the article was published, and the newspaper published a correction in a special edition later that day. Wiggins nevertheless sued Chief Mallard, the City of East Brewton, Wallace, and *The Standard*, alleging that Mallard knowingly gave the newspaper the incorrect name, and that the newspaper had published it with knowledge that it was false.

d. Verdict:

For plaintiff: for nominal damages of $1.00.

e. Length of Trial:

Two days.

f. Length of Deliberation:

One hour.

g. Size of Jury:

Unknown.

h. Issues Tried:

Defamation, falsity, actual malice (pursuant to an applicable privilege), compensatory and punitive damages.

i. Notes:

The trial court had granted motions for summary judgment, but was reversed by the Alabama Supreme Court which remanded the case for trial. *Wiggins v. Mallard*, 905 So. 2d 776 (Ala. 2004).

j. Post-Trial Disposition:

No appeal.

Plaintiff's Attorneys:

Nicholas S. Hare, Jr.
Don Wiggins Hare
Hare & Hare
Monroeville, AL

Defendant's Attorneys:

on behalf of Defendant Wallace
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on behalf of Brewton Standard
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for City and Mallard
Catherine Knight, etc.

10. Case Name: *Ziglar v. Media Six, Inc.*

Court: Va. Cir. Ct., Roanoke City
Case Number: CL02000132-00
Verdict rendered on: December 15, 2005

a. Name and Date of Publication:

Letter to the editor published "Buzz" newspaper on November 2, 2001.

b. Profile:

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

c. Case Summary:

The letter to the editor published by the defendant newspaper was from inmate Zakee P.J. Tahlib, who was serving a lengthy drug sentence and had been charged by Commonwealth's attorney (prosecutor) Joan Ziglar's office on new charges of murder. In his letter, Tahlib admitted that he was a drug dealer, but claimed he was "charged for something [he] had nothing to do with," that Ziglar had "trumped up" the murder charges against him because he had a relationship with Ziglar's sister; and that her office made a deal with a witness "to lie at the grand jury and to implicate me even more." Ziglar sued Tahlib, the newspaper, the newspaper's corporate owner, Media Six, Inc., and its publisher and editor Charles B. Roark. After the suit was filed, Roark told the local newspaper that "Buzz did not verify the authorship of letters or the accuracy of their contents. "We don't follow established ethics," he told the *Martinsville Bulletin*. "Ethics are ways to cover up people's doings. You have to follow what's in your heart." In July of 2002, Ms. Ziglar dismissed her claims against the prisoner, but the remaining claims went to trial.

d. Verdict:

For plaintiff: $75,000 compensatory damages.

e. Length of Trial:

Unknown.

f. Length of Deliberation:

4½ hours.

g. Size of Jury:

Eight.

h. Issues Tried:

Defamation, falsity, actual malice, damages.

i. Notes:

Before trial, the defendants filed motions to dismiss. Circuit Judge Clifford Weckstein denied the motions, holding that the letter contained statements that were capable of being proved false. *Ziglar v. Media Six, Inc.*, 61 Va. Cir. 173, 2003 WL 549977 (Va. Cir. Feb. 18, 2003). At the end of 2003, as discovery was proceeding, Media Six filed for Chapter 11 bankruptcy for unrelated reasons. The bankruptcy filing was dismissed at the request of Media Six on February 3, 2005.

At the close of the plaintiff's evidence, the trial court denied the defendant's motion for judgment for lack of proof of actual malice.

j. Post-Trial Disposition:

No post-trial motions nor any appeal was filed.

Plaintiff's Attorneys:

Robert Morrison
Watson & Morrison, P.C.
Halifax, VA

Defendant's Attorneys:

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2006 MLRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL TRIALS

By Tom Kelley

September 14, 2006
Boulder, CO

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

K. INTRODUCTION

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

In subsection B. below, I will summarize the results of the trials covered in Part I, and discuss trends. The results show, among other things, (1) that we are achieving a steadily rising success rate but trying fewer cases; (2) that print media enjoy a lower success rate than broadcast/cable/video media; (3) the success rates for cases tried under negligence and actual malice standards are roughly the same.

In section C. below, I will discuss common factors identified in the cases, and trial themes and tactics that have proved successful.

L. SUMMARY OF RESULTS AND COMPARISON TO PRIOR STUDIES

This summary covers trials concluded from September 9, 2004 through August 17, 2006. During the two-year period covered by this survey, 24 trials, resulting in 17 jury verdicts, 4 directed verdicts, and 3 completed bench trials were identified. The results, which do not reflect post-trial relief unless so indicated, were as follows:

	CASE	MEDIUM	VERDICT

	CASE	MEDIUM	VERDICT
1.	*Mark Adams v. Fox Interactive Television, LLC* U.S. Dist. Ct., D. Mass Case No. 01-10523 November 11, 2003	TV	For plaintiff: $1,000,000 (compensatory damages)
2.	*Aficial v. Mantra Films* Virginia Circuit Court, Virginia Beach, VA Case No. CL04003288-00 June 29, 2005	film	For plaintiff: $210,000 ($150,000 compensatory damages, $60,000 punitive damages)
3.	*Adolfo Krans Bell v. Santarrosa* Court Case No. KDP 2002-0545 March 7, 2006 (bench judgment)	TV	Bench judgment for plaintiff: $260,000 ($180,000 in compensatory damages to Adolfo Krans and $20,000 to each of his four children, who were not named in the broadcast)
4.	***Bramlett v. Liberty Group Publishing, Inc.*** Franklin County, Illinois Case No. 01-L-78 June 10, 2005 (bench judgment)	print	Bench judgment for plaintiff: $25,000 (compensatory damages)
5.	***Rebecca Brandewyne v. Author Solutions, Inc., d/b/a AuthorHouse*** District Court, Sedgwick County, Kansas Case No. 04CV4363 May 8, 2006	print	For plaintiff: $470,000 ($230,000 compensatory damages, $200,000 for Brandewyne, $10,000 for each of three children. Court awarded $240,000 in punitive damages after finding of entitlement by jury, allocated between Brandewyne and two of her children.)

	CASE	MEDIUM	VERDICT
6.	***Stephen Columbus v. Globe Newspaper Company, Inc. and Walter V. Robinson*** Middlesex Superior Court, Cambridge, Massachusetts Case No. 00-0724 February 2, 2005	print	For defendants
7.	***Bobby Davis v. Marion Star*** Circuit Court of Marion County, South Carolina Case No. 09-CP-33-372 May 3, 2005 (directed verdict)	print	Directed verdict for defendant
8.	***Darcie Divita v. John Zeigler and Clear Channel Broadcasting, d/b/a WHAS Radio 84, Louisville, KY*** Jefferson Circuit Court (Louisville, KY), Division 13 Case No. 03-CI-09214 Tuesday, May 24, 2005	radio	For defendant
9.	***Judy Johnson v. Lexington Pub. Co., Inc.*** Richland County S.C. Court of Common Pleas Case No. 02-CP-40-6064 July 2006 (directed verdict)	print	Directed verdict for defendants
10.	*Thomas L. Knight v. Chicago Tribune Company, Ken Armstrong, and Maurice Possley* Circuit Court of Cook County, Illinois Case No. 2000-L-004988 May 20, 2005	print	For defendants
11.	***Brittany Lowry and Lezlie Fuller v. Hastings Entertainment, Inc., Mantra Films, Inc., The Musicland Group, d/b/a Sam Goody and Sun Coast Motion Picture Co.*** Judicial District Court, Denton County, Texas Case No. 2003-30333-211 June 26, 2006	film	For defendants
12.	***Marc Mandell v. The Boston Phoenix, Inc.***)ist. Ct., D. Mass. Case No. 03-10687 December 17, 2004	print	For plaintiff: $950,000 (compensatory damages)

	CASE	MEDIUM	VERDICT
13.	***Monroe Y. Mann v. Bernard Abel*** N.Y. Sup. Ct., Westchester Cty. Case No. 14180/2003 October 20, 2005 (bench judgment)	print	Bench judgment for plaintiff: $105,000 ($75,000 in compensatory damages, $30,000 in punitive damages)
14.	***Ernest B. Murphy v. Boston Herald, et al.*** Suffolk County (Massachusetts) Superior Court Case No. SUCV2002-02424 February 18, 2005	print	For plaintiff: $2,090,000 (for loss of reputation and emotional distress, reduced through post-trial motions to $2,005,000)
15.	***Dr. Mark T. Reilly v. Boston Herald, Thomas Mashberg and Andrew F. Costello*** Barnstable Superior Court Case No. 98-294 November 4, 2005	print	For plaintiff: $225,000 ($125,000 lost income and $100,000 emotional distress; to that amount, the court added interest of close to $200,000, plus attorneys' fees of about $100,000)
16.	***Amelia Boynton Robinson v. American Broadcasting Companies, Inc., Walt Disney Pictures and Television, and Leah Keith*** Circuit Court of Jefferson County, Alabama Case No. CV-99-6867 November 18, 2004	TV	For defendants
17.	***Thermal Engineering Corp. v. Boston Common Press Limited Partnership and Cook's Illustrated*** Court of Common Pleas for Richland County, S.C. Case No. 2004-CP-40-2202 June 1, 2005 (directed verdict)	print	Directed verdict for defendants

	CASE	MEDIUM	VERDICT
18.	***Kent Trainor v. The Standard Times*** Washington County Superior Court, Wakefield, Rhode Island Case No. WC/2003-295 February 13, 2006 (motion for judgment as a matter of law granted)	print	Judgment for defendant as a matter of law
19.	***J.P. Turnbull, et al. v. American Broadcasting Companies, et al.*** U.S. District Court, Central District of California Case No. CV 03-3554 SJO (FMOx) October 28, 2004	TV	For defendants
20.	*Tuttle, et al. v. Marvin* U.S. Dist. Ct., D. S.C. Case No. 04-00948 January 30, 2006	print	For defendant
21.	*John Raymond Wiggins v. Wilson Mallard, et al.* ir. Ct., Escambia Cty. Case No. October 27, 2005	print	For plaintiff: $1 (nominal damages)
22.	***Thomas Workman v. Eric Serrano and Chanhassen (MN) Villager*** Carver County (MN) District Court Case No. 10-CV-03-579 December 22, 2004	print	For plaintiff: $625,000 ($225,000 for past injury to reputation; $200,000 for future injury; $200,500 for punitive damages)
23.	***George Young v. WKYC TV, Inc., Gannett Co., Inc., Richard Russ and Timothy White*** Lake County, Ohio Court of Common Pleas Case No. 02CV0974 February 17, 2006	TV	For defendants
24.	*Ziglar v. Media Six, Inc.* r. Ct., Roanoke City Case No. CL02000132-00 December 15, 2005	print	For plaintiff: $75,000 (compensatory damages)

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. My numbers are derived from slightly different criteria but are not wildly dissimilar from the results of the MLRC 2006 Report on Trials and Damages.

In the stats that follow, I omit the bench trials and the directed verdicts. The defendants won 9 of 17, or 52.9% of the completed jury trials. These results compare to my prior surveys as follows: 2004 - 48.6%; 2001 - 49.9%; 1999 - 34.6%; 1997 - 35.5%; 1995 - 35.7%. In the current survey, the overall rate of success, including the bench trials and directed verdicts, was 14 of 24, or 58.3%. The steadily growing success rates suggest that we are improving at something, be it vetting, litigating, trying, settling, or simply avoiding controversy in the first place.

The average of the plaintiffs' awards was very low $548,636, as compared to $3,032,067 for the 2004 survey, $3,732,867 for the 2001 survey, and $2,545,875 for the 1999 survey. The median verdict was $260,000, as compared to $505,000 in 2004, $1,975,000 in 2001, $450,000 in 1999, $280,000 in 1997, and $300,000 in 1995.

Continuing a counterintuitive trend that began with my 1999 survey, electronic media enjoyed a greater rate of success than print: Print media won 4 out of 10 jury cases (treating the $1.00 verdict in *Wiggins* as a defense win), or 47%, while electronic media won 5 of 7 cases, or 71.42%. The latter include one defense verdict involving radio (*Divita*), and a plaintiff's verdict (*Aficial*) and a defense verdict (*Lowry*) in a case involving a "Girls Gone Wild" video. I suspect that the best explanation for the better success rates enjoyed by the electronic media is that these organizations have become more willing to settle the marginal or more dangerous cases. In the 2004 survey, print media won 47.4%, electronic media 53.3%. In 2001 – print media won 5/12 or 41.7%, electronic media 4/9 or 44.4%; in 1999 – print media won 6/20 or 33.3%, electronic media won 4/8 or 50%.

In addition to avoiding losses, the electronic media have, for the second survey in a row, continued to defy the long-term trend in past surveys showing them to be at greater risk of large verdicts than print media. In this survey, the average electronic media verdict was $490,000, and the median was $260,000. The average print media verdict was $570,625, and the median $347,500. These comparisons are not particularly meaningful, since there were only two plaintiff's verdicts involving electronic media, and one of those was for a "Girls Gone Wild" video; the million dollars awarded in *Adams* was arguably significant. The fifteen-year trend overall shows electronic media to be at a greater risk of large verdicts than print media, but in 2004, the average electronic media verdict was $791,800, and the median $310,000, while the average print media verdict was $4,457,691, and the median for print $3,001,000.

These results are not quite as optimistic as those produced by the MLRC staff in its annual reports on trials and damages, but the MLRC statistics include directed verdicts and bench trials. The following is a table of winners and losers, showing the relevant background of each plaintiff (as always, giving the plaintiff the benefit of the doubt) and the standard of liability:

Case	Plaintiff's Background	Fault Standard for Liability
Successful Plaintiffs/Recovery (000's)		
Adams $1,000	parent/coach of junior hockey	negligence
Aficial $210	female teenager	strict liability under statute requiring written consent
Bell $260 (bench judgment)	governor's spouse/ insurance company owner	
Bramlett $25 (bench judgment)	builder	negligence
Brandewyne $470 (includes bench judgment for $240,000 punitive damages)	female best-selling author	defamation, public disclosure of private facts
Mandell $1,000	male parent in custody dispute	negligence
Mann $105	town attorney	actual malice
Murphy $2,090	judge	actual malice
Reilly **$225**	veterinarian	negligence
Workman **$625.5**	county commissioner	actual malice
Ziglar $75	district attorney	actual malice
Unsuccessful Plaintiffs		
Columbus	lawyer/real estate developer	
Davis (directed verdict)	city councilperson	actual malice
Divita	morning television anchorperson	actual malice
Johnson(directed verdict)	foundation director	actual malice
Knight	lawyer/former prosecutor	actual malice
Lowry and Fuller	female teenagers	newsgathering issues
Robinson	former civil rights leader	actual malice
Thermal Engineering Corp. (directed verdict)	gas grill manufacturing company	negligence
Trainor(directed verdict)	arrestee (employment background not a factor)	negligence
Turnbull, et al.	would-be actors and actresses and "pay to play" audition agency	newsgathering issues
Tuttle, et al.	former commander in Viet Nam	negligence
Wiggins ($1.00 verdict)	arrestee, recently defeated county commissioner candidate	negligence
Young	school lunchroom supervisor	negligence

In the past, most frequent and successful plaintiffs are lawyers and other professionals, judges, businesses and businesspersons, and celebrities. Hard to see much of a

pattern in the above, except that current and former prosecutors and judges are still frequent plaintiffs and frequent winners.

Another counterintuitive trend continues: In cases in which the jury determined liability for publication torts, the defendants prevailed in three of six cases (50%) when the standard was negligence, and in four of eight cases (50%) when the standard of liability was actual malice. When the bench trials and directed verdicts are added to the mix, the success rate under the actual malice standard remained at 50%, but the rate of success under the negligence standard rose to 63.6%. In past surveys, the results were as follows: (2004 – 57.1% in negligence case, 57.1% in actual malice cases; 2001 – 33.3% in negligence cases, 33.3% in actual malice cases; 1999 – 26.8% in negligence cases, 50% in actual malice cases; 1997 – 35% in negligence cases, 26.66% in actual malice cases). In sum, my surveys have only once – in 1999 – shown what would be expected, *i.e.*, a significantly greater success rate under the much more difficult actual malice standard.

In cases premised on newsgathering conduct, two involved issues of informed consent from teenagers in "Girls Gone Wild" videos, with mixed results, but a relatively low verdict for the successful plaintiff. It does not appear that juries have much sympathy for young women on spring break when they become inebriated and bare their breasts in public. The third newsgathering case (*Turnbull*) involved undercover reporting with a hidden camera, a genre of newsgathering case that we have always found difficult. *Turnbull* shows that such cases can be won with the right facts, the right personas, and good lawyering.

M. ANALYSIS

The observations 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. Jurors

Included in the Trial Tales materials for this conference is an article entitled "Trial Tales: Mock Trials in the United States, Canada, and the United Kingdom." The article details the deliberations of five juries in two different libel-by-implication hypothetical cases.

From the deliberations of the five juries that are described in the article, there emerges a pattern in which two or more (depending upon the size of the panel) pro-plaintiff (this usually means anti-media) leaders square off against two or more pro-defense leaders. The pattern was probably more pronounced than normal in the U.S. and Canada, since the mock trials utilized no *voir dire* procedures (which are not utilized in the U.K. in any event). The pro-defense jurors won in the U.S. and U.K. cases, while the pro-plaintiff jurors won in Canada.

The significant question for defense counsel, however, is: How does one identify and keep on the jury those jurors who will argue effectively for a defense verdict, and identify and remove those who will effectively advocate for the plaintiff? The same question is raised by a number of cases in this year's survey, the best example being *Knight*.

In most cases, it is much easier to identify during *voir dire* the pro-defense than the anti-media jurors. That is because the juror candidates are more willing to share positive feelings than negative ones. For those that appear to be "keepers," the trick is maintaining a balance between planting seeds of a rapport with each of those jurors, without triggering a peremptory challenge by the plaintiff's lawyer.

Over the fifteen years I have done this survey, I have reported defense counsels' (including my own) preferences for jurors in the defense of libel cases based upon socio-economic, educational, and employment background. However, the more I watch jury trials, the more I conclude that generalizations based upon background are the least useful criteria for jury selection. A much more important factor, in my opinion, is the personality type, and in particular whether the individual has high self-esteem, a tendency to run off her own gyroscope more than external influences, and the ability to accept and live with ambiguity, uncertainty, and unanswered questions. Such people are most likely to react favorably to an articulate defendant reporter, columnist, or producer, and understand and appreciate her role in stimulating thought and bringing issues to light.

Related to personality, but even more difficult to delve into in *voir dire*, is the juror's life experiences and how those experiences have instilled biases. The most direct example of a relevant life experience, of course, would be a bad encounter with the media on the part of the juror or a relative or acquaintance. Jury consultant Jason Bloom tells me that the pro-plaintiff group also includes those who "generally carry with them a sense of entitlement, who have been taken advantage of by others, who have lost opportunities in life due to actions of others without a chance to defend themselves. For instance, they may feel they have been passed up for promotion in the workplace because they perceived that someone else is out to get them or that a rumor has been spread around the office that they have not had a chance to diffuse nor can they, or that a performance evaluation was unfair or incorrect. In other words, those most pro-plaintiff in a libel case are best able to parallel a life experience to the case fact pattern and conclude they have seen this move before."

Most counsel who have used written jury questionnaires agree that is the best way to get useful information from the jurors. The most useful questionnaires ask the jurors to rate in order their views on matters relevant to the case. See, for example, the questions utilized in *Knight*. The questionnaire should also include open-ended questions seeking narrative answers, which may reveal the types of life experiences and biases that indicate a pro-plaintiff disposition. Other than asking jurors whether they have encountered problems with the media in the past, or, even more daringly, about problems with matters being said about

them, it is hard to probe a juror's negative life experiences, either in written questionnaires or in *voir dire* in open court, to the extent necessary to provide truly useful answers.

Nonetheless, the mock trial deliberations show that the deselection of toxic jurors is key to the defense of a libel case. For that purpose, the value of the assistance that can be provided by a jury consultant is quite apparent.

2. Trial Themes – Truthful Reporting of False Allegations

In the past quarter century or so, we have seen an ever intensifying assault upon the citadel of the common law republication rule. It arguably began with *Edwards v. National Audubon Society*, 556 F.2d 173 (2d Cir. 1977), which held that a newsworthy allegation by one prominent person or organization against another may be published in a balanced and neutral fashion without the publisher being called upon in court to prove that it is true or even that the defendant believed it was true. The so-called privilege of "neutral reportage" became bogged down in arcane technical requirements, not to mention the refusal of some courts to accept a new constitutional privilege that had not received the imprimatur of the U.S. Supreme Court, such that development of the privilege stalled.

More recently, however, and more effectively, the common law re-publication rule, which holds a publisher who attributes a defamatory statement to another responsible as though he had originally uttered the defamatory words, has been side-stepped by a much simpler formulation that does not necessarily require recognition of a free-standing constitutional principle. When a publisher accurately reports that a newsworthy allegation has been made, and accurately reports the current status of any controversy over that allegation, *e.g.*, that a civil complaint has been filed in court but has not yet been tested or adjudicated, the publication is, in a word, true. In the more recent of my jury trial surveys, including the present one, there has been greater willingness on the part of defense counsel to build their cases around a trial theme that ignores the truth or the defendant's attitude toward the truth of the allegation being reported or investigated, and focuses upon the defendant's accuracy in providing a snapshot of the controversy as it existed at the time of publication. This trial theme – that the defendant has a right and duty to raise questions on matters of public interest without forcing answers – prevailed in most of the deliberations described in the Mock Trial Tales article and prevailed in several of the cases tried this year, *e.g., Columbus, Knight,* and *Young*.

The non-exhaustive string cite below (taken from one of my recent briefs) will support the argument that because the defendant accurately and fairly reported what sources said, the publication is true.[3] In fact, that proposition is sometimes more intuitive to a jury

[3] *See Global Relief Found., Inc. v. New York Times, Co.*, 390 F.3d 973, 987 (7th Cir. 2004) ("The gist or sting of each article was that the President had issued a blocking order . . . against a number of organizations suspected of providing financial assistance to

terrorist groups, and the government was now contemplating adding other charities and non-governmental organizations to the list of blocked entities" and "none of the articles concluded that GRF was actually guilty of the conduct for which it was being investigated." The trial court correctly found that the reports were substantially true.); *Green v. CBS Inc.*, 286 F.3d 281, 284 (5th Cir. 2002) ("in cases involving media defendants, such as this, the defendant need not show the allegations are true, but must only demonstrate that the allegations were made and accurately reported"); *Melton v. City of Oklahoma City*, 928 F.2d 920, 928 (10th Cir. 1991) (public statement concerning allegations of perjury being investigated by the F.B.I. in Oklahoma City Police Department was true because the investigation was in fact underway, and there was "nothing contained in [the defendant's] publication which suggests . . . defendant either accepted the accusation as true or embraced it as his own"); *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313 (7th Cir. 1987) (substantially accurate report of information provided by the police department was substantially true); *Friendship Empowerment & Econ. Dev., CDL, Inc., v. WALB-TV*, 2006 WL 1285037 (M.D. Ga. 2006) (accurate report of mother's allegation that day-care facility "dropped" and "kicked" her child were substantially true); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 367-68 (S.D.N.Y. 1998) (statement that plaintiff was the main suspect of the Olympic Park bombings in Atlanta was substantially true because the plaintiff was indeed a suspect); *Basilius v. Honolulu Publ'g Co., Ltd.*, 711 F. Supp. 548, 552 (D. Haw. 1989) (gist of defendant's report was that letter accusing plaintiff of crimes existed, and this was substantially true regardless of the truth or falsity of the underlying allegations); *Janklow v. Newsweek*, 759 F.2d 644 (8th Cir. 1985) ("materially accurate report" of rape charge was not "an assertion by Newsweek that the plaintiff committed the alleged crime"); *Stone v. New York Times Co.*, 30 Media L. Rptr. (BNA) 1918, 1921 (Colo. App. 2002) (newspaper article that reported courtroom testimony of witness who accused plaintiff of being a drug dealer was substantially true without regard to the truth or falsity of the witness' testimony); *Basic Apple Mgmt., Inc. v. Dow Jones & Co., Inc.*, 96 S.W.3d 475 (Tex. App. 2002) (because "the challenged statements only characterized the allegations of the indictment, and do not purport to portray the underlying events described therein, our task is necessarily limited to determining whether the articles accurately report the charges set forth in the indictment," which the court found to be substantially true as a matter of law); *UTV of San Antonio, Inc. v. Ardmore, Inc.*, 82 S.W.3d 609, 612 (Tex. App. 2002) (report of allegations of the Texas Department of Protective and Regulatory Services was substantially accurate, and defendants were not required to determine whether any of the allegations were true before reporting them); *Pierce v. St. Vrain Valley Sch. Dist.*, 944 P.2d 646, 651 (Colo. App. 1997), *rev'd on other grounds*, 981 P.2d 600 (Colo. 1999) (suit concerning articles over "allegations of sexual harassment" levied against the plaintiff by a governmental entity, the court held that "the truthfulness of the harassment allegations themselves is not in issue . . . [R]ather, plaintiff's defamation claims concerns only the truth of the factual allegations . . . that allegations of sexual harassment were made . . ."); *KTRK Television v. Felder*, 950 S.W.2d 100, 106-07 (Tex. App. 1997) (accurate report of allegations against teacher that were subject to investigation); *McIlvain v. Jacobs*, 794 S.W. 2d 14 (Tex. 1990) (summary judgment for the defendant on an article that accurately reported findings of a private watchdog agency);

than the re-publication rule. The chances of success, both on summary judgment and before the jury, increase when: (1) the allegations are especially newsworthy; (2) the defendant's report makes it clear that the allegations are yet unproven, or otherwise accurately indicates their status; (3) available countervailing information is provided; and (4) the article accurately indicates biases and/or lack of direct information on the part of sources. In a perfect article or broadcast, all of the reasons a reporter might have for doubting the truth of the allegation would pass through to the reader, viewer, or listener.

Of course, such a trial theme would prove highly problematic if the court were to ultimately give an instruction that incorporated the common law republication rule. However, unless you are in a jurisdiction governed by a rare recent setback such as *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. 2005), the case law has developed to the point that it impressively supports a trial theme that reports of newsworthy allegations, which accurately indicate their status, are true regardless of the falsity of the allegations themselves. The case law is arguably strong enough to persuade a court to give an instruction negating the re-publication rule. At the very least, it should be enough to dissuade the judge from precluding the argument that accurate reports about controverted allegations are true.

The same approach can be taken with the issue of fault, be it negligence or actual malice. When the allegations are made as part of some official proceeding or record, and a fair reports privilege for whatever reason is not useful, the decisions of the United States Supreme Court, in *Greenbelt*, *Pape*, and *Firestone* can be taken as analyzing the issue of constitutional fault in terms of accuracy in reporting the public record, as opposed to the truth of the allegations contained in the record. The RESTATEMENT (SECOND) OF TORTS § 611 cmt. b, embodies the assumptions of these cases and provides that constitutional fault, when the defendant is reporting on public records, can only be established with respect to the defendant's attitude and efforts in publishing a correct account of the controversy, even when the defendant has knowledge of the falsity of allegations made in that controversy. More recent decisions, such as *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002), take the same approach to the issue of constitutional fault in reporting on newsworthy allegations regardless of whether they are attached to some official proceeding or record.

Bowers v. Loveland Publ'g Co., 773 P.2d 595, 596 (Colo. App. 1988) (report of disputed allegations that the plaintiff vandalized an automobile was substantially true, despite the fact that the article characterized the allegations with the words "police said," when in fact the allegations made in the police report were made by a non-police eyewitness); *Sivulich v. Howard Publications, Inc.*, 466 N.E.2d 1218, 1220 (Ill. App. 1984) (article reporting that plaintiff was the subject of "charges of aggravated battery" was substantially true because article accurately reported the allegations of a filed civil complaint); *Spriggs v. Cheyenne Newspapers, Inc.*, 180 P.2d 801, 810-11 (Wyo. 1947) ("they merely published that these charges had been made in the complaint filed, which was the undeniable truth").

The approach described above has the advantage of being consistent with longstanding traditions of good journalism (without having to enlist those who adhere to the current "cult of objectivity"). Of course, the plaintiff may find and call an expert witness to testify that the defendant should have satisfied herself of the truth of the allegations being reported, or the truth of defamatory answers suggested by questions raised. However, that is a view not shared by most experts concerning industry standards, including academics. The defendant should first try to exclude such expert testimony, but if that proves impossible, the defendant can likely win the battle of experts.

3. The Parties' Personas

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

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

Factors (1) - (3) go to what Mr. Bloom refers to as the "personas" of the parties. *See* "Mock Trial Tales/Mock Libel Trials in the United States, Canada, and England," at pp. 36-41.

The mock trial exercises, as well as several of the trials reported in this survey, demonstrate the extent to which juries focus upon and construct the personas of both the plaintiff and defendant. That this happened in the mock trials seems remarkable, since the jurors never laid eyes on nor heard from any of the parties. In *Columbus*, defense counsel, John Albano, in closing, urged the jury, who had listened to both the plaintiff and the defendant reporter for nearly three days each, to "take the measure" of the two of them. In a post-trial interview with the media, the jury forewoman, a 44-year-old day care provider, said the jurors did just that and found the reporter more credible than Columbus and believed he strived to accurately report about a program with rules that favored the well-connected. "We all felt what he said was real," she said. "He really knew what he was talking about. . . . I really felt that they were telling the truth, *The Globe*." The jury found the article to true notwithstanding a pesky libel-by-implication theory. Impressing the jury with the persona of the defendant also proved effective in *Robinson*, *Turnbull*, and *Knight*. The defendant reporters' less impressive showing in *Murphy* and *Workman* contributed to losses in cases where the proof of actual malice was marginal. In *Young*, the defendants not only were well prepared and played well, but they were aided by very credible third-party witnesses who provided supporting testimony.

As usual, there were cases in which the plaintiff's bad traits, bad acts, or tendency to overreach offset the warts on the defendant's side. That factor contributed to the jury's

willingness to find no actual malice in *Divita*, in which the plaintiff needed little encouragement to portray herself as a flaky exhibitionist. As a result, the jurors seemed to lose most of their ability to empathize or identify with her. The exposure of plaintiff as one willing to exaggerate and stretch the truth likely tempered the damage award in *Reilly*. Deficiencies in the plaintiff's persona also aided the defense in *Columbus*, and even the "Girls Gone Wild" cases. In *Turnbull*, the plaintiffs were a dozen aspiring actors, with differing personalities; all had been recorded in some fashion by a hidden camera, but many of them were never included in broadcast material. Some of the plaintiffs were relatively sympathetic, but many appeared to be overreaching. Some complained of the taping of conduct that, the defense was able to show, they had regularly exhibited in attention-getting settings, feeding the defense theme, "these are not private people," which effectively tarred the entire plaintiff group. As in *Divita*, the plaintiffs appeared to be of a different world than the jurors. Apparently, the bad light shone upon the plaintiffs in these cases did not strike the jurors as gratuitous or callous.

Even when the evidence of plaintiff's bad traits or bad acts is presented in a way that does not offend the jury, it is not always enough to carry the day, and in some cases is not much help at all. When the defendant is a large organization, with ample resources to prevent error, and fails to live up to the jury's expectations in that regard, the plaintiff's bad character may be non-factor. See, for example, *Levan v. ABC*, 1997 survey. In *Bramlett*, a trial to the court, the plaintiff, mistakenly reported as having been convicted of murder and living on death row, was shown to have been a frequently drunken scofflaw who suffered no damage and indeed had increased revenues from his construction firm after the article was published. It would appear that this judge, who awarded $25,000 in damages, had the same view of the "libel-proof" defense as Justice Scalia in his circuit court opinion in *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). The plaintiff's apparent bad traits also seemed to have little effect upon the mock jurors in Canada.

The persona of the reporter, as the principal person responsible for the story, is certainly most important. However, it is also necessary to impress the jury with the defendant's corporate persona, particularly through those whose job it is to supervise and edit the defendant reporter. Failure to tell the story through the entire team may have hurt the defendant in *Murphy* and *Reilly*. In *Murphy*, counsel believed the working class jury tended to empathize with the rank and file reporter, and was more willing to blame his arguable lapses upon the employer for lack of sufficient involvement in the work product.

4. Explaining Actual Malice

Explaining actual malice to a relatively dull and inattentive jury remains basically impossible, as best illustrated this year by *Workman*, and also to some degree by *Murphy*.

Effective communication with the jury on actual malice proved less difficult in *Divita*, where the jury found for the defendants on the basis of failure of proof of actual malice notwithstanding the jury's abhorrence of on-air personality Zeigler's cad-like behavior on his talk radio program, attacking his ex-lover from a highly publicized affair as, among other things, a "pathological liar." If nothing else, Zeigler was honest; as his supervisor at the station (who ultimately terminated him over the attacks) charmingly acknowledged, perhaps "pathologically" so. In *Knight*, the jury found for the defendant notwithstanding their belief that there was material falsity in the article because the defendants admitted a mistake and convinced the jury that their regret was sincere and brought home to the jury how all of this fell short of proving actual malice.

In *Columbus*, the jury foreman declared after trial that the defendants had prepared the "best report they could with the information they had," which suggests a verdict based upon the absence of fault rather than the absence of falsity; however, the jury found the article was not materially false and this was quite apparently due to their assessment of the defendant's competence and credibility.

In *Workman*, the defendant's last-minute switch in testimony, in which he acknowledged reviewing a file that arguably indicated falsity of what he published, made the actual malice issue much too tricky for the defendant to prevail, because of both the flip-flop and the reasons for doubts contained in the file. In *Murphy*, the plaintiff judge placed in issue twenty articles concerning the judge's alleged callously lenient sentencing and disrespect for victims, in which the judge's alleged "tell her to get over it" comment about a 14-year-old rape victim was repeated numerous times. That circumstance, combined with testimony of a defendant reporter who struggled on the witness stand in part because he discarded his notes and file, made it difficult for the defense to keep the actual malice issue in focus.

Robinson provided an interesting twist. The publication in issue was a children's film about the civil rights movement in the South that featured "Bloody Sunday" in Selma, Alabama. The plaintiff's role in those events was portrayed heroically, but not accurately, and the inaccuracies arguably made the plaintiff look less heroic in deed and less dignified in demeanor than she was in fact. The defendant's fact-checkers had information that demonstrated the inaccuracies of which plaintiff complained. The defense, particularly in closing argument, stressed the element of "malice" in a way that arguably addressed the absence of malice only in the common law sense with the theme that the defendants were attempting to produce a work that would be useful in the education of children, without any intent to cause harm or even chagrin to the plaintiff.

5. Materiality

When the defendant admits a false statement in a publication, but urges that the falsity had no bearing upon the gist or sting accurately conveyed by the article, the results over the years have been mixed, and this year was no exception. In *Knight*, the defendant reported

that an expert testified to the grand jury that the plaintiff, a former prosecutor, had urged the expert to be quiet about the existence of exculpatory information that had not been turned over to a criminal defendant. In fact, the expert did not provide this testimony to the grand jury; it was given by an investigator who had interviewed the expert. The jurors told defense counsel they believed this falsity was material. In *Columbus*, the defendant had corrected a statement of fact that the jury apparently deemed immaterial, since the jury found the article was true. In *Trainor*, the defendant received a directed verdict in a case in which it had reported that the plaintiff had been charged with "leaving the scene of an accident, death resulting." In fact, the police report indicated that the plaintiff was charged with "leaving the scene of an accident, injury/death resulting," and there was injury but no death.

6. Expert Testimony, Ethics Codes, and Stylebooks

This survey's trials produced mixed results in attempts to exclude such material. In *Murphy*, the defense was not successful in excluding journalism practices testimony in an actual malice case, but in *Reilly*, the same defendant succeeded in keeping such testimony out in a negligence case. In *Knight*, the court permitted only a small excerpt from the stylebook, the *Tribune*'s definition of "fairness." In *Young*, the RTNDA ethics guidelines were admitted, but with a reasonably useful limiting instruction.

7. Reporter's Notes

In *Murphy*, the defendants were clearly hamstrung by the defendant reporter's disposal of his notes, even though it occurred before notice of Murphy's claim. (Although the twenty-article series with titles such as "Murphy's Law" and "Dump the Judge" was not unlikely to result in a claim, the judge's failure to complain for three months reasonably led to complacency.) This case would appear to support the "keep 'em" side of the "keep 'em/toss 'em" debate.

8. Follow-Up

The importance of running follow-up stories when a subject of an adverse publication is subsequently exonerated is hard to keep in mind in the ordinary course of business. In *Young*, the defendants managed to exclude the station's failure to cover the exoneration in a ruling that is not likely to occur in many jurisdictions when punitive damages are in issue.

Another salutary practice is the maintenance of procedures for effectively responding to complaints. In *Thermal Engineering Corp.*, counsel believed that the suit could have easily been avoided had such procedures been in place and utilized. In *Davis*, the newspaper's thorough but unsuccessful efforts to get the plaintiff on the record to clarify the

comments he claimed were misquotes or taken out of context assisted the defendant in getting a directed verdict.

9. Libel by Implication

In addition to the hypothetical cases involved in the mock trials, the one true libel-by-implication case of the year was *Columbus*. The article dealt with lotteries conducted by public vocational schools which provided the winners with a newly constructed home without charge for labor. Using *Columbus* as an example, the article suggested that the winners of the lottery benefited from political connections, but also indicated that what was meant was that the system was flawed by complex and meaningless regulations that permitted the very few who knew the rules and thus had "inside knowledge" to benefit. Plaintiff argued that the article implied that he benefited from unlawful favoritism, and the judge was sufficiently in agreement to send the case to the jury. As noted above, the jury was persuaded that the article was true largely through the salesmanship of the defendant reporter.

10. Consumer Protection Act Liability

The legislatures of most states have enacted consumer protection statutes, which impose liability for various forms of knowingly false disparagement of a firm's products, services, or business, and provide for recovery of attorneys' fees and in some cases treble damages. In *Reilly*, this resulted in a not particularly significant attorney fee award. In states that provide for treble damages, a plaintiff's recovery could add up quickly. Under *Gertz*, such damages are, in effect, punitive damages, so that the standards of actual malice, clear and convincing proof, and independent review arguably apply even in private figure cases.

11. Verdict Forms

Most responding lawyers in this survey and over the years have expressed a preference for a verdict form that requires the jury to make findings as to all elements for each separate statement found by the court to be actionable. The problem with this type of verdict form is that it invites the jury to microfocus upon the details of the publication, and quite possibly find liability and damages for statements not likely to add to the impact of the article as a whole. It may also encourage a compromise verdict. On the other hand, by not requiring the jury's attention on a statement-by-statement basis, the odds increase that the jury will find the article to be false based upon its generally negative "gestalt."

In Colorado, when multiple false statements are submitted, there is a pattern jury instruction that requires the jury to find that "the false statements were such that the publication as a whole is false." Colo. Pattern Jury Instrs.-Civ. 4th, 22:1, Notes on Use, ¶ 7. A better solution to this potential problem came out of the *Columbus* case, in which the

verdict form first asked the jury to first answer the following question: "Has the plaintiff proved that the article, read in context, asserted a false statement of fact about the plaintiff either directly or by innuendo?" The "no" answer ended the case, and made it unnecessary for the jury to answer specific questions about the plaintiff's more particular claims about false statements and false implications in the article.

12. Punitive Damages

Has anyone noticed that we have not had a significant exponential punitive damage verdict since the 1997 survey? Of course, the 1997 survey included *MMAR Group, Inc. v. Dow Jones, Inc.*, in which a Houston jury awarded punitive damages of $200,020,00 on top of a compensatory damage award of $22.7 million. (I guess I would call that "exponential.") Since then, there have been very few awards in which punitive damages exceeded the amount awarded as compensatory damages, and only one case in which the punitive award was more than a multiple of 2 times the compensatory damage award. *See Merriweather v. Philadelphia Newspapers, Inc.*, 2001 survey, $400,000 punitive damages on top of $100,000 compensatory damages. As the MLRC 2006 report on trials and damages recognizes, punitive damages have become a much less significant component of the media's liability in content and newsgathering cases.

In this survey, the most significant award of punitive damages was $240,000 in *Brandewyne v. Authors Solutions, Inc.*, on top of $230,000 compensatory damages, and $200,500 in *Workman*, on top of $425,000 compensatory damages. Part of the reason for the absence of punitive damages in this survey is that nearly one-third of the plaintiff's verdicts occurred in Massachusetts, where punitive damages are not allowed.

In *Young v. Russ*, the defendants were successful in excluding from evidence the fact that the defendants had prepared but did not broadcast a report of the fact that the plaintiff had been exonerated of charges that he had roughed up school children, but this was because Ohio libel jurisprudence takes a particularly parsimonious view of post-publication evidence.

In *Turnbull*, the plaintiff attempted to establish punitive damages by showing that ABC was guilty of serial intrusions through the use of undercover reporting and hidden cameras. The court disallowed most of the proffered evidence in support of punitive damages on a *State Farm v. Campbell* type theory and evidence rule 403. The "recidivist" theory was reminiscent of the effort to establish a "pattern of racketeering" under RICO against ABC in *Food Lion v. Capital Cities ABC*, 23 Med. L. Rptr. 1673 (D.N.C. 1995).

13. Wire Service Defense

In this survey, a number of defendants relied on prior media reports for key pieces of their reporting without consulting primary sources. *See, e.g., Reilly*. Judges and juries tend

to regard this practice as sloppy. This could be addressed by educating judge and jury on the widespread industry practice of relying upon prior reporting by reputable newspapers, as exemplified by the A.P. "wire" system.

14. Early Exposure of the Jury to the Published Materials

Getting the published material in front of the jury early proved helpful to the defendants in *Divita* (radio program tape played during defendants' opening) by desensitizing the jury to the boorishness of the defendant's on-air personality and in *Robinson* (program played before opening statements) by warming the jury to the benign and sensitive nature of the defendant's program.

15. Conclusion

My friend and colleague Michael Sullivan has made the somber observation that in the defense of libel cases, our bar has "perfected the art of surgery upon a dinosaur." Is the libel trial becoming extinct? Although the number of trials per annum has diminished considerably since I began doing the survey, I still have plenty of tales of heroic efforts and an increasing number of successes to report. At least it seems unlikely that the libel trial will become extinct before I do.