2008 MLRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL/PRIVACY JURY TRIALS

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

PART I

CASE SURVEY

Introductory Note

This is my report of responses to a survey of defense counsel in jury trials in tort litigation against the media arising from communication content or newsgathering activity. This report covers cases concluded on or after August 17, 2006 and before August 9, 2008.

The reports in paragraphs A through L below are survey responses prepared by defense counsel. We provided a light edit and some additions and clarifications based upon follow-up telephone interviews with respondents. In the cases summarized in sections M.1 through M.6, 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.

Table of Trials Reported

A. Case Name: *Continental Inn, et al. v. Lake Sun Leader*

Court: Miller County Circuit Court, Missouri
Judge: Byron Kinder
Case Number: 26V050400241
Verdict rendered on: Directed verdict rendered in court on 8/3/06. Judgment entered on 8/18/06.

1. Name and Date of Publication: *The Lake Sun Leader*, January 10, 2001. (The original pleadings cited a second count, regarding a second story published on July 24, 2002, which count was later dismissed by the trial court prior to trial.)

2. Profile:

   a. Print _x_; Broadcast _____; Internet _____; Other _____.

   b. Plaintiff: Public Official _____; Public Figure ____; Private _x_.

   c. Newsgathering Tort _____; Publication Tort _x_.

   d. Standard applied: Actual Malice _x_; Negligence _____; Other _____.

3. Case Summary: Stories ran detailing closure of a local motel due to failure to meet city safety code. Stories quote city official detailing that motel was not "fit for human habitation." Plaintiffs sued for libel.

4. Verdict: The court entered a directed verdict at trial and subsequently entered judgment finding the statements at issue "are a matter of public concern and therefore are entitled to a qualified privilege under Missouri case law. …plaintiff must present evidence of actual malice to prevail in such a matter." The court further found "plaintiff has completed its presentation of evidence at trial in this petition and … plaintiff has failed to offer any evidence of actual malice, namely proof that the statements were made with knowledge that they were false or with reckless disregard for whether they were true or false at the time when defendant had serious doubts as to whether they were true."

5. Length of Trial: 1.5 days

6. Length of Deliberation: N/A

7. Size of Jury: Panel of 12

8. Significant Pre-Trial Rulings/Proceedings: Summary judgment motions on qualified privilege were filed and denied twice by the trial judge in pre-trial proceedings.

9. Significant Mid-Trial Rulings (including interlocutory appeals): Motion for directed verdict on qualified privilege denied by judge at close of plaintiffs' evidence, but was taken up by the court midway through defendant's presentation of evidence when the judge called counsel to the bench, demanded defendants rest immediately, demanded defendant's counsel to move again for a directed verdict and announced he would grant it.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Judge granted bifurcation on damages before trial began.

    In desperation, defense counsel filed an extremely pointed brief on the definition of qualified privilege and how courts had repeatedly overturned judges in Missouri who failed to recognize this defense. A brief on actual malice was filed with motion for directed verdict at close of plaintiff's case but was denied. However, during a break in the trial, the judge apparently read the brief and finally understood the error of his ways.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries): Court-prepared jury questionnaires were available to counsel before trial began.

12. Pretrial Evaluation: The story was based on solid information – quoting a city official. The plaintiffs had a poor reputation in town, as did their operation. However, defendant knew going into this that the judge had a long history of dislike for the media.

13. Defense Juror Preference During Selection: Several of the defendant's witnesses were well-known in the community. In one case, a juror spoke out and said if this one person (a city official) were to testify, the juror would give undue weight to his testimony because he believed him to be highly credible. When the judge excused him, several others in the panel spoke up and said the same thing, and for a moment, it looked like we might lose our jury panel before the trial actually began.

14. Actual Jury Makeup: Six men, six women, some retired. One former employee of a law firm. Some with jury experience., One related to police department employee. Two were acquainted with potential defense witnesses.

15. Issues Tried: Plaintiffs' case focused on harm to reputation. Defense counsel focused on whether any of plaintiffs' witnesses had evidence of actual malice to offer to court and all said they did not. Defendant's witnesses focused on truthfulness of story.

16. Plaintiff's Demand (damages sought, compensatory/punitive): In excess of $300,000.

17. Plaintiff's Theme(s): Devastation caused by story to a facility that was of good repute and frequented by families.

18. Defendant's Theme(s): Plaintiffs' motel was known in the community for frequent police calls due to shootings and a murder there and the low-life that frequented it. The defense emphasized the high reputations of the city officials making the report and the careful work done by the reporter on the story.

19. Factors/Evidence:

    a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: The reporter and paper have good reputation in the community. Plaintiffs were relatively unknown. The only plaintiff who appeared for trial was a young man in his 20s with long hair.

    b. Sympathy for plaintiff during trial: See above.

    c. Proof of actual injury: Tax returns for plaintiffs were admitted over defendant's objection that they were produced at the last minute and not properly available for discovery.

    d. Defendants' newsgathering/reporting: A dispute arose over whether reporter attempted to contact the plaintiffs before story ran to obtain their comments.

    e. Experts:

    Defense experts: Christopher Hermann, CPA, damages expert for defendant. The judge demanded defendants close before this witness was called to the stand.

    Plaintiff's experts: None

    f. Other evidence: The plaintiff presented a number of witnesses who told the jury about how terrible the newspaper story was for the reputation of the motel – once closed down, it never reopened and the reputation of the motel was ruined, the witnesses said.

    Of course, they never explained to the jury exactly why the plaintiff didn't do the repairs required and simply reopen the motel for business. One of plaintiff's witnesses who testified that he could no longer send his friends to stay at the motel, admitted that the reason he couldn't refer business

was because the motel was closed, not because its reputation was besmirched.

But the most important thing was that each of plaintiff's witnesses was specifically asked if they knew anything that would support that the paper or the reporter knew the statements made by the city officials in the story were false. No, they each responded. Did they know anything that would support that the paper or the reporter acted in reckless disregard as to whether the statements by city officials were false? Again, each responded that they did not. Indeed, no evidence was offered that the newspaper was in any way negligent, except that one of the motel's owners testified the newspaper did not return calls when the owners sought to comment, a claim that was disputed by the reporter of the story.

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiffs' counsel had no experience in libel law, although he was dogged in his misinterpretations of the law. He did not present a favorable impression to the jury.

ii. Defendant's trial demeanor: Defendant's reporter did a good job of explaining her work on the story. But the killer witness for defendant was the city building inspector who testified about what he found at the motel, prompting the closing. The operation clearly needed to be closed for public safety, and this gave a strong truth foundation to the story the paper ran. This building inspector had medical and emotional issues tied to his discharge eventually from his city employment and so defense counsel held her breath as he testified, fearing in part an emotional breakdown on the stand and also whether he would be able to support his conclusions on the job, now having been terminated from his job.

iii. Length of trial: On a personal note, at the end of the first day, defense counsel attempted once again to raise before the judge the lack of actual malice evidence. The judge publicly berated defense counsel for her repeated harping on this issue, told her he'd already decided that issue and that he didn't want her to bring it up again in his courtroom. Saying defense counsel was stunned by the turn of events about mid-day the next day when the case was ended is an understatement.

iv. Judge: Judge Kinder has long had a reputation in the state for hating the media. He was a visiting judge in Miller County

appointed to hear this case. The original judge on the case died, and then the second judge in that county also died, leaving no circuit judge in the county available to hear the case. When Judge Kinder was appointed to hear the case, the defense counsel knew this was a devastating blow. Defense counsel had appeared before him before and had seen his dislike of the media; in fact defense counsel had previously had him rule against her in a media case and had successfully taken it up on appeal to the Missouri Supreme Court, which overruled that judge. If the above does not convey the problems defendants had, when the judge spoke to the potential jury panel the first day, he advised them that he had no love for the media, particularly when they misreport his rulings, a statement that defense counsel tucked away in her notes for a possible appeal.

h. Other factors: Had not insurance counsel insisted at one point in the morning of the second day that we attempt to negotiate a settlement, which proved fruitless, the judge would not have taken the time to read the brief on qualified privilege that eventually lead to his directing his verdict.

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

21. Assessment of Jury: Several were smiling when they were discharged, but perhaps it was just that they were being turned loose. However, some did seem to be pleased that the judge was granting a verdict to the defense in the case. Clearly some liked the city inspector who testified.

22. Lessons: Lesson #1: In some cases, judges need to be told in hard words and sentences of five words or less that they will be overturned on appeal if they continue in the path they are going. Lesson #2: When balancing the interest of your client vs. the possibility you as counsel may be reprimanded by the judge for your outrageous pleading that you have filed in a case, you must take a chance on your client's behalf and trust that a subsequent court will protect you from the unwarranted wrath of a trial judge.

23. Post-Trial Disposition (motions, appeals): Plaintiffs filed an appeal with the court of appeals, and filed as the Record on Appeal only the pleadings, because they were too cheap to pay for a transcript of the trial. Repeatedly during the appellate process, defendant objected that the record on appeal was inadequate. At the time the case was argued to the appellate court, plaintiffs' counsel did not attend the oral argument. The appellate court ruled that the plaintiffs had failed to provide the appellate court enough of a record to allow it to determine if plaintiffs' issues on appeal were valid, and therefore ruled against the plaintiffs on appeal. Plaintiffs then attempted to obtain cert with the Missouri Supreme

Court and just last week the Supreme Court declined to take the case, allowing the mandate to be entered on the Court of Appeals decision.

Plaintiff's Attorneys:

Michael O'Neill
P.O. Box 7
Florissant, MO 63032

Defendant's Attorneys:

Jean Maneke
The Maneke Law Group, L.C.
4435 Main, #910
Kansas City, MO 64111
816-753-9000 (ph)
816-753-9009 (FAX)
jmaneke@manekelaw.com

B. Case Name: *Johnny "J.D." Dixon v. Guy Martin, et al.*

Court: Texas Dist. Ct., Montgomery County (9th Dist.)
Judge: Judge Fred Edwards
Case Number: 06-11-11017-CV
Verdict rendered on: July 11, 2008

1. Name and Date of Publication: *The Watchdog*, Sept. 2006 (available at www.conroewatchdog.com/Issue1.html)

Publication is mailed in hard copy to registered voters on Conroe, Tex. (circ. = about 3,000), and is also published online

2. Profile:

a. Print _x_; Broadcast _____; Internet _____; Other _____.

b. Plaintiff: Public Official _____; Public Figure ____; Private _x_.

c. Newsgathering Tort _____; Publication Tort _x_.

d. Standard applied: Actual Malice ____; Negligence _x_; Other _____.

3. Case Summary: In 2006, Guy Martin lost a campaign against his brother, incumbent Jay Ross Martin, for a city council seat in Conroe, Tex. He then founded a newsletter, *The Watchdog*, with his wife. (Two former council members are listed as associate and contributing editors, but their participation is limited to writing articles.) In the first issue, in September, 2006, *The Watchdog* published a story stating that "sources say" that J.D. Dixon, an ordained minister who operated a shoeshine stand at a local bank for 13 years and was prominent in

local politics, had given out beer and money in return for votes the re-election of Councilman Jay Ross Martin. Dixon sued Guy Martin and his wife, and the two contributors.

4. Verdict: 10-2 verdict for defendant.

5. Length of Trial: 4 days

6. Length of Deliberation: 4 hours

7. Size of Jury: 12

8. Significant Pre-Trial Rulings/Proceedings: Judge Edwards ruled that The Watchdog was a media defendant, and that plaintiff was a private figure. The first ruling, placing the burden on the plaintiff to prove falsity, was key to the verdict.

   Defendants split representation, with the publication and publishers Guy and Sandy Martin represented by John Paul Hopkins, and contributors Cochran and Douglas represented by Joe Micah Enis. The defense expected the plaintiff to dismiss claims against Cochran and Douglas, who had nothing to do with the article at issue, but he did not. Defense used this to its advantage, taking "two bites" at witnesses.

9. Significant Mid-Trial Rulings (including interlocutory appeals): None.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Trial was bifurcated: If jury had found for plaintiff, damages would have been subject to subsequent proceedings.

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

12. Pretrial Evaluation: It would have been impossible for defense to prove the truth of the statement, given the nature of the allegations and the lack of witnesses to testify that the allegations were true.

13. Defense Juror Preference During Selection: Intelligent jurors, willing to follow the law.

    In voir dire, plaintiff's counsel tried to raise racial issues. (The 1980 murder of a white cheerleader in Conroe led to the racially-tinged conviction of janitor Clarence Brandley, who spent nine years on death row before he was released.) Several potential jurors said that they were offended by this (and were struck from the pool).

14. Actual Jury Makeup: 7 men; 5 women / 1 Hispanic, 11 white, 0 black

15. Issues Tried:

1. truth of statement
2. freedom of speech
3. history of local election violations

16. Plaintiff's Demand (damages sought, compensatory/punitive): Plaintiff sought $5 million in compensatory damages.

17. Plaintiff's Theme(s): Plaintiff tried build up his credibility, and to paint defendants as racist bullies. In opening, plaintiff's counsel argued that Guy Martin attacked his brother – and, incidentally, Dixon – in an effort to recover his "glory days" as a high school football star who received a scholarship to the University of Texas, before an injury and two failed marriages.

18. Defendant's Theme(s): There had been similar election violations locally in the past. Plaintiff did not prove falsity.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: In voir dire, plaintiff's counsel tried to raise racial issues. (The 1980 murder of a white cheerleader in Conroe led to the racially-tinged conviction of janitor Clarence Brandley, who spent nine years on death row before he was released.) Several potential jurors said that they were offended by this (and were struck from the pool).

b. Sympathy for plaintiff during trial: Not a factor. Jurors were offended by his attorney's attempt to "play the race card."

c. Proof of actual injury: Damages were bifurcated and not tried as a result of the defense verdict on liability.

d. Defendants' newsgathering/reporting: Jurors said they did not like the defendants' article but found that the plaintiff had failed to prove falsity.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence: Defendants called a former councilwoman who testified that she had seen plaintiff remove election signs in prior elections.

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiff's counsel tried to make racial insinuations, which offended some panelists during voir dire. He also argued that the plaintiff was the victim in a feud between the brothers.

ii. Defendant's trial demeanor:

iii. Length of trial: Before each day of trial, judge continued with full appearance calendar of criminal and family law cases. Jurors were permitted to observe several sentencing and custody hearings during breaks in libel trial.

Two trial participants were hospitalized during trial: co-defendant Bill Cochran, Jr., after the first day of testimony; and Judge Fred Edwards, at the conclusion of trial.

iv. Judge: Hard-working.

h. Other factors: Councilman Jay Martin made a dramatic appearance for the plaintiff, arriving directly from the hospital, where he had gone for liver problems.

20. Results of Jury Interviews, if any: The jurors who spoke to defense counsel said that they did not like the article published in *The Watchdog*, but felt compelled to find for defendant because plaintiff has not proven the statements to be untrue.

21. Assessment of Jury: Willing and able to follow instructions.

22. Lessons: Burden shift ruling was key.

23. Post-Trial Disposition (motions, appeals): Pro-forma motion for new trial expected.

Plaintiff's Attorneys:

Reginald E. McKamie
Houston, Tex. 713-465-2889
www.mckamie.com

Defendant's Attorneys:

John Paul Hopkins
(rep. Watchdog; Guy & Sandy Martin)
Conroe, Tex. 936-441-0663
Note: practice is mainly P's personal injury

Joe Micah Enis
(rep. Cochran & Douglas)
Conroe, Tex. 281-367-2266
Note: semi-retired from practice

C. Case Name: *Germak v. Sieber* (*The Times,* Port Royal, PA)

Court: Pa. C.P., Juniata County
Judge: Barry F. Feudale
Case Number: 329-C-00
Verdict rendered on: 2/16/07

1. Name and Date of Publication: *The Times* (Port Royal, PA), 2/16/00

2. Profile:

a. Print _x_; Broadcast _____; Internet _____; Other _____.

b. Plaintiff: Public Official _x_; Public Figure ____; Private _____.

c. Newsgathering Tort _____; Publication Tort _x_.

d. Standard applied: Actual Malice _x_; Negligence _____; Other _____.

3. Case Summary: The suit was based upon a letter to the editor published in the weekly, *The Times*, in Port Royal, located in central Pennsylvania. The letter alleged that Ralph A. Germak, a former Juniata County district attorney who by then was in private practice, had been involved in efforts to undermine the county school administration. The school board, administration, and school issues in general had been the subject of much local controversy in the mid to late 1990s.

In the November 1999 election, Germak lost his bid for re-election to a fourth term as district attorney. At the same time, a new school board majority was elected, and in January 2000 they appointed Germak as School Board Solicitor.

On February 16, 2000, the *Times* published a 10-paragraph letter that stated in the first paragraph that meetings had been held in the school board solicitor's home – without mentioning Germak by name – and that the goal of these meetings was "to try and undermine the present [school] administration."

In late 2000, Germak sued the *Times*, its owner Donna K. Swartz, and the man who signed and submitted the letter to the newspaper. After learning in discovery that the letter to the editor was initiated and drafted by one Sweitzer – a frequent commentator on school board issues – Germak filed a separate libel action against him on the letter and separate statements by Sweitzer to the state police concerning alleged election manipulation.

After an initial flurry of activity, the cases remained dormant until 2006, when they were revived. The cases were consolidated and went to trial before visiting senior Judge Barry F. Feudale, who has presided over a number of high profile defamation cases in Pennsylvania.

4. Verdict: Defense verdict.

5. Length of Trial: 3_ days.

6. Length of Deliberation: Less than _ hour – 20 to 30 minutes.

7. Size of Jury: 12

8. Significant Pre-Trial Rulings/Proceedings: Denial of motion for summary judgment as to media defendant.

9. Significant Mid-Trial Rulings (including interlocutory appeals): Motion for non-suit (at close of plaintiff's case) denied. Motion for directed verdict denied.

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: Defense verdict likely for newspaper defendants; outcome not as clear for Sweitzer. Defendants made no offer before trial.

13. Defense Juror Preference During Selection: *Voir dire* October – November. Avoid teachers (union liked the administration Germak supported).

14. Actual Jury Makeup: 9 of 12 were under 40 years old. 70 were excused for cause because they knew defendants.

15. Issues Tried: Falsity, defamation, actual malice.

16. Plaintiff's Demand (damages sought, compensatory/punitive): None.

17. Plaintiff's Theme(s): Germak attempted to show that the statements made about him implied that he had behaved criminally, violated his oath of office as district attorney, and violated the code of professional responsibility as school district solicitor.

18. Defendant's Theme(s): The defense argued that the statements were true, they were not defamatory, and that there was no evidence that the letter had actually harmed Germak.

19. Factors/Evidence:

    a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Attitudes in this small venue were once quite polarized, but had subsided somewhat with passage of time.

    b. Sympathy for plaintiff during trial: Loved him or hated him, based on position in former firestorm over school board.

    c. Proof of actual injury: None.

    d. Defendants' newsgathering/reporting: The newspaper's owner and editor Donna K. Swartz testified that she checked with a reporter for the newspaper who covered school district matters, who told her that at least one meeting had been held in Germak's home, and that the participants were undermining the school administration. Swartz did not contact Germak, but testified that she thought that the contents of the letter were true based upon information known to her as a resident citizen.

    e. Experts: None.

    f. Other evidence:

    g. Trial Dynamics:

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

        ii. Defendant's trial demeanor: Good, *see* ¶ 19.d.

        iii. Length of trial: Not a factor.

        iv. Judge: Not a factor.

h. Other factors: N/A.

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

21. Assessment of Jury: Reasonable.

22. Lessons: With the consent of all clients, defense counsel represented all defendants. This proved beneficial to defendant Sweitzer, whose strident writings could have produced a different result if the case had been more focused upon him.

23. Post-Trial Disposition (motions, appeals): Plaintiff filed a motion for a new trial on the grounds that one of the jurors should have been disqualified because she was convicted of misdemeanor theft in a case that he prosecuted as district attorney. The defense responded by arguing that Germak could have discovered this before trial and removed the juror during *voir dire*, and that the verdict should stand even if that juror is disqualified because Pennsylvania law allows a verdict by five-sixths of a jury to stand.

Plaintiff's Attorneys:

pro se
Ralph A. Germak
McAllisterville, PA
(717) 463-3686

Defendant's Attorneys:

Scott C. Etter
Miller, Kistler, Campbell
720 S. Atherton St.
State College, PA 16801
814-234-1500 (ph)
814-234-1549 (FAX)
setter@mkclaw.com

D. Case Name: *Thomas A. Joseph, Thomas J. Joseph, Acumark, Inc., Airport Limousine and Taxi Service, Inc. and Airport Taxi, Limousine and Courier Service of Lehigh Valley, Inc. v. The Scranton Times L.P., The Times Partner, Edward J. Lynett, Jr., George V. Lynett, Cecilia Haggerty, The Scranton Times, Inc., Shamrock Communications, Inc., ZYXW, Inc., James Conmy and Edward Lewis*

Court: Court of Common Pleas of Luzerne County, PA
Judge: Mark A. Ciavarella, Jr.
Case Number: 3816-C of 2002
Verdict rendered on: October 27, 2006

1. Name and Date of Publication: Ten articles published in *The Citizen's Voice*, a daily newspaper published in Wilkes-Barre, PA, between June 1, 2005 and October 10, 2005.

2. Profile:

   a. Print _x_; Broadcast _____; Internet _____; Other _____.

   b. Plaintiff: Public Official _____; Public Figure ____; Private _x_.

   c. Newsgathering Tort _____; Publication Tort _x_.

   d. Standard applied: Actual Malice ____; Negligence _x_; Other _____.

3. Case Summary: *The Citizen's Voice* ran a series of articles concerning a federal grand jury investigation that burst into public view with simultaneous searches at five locations in the Wilkes-Barre area, including the home of plaintiff Thomas A. Joseph and the office of his business, Acumark. The search warrants specified that the agents were investigating alleged money laundering and organized crime. The CV's initial articles focused on these searches, while later articles, based on confidential sources, reported on the continuing investigation.

   The *Citizens' Voice* coverage of the investigation cited anonymous sources who said that a federal grand jury was investigating whether a defunct newspaper owned by Joseph and his current direct mail and telemarketing company had been used for money laundering, and that a limousine service he owned was used to transport money, drugs, prostitutes, and guns to and from Philadelphia, New York, and Atlantic City.

   No charges were ever filed against Joseph or his business.

   Joseph, his son (Thomas J. Joseph), Acumark, and two businesses related to Acumark sued the CV, its publishers, and two of its reporters. The plaintiffs alleged that the articles falsely accused them of being associated with organized crime and of actually committing the crimes under investigation.

4. Verdict: A non-jury verdict for Plaintiff Thomas Joseph in the amount of $2,000,000 compensatory damages and for plaintiff Acumark in the amount of $1,500,000 compensatory, all against the newspaper and one reporter. The court entered judgment for the individual publisher defendants and for the second reporter, and dismissed all of the plaintiffs' false light claims. The court also entered judgments against Joseph's son and against the two related businesses.

5. Length of Trial: 8 trial days, non-jury

6. Length of Deliberation: 4 months

7. Size of Jury: N/A

8. Significant Pre-Trial Rulings/Proceedings: The court denied summary judgment without opinion.

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

a. The court sustained a hearsay objection to the affidavit of probable cause in support of the search warrants that was offered by defendants as a record of official action under the Pennsylvania analogue to F.R.E. 803(8). The court also declined to consider the affidavit as a basis for fair report privilege defense, because it remained sealed at the time of the defendants' articles.

b. The court overruled defense objections to testimony by plaintiffs' two experts, a professor of journalism and a damages expert.

c. The newspaper attempted to begin its case by calling one of the state investigators who was cited in the affidavit for the original raid of the elder Joseph's home and business – the affidavit that had earlier been excluded as hearsay. The investigator appeared, but told the court that he could not testify because of an ongoing grand jury investigation.

Three other state and federal agents sent letters saying that they could not testify. The defense asked Judge Ciavarella to order their appearance, but withdrew the motion after it was agreed that the investigators' failure to testify would not create a negative inference against the newspaper.

d. The question of confidential sources arose the following day, after the newspaper presented testimony from one of the defendant reporters, James Conmy. Conmy testified that his colleague and co-defendant Ed Lewis took over the story after he developed confidential sources within the investigation. Conmy did not identify the sources, in accordance with Pennsylvania's shield law.

Prior to Conmy's testimony, plaintiff's counsel asked Judge Ciavarella to bar any discussion of the sources' credibility without revealing the sources' identity. Judge Ciavarella did not issue such an order, but warned defense counsel that any discussion of the sources' credibility would open the door to allow the plaintiff to attack the sources' credibility.

e. On the day of trial, a sealed indictment against William D'Ellia, admittedly an acquaintance of Joseph and a primary target of the investigation, for money laundering was filed in federal court in Harrisburg, PA. The indictment was unsealed a week later, and the newspaper then moved to

re-open the libel case and introduce the indictment and the supporting affidavit of probable cause and brief as evidence. The plaintiff did not oppose the motion, and it was granted after a June 27 hearing.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The court reserved ruling on the public/private figure issue until it filed its opinion in support of its verdict, at which time it held that plaintiffs were private figures.

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

12. Pretrial Evaluation: N/A

13. Defense Juror Preference During Selection: N/A

14. Actual Jury Makeup: N/A

15. Issues Tried:

    a. Falsity
    b. Negligence and Actual Malice
    c. Public/Private Figure
    d. Damages (compensatory and punitive)

16. Plaintiff's Demand (damages sought, compensatory/punitive): $3.5 million in economic damages, plus reputational damages and emotional distress, plus punitive damages.

17. Plaintiff's Theme(s):

    1. The plaintiffs were private figures at all times, even after the searches of their premises.
    2. The articles went beyond reporting on the investigation to implicitly accuse plaintiffs of committing the underlying crimes.
    3. The plaintiffs were never charged with a crime.
    4. The plaintiff's businesses suffered economic harm.

18. Defendant's Theme(s):

    1. The plaintiffs were public figures after the initial burst of publicity surrounding the searches (which included publications by other news outlets), all of which was true.
    2. The articles merely reported on an investigation into alleged crimes and did not accuse plaintiffs of actually committing those crimes.

3. Defendants were not negligent or reckless.
4. Plaintiffs failed to prove any economic damages.
5. Any harm to plaintiffs was of their own doing.

19. Factors/Evidence:

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

b. Sympathy for plaintiff during trial: The elder Joseph admitted in his testimony that he was once close friends with D'Ellia, but he denied that he was involved in any criminal activity. The trial judge was clearly moved by the failure of the federal government to charge Joseph with any crime.

c. Proof of actual injury: Plaintiffs' economic expert projected $3.5 million in lost profits. On cross, he admitted that this figure did not take into account how Joseph managed the businesses, and that he could not show that it was a direct result of the articles.

Plaintiffs also presented a businessman who said that he gave less business to the elder Joseph's mailing house company after the articles appeared. But on cross-examination the witness admitted that he has since restored his use of the company.

d. Defendants' newsgathering/reporting: The stories about the investigation were heavily based on confidential sources. *See* ¶ 9, *supra*.

Plaintiffs were permitted to call Temple University Associate Professor Christopher Harper (also used by plaintiff in *Kerrick*), formerly a bureau chief for *Newsweek* and ABC News and a producer for the ABC News program *20/20*, as an expert on journalistic practices. He testified that the *Voice* violated its own policy, and general good practice, by using anonymous sources where they were not "absolutely necessary." "What you have here is the equivalent of a journalistic train wreck," he said. During cross-examination, Harper admitted that he did not know whether the articles were true or not.

Plaintiffs did not sue the Wilkes-Barre *Times Leader*, which also covered the raids. In his testimony during the trial, Thomas J. Joseph said that the *Times Leader* was more balanced, because it included comments from his and his father's attorneys.

e. Experts:

Defense experts: Economic: Mark Gleason, CPA

Plaintiff's experts: Economic: Andrew Verzilli, CPA
Journalistic: Christopher Harper, Professor of Journalism, Temple University (note that this witness also testified for plaintiff in *Kerrick*)

f. Other evidence: Defendants concluded by reading the deposition of Thomas A. Joseph's ex-wife, who said that she had been questioned by federal investigators whether her husband had ties to prostitution and drug dealing, and his connections to Billy D'Ellia.

g. Trial dynamics:

i. Plaintiff's counsel: Workmanlike and of appropriate demeanor in a bench trial.

ii. Defendant's trial demeanor: Not a factor in this bench trial.

iii. Length of trial: 8 trial days

iv. Judge: See 9. above.

h. Other factors: The plaintiffs' case ended with testimony from the son, Thomas J. Joseph. He said that the *Voice* articles did not distinguish between him and his father. He also said that the articles, which were published when he was separated from his wife, led to his divorce – although at the time of the trial he was again living with is ex-wife, without having remarried.

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

21. Assessment of Jury: N/A

22. Lessons: Reports on investigations, and particularly investigations that do not result in criminal charges, can create significant risks for the media unless they are worded very carefully and supported by sources that can be fully presented at trial.

23. Post-Trial Disposition (motions, appeals): Appeal is currently pending before the PA Superior Court. Oral Argument took place on April 17, 2008.

Plaintiff's Attorneys:

George W. Croner
Christina Donato Saler
Kohn Swift & Graf, P.C.
Philadelphia, PA

Timothy P. Polishan
Hoegen, Kelly & Polishan
Wilkes-Barre, PA

Defendant's Attorneys:

W. Thomas McGough, Jr.
Kevin C. Abbott
Reed Smith, LLC
Pittsburgh, PA

J. Timothy Hinton
Haggerty, McDonnell & O'Brien
Scranton, PA

E. Case Name: *Joanne Kerrick v. Kelly Monitz and Hazleton Standard-Speaker, Inc.*

Court: Luzerne County Court of Common Pleas
Judge: Thomas F. Burke, Jr.
Case Number: 2995-C-2004
Verdict rendered on: October 11, 2007

1. Name and Date of Publication: *Hazleton Standard-Speaker* (Hazleton, Pennsylvania), article titled "Hunt for Alleged Killer Intensifies", published on June 3, 2003

2. Profile:

   a. Print _x_; Broadcast _____; Internet _____; Other _____.

   b. Plaintiff: Public Official _____; Public Figure _____; Private _x_.

   c. Newsgathering Tort _____; Publication Tort _x_.

   d. Standard applied: Actual Malice ____; Negligence _x_; Other _____.

3. Case Summary: Hazleton *Standard-Speaker* reporter Kelly Monitz was assigned to cover a Pennsylvania State Police press conference on Monday, June 2, 2003 regarding an investigation into the brutal murder of an alleged drug dealer. The murder took place on Wednesday, May 28, 2003 at one location and the body was then transported in a van to a remote location. The van was subsequently set on fire with the deceased individual still in the van.

   At the press conference the State Police provided those present with various documents, including Criminal Complaints and Affidavits of Probable Cause, as well as photographs of certain suspects involved in the crime. The documentation

also included the name of Joanne Kerrick, the plaintiff, as well as the name of Jessica Kerrick, a 16-year-old girlfriend of one of the suspects.

On Tuesday June 3, 2003, the Hazleton *Standard-Speaker* published an article by Monitz titled "Hunt for Alleged Killer Intensifies." The article erroneously identified Joanne Kerrick as an individual who assisted in cleaning up the murder scene and assisted in hiding the guns.

Although the article began on the front page of the *Standard-Speaker*, the language at issue appeared on page 17 of the June 3, 2003 edition. The entire article totaled approximately 1,500 words with the contested language on page 17 comprised approximately 177 words.

Defendants published a follow-up article on June 4, 2003 that explained plaintiff's lack of involvement and portrayed plaintiff in a favorable light.

4. Verdict: For Plaintiff in the amount of $305,250.00, broken down as:

   a. Actual harm to the Plaintiff's reputation: $16,500.00;
   b. Emotional distress, mental anguish and humiliation: $51,250.00; and
   c. Economic loss: $237,500.00

5. Length of Trial: Eight days

6. Length of Deliberation: 2_ hours

7. Size of Jury: 12, plus 2 alternates. One of the jurors was excused during the charge to the jury (his wife went into labor) and an alternate juror was substituted.

8. Significant Pre-Trial Rulings/Proceedings: The judge declined to exclude plaintiff's evidence of emotional distress. The defendants contended that such evidence should not be admitted without testimony from a mental health care professional where there was an obviously independent cause: the daughter's involvement in the murder and subsequent juvenile court proceedings.

9. Significant Mid-Trial Rulings (including interlocutory appeals): Judge Burke granted Plaintiff's Motion for a Directed Verdict as to liability (negligence), at the close of all evidence. Judge Burke agreed with the defense not to instruct the jury as to punitive damages.

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): Defense went through extensive

preparation with regard to questions for voir dire as such questions related to the perspective juror's perception of print media.

12. Pretrial Evaluation: This case involved a matter of defamation per se of a private Plaintiff. As a result, the primary issue for the jury related to damages. The Plaintiff attempted to establish a claim for punitive damages by alleging that the corrective article appearing on June 4, 2003 was not a correction, retraction or any form of acknowledgement by the Defendant that an error had been made with respect to the article in issue.

13. Defense Juror Preference During Selection: The defense attempted to secure individuals with a higher level of education (post high school).

14. Actual Jury Makeup: 4 were female, 8 were male; 5 of the 12 were college graduates.

15. Issues Tried: The primary issues tried were negligence, causation and the amount of damages sustained by Plaintiff.

16. Plaintiff's Demand (damages sought, compensatory/punitive): Plaintiff sought damages in the amount of 1.5 million and during the course of Trial reduced her demand to $700,000.00.

17. Plaintiff's Theme(s): Defendants falsely identified Plaintiff as being involved in a homicide "cover-up" and failed to publish a proper correction. Plaintiff also alleged that the Defendant-Reporter improperly interviewed a minor (16-year old) about the minor's involvement in the homicide and came upon Plaintiff's property under false pretenses in an attempt to secure "another story". Plaintiff contented that the article of June 4, 2003, was not a corrective article as it failed to admit the error, refer to the Plaintiff as being misidentified, failed to identify the article as a correction and, otherwise, was not in accord with past practice of the newspaper as it relates to "corrections". Plaintiff alleged that she had lost her job as a result of the incorrect article.

18. Defendants' Theme(s): Defendants acknowledged that they erred in identifying the Plaintiff and corrected their error by publishing what they considered to be a corrective article on June 4, 2003. That article appeared on Page 1, above the fold, and was written in a sensitive and sympathetic manner so as to place the Plaintiff in a favorable light. The article did not repeat the error set forth in the previous publication. The article, itself, was an admission of the error that had existed in the previously day's publication. Defendants raised the issue that any emotional damage sustained by Plaintiff was not the result of the newspaper article of June 3, 2003 but rather the involvement of the Plaintiff's daughter in the homicide matter. Defendants took the position that the Plaintiff did not lose her job as a

result of the newspaper article and failed to maintain subsequent employment as a result of her own doing.

19. Factors/Evidence:

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

b. Sympathy for plaintiff during trial: Plaintiff displayed a good bit of emotion when testifying as well as during the course of the trial.

c. Proof of actual injury: Plaintiff testified that she lost her job of 10 years as a result of the article and has been unable to find permanent employment since that time. Defendants introduced testimony via the employer's human relations representative and related documentation that the plaintiff was terminated because "after an evaluation of the program it was determined that the [employer] was no longer in need of [plaintiff's] services." The employer's human relations representative further testified that the plaintiff's position was never filled after June 9, 2003. The jury apparently disbelieved or ignored this evidence.

Plaintiff testified that she was angry and upset over the article, became less caring and was shunned and treated differently by peers and individuals in the community after publication of the article.

Plaintiff testified that following the loss of her job in June of 2003, she had secured employment through at least three temp agencies and had obtained at least two jobs on her own. One of the jobs plaintiff secured without assistance was at a nursing home doing personal care work similar to the work she performed from 1992-2003. However, plaintiff testified that she did not like the way this nursing facility treated its clients so she quit after less than a month. Plaintiff also testified that that during the summer of 2003, she had applied for a night shift job at a convenience store, but that she believed she was not given the job because of the publication.

Plaintiff admitted that she was emotionally disturbed by the fact that her daughter was being investigated for her participation in the crime and because her daughter had to serve approximately eight months to a year in a juvenile detention facility.

d. Defendants' newsgathering/reporting: Defendant-Reporter misidentified Plaintiff in the June 3, 2003 article.

The testimony in the case revealed that reporter Monitz received a telephone call from Joanne Kerrick on the morning of the publication, Tuesday, June 3, 2003, relative to the article. Specifically, Joanne Kerrick advised that she was erroneously identified and that, in fact, it was her 16-year-old daughter, Jessica, who had been involved in the matter. "I said, it wasn't me. It was my daughter. You can talk to my daughter. She's right here."

Monitz testified that she checked her paperwork while the plaintiff was still on the phone, acknowledged the error, apologized, and made arrangements to speak with the plaintiff later that day, around lunchtime. The plaintiff denied making definite arrangements to meet or speak with the reporter.

The reporter further testified that she called the plaintiff's house around noon, and continued to do so for about 45 minutes, but that there was no answer. Fearing for the plaintiff's safety, the reporter testified that she had called both the state police and local police to advise of her concerns, but the authorities would not send someone out to investigate. Accordingly, the reporter made the decision, on her own, to travel to the plaintiff's house to make certain that she was safe. Upon arriving, the reporter sat in her truck for some time mulling over whether her own safety would be in jeopardy. At that time, not all of those accused of taking part in the murder were in police custody.

Monitz then proceeded to the plaintiff's house and knocked on the door. A girl answered the door, and after the reporter identified herself and advised why she was there (to check on the safety of the plaintiff) she was informed that the plaintiff was okay, but not at home. The reporter was then invited into the house. At the time, only two individuals were at the plaintiff's residence, her 16-year-old daughter, Jessica, and a friend of Jessica. The reporter proceeded to interview the girls and left the residence when asked to do so by the plaintiff's daughter. The reporter provided her telephone number and asked that Jessica tell her mother about her presence.

Monitz then wrote a second article based upon information provided by the plaintiff in her telephone call of June 3, 2003, as well as information provided during the interview with her daughter. The reporter testified that she spoke with her managing editor about the error that appeared in the article of June 3, 2003 and that the editor advised her to correct the error. That conversation occurred prior to the reporter going out to the plaintiff's residence. When she had returned to the newsroom, she prepared a corrective article.

Monitz presented that article to her managing editor who was of the opinion that it was a sensitive and sympathetic way to resolve the issue by correcting the error without repeating the error, by giving it prominence on the first page above the fold, and by printing it promptly on June 4, 2003. Furthermore, the managing editor felt that by printing the corrective article in the manner described, it would be more beneficial than just placing a correction on page 2 in the standard correction box of the newspaper wherein it would just set forth that the plaintiff had been misidentified in the preceding day's article. In that regard, the managing editor testified that by publishing a corrective article, the newspaper could, "number one, present it in a way where no one could miss it, and number two, not add to whatever damage might have been done by the original error."

The newspaper, through its managing editor, said that running a standard correction would merely call attention to the original error and that a corrective article would be a more appropriate way to resolve the matter for the plaintiff and her daughter.

The corrective article was published on the front page of the Wednesday, June 4, 2003 edition of the *Standard-Speaker*. It properly identified the parties, indicating that the plaintiff had no involvement with the murder or its cover-up. In that regard, the article stated that plaintiff "didn't know about the murder of an alleged drug dealer until police arrested her daughter's 16-year-old boyfriend on homicide charges."

The article also clarified that the plaintiff's 16-year-old daughter, not the plaintiff, "helped her boyfriend hide the two guns used to kill [the victim] in her basement the day after the murder, according to court papers. She also helped clean the West Hazleton apartment where the murder took place, the affidavit said." The article did not contain an apology, it did not specifically admit the error or restate any of the incorrect information. Furthermore, the article did not use the words "correction" or "misidentification" and did not contain a "correction" heading. The article published the correct information in a format that the managing editor thought would be least harmful to the plaintiff.

Following the publication of the June 4 article, neither the newspaper nor the reporter received any phone calls from the plaintiff indicating her concern with the June 4 article. In fact, the defendants heard nothing further from the plaintiff until her complaint was filed on May 4, 2004.

e. Experts:

Defense experts: Jack C. Doppelt, Professor, Medill School of Journalism, Northwestern University, 2-123 McCormick Tribune Center, 1870 Campus Drive, Evanston, IL 60208. Professor Doppelt was qualified as an expert in newsroom standards and practices and journalism ethics. Specifically, Professor Doppelt testified that the error was not as a result of journalistic negligence and that the corrective article published by the Defendant newspaper was a "correction" within accepted journalistic standards and that it was within acceptable journalistic standards for the Defendant-Reporter to have interviewed a minor outside the presence the minor's parent and to have published comments made by the minor as a result of the interview. Professor Doppelt further testified that there are numerous acceptable means by which to correct an error and that the predominant standard is that such correction should be made promptly and prominently. In this instance, Professor Doppelt took the position that the article, appearing on Page 1 above the fold on the date following the error, was both prompt and prominent and to repeat the error in the corrective article would have been more harmful to the Plaintiff. We would highly recommend Professor Doppelt as an expert to media defense counsel.

Plaintiff's experts: Christopher Harper, Associate Professor, Department of Journalism, Temple University, 2020 13th Street, Philadelphia, PA 19122 (note that this witness also testified for plaintiff in *Joseph*). Mr. Harper testified as an expert in newsroom standards and practices. Professor Harper opined that the corrective article failed to follow generally accepted newsroom standards and practices relating to corrections in that there was no specific admission of a mistake and the article contained no apology. Professor Harper also testified that the Defendant-Reporter failed to follow generally accepted newsroom standards and practices by interviewing Plaintiff's 16-year old daughter, who was being investigated by police in connection with the underlying murder at the time.

f. Other evidence: Plaintiff argued that the Defendants acted outrageously by "posting" the June 3rd article on its website archive in January of 2006 and subsequently failing to remove the said article until a week before Trial. Plaintiff also argued that the Defendants acted with reckless indifference to the Plaintiff's interests by physically failing to remove copies of the June 3rd edition from their news counter as well as local newsstands and distribution centers (stores). Based on this evidence, plaintiff requested but was refused an instruction on punitive damages.

Plaintiff testified that she allowed the four murder suspects to stay at her

house the night of the murder, believing that they had been evicted from their apartments and had nowhere to go. Plaintiff admitted that her daughter had been dating the 16-year-old suspect for about two months. On cross-examination, plaintiff was questioned as to the language of one of the probable cause affidavits provided to the reporter by the police, which indicated that plaintiff's daughter told the police that her boyfriend had lived with her for a month prior to the murder. The plaintiff adamantly denied this fact and stated that he had slept over "a couple of times."

g. Trial dynamics:

i. Plaintiff's counsel: Very professional in their demeanor.

ii. Defendants' trial demeanor: The Defendant-Reporter and the newspaper's Executive Editor sat with counsel during the entire two week Trial and both testified. It is not believed that their demeanor at counsel's table or on the stand greatly influenced the jury either positively or negatively. Both individuals admitted the error on several occasions and testified at great length as to why they believed the June 4th article was effective as a correction and a proper and sympathetic response to the errors published on June 3, 2003.

The Defendant-Reporter testified that she did not believe that she had done anything inappropriately when she interviewed the plaintiff's minor daughter, in that she had gone to the house innocently and during the conversation that she had with the plaintiff, that morning, the plaintiff offered to allow the reporter to speak to the minor on the telephone.

iii. Length of trial: 8 days.

iv. Judge: Judge Burke is an excellent jurist and a credit to the bench. He showed fairness and impartiality to the parties, evidenced a depth of understanding of the legal issues involved, convened proceedings with punctuality, ruled on issues with promptness and displayed commendable judicial temperament.

h. Other factors:

20. Results of Jury Interviews, if any: None at this time.

21. Assessment of Jury: Due to the size of the economic damage award, we believe the jury concluded that Plaintiff lost her job due to the article and awarded

economic damages based upon Plaintiff's approximate yearly loss of income as between the amount that she had earned while she was a full-time employee prior to the June 3rd article as opposed to the amount that she was earning subsequent to the termination of her job on June 9, 2003. Based upon the jury's request for certain instructions by the Court during deliberations (i.e. recklessness), it is believed that the jury concluded that the Defendant-Reporter acted recklessly.

22. Lessons: The corrective article in this matter did not make reference to improperly identifying or misidentifying an individual. It would appear that the jury may have considered that the corrective article was not a correction, but rather another story. It may be appropriate to print a correction in the standard correction section (typically Page 2) and refer to any supporting article in that section. While counsel does not believe that if that was done in this case it would have eliminated the lawsuit, counsel is of the opinion that it would have mitigated the loss in that the jury would have recognized that the newspaper "admitted" its error. In this instance, it appears that the jurors may not have believed that the corrective article acknowledged any error.

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

Plaintiff's Attorneys:

Cletus P. Lyman
Michael T. Sweeney
Lyman & Ash
1612 Latimer St.
Philadelphia, PA 19103

Defendants' Attorneys:

Niles S. Benn
Terence J. Barna
Benn Law Firm
103 E. Market St.
P.O. Box 5185
York, PA 17405-5185
717-852-7020 (ph)
717-852-8797 (FAX)
nbenn@bennlawfirm.com
tbarna@bennlawfirm.com

F. Case Name: *Paul Lusczynski v. Tampa Bay Television, Inc. and Mike Mason*

Court: Hillsborough County Circuit Court, FL
Judge: James D. Arnold
Case Number: 03-CA-011424
Verdict rendered on: 9/11/06

1. Name and Date of Publication: TV news segments, "Bad Cops, Big Promotions" May 2003, June 2003 and January 2004

2. Profile:

   a. Print _____; Broadcast _x_; Internet _____; Other _____.

   b. Plaintiff: Public Official _x_; Public Figure ____; Private _____.

   c. Newsgathering Tort _____; Publication Tort _x_.

   d. Standard applied: Actual Malice _x_; Negligence _____**;** Other _____.

3. Case Summary: Sergeant Paul Lusczynski, a Tampa police officer, sued WFTS-TV d/b/a Channel 28 News and its reporter, Mike Mason, for defamation and false light invasion of privacy based upon a series of broadcasts about the promotions process of the Tampa Police Department. Two other police officers brought lawsuits premised upon the same series in separate cases (which were never tried). The series addressed whether the promotions at the police department process was fair and featured police officers who said the process encouraged poor behavior and favoritism as well as those who defended the process.

   Lusczynski was depicted in the broadcasts because Lusczynski head-butted an ATF agent during an argument at a bar and was later promoted to Sergeant:

   > Mason: Example. Off-duty officer Paul Lusczynski head-butted another officer during an argument at a bar in Ybor City. He was only given a written warning. Lusczynski has since been promoted to corporal.
   >
   > Lusczynski: I think I've earned my promotion, my assignment. Uh, obviously the Chief of Police and the staff did.

   Lusczynski claimed that though the statements made about him were accurate, they were juxtaposed in such a way as to create the false impression that he was a bad cop who was promoted as a result of favoritism.

   The plaintiff voluntarily dismissed his claims for defamation and pursued his claims for false light. The case was tried, and a jury found in favor of Defendants.

   During the presentation of his case in chief, Lusczynski called three officers who appeared as on-air sources in the broadcast. Retired Deputy Chief John Bushell, who stated in the broadcast that there was too much friendship at the Police Department and a good ol' boy system testified that his statements did not refer specifically to Lusczynski. Officer Steve Thurman, who stated in the broadcast that the Police Department needed officers that were corrupt out and officers with

integrity and smarts promoted and that the Department was not promoting the best and the brightest, also testified that his statements did not refer to Lusczynski.

Finally, Chief of Police Stephen Hogue testified that his statements – that he would promote officers based on performance rather than friendship – were not a reference to Lusczynski. Lusczynski's attorney attempted to show that their statements had been structured in the broadcasts to imply that these individuals were referring to Lusczynski.

Each of the three officers testified that they were never asked by the station about Lusczynski and that their comments were about the promotions process generally. Plaintiff's attorney argued in closing that the station's failure to ask the sources about Lusczynski demonstrated actual malice.

4. Verdict: For Defendants

5. Length of Trial: One week

6. Length of Deliberation: Two hours

7. Size of Jury: Six

8. Significant Pre-Trial Rulings/Proceedings: Order denying motion for summary judgment on single action rule (that when libel and other tort claims including false light are brought over the same facts, the libel claim supersedes and the other claims are dismissed), actual malice, and public concern (as precluding any form of "privacy" action, *Jacova v. S Radio & Tel. Co.*, 83 So. 2d 34 (Fla. 1955)) grounds. The plaintiff avoided the single action rule by dismissing his defamation claims and admitting that the facts reported were truthful and not defamatory. This Florida jurisdiction was bound by the intermediate appellate decision in *Heekin v. CBS Broad., Inc.*, 798 So. 2d 359 (Fla. 2d DCA 2001), holding that a false light claim can lie "when the facts published are completely true."

   Order compelling the deposition by defendants of Tampa Mayor Pam Iorio, overruling claim of executive privilege.

9. Significant Mid-Trial Rulings (including interlocutory appeals): Ruling preventing the plaintiff showing to jurors most of the 31 broadcasts in the series because they did not arguably contribute to the alleged false light.

   Ruling denying jury instruction on public concern defense

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The verdict form asked two questions: 1) whether

the plaintiff was case in false light as to each of the alleged false impressions; 2) whether the false light was highly offensive to a reasonable person in Lusczynski's position; 3) whether WFTS and Mason acted with knowledge or reckless disregard; and 4) the amount of damages to be awarded to Lusczynski.

The jury answered "no" to the first question, finding Lusczynski had not been cast in a false light as to any of the alleged false impressions. Proceeding no further with the verdict form, the jury returned to the courtroom with a verdict in favor of WFTS and Mason.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries): A mini Mock trial/Focus Group session assisted the defense in determining attitudes of the jury pool concerning the media and police officers in general, including whether reporting incidents such as these is a matter of great public concern. Most of the mini mock juries found in favor of the defendants, and those who found for Lusczynski awarded little damages. One mock jury awarded the plaintiff one-million dollars in damages, though this mock jury was an anomaly.

12. Pretrial Evaluation: Defendants and their attorneys believed there was a strong likelihood of success at trial and determined that the importance of the issues outweighed the desirability of providing a monetary settlement to plaintiff.

13. Defense Juror Preference During Selection: The defendants' focus in selecting jurors was to find jurors who would not exhibit an anti-media or pro-law enforcement bias, and who would understand the importance of the complex issues before them (such as an ability to grasp the concept of "actual malice" and to understand its importance to speech matters).

14. Actual Jury Makeup: 4 female, 2 male, including a paralegal and a magazine writer

15. Issues Tried: False light invasion of privacy based upon three allegedly false impressions: 1) that Lusczynski was a corrupt cop; 2) that Lusczynski was promoted to sergeant as a result of favoritism and a good old boy system; and 3) that the new police chief thought Lusczynski was a corrupt cop who did not deserve his promotion.

16. Plaintiff's Demand (damages sought, compensatory/punitive): compensatory damages of an unspecified amount

17. Plaintiff's Theme(s): Plaintiff was a good cop, a family man with a bad incident in his past who didn't deserve to have that incident reported on the news because the incident was not significant.

18. Defendant's Theme(s): The broadcasts were about the promotional process of the Tampa Police Department, not this officer; the broadcasts were truthful; the broadcasts were about issues of legitimate public concern.

In closing, defense counsel argued that the broadcasts did not create any false impressions about Lusczynski, and that the station's failure to ask each of the sources in the story about Lusczynski directly did not amount to actual malice, and that any damages Lusczynski suffered was the result of the truthful information about his misconduct.

19. Factors/Evidence:

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

b. Sympathy for plaintiff during trial: None, *see* ¶ 20, *infra*.

c. Proof of actual injury: None

d. Defendants' newsgathering/reporting: WFTS and Mason presented evidence that the broadcasts were never intended or structured to be about Lusczynski and that the only statements about Lusczynski were the truthful statements concerning his misconduct, discipline, and promotion.

Defendants also presented evidence of the thoroughness of the newsgathering process, including the diligence and exhaustiveness of Mason's research and investigation, the careful scrutiny of the wording used to tell the stories, and the conscientious choice of video footage to pair with those words.

e. Experts:

Defense experts: Deborah Halpern
MA in English
Professor of Journalism & Mass Communications at Virginia Commonwealth University
Would recommend

Plaintiff's experts: None

f. Other evidence: The report of the incident involving the Plaintiff was true as evidenced by documents and witness testimony.

g. Trial dynamics:

i. Plaintiff's counsel: Mark Herdman of Herdman & Sakellarides; not a factor.

ii. Defendant's trial demeanor: Appropriate and likeable

iii. Length of trial: Six Days

iv. Judge: Honorable James S. Arnold

h. Other factors:

20. Results of Jury Interviews, if any: Favorable. The jurors were excited to speak with Defense counsel. In fact, the entire jury was waiting for Defense counsel in the hallway immediately following the trial. All of the jurors felt that the reports were of important public concern and that the Plaintiff had been involved in a serious altercation for which, as a police officer, he should have been exposed. The jurors reported that they did not like the Plaintiff's demeanor – that his facial expressions and body language showed anger and that he even frightened some of them. The jurors thought Mason was a good journalist with a sincere demeanor in court. In addition, although the jurors respected the opinion of Defendants' expert witness, they thought she was unnecessary because by the time she took the stand, they understood that the broadcasts were not structured to create any false impressions about Lusczynski.

21. Assessment of Jury: The jury was intelligent, open minded, and happy to do their service.

22. Lessons: When a case is premised upon truthful statements creating false impressions, focus on establishing the truth of the underlying statements and on undercutting the existence of the supposedly false impressions. The jurors reacted negatively to plaintiff's attempt to twist truthful speech into actionable claims.

23. Post-Trial Disposition (motions, appeals): Two additional Plaintiffs who had filed suit based upon the same series of broadcasts, dismissed their suits with prejudice. No appeal was taken by Lusczynski.

Plaintiff's Attorneys:

Mark Herdman
Herdman & Sakellarides, P.A.
Clearwater, FL

Defendant's Attorneys:

Greg, D. Thomas (lead)
Thomas & LoCicero PL
100 W. Kennedy Blvd., #500
Tampa, FL 33602
813-984-3060 (ph)
813-984-3066 (direct)
813-984-3070 (FAX)
gthomas@tlolawfirm.com

Deanna K. Shullman (second chair)
Thomas & LoCicero PL
Ft. Lauderdale, FL
954-332-3619 (direct)
dshullman@tlolawfirm.com

Rachel E. Fugate (pre-trial)
Thomas & LoCicero PL
Tampa, FL
813-984-3065 (direct)
rfugate@tlolawfirm.com

G. Case Name: *Marc E. Mandel v. The Boston Phoenix, et al.*

Court: U.S. District Court for the District of Massachusetts
Judge: Richard G. Sterns
Case Number: 03-10687 (RGS)
Mistrial declared: December 11, 2007

1. Name and Date of Publication: "Children at Risk" published by *The Boston Phoenix*, January 10-16, 2003.

2. Profile:

   a. Print _x_; Broadcast _____; Internet _x_; Other _____.

   b. Plaintiff: Public Official _x_; Public Figure _____; Private _____.

   c. Newsgathering Tort _x_; Publication Tort _____.

   d. Standard applied: Actual Malice _x_; Negligence _____; Other _____.

3. Case Summary: An entry-level state prosecutor, plaintiff claimed he was libeled by lengthy investigative article addressing probate court litigations in divorce cases where a spouse claims the other spouse sexually abused a child. The article reported on several national studies that had found wives often lose either partial or complete custody of/access to their children when they make such claims in a divorce. The article reported on specific cases bearing a relationship to Massachusetts where custody of children had been curtailed in such cases. The article 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. Plaintiff's core theory was that the reporter and editors had not thoroughly researched proceedings in a messy divorce, had missed exculpatory evidence, and had failed to give husband enough voice to support his claim that his children were not molested.

4. Verdict: Hung Jury

5. Length of Trial: 6 trial days

6. Length of Deliberation: 3 days

7. Size of Jury: 8

8. Significant Pre-Trial Rulings/Proceedings: Case was a retrial of a case overturned on appeal. At the first trial, the judge had ruled on summary judgment that plaintiff was a private citizen and so the case had been tried to a negligence standard. The jury found newspaper liable and awarded $950,000 in compensatory damages (322 F. Supp. 2d 39 (D. Mass. 2004)). On appeal, the First Circuit held that whether plaintiff was a public official required detailed fact finding and remanded the case for a new trial on the public official issue and liability questions (456 F.3d 198 (1st Cir. 2006)). The second trial was bifurcated. A bench trial was held where plaintiff was found to be a public official. A jury trial on liability followed.

9. Significant Mid-Trial Rulings (including interlocutory appeals): Controversial rulings admitting certain evidence: evidence that administrative tribunal, subsequent to the defendants' publication, reduced finding of "probable" molestation to a "neutral" finding; examination of reporter concerning notes and outline of article unrelated to portions of article in issue; evidence of misconduct by the wife, including disobeying court orders, and other marital issues.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The court gave the jury short initial instructions; it used a special verdict form; it carefully vetted all instructions and the verdict form with counsel. (See excerpt of jury charge, attached.) The verdict form led the jury through sequential process, from truth/falsity, to actual malice, to damages (specific to each of the challenged statements).

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries): There were no profiles, surveys or mock trials. However, substantial jury consultant input was used with witnesses. An informal "shadow jury" assisted at trial.

12. Pretrial Evaluation: The actual malice defense seemed strong. The first trial judge declared, at the close of plaintiff's case, that actual malice was not proven. Article was not immune from (relatively small) glitches in reporting, *i.e.* on minor "negligence."

13. Defense Juror Preference During Selection: Ethnic diversity/minorities/younger jurors/professional or caretaker backgrounds/potentially liberal conviction/people actively involved in community.

14. Actual Jury Makeup: An all white jury, many with graduate-level education. 5 women, 3 men.

15. Issues Tried: Falsity of four specific statements (*see* jury charge excerpt attached), actual malice, and damages arising from statements complained of.

16. Plaintiff's Demand (damages sought, compensatory/punitive): $2 million (punitive damages not available).

17. Plaintiff s Theme(s): That the reporter chose the topic with preconceptions (allegedly biased national surveys had inspired it); that the reporter chose not to pursue relevant issues of inquiry (e.g., "people not contacted," "documents not read"); that article made plaintiff unemployable for government work (e.g., prosecutor, judge); that arguably he'd lost his prosecutor's job due to article; that plaintiff needed to "clear the record" for his kids; that custody of children he was awarded in divorce shows he did not molest; that press was "out of control"; that this paper was a scandal sheet; that this reporter and editors here were not on same page; that internet coverage indelibly branded him.

18. Defendant's Theme(s): That the article treats a topical and important subject; that state administrative findings implicating plaintiff were persuasive; that reporter's research was thorough and dogged; that reporter had available expert and persuasive and documented evidence of plaintiff wrongdoing; that plaintiff was

inconsistent in his attack against the article; that the article in all material respects was truthful; that admitted but minor factual inconsistencies were easily explained and not defamatory; that other damning points made about plaintiff in the article he did not complain about were equally or more impactful to plaintiff's reputation; that plaintiff's successes in private law practice belied damage claims; that plaintiff's acts of violence in the family undermined claim of ruination due to the article, and served to support what was reported; that plaintiff's story contained many inconsistencies.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Several prospective women jurors expressed discomfort at sitting on a case involving allegations of child molestation ("I'm pregnant and cannot sit through this"); some jurors expressed concerns they "might" be biased against the press.

b. Sympathy for plaintiff during trial: Jury gave no strong indicators; Plaintiff's courtroom behavior had odd elements, e.g., tearing-up while testifying; often staring rigidly at jury from audience seat; exhibiting "shoulder to shoulder" solidarity with his ex-father-in-law (estranged from his own daughter, plaintiff's ex-wife) a character witness at trial.

c. Proof of actual injury: Minimal and undocumented claims, somewhat inconsistent with records.

d. Defendants' newsgathering/reporting: Major areas explored were reporter's failure to review one (arguably redundant) court memo critical of divorcing wife, and a transcript from a nasty custody hearing arguably inconsistent with wife's testimony about risk of husband; efforts to show tension between reporter's text and edits (minimal); subheading that introduced disputed portion of article ("Losing custody to a child molester") was controversial, and reporter was not consulted on its use pre-publication.

e. Experts: Defense experts - None; Plaintiff's Experts - None

f. Other evidence: Case presented difficult choices as to offering testimony by estranged wife and whether by deposition or with live testimony. A complex, and melodramatic story as to marital battles over custody, going well beyond the article's scope, intruded to some degree.

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiff's counsel played well to the jury; righteous indignation and a brogue seemed, on balance, to serve him.

ii. Defendant's trial demeanor: Four defendants testified (reporter, 2 editors, publisher), standing up well, on balance. Reporter's demeanor was very professional but, at times, may have seemed cold. Her testimony was clear as to how decisions were made and her basis for them. Her testimony did not, however, generate strong sympathy from the jurors. Some tension played out as to how the reporter and editors had interacted on some steps in vetting the article.

iii. Length of Trial: 6 days

iv. Judge: Trial judge held no sidebar conferences – a major drawback. When jury was away, he remained virtually inaccessible. Once evidence had closed, he was very interactive with counsel, *e.g.*, as to refining jury charge and special jury verdict form. The Court's instructions were in clear lay English, comprehensive, and vetted thoroughly with counsel in advance.

h. Other factors: The underlying topic (alleged molestation by a parent of his children) seems such a "raw" topic that it may effectively be indefensible, before an average juror, without evidence approaching proof "beyond reasonable doubt." Article, on balance, was well researched, well written, and comprehensive. It was not without its glitches, however. Moreover, several of the subheadings were controversially suggestive. The inevitable, "what more could have been done" questions presented some challenges.

20. Results of Jury Interviews, if any: None

21. Assessment of Jury: In hindsight, many jurors seemed to have believed newspaper reporters are subject to an extremely high standard of care, *i.e.*, virtually airtight "proof" for a subject matter such as this one. There was increasingly obvious tension among jurors as deliberations dragged on before the court declared a hung jury. Passions appeared high at the end.

22. Lessons: On topics of such strong volatility, more aggressive vetting of themes with mock jurors may have changed some points of emphasis. The concept of "actual malice" did not apparently serve as a high bar in the eyes of many jurors.

23. Post-trial Dispositions (motions, appeals): Trial ended with hung jury and settlement followed.

Plaintiff s Attorney(s):

Stephen A. Cullen
Mary A. Azzaritto

Defendant(s) Attorneys:

Daniel J. Gleason
Christa von der Luft
Nutter, McClennen & Fish
World Trade Center West
155 Seaport Blvd.
Boston, MA 02210-2604
617-439-2233 (ph)
617-310-9000 (FAX)
dgleason@nutter.com
cvonderluft@nutter.com

CLOSING INSTRUCTIONS

MARC E. MANDEL

v.

THE BOSTON PHOENIX, INC., KRISTEN LOMBARDI, PETER KADZIS, SUSAN RYAN-VOLLMAR

December 3, 2007

Members of the jury:

Now that the closing arguments of the lawyers have been presented, the time has come for me to instruct you on the law. My instructions will be in four parts: first, some instructions on the general rules that define and control the duties of a jury in a civil case; second, some instructions that you may find of use in evaluating the evidence that has been presented; third, I will explain the rules of law that you must apply to the facts as you find them, and finally I have some brief guidelines that will govern the conduct of your deliberations.

In defining the duties of the jury, let me first give you a few general rules.

* * * *

DEFAMATION

Let me turn now to the legal standards that you will apply to the facts as you find them.

Mr. Mandel has brought a suit against the defendants accusing them of libel. Libel refers to written words that are defamatory, while slander refers to spoken words that defame.

There are four statements that appear in the January 10-16, 2003 edition of the Boston Phoenix that Mr. Mandel alleges were defamatory. They are:

1. The subheading within the article: "Losing custody to a child molester."

2. "The Orleans resident, 30, is telling me about how she lost custody of her two children, a daughter now four years old and a son now age three in Barnstable Probate and Family Court to her ex-husband, a man who Baltimore County child-protection workers believe is a child molester."

3. "By the time the Baltimore trial took place in August, Fitzpatrick had accumulated a battery of documentation and witness to back up her sex-abuse claims, including the Baltimore DSS findings that Mandel had assaulted his oldest daughter."

4. "But a July 2002 report conducted for the Baltimore County DSS determined that Mandel had assaulted his 10-year-old daughter from an earlier marriage."

In order to prevail on his claim for defamation, Mr. Mandel must prove to you by a preponderance of the evidence the following elements:

First, that the defendants published statements "of and concerning" Mr. Mandel.

Second, that one or more of the statements was false in some material, that is, significant sense.

Proof by a preponderance of the evidence, you will recall, is the familiar "more likely than not" standard. If Mr. Mandel successfully proves the above elements by a preponderance of the evidence, he must then prove a third element by clear and convincing evidence, that is:

Third, that the defendants published the defamatory statements with actual malice. Malice in this context is a term of legal art that is distinct from the common-law connotation of spite or It means that the statements were published either with actual knowledge that they were false or with reckless disregard as to their truth.

"Reckless disregard" means that the defendants entertained serious doubts about the accuracy of the statements at the time they were published. The reason for the higher standard of proof on this element lies in the guarantee the First Amendment of the United States Constitution

affords to a free press to publish statements critical of public figures like Mr. Mandel, who at the time the article was published, was an Assistant State's Attorney. The First Amendment guarantee protects the press from liability for mere carelessness in what it reports. A publisher is subject to liability only if it forfeits First Amendment protection by publishing defamatory statements knowing that they are false or acting in reckless disregard for their truth. You will note that I said that the publisher's state of mind must be assessed as of the time of publication. Post-publication evidence is irrelevant to that assessment. Rather, it has been admitted to the extent that you might find it to bear on Mr. Mandel's burden of proving the falsity of the statements at issue.

As a rule, the fact that journalistic standards were not met or that a reasonably prudent person would have investigated the reported facts further, are not sufficient to show that a publisher acted in reckless disregard for the truth. A plaintiff must show something more than a deviation from professional reportorial standards. In this regard you may consider the following factors: (1) when a reporter is aware of a statement's probable inaccuracy, a deliberate intent to avoid the truth may be adequate to establish actual malice; (2) recklessness may also be established where there are obvious reasons to doubt the veracity or accuracy of a source or to believe that the source is motivated by bias or a self-serving purpose; and (3) the fact that a reporter is aware of other sources with relevant and contradictory information and yet purposefully fails to contact these witnesses or to make a reasonable attempt to do so may establish recklessness. None of these factors is determinative, but all may be considered.

The burden of clear and convincing proof is sustained if the evidence induces in your minds a reasonable belief that the facts asserted are highly probably true, and that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. If you believe upon consideration and comparison of all the evidence in the case that there is a high degree of probability that the facts are true, you must find that the facts have been proven. Clear and convincing evidence is a burden of proof more strict than a preponderance of the evidence but less strict than the standard of proof beyond a reasonable doubt applied in criminal cases.

The plaintiff must show that the disputed statements were of and concerning him. Mr. Mandel need not be referred to specifically by name in a statement in order to prove that the statements were about him. But he must show that the defendants intended the words to refer to him and that it is reasonably probable that members of the public who read the statements would have understood them as referring to Mr. Mandel.

Statements are defamatory if they are unprivileged and, singly or collectively, tend to hold a person up to scorn, hatred, ridicule, or contempt in the mind of any considerable and respectable segment of the community. A statement must be interpreted in light of the circumstances in which it was made and must be given the natural meaning that the statement would generally convey. As a matter of law, a statement that a person has committed a serious crime like child molestation is defamatory. A statement may, of course, be defamatory in the sense of imputing disgrace to its subject, and nonetheless be nonactionable. As the highest court in Massachusetts has said: "No matter how defamatory a statement may be; no matter what the defendant's motive in writing it, if the plaintiff has failed to prove by a preponderance of the evidence that the statement is false, that is, that it is not substantially true, the plaintiff cannot prevail on his claim." Because the nature of the statements at issue in this case are defamatory, Mr. Mandel has no obligation of proving them as such. He must, however, prove by a preponderance of the evidence that they were false. Truth in other words is an absolute defense to a claim of defamation. If you find that Mr. Mandel has failed to meet his burden of proving by a preponderance of the evidence that the statements were false, you must return a verdict for the defendants.

Similarly, even if you find that the statements were false, you must be satisfied that Mr. Mandel has proven by clear and convincing evidence that the defendants published them with actual malice, that is, with a reckless disregard for the truth. If he has failed to meet this additional burden, your verdict must be for the defendants.

H. Case Name: *William Stephens and Ray Jordan v. Wayne Dolcefino, et al.*

Court: 215th District Court of Harris County, Texas
Judge: Hon. Levi Benton
Case Number: 99-43183
Verdict rendered on: February 15, 2007

1. Name and Date of Publication: "The Lloyd Kelley Series" – broadcast on August 12, 13, 14 and 15, 1997

2. Profile:

   a. Print _____; Broadcast _x_; Internet _____; Other _____.

   b. Plaintiff: Public Official _x_; Public Figure ____; Private _____.

   c. Newsgathering Tort _x_; Publication Tort _____.

   d. Standard applied: Actual Malice _____; Negligence _____**;** Other _x_ (Texas wiretap statute).

3. Case Summary: This case stemmed from an undercover investigation of the Houston City Controller Lloyd Kelley. KTRK's 13 Undercover Unit received tips that the Controller was often absent from work during regular hours. The station thus began surveillance of the city official. During this period, Kelley and his deputy, Bill Stephens, drove to San Antonio to attend a continuing legal education seminar and Channel 13 followed. At the seminar, during a break, in a public courtyard, KTRK producer Steve Bivens filmed Kelley, Stephens, the Houston Police Chief R.A. Bradford and his assistant, Ray Jordan, with a pager-cam, that is a camera disguised to look like a pager. The pager-cam had sound capability but the sound was erased when the tape was dubbed over to beta tape.

   Stephens and Jordan sued under the Texas wiretap statute and for common law invasion of privacy claiming that their private conversation with Kelley and Bradford had been illegally intercepted. KTRK obtained summary judgment on both claims but, on appeal, the wiretap cause of action was reversed and remanded for trial. The appellate court believed that there was a fact issue on whether the Plaintiffs had a reasonable expectation of privacy when they engaged in the conversation.

4. Verdict: The jury found, by a vote of 10-2, for the Defendants on liability and also that one of the Plaintiffs' (Stephens) claims were barred by limitations. They did not reach the issue of damages. The Special Interrogatories and the Jury Answers are as follows:

QUESTION 1: Did Steve Bivens intercept or attempt to intercept a communication to which William Stephens or Ray Jordan was a party?

ANSWER: William Stephens – NO; Ray Jordan – NO

QUESTION 2: Did Wayne Dolcefino employ or obtain another to intercept or attempt to intercept a communication to which William Stephens or Ray Jordan was a party?

ANSWER: William Stephens – NO; Ray Jordan – NO

QUESTION 3: Did Henry Florsheim employ or obtain another to intercept or attempt to intercept a communication to which William Stephens or Ray Jordan was a party?

ANSWER: William Stephens – NO; Ray Jordan – NO

QUESTION 4: Did KTRK Television, Inc. employ or obtain another to intercept or attempt to intercept a communication to which William Stephens or Ray Jordan was a party?

ANSWER: William Stephens – NO; Ray Jordan – NO

QUESTION 5: Did ABC, Inc. employ or obtain another to intercept or attempt to intercept a communication to which William Stephens or Ray Jordan was a party?

ANSWER: William Stephens – NO; Ray Jordan – NO

QUESTIONS 6 and 7 not answered.

QUESTION 8: Did William Stephens and Ray Jordan have a reasonable expectation of privacy while speaking with Lloyd E. Kelley and C. O. Bradford in the courtyard of the Plaza San Antonio Hotel on July 10, 1997?

ANSWER: William Stephens – NO; Ray Jordan – NO

QUESTIONS 9: Intentionally left blank

QUESTION 10: By what date should each of those below in the exercise of reasonable diligence have discovered the conduct found by you, if any, in questions one through five?

ANSWER: William Stephens – July 29, 1997; Ray Jordan – August 28, 1999

QUESTIONS 11-15, relating to damages and punitive damages, not answered.

5. Length of Trial: 2 weeks

6. Length of Deliberation: 4 hours

7. Size of Jury: 12 jurors

8. Significant Pre-Trial Rulings/Proceedings: The Court granted summary judgment which was affirmed in part and reversed in part. *See Stephens v. Dolcefino,* 126 S.W.3d 120, Tex. App.-Hou. [1st Dist.] (2003). The appeals court ruled that the record demonstrated factual issues regarding the time of discovery of the alleged injury for purposes of the statute of limitations, and as to the wiretap statute elements of interception (whether audible speech was recorded), absence of consent (presence or absence of reasonable expectation of privacy).

   On remand, the court disqualified Kelley who was attempting to represent the Plaintiffs even though he was a witness at trial. His appeal of that ruling was denied. On the day of trial, Plaintiffs' new counsel sought to recuse the trial judge based on his alleged social connection to one of Defendants' counsel (Chip Babcock) and because his sister worked for another Houston television station. The trial judge refused to step down and an appeal of that ruling was denied within an hour.

9. Significant Mid-Trial Rulings/Proceedings: The judge permitted the Plaintiffs to introduce evidence on their claim that the sound on the tape had been intentionally spoliated, but did not permit the issue to go to the jury. There was a dispute about a tape made with the pager-cam by Kelley during his separate case against the same defendants. The defendants were able to get this into evidence and the jurors told us later that they were influenced by the tape which showed that the pager-cam's sound capability was limited.

   The judge also allowed defense evidence of a vendetta by Kelley against the television station (there were two other Kelley lawsuits which had failed). This vendetta evidence was shown through demonstrative graphics. The judge denied defense motions for directed verdict based on statutory construction of the Texas Wire Tap Act (requiring interception of a communication through an electronic device that would enable an overhear not audible to a human ear).

10. Trial Management: There were no mid-trial instructions but there was a special verdict form which is set forth in ¶ 4 above.

11. Pre-Selection Jury Work: We mock tried the case and learned valuable lessons about our case. We also had a jury questionnaire which is attached. In addition, during trial we learned valuable information from a six person shadow jury.

12. Pre-Trial Evaluation: Based on our pretrial research, we thought this was a dangerous case from a jury perspective. We worried about the spoliation issue and feared that it might taint our case. In addition, at the mock trial we learned there were significant privacy concerns from certain types of jurors. These people were prone to use the "media" as a "whipping boy" for all their concerns about technology intruding on their private lives. We saw that jurors who had non-traditional lifestyles were especially sensitive to this issue.

13. Defense Juror Preference During Selection: In Texas, the process is more de-selection than selection. The Plaintiff identified several dangerous jurors for us in voir dire by asking each juror on a scale of 1-10 how serious they felt about a fact pattern very close to the actual facts. As a result, we were able to successfully challenge for cause several dangerous jurors. Our last peremptory strike boiled down to two jurors, one of whom had been qualified and served on a death penalty jury. Conventional wisdom would argue for a strike of that juror but her responses in the selection process seemed to be favorable to our side and defense counsel sensed a good relationship had been formed. The other juror seemed eager (too eager) to serve on the jury and some of the defense team sensed hostility to our case. Still it was a close call. We went with the gut this time against conventional wisdom. It was the right call. The death penalty juror was one of our strongest advocates at trial.

14. Actual Jury Makeup: 9 women, 3 men. The defense peremptory challenges drew a Batson challenge based on race which the trial judge summarily dismissed (there were three African Americans on the jury).

15. Issues Tried: Violation of the wire tap statute, reasonable expectation of privacy (which the defense contended was a prerequisite to constitutionality), spoliation and statute of limitations.

16. Plaintiffs' Demand: $50,000 in statutory damages and $25 Million in punitive damages.

17. Plaintiffs' Themes: The media is intrusive and no one is safe from their prying electronic equipment. It may be Stephens and Jordan today but it could be you tomorrow. The defendants were dishonest because they destroyed the evidence which would have shown that the Plaintiffs were talking about private matters during their conversation.

18. Defendants' Themes: Investigative journalism is in the public interest; there was no violation of the statute because a wire was not used for the intercepted conversation (as in a typical telephone wire tap), and the recording device was incapable of recording more than was audible to the naked ear; there is no expectation of privacy in a public courtyard where public officials are on break

attending a seminar on public business and where no private information was exchanged. Finally, the Plaintiffs suffered no damage because no sound was broadcast and only Stephens was shown on the broadcast and what was shown about him was undeniably true.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: None apparent, *but see* ¶ 20, *infra*.

b. Sympathy for plaintiff during trial: Not significant.

c. Proof of actual injury: Nothing of substance.

d. Defendants' newsgathering/reporting: Eavesdropping and spoliation were in issue, but the defendants were well received by ten of the twelve jurors.

e. Experts:

Defense experts: None.

Plaintiff's experts: None.

f. Other evidence: There was a dispute about a tape made with the pager-cam by Kelley in a different courtroom during a spoliation hearing in his related case against the same defendants. The recording, which Kelley denied making, was in violation of the court's EMC rules. The defendants were able to get this into evidence because it went to Kelley's credibility, and because it showed that the pager-cam's sound capability was extremely limited. The jurors told us later that they were influenced by the tape.

g. Trial dynamics:

i. Plaintiff's counsel: Overreached.

ii. Defendant's trial demeanor: Respectful.

iii. Length of trial: Not a factor.

iv. Judge: Fair, good temper.

h. Other factors:

20. Results of Jury Interviews: We conducted our jury interviews at a post-verdict cocktail reception hosted by Jackson Walker at a local restaurant. The results, as usual, were revealing. The real jury did not like Kelley as a witness (contrary to the impression of our shadow jury). They thought, as we did, that Stephens appeared disinterested at trial and that neither plaintiff had any damages (although they never got to rule on that). They were protective of the dissenting jurors (who did not attend the reception) saying that their dissents were borne of a sense of violated privacy.

21. Assessment of Jury: The venire was incredible. Only one member of the 55 persons gathered was under 50 years old. Many had post-graduate degrees. The jury as chosen had eleven members over 50 years old and one who was 40. Five had post-graduate degrees, while eight of twelve had graduated from college. The Presiding Juror was the Head of a Private High School. There were three African Americans, two Hispanics and one Asian. Excellent, intelligent jury.

22. Lessons: The broadcast media might take from this win that even though we won the war, the expensive battles weren't worth it. That would be a shame. The jurors were especially appreciative of the TV station tackling a difficult subject and exposing the city controller who was soon thereafter voted out of office. The investigation would not have been possible without the pager-cam tools used by the 13 Undercover Unit.

23. Post-Trial Disposition: There were no post-trial motions or appeals.

Plaintiffs' Attorneys:

Marc Hill
Terry Yates

Defendants' Attorneys:

Charles L. "Chip" Babcock
Jackson Walker LLP
1401 McKinney St., #1900
Houston, TX 77010
(713) 752-4200 (phone)
(713) 752-4221 (FAX)
cbabcock@jw.com

Robert P. Latham
John K. Edwards
Jackson Walker LLP
901 Main St., #6000
Dallas, TX 75202
(214) 953-6000 (phone)
(214) 953-5822 (FAX)
blatham@jw.com
jedwards@jw.com

JUROR QUESTIONNAIRE

TO SPEED UP THE JURY SELECTION PROCESS, WE ARE USING INDIVIDUAL QUESTIONNAIRES. THE INFORMATION YOU PROVIDE TO THE COURT IN THIS QUESTIONNAIRE WILL BE CONFIDENTIAL AND WILL ONLY BE SEEN BY THE PARTIES' LAWYERS AND THEIR ASSISTANTS FOR THE SOLE PURPOSE OF SAVING TIME IN SELECTING THE JURORS WHO WILL HEAR THIS CASE. AS A POTENTIAL JUROR IN THIS CASE, YOU MUST ANSWER EACH QUESTION TRUTHFULLY, UNDER OATH AS A JUROR. PLEASE ANSWER ALL QUESTIONS IN A COMPLETE AND ACCURATE MANNER. WITH REGARD TO YOUR ATTITUDES, BELIEFS AND OPINIONS, THERE ARE NO RIGHT OR WRONG ANSWERS; THE COURT AND THE ATTORNEYS ARE JUST INTERESTED IN LEARNING ABOUT YOUR BACKGROUND AND TRUE OPINIONS. YOU SHOULD NOT CONSULT WITH ANY OTHER PERSON. SIGN AND DATE YOUR COMPLETED QUESTIONNAIRE ON THE LAST PAGE.

1. **Name:** _____ **Juror No.**_____
2. Sex: Male Female *(CIRCLE ONE)*
3. Age: _____ 4. Years in Houston Area: _____ 5. Place of Birth: _____
6. Do you **rent, own,** or have some **other** arrangement for living accommodations? _____
7. How long have you lived there? _____
8. How many times have you moved in the last 10 years? _____
9. Occupation and job duties: _____
10. Employer: _____ 11. For how long? _____
12. If not employed, how are you supported? _____
    If retired, what was your occupation and employer? _____
13. How many jobs have you held in the last 10 years? _____
14. Highest level of education: _____
15. Field of study, or special expertise: _____
16. What is your current marital status?
    _____Single
    _____Married *How long?* _____
    _____Divorced *How long?* _____
    _____Divorced, but remarried
    _____Widowed *How long?* _____
17. Spouse's Name: _____ Employer: _____
18. Please describe any military experience:_____
19. Have you ever served on a jury? _____YES _____NO
    If so, was it civil or criminal? _____Civil _____Criminal
    If so, was a verdict reached? _____In favor of Plaintiff/Prosecution _____In favor of Defendant(s)
20. Do you believe a lawsuit is a reasonable means of resolving a dispute?_____YES _____NO
    Please explain: _____
21. Have you ever wanted to file a lawsuit but did not or could not for some reason? _____YES _____NO
    IF YES, please describe: _____
    _____
22. Please list any labor unions to which you have belonged and positions held, if any: _____
23. Please list any other organizations, clubs, groups, or other affiliations: _____
    _____
24. Have you held any positions of leadership in these organizations? _____
25. Favorite leisure time activities: _____
26. Favorite magazines: _____
27. Have you or has someone close to you ever run for or served in public office at the city, state or federal government level?
    _____YES _____NO IF YES, please describe: _____
    _____

28. What is your primary source of news?

_____Television _____Internet _____Newspapers _____Friends/Family _____Radio

29. About how many hours of TV do you watch every day? _____What programs: _____

30. Do you watch investigative reporting pieces on the local news? _____YES _____NO

If so, what are your impressions of investigative reporting: _____

_____

31. How often do you watch the local or national news? _____ Preferred station: _____

32. Have you ever heard of Wayne Dolcefino, the local investigative reporter?_____YES _____NO

If YES, what are your impressions of him: _____

33. Have you ever heard of Lloyd Kelley, the former Houston City Controller? _____YES _____NO

If YES, what are your impressions of him: _____

34. Do you recall ever viewing any investigative reporting pieces produced by Wayne Dolcefino and 13 Undercover on the former City Controller Lloyd Kelley and his use of taxpayer money? _____YES _____NO

If YES, what were your impressions: _____

35. How much confidence do you have in the news media to report the news fairly and accurately? (1= No Confidence)

1 2 3 4 5 Please explain: _____

36. How strongly do you approve or disprove of investigative reporting on public officials? (1= Very Much Disapprove)

1 2 3 4 5 Please explain: _____

37. How strongly do you agree with or disagree with allowing the media to use any legal means necessary to expose political corruption? (1= Strongly Disagree)

1 2 3 4 5 Please explain: _____

38. Regarding public officials, do you believe that an individual's right to privacy is more important than the public's right to know? _____YES _____NO

IF YES, please describe: _____

_____

39. Do you think it is acceptable for the news media to use hidden cameras when investigating a possible story?

_____YES _____NO _____IT DEPENDS

Please explain: _____

40. Have you or anyone close to you had any negative experiences with the media?_____YES _____NO

IF YES, please describe: _____

41. Have you ever filed a grievance, participated in a boycott, or otherwise felt strong disagreement with a company or employer?

_____YES _____NO IF YES, please describe: _____

_____

42. Have you ever felt like you were the victim of a false rumor, either at work or in your personal life?

_____YES _____NO IF YES, please describe: _____

_____

43. Are you familiar with the Texas Wiretap Laws? _____YES _____NO

IF YES, what do you know: _____

44. Have you or someone close to you experienced any emotional or health related trauma within the past year?

(Example: Death in the family; lost job; diagnosis of cancer; etc.?) _____YES _____NO

IF YES, please describe: _____

45. Which are you most guided by: _____Letter of the Law _____Spirit of the Law

46. This case involves a dispute between Bill Stephens, Ray Jordan, and 13 Undercover's Wayne Dolcefino. Have you heard or read anything about this lawsuit? _____YES _____NO

IF YES, what have you read or heard? _____

Signature_____ Date_____

I. Case Name: *Robert Thomas v. Bill Page and Kane County Chronicle*

Court: Circuit Court of Kane County, Illinois
Judge: Donald J. O'Brien
Case Number: 04 LK 013
Verdict rendered on: November 13, 2006

1. Name and Date of Publication: *Kane County Chronicle*, May 20, 2003 and November 25, 2003

2. Profile:

a. Print _x_; Broadcast _____; Internet _____; Other _____.

b. Plaintiff: Public Official _x_; Public Figure ____; Private _____.

c. Newsgathering Tort _____; Publication Tort _x_.

d. Standard applied: Actual Malice _x_; Negligence _____**;** Other _____.

3. Case Summary: Plaintiff, Robert Thomas, an Illinois Supreme Court Justice, sued the *Kane County Chronicle* and its columnist, Bill Page, for defamation and false light invasion of privacy arising out of columns that appeared on the paper's Opinion page. The *Kane County Chronicle* published columns regarding Justice Thomas on May 15, 2003, May 20, 2003, and November 25, 2003. Justice Thomas sued only on the May 20 and November 25 columns.

The Cast of Characters
At the time of the columns, Justice Thomas had been on the Illinois Supreme Court for a few years. Bob Thomas came to Chicago from Notre Dame, where he had been a football star, as the kicker for the Chicago Bears. Thomas remains the third-leading scorer in Bears history. Thomas attended law school part-time while finishing his NFL career, and he spent a few years in private practice and in-house before he went on the trial bench. He then moved to the Illinois appellate court and, in 2000, was elected to the Illinois Supreme Court representing a district that covers the northern swath of Illinois (excluding Chicago). During the pendency of his defamation case, his colleagues selected him as Chief Justice of the Illinois Supreme Court.

Bill Page is a former columnist for the *Kane County Chronicle*. Mr. Page had a lengthy career in local journalism, and he focused his column on local issues. The *Kane County Chronicle* had a circulation of approximately 14,000, and its coverage concentrated on issues important to Kane County, Illinois.

Meg Gorecki was not a party to the case, but her story was integral to the columns and lawsuit. Ms. Gorecki was the state's attorney in Kane County. She was the youngest person ever and first woman to hold the position. She also had left voicemail messages on a friend's telephone answering machine suggesting that a county job could be had in exchange for a bribe. Those messages came to light during her campaign for state's attorney, but she managed to win the post despite the negative publicity.

The Columns

Ms. Gorecki was brought before the Illinois attorney disciplinary commission, however, and the columns concerned Ms. Gorecki's attorney disciplinary case. That case ended up before the Illinois Supreme Court, and, in the May 15 column, Mr. Page discussed Justice Thomas's perceived bias against Ms. Gorecki. The column hypothesized that Thomas was "pushing hard for very severe sanctions – including disbarment." In the May 20 column, Mr. Page reiterated the perception that Justice Thomas was biased against Ms. Gorecki. The Supreme Court issued its decision in November, and determined that Ms. Gorecki's law license would be suspended for four months. This was a lighter sentence than Mr. Page had originally hypothesized, and he visited the Gorecki case again in his November 25 column. In that column, Mr. Page wrote that Justice Thomas had decided to advocate a lighter punishment for Ms. Gorecki. According to Mr. Page: "The four-month suspension is, in effect, the result of a little political shimmy-shammy. In return for some high profile Gorecki supporters endorsing Bob Spence, a judicial candidate favored by Thomas, he agreed to the four-month suspension." Justice Thomas sued approximately two months later.

The Litigation

It quickly became apparent that key witnesses in the case would be Justice Thomas's fellow Illinois Supreme Court Justices. They were the only witnesses privy to the Court's deliberations on the Gorecki matter and, next to the Plaintiff himself, were in the best position to discuss the interplay among the Justices and Justice Thomas's role in particular. It also quickly became apparent that the Justices intended to staunchly oppose Defendants' attempts to subpoena them for documents and deposition testimony—even though their colleague had put such discovery directly at issue by filing a lawsuit based largely on what occurred in those deliberations. Although Illinois had never recognized a judicial deliberation privilege and the Illinois Supreme Court had stated that courts should be hesitant in finding new privileges, the trial court determined that there was in fact a judicial deliberation privilege. The appellate court went a step further and became the first court in the history of U.S. jurisprudence to not only find a judicial deliberation privilege but also to determine that it is an absolute privilege. All but one of the Justices of the Illinois Supreme Court recused themselves on

the petition for review that followed. The court then determined that it could not rule on the petition for lack of a quorum and remanded the case back to the trial court so Justice Thomas could continue pursuing the newspaper.

The case ultimately went to trial but not without many more procedural twists and turns. On his third try, Justice Thomas finally convinced the trial court to divest Defendants of the reporter's privilege. Defendants immediately stated they would take an interlocutory appeal, and Justice Thomas, knowing he would lose his upcoming trial date if Defendants appealed, offered to make a deal. The parties agreed that Justice Thomas would not be entitled to the identity of the sources and Defendants would be able to state that Mr. Page had sources for the columns, that those sources gave him the information in the columns and he accurately conveyed the information. If he was asked certain questions on cross examination, Mr. Page could also testify that he believed the sources were in a position to know what they told him. The trial court also gutted Defendants' substantial truth defense on motions *in limine* and refused to allow Defendants to present an opinion defense—even though the statements at issue were written by a columnist in columns that appeared on the Opinion page.

The trial stretched over parts of four weeks, and most of the Supreme Court Justices testified on Justice Thomas's behalf. Some witnesses appeared clearly intimidated by Justice Thomas, and other witnesses appeared enthralled with Justice Thomas's football exploits. Ultimately, the jury returned a verdict for Justice Thomas of $7 million.

4. Verdict:

- $1 million – economic loss
- $1 million – emotional distress
- $5 million – injury to reputation

5. Length of Trial: Fourteen trial days

6. Length of Deliberation: 1_ days

7. Size of /Jury: 12

8. Significant Pre-Trial Rulings:

- The court denied the motion to dismiss, 35 Med. L. Rep. 1238 (Cir. Ct. Kane Cty. July 8, 2005);
- The court denied Plaintiff's motion to divest Defendants of the Illinois statutory reporter's privilege, 361 Ill. App. 3d 484, 837 N.E.2d 483, 34 Med. L. Rep. 1852 (Cir. Ct. Kane Cty. Oct. 17, 2005);

- The court determined that the non-party Illinois Supreme Court justices could avail themselves of a judicial deliberation privilege. The Appellate Court then became what is believed to be the first court in U.S. history to not only find such a privilege (previously unrecognized in the State of Illinois) but also to determine that it is an absolute privilege, 34 Med. L. Rep. 1854 (2d Dist. Oct. 20, 2005);
- Defendants filed a Petition for Leave to Appeal to the Illinois Supreme Court (and simultaneously sought to recuse the members of the Supreme Court), and the Supreme Court granted the recusal but effectively denied the Petition for Leave to Appeal by stating that it did not have a quorum to rule and then nonetheless entered the mandate and sent it back to the trial court;
- The court denied Defendants' motion to dismiss based on the judicial deliberation privilege;
- The court denied Defendants' motion to compel or, in the alternative, to strike certain allegations based on the invocation of the judicial privilege;
- After one Illinois state court judge walked out of his deposition in the middle of questioning (the judge had written a memo about judges in Justice Thomas's district who were, in essence, playing politics) the court refused to order the other judge to sit for the remainder of his deposition;
- The court quashed Defendants' subpoenas for the oral depositions of the non-party Illinois Supreme Court Justices—allowing only depositions limited to written questions;
- The court denied the attempt by Illinois Supreme Court Justice Mary Ann McMorrow to materially change her written deposition testimony by means of an errata sheet;
- The court ultimately stripped Justice McMorrow of the judicial deliberation privilege on the ground that she had waived it;
- The court denied Plaintiff's motion for summary judgment;
- The court granted Plaintiff's renewed motion to divest Defendants' of the Illinois statutory reporter's privilege, 35 Med. L. Rep. 1246 (Cir. Ct. Kane Cty. Oct. 11, 2006);
- Shortly before trial, to avert a possible interlocutory appeal on divestiture of the reporter's privilege, Plaintiff agreed he would not seek divestiture and agreed to allow testimony from Mr. Page in which Mr. Page would state that he relied on confidential sources and, if asked certain questions, that he believed them to be credible;
- The court barred Defendants from referring to the columns at issue as opinions or editorials;
- Relatedly, the court determined that the columns were, as a matter of law, defamatory and refused to let that issue go to the jury; this limited the Defendants' ability to urge a meaning that would support a defense of opinion based upon substantially true facts;
- The court barred Defendants from presenting evidence of the political donations from Gorecki supporters that went to Judge Spence (an old friend and supporter

of Justice Thomas) after the Supreme Court issued the Meg Gorecki decision and also of evidence of phone calls between the two camps before the decision;

- The court denied Plaintiff's attempt to exclude his other negative coverage in the press;
- The court granted Defendants' motion to bar Robert Cummins (former head of Judicial Inquiry Board proffered to testify on meaning and damages), one of Plaintiff's experts, and barred another of Plaintiff's experts, Timothy Eaton (lost employment opportunities), from discussing the likelihood of Plaintiff's retention on the Supreme Court;
- The court barred damages testimony from Plaintiff's friend John Callahan;
- The court refused Defendants' proposed jury instruction regarding the parameters of actual malice. To wit, Defendants sought a jury instruction stating that actual malice is not failure to investigate and the like;
- Shortly before opening statements, the court ruled that Defendants could use full page, poster-size blowups of the newspaper pages on which the columns at issue appeared but would have to redact the word "Opinion" prominently emblazoned on the top of each page; and
- The court prohibited Defendants from exploring during *voir dire* the difference between a columnist and a reporter.

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

- Midway through the trial, an Illinois appellate court published an opinion in *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 858 N.E.2d 967 (5th Dist. 2006), in which an Illinois appellate court disallowed plaintiff's claim that a campaign flyer caused him to lose a judicial election because it was "far too speculative and uncertain to entertain." On this basis, Defendants moved *in limine* during trial to bar all evidence that the columns at issue lessened the likelihood that Justice Thomas would be retained when his seat on the bench came up in 2010. The Court did not grant the motion but indicated that it was strongly leaning toward doing so, and Justice Thomas withdrew his claim for damages arising from potential failure to be retained for his Supreme Court seat;
- The court allowed Plaintiff to introduce a journalistic code of ethics into evidence (after initially denying Plaintiff's attempt to do so) but then prevented Defendants from exploring the difference between a columnist and a reporter; and
- The court limited Defendants' ability to prevent evidence of Plaintiff's political activities, including his vigorous anti-abortion stance (for which he had been publicly criticized for injecting into a judicial campaign).

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Defendants did not bifurcate, because the absence of damages appeared to be their strong suit. Defendants moved for directed verdict on absence of actual malice, and the motion was denied.

11. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires, "shadow" juries): Defendants conducted a focus group about six months before the trial. See ¶ 12.

12. Pretrial Evaluation: Defendants anticipated a difficult case on liability but believed the case was strong on damages. The confidential sources made an actual malice defense difficult—but the resolution reached (that Mr. Page could state that he had sources without giving details about them) seemed extraordinarily favorable. The focus group participants believed that plaintiff was making much ado about very little and abusing his power. Most were for the defense on liability.

13. Defense Juror Preference During Selection: The *venire* drew from Kane County, which is split between suburbs and rural areas—the outer ring of the Chicago suburbs basically cuts through Kane County on a north-south line. Inside the line are several fairly wealthy suburbs/exurbs bracketed by working-class suburbs, and outside the line are farmland and rural communities. Defendants sought jurors who were well educated and heavy consumers of media. Unfortunately, although the jurors selected were generally well educated, the *venire* was surprisingly short of newspaper readers. Even if they did subscribe to a newspaper, they said they didn't really read the paper they received. Many jurors said they got their news on the radio while driving to work or while viewing websites at work. To the extent they read periodicals, it was generally *People* or *Us*.

14. Actual Jury Makeup: We ended up with a jury of five men and seven women who ranged in age from mid-twenties to early eighties. The foreman was male. The jurors were fairly well educated—probably half had college degrees. The alternates were a male and female, and ultimately were not needed.

15. Issues Tried:

- Actual malice
- Truth
- Damages

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

- $7.7 million – economic loss
- $1 to $3 million – emotional distress
- $7.7 million – injury to reputation

17. Plaintiff's Themes:

- Bill Page lied. He had no sources, and he made up a story about Justice Thomas to help his friend and ally Meg Gorecki get a lighter punishment in her pending Illinois attorney disciplinary action.
- Bill Page also wanted to help his daughter (who had worked as an unpaid intern in Ms. Gorecki's office) by helping her former boss get a lighter sentence.
- Bill Page was attempting to bully the Illinois Supreme Court through his columns and improperly affect the decision making process of the Illinois Supreme Court.
- Justice Thomas (R) was not a political hack but instead a courageous outsider who repeatedly took on the Republican establishment when he ran for various judgeships.
- The *Kane County Chronicle* was sloppy and didn't care whether it was getting the story right. Even after the Illinois Supreme Court press liaison informed the *Chronicle* the first column was wrong, the *Chronicle* continued to make false statements about Justice Thomas.

18. Defendants' Themes:

- Justice Thomas was just another politician, and the columns simply portrayed him making a political deal as all politicians do.
- The columns were true. The evidence showed that Justice Thomas had contact with Don Anderson, the alleged lynchpin of the "shimmy shammy" Mr. Page referenced in his November 25 column, and he did switch his vote on the Gorecki disciplinary matter.
- There was no actual malice. Bill Page had confidential sources for his columns, they were in a position to know what they told him, and he relied on those sources.
- Justice Thomas is a powerful man. Nearly every witness who testified on his behalf was beholden to him in some way.
- Bill Page had a long history of serving the community with thoughtful and, at times, provocative journalism.
- Justice Thomas's future damages were speculative, and he had suffered no harm to his reputation—indeed, his career flourished in the aftermath of the publication of the columns.

19. Factors/Evidence:

a. Pre-existing attitudes of the *venire* toward the plaintiff, defendants, or issues: There were surprisingly few of the *Kane County Chronicle's* 14,000 subscribers among the *venire*. One woman identified herself as an ardent fan of Bill Page's writing, and she was promptly stricken. Otherwise, members of the *venire* were neither strongly positive or negative toward Bill Page and the *Kane County Chronicle*. Similarly, although a few admitted to being Bears fans and remembering Plaintiff's

exploits as a kicker for the Bears, they did not appear (at the time) to be overly hero-worshipping. On the other hand, they also did not display the distrust many Illinoisans feel for public officials. One former Illinois governor resides in federal prison; the confidante of the current governor was recently convicted of numerous federal crimes; and many Illinois residents regard the political system as hopelessly corrupt. The *venire*, however, did not appear to view Justice Thomas as part of the Illinois political machine.

b. Sympathy for plaintiff during trial: This appears to have been a strong factor, and one Defendants did not fully appreciate until after the trial. Admittedly, Plaintiff did a good job on the stand, and he clearly played to the jurors with tales of his Chicago Bear heroics, which the judge allowed over objection. Justice Thomas testified about walking on to the Notre Dame football team and kicking the game-winning field goal against the Giants to put the Bears in the playoffs. It's difficult to litigate against a sports star in Chicago, particularly in the middle of a football season in which the Bears were marching toward the Super Bowl.

c. Proof of actual injury:

Emotional Harm

Those who worked closely with Plaintiff and claimed to know him well provided no evidence of emotional harm. Plaintiff's testimony provided no better support for his emotional harm claim. Plaintiff merely testified that he noticed a "general weariness" after the November 25 column ran and that he thought about it when he went to bed and when he woke up. (Now, presumably, Plaintiff wakes up feeling like a million bucks.) Notably, Plaintiff:

- Never saw a doctor about his alleged stress;
- Never had any physical manifestation (other than stress) of his alleged emotional harm;
- Did not take medication for his alleged stress;
- Never claimed to lose any sleep over the columns;
- Never claimed to miss any days of work because of his alleged emotional harm; and
- Never claimed to have a performance-related issue at work because of his alleged emotional harm.

Future Economic Loss

Plaintiff asserted two theories of potential future economic harm: (1) that he would not be able to become an equity partner at a major Chicago law firm when he retires from the bench in either 2008 or 2010 and (2) that he will be unable to attain a seat on the federal bench at some time in the future. Plaintiff's future employment damages depended on numerous contingencies and did not even mature until 2008 at the earliest.

No witness captured the speculative nature of the damages better than William Quinlan, Plaintiff's damages expert. Mr. Quinlan:

- Repeatedly acknowledged the speculative nature of Plaintiff's claimed damages, stating at one point that: "I don't think there's any real predicate that's been established that he'd be looking for a job in 2010";
- Admitted he does not know what circumstances will be like in 2010; and
- Conceded that "nobody knows here today what's going to happen in 2010, but that doesn't help me at all."

Justice Thomas claimed the columns would prevent him from joining a major Chicago law firm as an equity partner, but he presented no evidence to the jury that – absent the article – he could attain such a position. Critically, none of Plaintiff's witnesses, including his experts, testified that Plaintiff *could* attain an equity partner position at a major Chicago law firm. On the other hand, Defendants' expert, Joel Henning, testified "that there is little probability, probably less than 10 percent," that Plaintiff would receive an offer to join a major Chicago law firm as an equity partner. As Mr. Henning explained, Plaintiff simply did not exhibit the characteristics—primarily an existing book of business or the ability to develop a book of business—that would make him attractive to a major Chicago law firm as a lateral equity partner. Mr. Henning further concluded that if Justice Thomas could have attained an equity partnership before the columns ran, there was little likelihood that the columns will have an adverse effect on his chances.

The jury's award for future economic loss also related to Plaintiff's claim that the columns diminished his opportunity to be appointed to the federal bench. Plaintiff admitted that he had never applied for a vacancy on the federal bench nor had anyone ever approached him about taking a seat on the federal bench. As Defendants' expert, Eleanor Acheson, concluded, the columns would likely have minimal adverse effect on Justice Thomas's possible selection to the federal bench.

Reputational Harm

Notwithstanding Justice Thomas's self-serving and unsupported claim that Bill Page had "taken away [plaintiff's] integrity and [plaintiff's] good name," Justice Thomas failed to show any way in which the columns harmed his reputation. Not only did Plaintiff fail to show any harm to reputation, but Defendants also rebutted any presumption of harm and demonstrated that Plaintiff's reputation had not suffered at all:

- Several witnesses testified that Plaintiff still enjoys a good reputation (Justices Rarick; Fitzgerald, Garman, Freeman, and Kilbride);
- No one testified that Plaintiff does not have a good reputation;
- No one testified that they thought less of Plaintiff as a result of the columns (his clerk, his friend, the Supreme Court press secretary, the Supreme Court clerk, and Justices Rarick, Fitzgerald, Garman, Freeman and Kilbride);
- No witness testified that anyone ever told them they thought less of Plaintiff as a result of the columns;
- Justice Thomas received a promotion—to Chief Justice—after the publication of the columns and gained additional speaking opportunities among other additional Court-related duties;
- The highest ranking Republican in state government sent a representative to inquire of Justice Thomas—*after* the publication of the columns—whether he would consider becoming the Republican candidate for the United States Senate; and
- Numerous bar associations and other groups have honored Justice Thomas since the publication of the columns.

No one testified that Justice Thomas had a less than impeccable reputation; that they thought less of Justice Thomas because of the columns; or that *anyone ever* told them that they thought less of Justice Thomas because of the columns. Shortly after the trial, numerous diverse bar groups celebrated Justice Thomas at a reception in Chicago that was planned well before the verdict.

d. Defendants' newsgathering/reporting: Plaintiff went after Defendants hard on newsgathering and reporting. Plaintiff took Mr. Page to task for not calling Justice Thomas for a comment, for relying on confidential sources, and for allegedly having a personal vendetta. Plaintiff also went after Greg Rivara, the former managing editor of the *Kane County Chronicle*, and tried to portray him as violating journalistic codes, ignoring clear warning signs that the columns were flawed and blithely ignoring repeated requests for a correction.

e. Experts:

Defense Witnesses			
Witness	**Position**	**Expertise/Area of Testimony**	**Recommended?**
Eleanor D. Acheson	Now General Counsel of Amtrak; former Assistant Attorney General, Department of Justice in Clinton administration	The selection, nomination, and confirmation process for candidates for positions on the federal bench, and what effect, if any, the newspaper columns, standing alone, would have on prospects for Robert Thomas with regard to the selection, nomination and confirmation process for the federal bench.	Yes. Ms. Acheson did a terrific job.
Joel F. Henning	Consultant, Hildebrandt International	An overview of the Chicago legal market, including partnership structures of major Chicago law firms and trends in the market; the probability of Robert Thomas receiving an offer of equity partnership from a major Chicago law firm after he steps down as Chief Justice of the Illinois Supreme Court in 2010; and an assessment of how this probability would be affected by the newspaper columns at issue.	Yes. Mr. Henning did a terrific job.

Plaintiff's Witnesses		
Witness	**Position**	**Expertise/Area of Testimony**
Charles Linke	Professor Emeritus of Finance, University of Illinois	Damage calculation
William R. Quinlan	Partner, Quinlan & Carroll	Plaintiff's lost employment opportunities
J. Timothy Eaton	Partner, Shefsky & Froelich	Plaintiff's lost employment opportunities

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiff was represented by one of the leading plaintiff's firms in the state. Joe Power, plaintiff's lead attorney, is a leading member of the Chicago plaintiff's bar. He and his firm also donated tens of thousands of dollars to Justice Thomas's campaign when he ran for the Illinois Supreme Court. Power did not appear to be particularly conversant with defamation law, but he has a great deal of trial experience. He was also quite friendly with the trial judge and appeared to have a personal relationship with him. Although Mr. Power handled the vast majority of pre-trial matters, he brought his partner Todd Smith in for the trial. Mr. Smith is a skilled cross examiner.

ii. Defendant's trial demeanor: Two defendants—Bill Page, the columnist who wrote the columns at issue, and Tom Shaw, the head of Shaw Publications—spent the entire trial at counsel table. Plaintiff's counsel challenged Mr. Page repeatedly on cross examination and claimed to have repeatedly impeached him.

iii. Length of trial: The trial proceeded slowly, in large part because there were so many sidebars. At one point, the judge, who has a great deal of experience trying cases, commented that he had never had a case with so many sidebars. At times, the lawyers would be in chambers for 15-20 minutes, which must have been difficult for the jury.

iv. Judge: The judge is experienced and intelligent, but the issues presented in this trial were clearly outside his comfort zone. A judge in his position typically presides over medical malpractice and personal injury trials. The judge did a good job controlling a trial that could have become a bit of a circus, but he also made some

mistakes—forcing Defendants to redact the word "Opinion" from the pages on which the columns appeared stands out in that category. Also, regardless of how good a job the judge did, the fact that the Plaintiff was, in effect, his boss as well as the fact that several witnesses were his judicial superiors hung over the trial at all times.

h. Other factors:

20. Results of Jury Interviews, if any: We conducted informal juror interviews with the jurors immediately after they rendered their verdict. Two themes emerged from those interviews: 1) the jurors wanted to help Justice Thomas and felt he had been wronged; and 2) the jurors thought the *Kane County Chronicle* had been reckless in publishing the columns.

21. Assessment of Jury: The jury appeared conscientious, and the jurors appeared to take their duties seriously. They paid close attention throughout a very lengthy trial. Nonetheless, they returned a record-setting verdict that bore no relation to reality. Perhaps unwittingly, several jurors revealed the impetus behind this verdict when they left the jury room. Many jurors hugged Justice Thomas (the scene resembled a wedding receiving line) and had tears streaming down their faces as they walked out of the jury room after rendering the verdict. The trial judge found that the jury's excessive verdict was the result of passion and prejudice.

22. Lessons: Although it might be self evident, it is very difficult to take a case against a former Chicago Bear and the Chief Justice of the Illinois Supreme Court to a Chicago-area jury. It was also difficult when most of the Plaintiff's witnesses worked for him (or were otherwise beholden to him) or were fellow Supreme Court Justices. The Justices presumably had a great deal of credibility with the jury. Also, it is easy to state that a reporter had confidential sources, but the absence of sources who could testify on Defendants' behalf was a glaring and devastating fact. There is a real risk to relying solely on confidential sources and stating that the columnist had sources was clearly not enough to get over actual malice in the jury's mind.

23. Post-Trial Disposition (motions, appeals): Defendants filed a motion for judgment notwithstanding the verdict, remittitur, and new trial. The court granted the motion in part and denied it in part, reducing the verdict to $4 million ($3 million for reputational harm and $1 million for emotional harm). The size of the remitted reputational award was still somewhat surprising because the court noted in the opinion that there was "a paucity of evidence on this item of damages" and "was the result of passion and prejudice and shocks this judicial conscience." The court granted judgment notwithstanding the verdict on the economic damages, finding the claimed damages speculative.

The case settled during the pendency of Defendants' appeal, but it did so in an unusual manner in that it settled via a federal court mediation. The court ruled on post-trial motions in the spring, and that summer Defendants filed a federal court lawsuit against the trial court judge, the appellate court judges from the judicial deliberation appeal, most of the Illinois Supreme Court Justices, and Justice Thomas. Defendants sued under Section 1983 and alleged that this coterie of state judges had denied their civil rights. The judges moved to dismiss, and before the motion to dismiss was resolved, the case was mediated before a magistrate.

While the federal court lawsuit played out, Defendants pursued their appeal in state court and fought other battles. Defendants filed a motion in the trial court to dismiss the entire case under Illinois' newly passed anti-SLAPP statute (believed to be the first such motion filed in Illinois under the new statute) and also asked the Supreme Court to vacate prior orders it had entered in the case (entering a mandate, assigning the trial judge and assigning an appellate court) on the ground that the Supreme Court never had a quorum to enter such orders because it was hopelessly conflicted.

Plaintiff's Attorneys:

Joseph A. Power, Jr.
Todd Smith
Power Rogers & Smith
Chicago, IL

Defendants' Attorneys:

Steven P. Mandell
Stephen J. Rosenfeld
Steven L. Baron
Brendan J. Healey
Mandell Menkes LLC
333 W. Wacker Dr., #300
Chicago, IL 60606-1252
312-251-1000 (ph)
312-251-1010 (FAX)
smandell@mandellmenkes.com
sbaron@mandellmenkes.com

On Appeal:
Bruce W. Sanford
Lee T. Ellis, Jr.
Bruce D. Brown
Baker & Hostetler LLP
Washington, DC

J. Case Name: *Peter Tilton v. The McGraw-Hill Companies, Inc.*

Court: U.S. District Court, District of Washington
Judge: Robert S. Lasnik

Case Number: C06-98RSL (removed from state court)
Verdict rendered on: December 11, 2007

1. Name and Date of Publication: *BusinessWeek Magazine*, May 10, 2004 issue.

2. Profile:

   a. Print _x_; Broadcast _____; Internet _____; Other _____.

   b. Plaintiff: Public Official _____; Public Figure ____; Private _x_.

   c. Newsgathering Tort _x_; Publication tort _____.

   d. Standard applied: Actual Malice ____; Negligence _____; Other _x_ (breach of contract, promissory estoppel, and intentional tort).

3. Case Summary: In 2004, Mr. Tilton, then an executive at Microsoft Corp., agreed to be interviewed by Michelle Conlin for a *BusinessWeek* story she was writing on family dynamics in the workplace. Mr. Tilton agreed to participate in a telephone interview along with his therapist Brian DesRoches, who had written a book on family dynamics being replicated in the workplace and whose name appeared in the resulting *BusinessWeek* article without complaint.

   The article, entitled "I'm a Bad Boss? Blame My Dad," was published in the May 10, 2004 issue of *BusinessWeek*, and included Tilton's name, indicating that he was a director-level employee at Microsoft. The article opened with a description of an incident in which Tilton yelled at colleagues during a meeting at Microsoft and slammed his fists against a whiteboard. The article closed by referencing Tilton, mentioning that his "parents tried to send him to a pipe-smoking guy in seventh grade," and noting that he had been seeing an executive coach, who had helped him address his issues.

   Plaintiff Peter Tilton alleged that his participation in an interview with BusinessWeek reporter Conlin was contingent on Ms. Conlin's agreement not to publish his name, position or employer in the resulting article. Tilton claimed that the publication of his name and other identifying information in BusinessWeek damaged his personal and professional reputation, caused the loss of his job and damaged his future job prospects, caused his divorce, and ruined his physical and mental health. He asserted claims for breach of contract, breach of promise, negligent performance of contract, invasion of privacy, outrage, and negligent infliction of emotional distress.

   Prior to trial, as a sanction for Plaintiff's significant discovery abuses, the Court ruled that "economic damages" would not be available to Plaintiff, which effectively mooted Plaintiff's breach of contract claim. The court did, however,

allow Plaintiff to substitute a promissory estoppel claim for his breach of contract claim. As a result of this substitution of an equitable claim for a legal one, the Court informed the parties prior to trial that the jury would be rendering only an advisory opinion on the promissory estoppel claim (although he only told the jury this after the verdict).

Prior to the commencement of trial, the Defendants successfully moved for summary judgment on Plaintiff's negligent infliction of emotional distress claim. The Court ruled that applying a negligence standard to a newsgathering media defendant when the facts printed were true, rather than false and/or defamatory, would have an impermissible chilling effect.

Trial then commenced on Plaintiff's promissory estoppel, invasion of privacy and outrage claims. At the end of Plaintiff's case, Defendants successfully obtained judgment as a matter of law dismissing Plaintiff's outrage claim because the Court determined that Defendants' conduct, even if it did occur, was not outrageous.

Both a unanimous jury and the Court concluded that Ms. Conlin made no promise of confidentiality or anonymity. Based on the jury's advisory finding, and for reasons the Court explained on the record, the Court found for Defendants on Plaintiff's claim for promissory estoppel. As a result of the jury's finding, Plaintiff's claim of invasion of privacy necessarily failed, and a verdict was therefore rendered for defendants, dismissing the case in its entirety. Plaintiff did not appeal.

4. Verdict: Consistent with the advisory jury's verdict, the Court found for the defense on Plaintiff's promissory estoppel claim. The jury's finding also negated Plaintiff's invasion of privacy claim, the only other claim remaining at the end of trial.

5. Length of Trial: 6 days

6. Length of Deliberation: 1_ hours.

7. Size of Jury: 9 (no alternates)

8. Significant Pre-Trial Rulings/Proceedings: Prior to trial, as a sanction for Plaintiff's significant discovery abuses, the Court ruled that "economic" damages" would not be available to Plaintiff, which effectively mooted Plaintiff's breach of contract claim. The Court did, however, allow Plaintiff to substitute a promissory estoppel claim for the breach of contract claim. As a result of this substitution of an equitable claim for a legal one, the Court informed the parties prior to trial that the jury would be rendering only an advisory opinion on the promissory estoppel claim (although the Court only informed the jury of this after the verdict).

Prior to the commencement of trial, Defendants successfully moved for summary judgment on Plaintiff's negligent infliction of emotional distress claim. The Court ruled that applying a negligence standard to a newsgathering media defendant when the facts printed were true, rather than false and/or defamatory, would have an impermissible chilling effect.

9. Significant Mid-Trial Rulings (including interlocutory appeals): At the end of Plaintiff's case, Defendants successfully obtained judgment as a matter of law dismissing Plaintiff's outrage claim. The Court ruled that, even if the conduct about which Plaintiff complained occurred, it was not outrageous.

10. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The Court allowed Plaintiff to substitute a promissory estoppel claim for his breach of contract claim, which had effectively been negated because of the Court's ruling that Plaintiff was not entitled to "economic damages" as a result of his significant discovery abuses. As a result of this substitution of an equitable claim for a legal one, the Court informed the parties prior to trial that the jury would be rendering only an advisory opinion on the promissory estoppel claim (although the Court only informed the jury of this after the verdict).

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

12. Pretrial Evaluation: Defendants expected to prevail at trial because of the overwhelming contemporaneous documentary evidence demonstrating that Ms. Conlin did not make plaintiff or his therapist any promise of confidentiality or anonymity at any time before the story was published in *BusinessWeek*.

13. Defense Juror Preference During Selection: Defendants wanted educated and sophisticated jurors, in part because they would be more likely to appreciate that one would normally take demonstrable steps to ensure that a confidentiality agreement had been made when speaking to the media, and there was no indication that Plaintiff had taken any such steps. Because Defendant Conlin was a working mother with a young daughter, Defendants were also interested in jurors who were working mothers with children. Voir dire questions were also used to identify and exclude potential jurors with anti-media bias.

14. Actual Jury Makeup: 6 women, 3 men; 3 jurors under 30 years old, including the foreman; 8 Caucasian, 1 African American.

15. Issues Tried: Whether Ms. Conlin made a promise of confidentiality or anonymity to Plaintiff and/or his therapist, and, if so, whether breach of that promise constituted an invasion of privacy.

16. Plaintiff's Demand (damages sought, compensatory/punitive): Prior to trial, plaintiff's discovery responses identified up to $10 million in compensatory damages. Plaintiff's counsel suggested in his closing argument at trial that the jury award plaintiff $3 million in compensatory damages.

17. Plaintiff's Theme(s): On liability, Plaintiff argued that no rational person in his position would have agreed to the interview without a confidentiality agreement.

On damages, Plaintiff argued that while he had a history of psychological, addiction and martial problems, he was well on the way to recovery and his marriage was stabilizing prior to publication of the *BusinessWeek* article but, after publication, he lost his job, marriage and spiraled into an increasingly psychotic state, which would not have occurred but for publication of his name, position and employer in *BusinessWeek*.

18. Defendant's Theme(s): Ms. Conlin never made a promise of confidentiality to Plaintiff or his therapist, neither of whom were credible, and the contemporaneous documentary evidence proved that defendant knew his name and other identifying information was going to be published in *BusinessWeek*. Further, that breach of such a promise would effectively be the end of a journalist's career, was contrary to Ms. Conlin's education and training as a journalist and would be contrary to the McGraw-Hill Code of Business Ethics and *BusinessWeek* Code of Journalistic Ethics, which are taken very seriously by the organization.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Some potential jurors expressed the view that Plaintiff should have known that his name would appear in the magazine if he were talking to a reporter , and one expressed that, even if a promise of confidentiality were made, Plaintiff should not have relied on any such promise. Several potential jurors expressed general unhappiness with large damage awards to plaintiffs in "meritless" lawsuits.

b. Sympathy for plaintiff during trial: None evident.

c. Proof of actual injury: While Plaintiff had admitted significant psychological, marital and addiction issues both prior and after publication of the article, and while certain of those issues increased in the months and years after publication of the article, there was no evidence that the article caused or exacerbated any injury to Plaintiff.

d. Defendants' newsgathering/reporting: As the court made clear when instructing the jury, Plaintiff's invasion of privacy claim rested on whether

the underlying promise of confidentiality and/or anonymity had been made. Neither Tilton nor his therapist, DesRoches, presented any documentary evidence that confidentiality or anonymity had even been discussed, let alone that Ms. Conlin had agreed to it, and instead, offered only their oral testimony that Ms. Conlin had repeatedly made such promises before and during her interview of Mr. Tilton.

Ms. Conlin interviewed dozens of people to potentially include in her story about family dynamics being replicated in the workplace, taking copious, almost verbatim, notes of the interviews. Ms. Conlin clearly indicated in her notes when an interviewee requested confidentiality and/or anonymity. Ms. Conlin testified that she made it a practice to indicate in her notes when a source requested confidentiality or anonymity due to the importance of such a promise in the journalism field and the consequences that breaking such a promise would have on her career as a reporter. During the newsgathering process, Ms. Conlin operated consistently with her education and training as a journalist, including her training as a fact-checker at a previous employer, and in full compliance with the McGraw-Hill Code of Business Ethics and the *BusinessWeek* Code of Journalistic Ethics.

e. Experts:

Defense experts:

Tom Goldstein, Professor of Journalism, U.C. Berkeley; journalism expert. Prof. Goldstein testified that Ms. Conlin's prodigious note-taking was "awesome."

Gerald Rosen, Psychologist; psychology expert.

Defendants would recommend the use of both experts to fellow media defense counsel.

Plaintiff's experts:

Gerald J. Baldasty, Department of Communications, University of Washington; journalism expert.

Daniel Wolf, D.O.; psychological expert.

f. Other evidence: In addition to witness testimony by the then Assistant Managing Editor of *BusinessWeek* and the former Editor-in-Chief about

the culture of journalistic ethics at McGraw-Hill and *BusinessWeek*, as well as the fact that breaking such a promise would effectively mean the end of a reporter's career, there was a slew of documentary evidence refuting plaintiff's claims that a promise of confidentiality or anonymity was made.

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiff's counsel was a seasoned Seattle media lawyer now practicing as a sole practitioner.

ii. Defendant's trial demeanor: Defendants and their counsel remained respectful and attentive during plaintiff's presentation, even though the key factual allegations in the presentation about the newsgathering process were clearly and demonstrably false. It was particularly important for Defendants and their counsel to remain respectful in this case because of the very personal nature of much of the testimony about Plaintiff and his family, including his problems with addiction and the difficulties in his marriage.

iii. Length of trial: Not a factor.

iv. Judge: Knowledgeable (with backgrounds in journalism and psychology in addition to law), thorough but respectful.

h. Other factors: Changes in Plaintiff's psychological condition from the time of filing of the complaint through trial made Plaintiff unsympathetic and bolstered Defendants' claim that any emotional distress Plaintiff suffered from was not caused by the article.

20. Results of Jury Interviews, if any: Both the jurors and the judge expressed that an important part of their decision-making process was that they did not find Plaintiff or his therapist to be credible, particularly the therapist.

21. Assessment of Jury: The jury was attentive, interested in the case, and particularly interested in properly assessing the credibility of the witnesses. The jury remained focused on the evidence in decision-making, despite their affinity for plaintiff's counsel. (Several jurors praised plaintiff's counsel's performance after the trial, though at least one juror commented that plaintiff's counsel "had the wrong client").

22. Lessons: Careful reporting, including copious note-taking and fact-checking, can be an important tool in defending against false accusations relating to the newsgathering process.

23. Post-Trial Disposition (motions, appeals): Defendants' motion for costs was granted post-trial. Plaintiff did not appeal.

Plaintiff's Attorneys:

Camden Hall
Camden Hall, PLLC
1001 Fourth Avenue
Suite 4301
Seattle, Washington 98154
(206) 749-0200

Defendant's Attorneys:

John D. Lowry
Gavin W. Skok
Riddell Williams, P.S.
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154-1192
(206) 624- 3600

K. Case Name: *Roger Valadez v. Emmis Communications (KSN-TV, Wichita) and Todd Spessard*

Court: Sedgwick County, Kansas District Court
Judge: Paul W. Clark
Case Number: 05CV0142
Verdict rendered on: 10/20/06

1. Name and Date of Publication: Newscast, December 2, 2004

2. Profile:

a. Print _____; Broadcast _x_; Internet _____; Other _____.

b. Plaintiff: Public Official _____; Public Figure ____; Private _x_.

c. Newsgathering Tort _____; Publication Tort _x_.

d. Standard applied: Actual Malice ____; Negligence _x_; Other _x_ (invasion of privacy, outrageous conduct).

3. Case Summary: In March of 2004, the *Wichita Eagle* received a letter from someone claiming to be BTK, the notorious self-named serial killer (the name stood for "Bind, Torture, Kill") who terrorized Wichita during the late 1970s and early 1980s and then fell silent. During the intervening period, many Wichitans believed that the killer had died, been arrested, or moved away. The receipt of the March 2004 letter changed everything. A massive police manhunt was relaunched and for months the killer played a cat and mouse game with the police and the media.

In late October 2004, BTK sent another message to the police, this time enclosing his purported life story. On November 30, the police held a press conference during which they released a profile of the serial killer (based in large part on the October message) and requested the public to call a special BTK Tip Line with information about any person who might fit the profile.

The very next morning, a tipster called police and identified Wichita resident Roger Valadez as fitting several elements of the profile. The police categorized the tip as a "priority" tip and assigned a detective from the BTK Task Force to immediately investigate the tip. Three detectives went to Valadez's home to request a voluntary DNA swab. When Valadez did not answer the door, two of the detectives left to personally interview the tipster, while the third detective remained behind to surveil the house from a rental business located across the street.

During the interview of the tipster, the detectives learned additional information about Valadez that increased their suspicion of him. Additionally, the detective who remained outside Valadez's home observed Valadez come out of his home to retrieve his mail and return inside – he had been home the whole time.

Armed with this information, the detectives sought and obtained a search warrant for Valadez's DNA. They then assembled a force of Wichita Police officers, agents of the Kansas Bureau of Investigation, and special agents of the Federal Bureau of Investigation who forced their way into Valadez's home. They presented Valadez with the search warrant for this DNA and, after Valadez refused to voluntarily provide the sample, forcibly took the sample from Valadez's mouth. The officers then placed Valadez under arrest on two unrelated municipal court warrants, one for criminal trespass-domestic violence and one for housing code violations relating to a rental home that Valadez owned.

While in the house executing the DNA search warrant, officers observed other items (in plain view) which further increased their suspicion of Valadez. As a result, they prepared a second search warrant application, this time for Valadez's home. After they obtained this second search warrant, a group of twenty officers literally worked through the night searching Valadez's home for BTK-related evidence.

At the same time, the administrative judge of the Wichita municipal court was called at home and advised that police had a "person of interest" in the BTK case in custody on city warrants. As a result, the judge increased Valadez's bond on the criminal trespass charge from the standard $2,500 property/$1,000 cash bond to a $25,000 cash only bond.

The next morning at 2:30 a.m., the local Wichita ABC-affiliate, KAKE-TV, broke into programming with a report that there had been a possible arrest in the BTK case. The report gave the location of the arrest, but did not identify the person arrested. A few hours later, the CBS-affiliate, KWCH-TV, did the same. At 5:00 a.m., the NBC-affiliate, KSNW-TV, began its regular morning newscast with news of the arrest. KSN, as it is called, gave the exact address of the home where the arrest and search had occurred.

At 6:45 a.m., KSN reported that, according to the Polk Directory, a Roger Valadez owned the home where the arrest and search occurred and that a Roger Valadez was also listed in the official jail log as being arrested at that address the prior night.

KSN – and only KSN – continued to broadcast Valadez's name throughout the rest of the day. In each of its broadcasts, KSN was careful to point out that Valadez had only been arrested on the unrelated charges set forth above, and that police were not saying he was a BTK suspect. KSN pointed out, however, that the overwhelming police presence at Valadez's home overnight, along with his unusually high bond, were all inconsistent with the man being held only on simple city charges.

Later that afternoon, the Wichita Police Chief held a press conference during which he stated that there had been no arrest in the BTK case. The chief gave no explanation, however, for the overwhelming police presence the night before at Valadez's home, nor did he explain the high bond. Still later that afternoon, after preliminary DNA results showed that Valadez was likely not the BTK killer, his bond was reduced and he was released from jail.

The following day, Valadez's attorney issued a press release stating that Wichita Police had confirmed that Valadez's DNA did not match DNA found at several of the BTK crime scenes. KSN reported those facts on its 10:00 p.m. newscast that evening.

In January 2005 – two months before the real BTK killer, Dennis Rader, was arrested and later publicly confessed – Valadez sued KSN's owner, the owner of Wichita radio station KFDI, and the Associated Press for defamation, invasion of privacy, and outrage. Valadez later voluntarily dismissed KFDI and the AP after the media outlets convinced Valadez they did not use Valadez's name in their reports. Accordingly, at trial, the only remaining defendants were KSN and KSN's news director, who had been added simply to destroy diversity when Valadez dismissed KFDI and the AP.

4. Verdict: For plaintiff, $1.1 million, $800,000 for emotional distress, $300,000 for damage to reputation, mistrial on issues of invasion of privacy/outrageous conduct.

5. Length of Trial: Four days.

6. Length of Deliberation: 4_ hours.

7. Size of Jury: 11.

8. Significant Pre-Trial Rulings/Proceedings: A different judge denied plaintiff's motion to amend to add punitive damages and also denied the defendants' motion for summary judgment.

9. Significant Mid-Trial Rulings (including interlocutory appeals): 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): Mock jury found negligence, but not actual malice.

12. Pretrial Evaluation: Discovery established that Valadez was, in fact, a prime BTK suspect; the defendants believed they would prevail on truth.

13. Defense Juror Preference During Selection: Males.

14. Actual Jury Makeup: 7 females/4 males.

15. Issues Tried: Defamation, invasion of privacy, and outrage.

The trial judge then shocked both parties when he announced that he was not going to instruct on actual malice, despite long-standing Kansas law that provides a qualified privilege to media reports of matters of legitimate public concern, specifically including police investigations of crime. Instead, he issues a bizarre set of jury instructions that included the following:

> The evidence in this case proves that by certain information put out to the community by defendant, a reasonable person would conclude that a man under arrest on unrelated charges was more than likely a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lives.

Thus, after the defense spent four days attempting to convince the jury that KSN had acted responsibly in reporting that Valadez had only been arrested on unrelated charges and was only a "possible suspect" in the BTK case, the trial judge cut the defense's legs from beneath them by making this finding that the defendant had said Valadez was BTK. Accordingly, the jury had little trouble finding that KSN's broadcasts were false – KSN had admitted that Valadez was not BTK.

The judge also substituted the actual malice instruction with an instruction that defined negligence as what would a responsible broadcaster in the community do. Given that KSN was the only media outlet in Wichita to report Valadez's name, it was a forgone conclusion that the jury would find that KSN was negligent.

The judge then compounded our problems with a defective verdict form which asked: "Do you find plaintiff has proved the defendants [no apostrophe] conduct was: defamatory." Given the judge's instruction that KSN had reported that Valadez was "a serial killer whose evil exploits were known by the majority of the adult population," the jury found KSN's broadcasts to be defamatory. The jury was never asked whether the broadcasts were false, or whether KSN was negligent, despite the fact that both elements were identified earlier in the instructions.

The trial judge also instructed on false light invasion of privacy and the tort of outrage. The jury checked "yes" as to whether the "defendants [no apostrophe] conduct was: extreme and outrageous," but did not answer whether "defendants [no apostrophe] conduct was: an invasion of privacy," instead leaving that section of the verdict form blank. Both parties asked the trial judge to send the jury back to deliberate on that claim, but he refused to do so.

16. Plaintiff's Demand: Plaintiff sought compensatory and punitive damages.

17. Plaintiff's Theme(s): The big bad media went overboard. Plaintiff stressed that KSN was the last to the scene of the search, and that KSN bowed to competitive pressure to "catch up."

18. Defendant's Theme(s): We got it right.

19. Factors/Evidence:

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

    b. Sympathy for plaintiff during trial: Did not appear to be a significant factor.

c. Proof of actual injury: Valadez called one of his two adult daughters, who currently lives in Arlington, Texas. She testified that she received a call at 4:00 a.m. (an hour before KSN first began its reports) informing her that her father had been arrested as BTK. She testified that she frantically drove to Wichita to help find a lawyer for her father. Next, the plaintiff called Valadez's other adult daughter, who testified she learned of her father's arrest from her brother at 8:00 p.m. on December 1, the day before KSN's first broadcast. She explained that her brother learned of their father's arrest from a *Wichita Eagle* reporter who called the brother asking about Valadez's arrest as BTK.

Valadez himself testified next. He explained that he had been home sick on the day of his arrest and that he had been sleeping both times police arrived and that is why he did not come to the door. He said that he was not BTK and that he was emotionally upset over KSN's reporting. He testified that he had been retired for two years at the time of his arrest. He also testified that he did not see a doctor, psychiatrist, counselor, etc. over his emotional distress, only a lawyer.

d. Defendants' newsgathering/reporting: The news director was called by plaintiff and testified he was aware of Valadez's name at or around the time the station began its reporting at 5:00 a.m., but decided to wait to use the name until the station had confirmation of the name from the official jail log. He testified that the station got that confirmation shortly before 6:45 a.m. and that once the name was confirmed through the official jail log, he believed Valadez's name was public record and that he was merely following the long-accepted practice of identifying criminal suspects once they were formally charged. He pointed out that the station repeatedly warned viewers against jumping to the conclusion that Valadez had been arrested in connection with the BTK case and that he had only been arrested on two unrelated warrants.

Upon questioning from Valadez's attorney, the news director testified that he believed that KSN had covered the arrest properly and that the other stations, along with the newspaper, had acted irresponsibly in not reporting Valadez's name. He pointed out, for example, that during his fifteen-year career he could not recall a single time where the media had reported live on a court appearance (which every station had done for Valadez's 3:00 p.m. arraignment on the city charges) but had not used the defendant's name.

e. Experts: None.

f. Other evidence: In their case, defendants called the detective who had been assigned to investigate the tip. He testified as to the police investigation of Valadez set forth above and stated that on December 2, 2004, it was his personal belief that Valadez "very possibly was BTK." Defendants also called the judge who increased Valadez's bond during the overnight hours.

g. Trial dynamics:

i. Plaintiff's counsel: Effective.

ii. Defendant's trial demeanor: The news director testified for two days and was credible.

iii. Length of trial: Not a factor.

iv. Judge: Very passive during trial; see above concerning jury charge.

h. Other factors:

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

21. Assessment of Jury: Competent.

22. Lessons: I would retry this case the same way. Prior to the jury instruction conference, we were very optimistic.

23. Post-Trial Disposition (motions, appeals): The plaintiff died in December of 2006, prior to entry of judgment. Following a lengthy post-trial motion practice, the trial court ruled that Valadez's defamation and invasion of privacy claims abated upon his death. The court ruled, however, that Valadez's outrage claim did not abate. Finally, the court reduced Valadez's damages to $250,000 in accordance with the Kansas damage cap of $250,000 on "non-economic" damages.

KSN and Spessard appealed the outrage judgment and Valadez's estate, which had been substituted as the plaintiff, cross-appealed the dismissal of the defamation and invasion of privacy claims, as well as the reduction in the damages. The appeal should be heard by the Kansas Court of Appeals sometime in the Fall of 2008.

Plaintiff's Attorneys:

Craig Shultz
Wichita, KS

Defendant's Attorneys:

Bernard J. Rhodes
Lathrop & Gage L.C.
2345 Grand Blvd., #2800
Kansas City, MO 64108-2663
816-292-2000 (ph)
816-202-2001 (FAX)
brhodes@lathropgage.com

L. Case Name: *Weber v. Lancaster Newspapers, Inc., et al.*

Court: Pa. Court of Common Pleas, Lancaster County
Judge: Judge Paul K. Allison
Case Number: No. CI-98-13401
Verdict rendered on: July 31, 2007

1. Name and Date of Publication: Eight (8) articles in late 1997 and early 1998 in the *Sunday News*, *Lancaster New Era*, and *Solanco Sun Ledger*.

2. Profile:

   a. Print _x_; Broadcast _____; Internet _____; Other _____.

   b. Plaintiff: public official _____; public figure ____; private _x_.

   c. Newsgathering tort: _____; Publication tort _x_.

   d. Standard applied: Actual Malice ____; Negligence _x_; Other _____.

3. Case Summary: Plaintiff, Gail Weber, is an attorney who provided legal counsel to Quarryville Borough in her capacity as an associate attorney with the Shirk Reist law firm which, at all relevant times, had been appointed as and acted in the capacity of Borough solicitor.

   Weber became involved in a professional and personal relationship with Patricia Kelley, the Acting Police Chief of Quarryville Borough. As a consequence, she was drawn into a domestic dispute between the Acting Police Chief and Dawn Smeltz, Kelley's lesbian lover. Specifically, Smeltz filed a Protection From Abuse ("PFA") Petition which identified Kelley as the only named defendant. However, in the allegations of abuse supporting that PFA Petition, Smeltz stated:

> Patti's friend, Gail Weber, phoned me at work, harassing me.

Concerned about how the controversy would adversely affect the qualifications of the Acting Police Chief, the Borough commenced an investigation. Due to the apparent conflict of interest caused by Weber's actions, the investigation was undertaken not by the Shirk Reist law firm as solicitor but by specifically appointed independent counsel. This controversy garnered much attention given the public profiles of the Acting Police Chief, who was the leading candidate for permanent assignment to the chief's position, and Weber, who had functioned publicly in the role of solicitor to the Borough.

The newspaper defendants reported these and related events, specifically and accurately stating the literal truth that Weber was accused of harassing the Acing Police Chief's lover. Specifically, after six paragraphs detailing the PFA allegations against Kelley, the language in the article in question reads as follows:

> Smeltz also accused Gail Weber, an attorney who Kelley is now living with, of making harassing calls to her at work. . . .

Respondent then sued for defamation.

The action was initiated in 1998, when plaintiff asserted seven claims that published reports of her being variously identified in relation to the allegations of the PFA Petition were defamatory for, among other reasons, falsely implying that she was a co-defendant in that domestic violence proceeding.

4. Verdict: For Defendant (no cause for action).

5. Length of Trial: 7 days.

6. Length of Deliberation: 50 minutes.

7. Size of Jury: 12.

8. Significant Pre-Trial Rulings/Proceedings: The trial court granted summary judgment to the defense on all claims. 2004 WL 5149404, 33 Media L. Rep. 1223 (Pa.Com.Pl. May 19, 2004). On plaintiff's appeal, the Superior Court affirmed dismissal of six (6) of the defamation claims, but remanded for trial of the seventh claim that plaintiff was "named" and "accused" and "charged" in the allegations of the domestic violence complaint with having telephoned the victim at work harassing her. 878 A.2d 63, 34 Media L. Rep. 1203, 2005 Pa.Super. 192 (May 24, 2005). The Pennsylvania Supreme Court declined to hear the further appeal. 588

Pa. 759, 903 A.2d 539 (July 26, 2006)(table) and 591 Pa. 666, 916 A.2d 634 (Jan. 3, 2007) (table).

9. Significant Mid-Trial Rulings (including interlocutory appeals): Plaintiff unsuccessfully moved *in limine* (1) to continue the trial date (unsuccessful interlocutory appeal), (2) to certify interlocutory order for appeal, (3) to conform the burden of proof to the ruling of the Superior Court, e.g., seeking to eliminate plaintiff's burden to prove defamatory meaning, falsity, and disrepute, as well as to bar the defenses of truth and "fair report" privilege (interlocutory appeal undecided at verdict), (4) to preclude certain evidence based on the Superior Court decision, e.g., the lesbian affair (interlocutory appeal undecided at verdict), (5) to recuse the trial judge (unsuccessful interlocutory appeal), and (6) to discontinue prosecution against the *pro se* defendants (no interlocutory appeal).

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

(1) Plaintiff successfully moved to bar not only the "public figure" defense per the Superior Court ruling, but also the "public official" defense together with the actual malice fault standard. At trial, plaintiff was deemed a private figure to whom the negligence fault standard applied.

(2) Defense successfully opposed plaintiff's discontinuance in order to retain the ability to treat the *pro se* defendants as adverse parties on examination, then did not object to discontinuance at close of trial.

(3) Defense successfully moved to preclude any reference by plaintiff to any of the six (6) factual grounds which plaintiff had originally asserted in support of her defamation claim and which the Superior Court had ruled were not actionable. When plaintiff's counsel repeatedly attempted to ignore this ruling, the defense moved for sanctions and the judge temporarily dismissed the jury and threatened plaintiff's counsel with contempt.

(4) Defense successfully moved to *voir dire* a potentially dangerous "lay opinion" witness out of the presence of the jury in order to carefully circumscribe his testimony and avoid the risk of the jury hearing certain opinion evidence despite speaking objections.

(5) Defense successfully persuaded the trial court to include in the jury charge the "public concern" defense under Pennsylvania statute.

(6) Defense successfully persuaded the trial court to exclude from the jury charge plaintiff's proposal that the "fair report' privilege could be overcome by a

showing of negligence, though the trial court did not articulate the applicable fault standard.

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

12. Pretrial Evaluation: Defense verdict probable.

13. Defense Juror Preference During Selection: Older, working women.

14. Actual Jury Makeup: 9 women, 3 men.

15. Issues Tried:

(1) Whether the published statements, that plaintiff was "named" and "accused" and "charged" in the allegations of the domestic violence complaint with having telephoned the victim at work harassing her, were defamatory.

(2) If the published statements were defamatory, whether they were privileged as "fair report" without any showing of abuse, i.e., no sting greater than the underlying subject which was reported.

16. Plaintiff's Demand (damages sought, compensatory/punitive): Total demand of $2.3 million discounted 60 % to a net settlement offer of $900,000.00 (compensatory damages only).

17. Plaintiff's Theme(s): The trial theme of the plaintiff was that she had been mentioned in the domestic violence complaint but not accused or named or charged, and the reporting to this effect imparted a defamatory spin to the publication implying that plaintiff was a defendant.

Plaintiff argued to the jury that the articles were defamatory for communicating a sting greater than that contained in the complaint by effectively accusing plaintiff of the conduct alleged in the complaint, inaccurately and unfairly conveying the impression that plaintiff was the co-defendant in the domestic violence complaint, giving plaintiff prominence in the headline and article layout greater than her mere mention in the complaint, and failing to check corroborating sources. Plaintiff further asserted that defendants abused any privilege that they may have otherwise enjoyed. Plaintiff claimed that, because of the defamatory publications, she was involuntarily terminated from her law firm and also suffered non-economic loss in terms of emotional distress, ridicule, and humiliation.

18. Defendant's Theme(s): The trial theme of the defense was that the published statements were literally and substantially true, the articles were a fair and

accurate report, the published statements were not the proximate cause of any alleged damage, and any "injury" she complained of was the result of the choices she had made, not anything that defendants reported.

Defendants then successfully argued to the jury that the published articles truthfully conveyed the substance of the allegation in the complaint according to the ordinary meaning of the language used and understood by the average reader, and/or fairly and accurately reported the allegation against plaintiff without any showing of abuse, and communicated a matter of public concern which is a statutory defense under Pennsylvania law. Defendants also successfully asserted that the alleged actions of the defendants were not a proximate or factual cause of the purported economic loss suffered by plaintiff, and that plaintiff's damages were non-existent. Defendants offered evidence that plaintiff voluntarily left her employment and averred that plaintiff had no affirmative proof of disrepute by anyone who rejected her or thought less of her. The defense economic and vocational experts confirmed the absence of proximate cause and the fact of plaintiff's unemployability prior to the publications.

19. Factors/Evidence:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: *Voir dire* revealed significant anti-media sentiment (working against the media defendants) and significant anti-gay sentiment (working against the plaintiff who was a lesbian, whose affair with another woman was the original impetus for the domestic violence complaint).

b. Sympathy for plaintiff during trial: None. In fact, there were incidents of the jury's manifest impatience with plaintiff's case.

c. Proof of actual injury: Plaintiff attempted to cast the conclusion of her employment as a constructive termination, with consequential damage in the form of lost employment opportunity. However, no witness was offered to testify that they understood and believed the "spin" plaintiff was asserting, and in turn thought any less of plaintiff.

d. Defendants' newsgathering/reporting: Not applicable.

e. Experts:

Defense experts:

Douglas Crawford, Ph.D.: labor economist; very effective, testifying that that there was no factual basis in the record to show proximate causation by defendants of any economic injury to plaintiff. Highly recommended.

Taylor Tunstall, J.D.: legal recruiter; very informal but effective, testifying that plaintiff's own vocational choices had rendered her unemployable and lacking the skills necessary for self-employment thereafter. Recommended.

Plaintiff's experts:

Douglas B. Richardson, J.D.: legal recruiter; forced on defense cross-examination to admit that he had adopted the assumptions of plaintiff's counsel without any independent examination of the record. Defense motion to strike denied, with the judge ruling that the testimony will go to the weight of the evidence accorded by the jury.

Royal A. Bunin, M.B.A.: actuary; testified by deposition, not live; forced on defense cross-examination to admit that he had adopted the assumptions of plaintiff's vocational expert, compounding the error above. Defense motion to strike denied, with the judge ruling that the testimony will go to the weight of the evidence accorded by the jury.

f. Other evidence: Not applicable.

g. Trial dynamics:

i. Plaintiff's counsel: Academic/professorial; heavily detailed; aggressive in challenging court rulings.

ii. Defendant's trial demeanor: Reserved; little to no interaction with jury.

iii. Length of trial: 7 days, often at a desultory pace.

iv. Judge: Hon. Paul K. Allison, J.: very conservative as a jurist, adhered strictly to the ruling of the Superior Court; wonderful temperament; quintessentially professional.

h. Other factors: Not applicable.

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

21. Assessment of Jury: Conservative, but fair, practical, and patient.

22. Lessons: Evidentiary proofs must be crisply tailored to the pertinent legal elements of the claim or defense, without distraction.

23. Post-Trial Disposition (motions, appeals): Post-trial motions have been withdrawn by plaintiff, and no appeal is pending or being pursued.

Plaintiff's Attorneys:

Ralph David Samuel
RALPH D. SAMUEL & CO., P.C.
P.O. Box 35185
Philadelphia, PA 19128
(O) 215-893-9992
(F) 215-701-1085
ralphsamuel@ralphsamuel.com

Defendants' Attorneys:

George C. Werner
Barley Snyder LLC
126 East King Street
Lancaster, PA 17602
(O) 717-399-1511
(F) 717-291-4660
gwerner@barley.com

for The Lancaster News Defendants

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John C. Connell
Archer & Greiner, P.C.
One Centennial Square
P.O. Box 3000
Haddonfield, NJ 08033-0968
(O) 856-354-3074
(F) 856- 795-0574
jconnell@archerlaw.com

for The Ledger News Defendants

M. SUMMARY REVIEWS

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

1. Case Name: *Jeff Maynard v. Tribune-Star Publ. Co.*

Court: Indiana Circuit Court, Sullivan County (case was filed in Vigo County, but was transferred to Sullivan County under a long-standing arrangement to relieve backlog in Vigo County)
Judge: P.J. Pierson
Case Number: 77C01-0406-CT-00219
Verdict rendered on: July 24, 2008

a. Name and Date of Publications: "Woman: Clay deputy made sexual innuendos," *Terre Haute (Ind.) Tribune-Star*, March 12, 2004. (second article), *Terre Haute (Ind.) Tribune-Star*, April, 2004.

b. Profile:

(1) Print _x_; Broadcast _____; Internet _____; Other _____.
(2) Newsgathering Tort _____; Publication Tort _x_.
(3) Standard applied: Actual Malice _x_; Negligence _____; Other _____.

c. Case Summary: Sandra Buscek, who was stopped for a traffic violation in February 2004, accused Clay County sheriff's deputy Jeff Maynard of making sexual innuendos (allegedly offering to not give her a ticket if she exposed her breasts) and pushing her. The newspaper reported on the accusations on March 12, 2004, and in April 2004 reported that thee county sheriff asked the Indiana State Police to investigate.

In June 2004, the investigation cleared Maynard of wrongdoing. This was also reported in the newspaper.

On June 30, 2004, Maynard sued over the March and April articles.

Buscek was charged with false reporting, but the charges were dismissed as part of a plea bargain of other charges against her. Buscek later filed a federal suit claiming that she had been harassed by different officers, and had gotten the name wrong when he identified Maynard. *Buscek v. Clay County*, Civil No. 04-00285 (S.D. Ind.). Various defendants in this case were dismissed, leaving reserve sheriff's deputy Michael Deakins as the sole defendant; the case was then settled.

On March 15, 2006, Judge Pierson denied the defendants' motion to dismiss under Indiana's anti-SLAPP statute (Ind. Code § 34-7-7, et seq.). No written opinion or reasoning was given. Judge Pierson certified an interlocutory appeal of this ruling, but the Indiana Court of Appeals did not accept the appeal. *Tribune-Star Publishing Co., Inc. v. Maynard*, No. 77 A 01-0606-CV-00238 (Ind. App. juris. denied July 24, 2006).

d. Verdict: For plaintiff, $1,500,000 ($500,000 compensatory. $1 million punitive). (Under Indiana law, 75 percent of punitives go to state victims' compensation fund.)

e. Length of Trial: Three days

f. Length of Deliberation: Two hours

g. Size of Jury: Six

h. Issues Tried: Falsity, defamation, actual malice.

i. Notes: Defense counsel reports that in jury selection, defendants wanted jurors who believed in the First Amendment and could understand the distinction between opinion and allegations of fact. Defense counsel questioned the jurors on their opinions/attitudes to police.

There was little, if any proof of actual injury (but damage presumed because of alleged criminality of alleged actions). Plaintiff was actually promoted after the incident. Plaintiff claimed that allegations helped lead to his divorce, but his ex-wife denied that.

There were no post-verdict interviews, but one juror was overheard telling plaintiff, "your ex-wife doesn't deserve you." They seemed to think that plaintiff was a "nice guy."

j. Post-Trial Disposition (motions, appeals): Post-trial motion for "judgment on the evidence" (JNOV) denied. Defendant may appeal (has 30 days from July 24 to decide).

Plaintiff's Attorneys:

Eric A. Frey
Frey Law Firm
Terre Haute, Ind.
812-232-7483

Defendant's Attorneys:

David W. Sullivan
Cox Zwerner Gambill & Sullivan
Terre Haute, Ind.
812-232-6003

2. Case Name: *Elizabeth Murphy v. Jefferson-Pilot Communications*

Court: South Carolina Court of Common Pleas, Charleston Cty.
Case Number: 01-CP-10-1115
Verdict Rendered on: September 14, 2007

a. Name and Date of Publication: Letter written on television station's directory by news director concerning plaintiff and false documents prepared by the news director in connection therewith in 1999.

b. Profile:

(1) Print _____; TV _____; Other _x_ (letter).
(2) Plaintiff: public _____; private _x_.
(3) Newsgathering tort _____; Publication tort _x_.

c. Case Summary: This is a retrial of a case that was originally tried in 2003.

At issue in the case were statements made in 1999 by Donald Feldman, then the news director of WCSC-TV in Charleston, South Carolina. In statements first made to Sandra Senn, a lawyer and regular panelist on a WCSC-TV public affairs show, Feldman said he was a on a flight with plaintiff Elizabeth Murphy, an attorney. He said that Murphy was drunk, and that she made slanderous remarks about the station and Senn. Feldman then prepared a letter on station letterhead threatening legal action against Murphy; claimed he had obtained the flight manifest and service log (showing what plaintiff drank on the flight; and claimed plaintiff had agreed to sign an agreement to stop defaming Senn.

Feldman's story began to unravel when a copy of the letter was actually delivered for the first time to plaintiff, and it became clear that Feldman was never on a flight with plaintiff, and that he had concocted the fabrications because he was infatuated with Senn.

Moreover, Feldman pleaded guilty in 2001 to embezzling almost $2.5 million from the station, and was sentenced to three years in prison followed by three years of probation, and ordered to pay restitution to the station.

Plaintiff's libel claims against Feldman and the station went to trial in 2003. Before the case was submitted to the jury, the trial judge, Circuit Judge Thomas Hughston, granted a directed verdict to the station and its corporate owner. The judge described the facts as "bizarre" and "unique" and noted that "to extend vicarious liability to the facts of this case would be beyond reason." *See Murphy v. Jefferson-Pilot Communications*, No. 01-CP-10-1115, 2002 WL 34217984 (S.C. Ct. C.P., Charleston County jury verdict Sept. 14, 2007); *see also MLRC MediaLawLetter*, June 2003 at 12.

The jury went on to render a $9 million damage judgment against the (indigent) former news director.

The South Carolina appeals court reversed the directed verdict in favor of the broadcaster. *See Murphy v. Jefferson-Pilot Communications*, No. 3988, 2005 WL 1115211 (S.C. App. May 2, 2005); *see also MLRC MediaLawLetter*, May 2005 at 10.

The appeals court held that the jury should have been allowed to decide whether the broadcaster was vicariously liable for the news director's

statements. The Court of Appeals agreed that the case was bizarre, but found conflicting evidence whether the news director was acting within the scope of his employment or simply pursing a personal matter. Since this involved issues of credibility regarding the director, other station employees and witness, the court concluded these issues should have been decided by the jury.

d. Verdict: $2.7 million in favor of plaintiff Elizabeth Murphy; $250,000 in favor of her husband, Christopher Murphy.

e. Length of Trial: Eight days.

f. Length of Deliberation: Three hours.

g. Size of Jury: Unknown.

h. Issues Tried: Factual issues material to the defendant's liability on the doctrine of *respondeat superior*.

i. Notes:

j. Post-Trial Disposition: Unknown.

Plaintiff's Attorneys:

John E. Parker
Ronnie Crosby
Hampton, SC

Defendant's Attorneys:

John J. Kerr
Henry E. Grimball
Buist Moore Smythe McGee, P.A.
P.O. Box 999
Charleston, SC 29402
843-722-3400 (ph)
843-723-7398 (FAX)
jkerr@bmsmlaw.com

3. Case Name: *Omega World Travel v. Mummagraphics, Inc.*

Court: E.D. Va. (Leonie Brinkema, J.)
Case Number: Civil No. 05-2080
Verdict Rendered on: April 27, 2007

a. Name and Date of Publication: www.sueaspammer.com (relevant material posted Jan. 2005)

b. Profile:

(1) Print _____; TV _____; Internet _x_; Other _____.
(2) Plaintiff: public official _____; private figure _x_.
(3) Newsgathering tort _____; Publication tort _x_.
(4) Standard applied: Actual Malice ___; Negligence _x_; Other ___.

c. Case Summary: Mark Mumma claimed that he received unsolicited e-mails from plaintiff Omega World Travel and its subsidiary cruise.com. He objected to receiving the e-mails; but instead of clicking on the "opt-out" link in the e-mails (which he later claimed was just a means for people who send unsolicited commercial e-mails to collect valid e-mail addresses, and sent their e-mails to such addresses), he directly contacted Omega's general counsel personally. Despite the attorney's assurances that Mumma's domains would be removed from Omega's mailing lists, the same day Mumma received another e-mail from Omega. This led him to post material on his web site, including a picture of the owners of Omega apparently copied from their own web site, labeling Omega as a "spammer." Omega sued for libel, copyright and trademark infringement, and misappropriation; Mumma countersued for violations of the CAN-SPAM Act.

Prior to trial, all claims and counterclaims other then plaintiff's defamation claim were dismissed; dismissal of the counterclaims was affirmed in *Omega World Travel v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006).

At a March 30, 2007 motions hearing, Judge Brinkema issued a partial summary judgment for the plaintiff, ruling that the statements were false; jury would rule only on fault (negligence for compensatory damages, actual malice for punitives) and damages.

d. Verdict: Jury award to plaintiff: $2,500,000 ($500,000 compensatory, $2 million punitive). Split evenly between Mumma and his (one-person) company.

e. Length of Trial: 2_ days.

f. Length of Deliberation: Three hours.

g. Size of Jury: 6 jurors + 1 alternate.

h. Issues Tried:

i. Notes: During jury selection, the defense sought women jurors. The court struck one juror with an Internet career. The jury picked consisted of four

men, three women. The foreman was a military officer who had overseen courts martial.

Plaintiff's pre-trial demand was $3.8 million.

At trial, plaintiff contended that statements on web site damaged Omega's brand; statements and photo were picked up by Google and thus available widely; defendant also repeated "spamming" charge in various news interviews.

The defendant contended that the case was about freedom of speech (right to criticize); plaintiff suffered no damages; defendant did not act negligently.

No expert witnesses were called.

j. Post-Trial Disposition: The court reduced the award to $10,000 compensatory damages and $100,000 punitive damages.

Plaintiff's Attorneys:

James Patrick Hodges
The Hodges Law Firm PC
1861 Wiehle Ave, Suite 320
Reston, Va. 20190

John J. Lawless
General Counsel, Omega World Travel
3102 Omega Office Park
Fairfax, Va. 22031

Defendant's Attorneys:

Richard Scott Toikka
Metropolitan Legal Services LLC
11016 Wickshire Way
Rockville, Md. 20852

4. Case Name: *Austin Rhodes v. The Rejoice Network and Brian Lamont "Ryan B" Doyle*

Court: South Carolina Court of Common Pleas (Jack Early, J.)
Case Number: 06-CP-02-1075
Verdict Rendered on: March 28, 2008

a. Name and Date of Publication: "Ryan B" Radio Talk Show

b. Profile:

(1) Print _____; TV _____; Other _x_ (radio).
(2) Plaintiff: public _x_; private _____.

(3) Newsgathering tort _____; Publication tort _x_.

c. Case Summary: Rhodes, a rival talk show host with WGAC-AM in Atlanta, sued Doyle and his co-host, Charles "Champ" Walker (who was also manager of the weekly *Augusta Focus* newspaper), and WAAW owners, Rejoice Network, Inc. and Frank Neely. The suit involved on-air statements by Doyle and Walker that Rhodes had been arrested for indecent exposure, sex offenses, and that he had been convicted of spousal abuse. The suit also alleged that the defendants had coordinated a boycott of advertisers on Rhodes' WGAC program and his local cable show.

d. Verdict: Bench judgment after default judgment on liability and trail on damages.

For plaintiff, $1,065,000: $490,000 compensatory and $350,000 punitive damages on the slander claim; $75,000 for the unfair practices claim, which is trebled under South Carolina law to $225,000.

e. Length of Trial:

f. Length of Deliberation: N/A.

g. Size of Jury: N/A.

h. Issues Tried: Damages.

i. Notes: The court denied a motion seeking an injunction preventing Doyle from repeating the disputed statements on-air.

After successfully opposing the motion for injunction, the defendants failed to appear at hearings and were held in default. Rhodes and Walker reached a settlement.

After the default was entered, the court ordered the defendants to correct and retract the statements, and plaintiff's counsel sent a cease and desist letter. But Doyle refused to retract the statements and reportedly mocked the letter on the air.

A hearing on damages was held November 7, 2007, by Aikin County Master in Equity Robert Smoak, Jr. Master Smoak noted that the defendants had acted with actual malice against a marketplace competitor, and awarded the judgment.

j. Post-Trial Disposition:

Plaintiff's Attorneys:

John Harte
Aikin, SC

Defendant's Attorneys:

Eleazer R. Carter
Reddix-Smalls & Carter Law Firm
Columbia, SC

5. **Case Name:** *Linda Root v. Ellis County Press and Joey Dauben*

Court: Texas District Court, 116th District, Dallas Cty.
Case Number: 03-3487-F
Verdict Rendered on: January 26, 2006 (case was omitted from 2006 Survey)

a. Name and Date of Publication: March 2003 article in *The Ellis County Press*

b. Profile:

(1) Print _x_; TV _____; Internet _____; Other _____.
(2) Plaintiff: public official _x_; private figure _____.
(3) Newsgathering tort _____; Publication tort _x_.
(4) Standard applied: Actual Malice _x_; Negligence ___; Other ___.

c. Case Summary: Linda Root, then the mayor of Wilmer, Texas, was in a hotly contested election in 2003. She sought to address the city council, but the meeting was cancelled for lack of business. So she created her own agenda, and had her husband distribute it to council members after the city police refused. When Root's husband attempted to deliver the agenda to City Councilman Don Hudson (who later replaced Root as mayor) on March 17, 2003, Hudson refused to accept it and filed a police complaint for trespassing.

Root and her husband filed suit against the *Ellis County Press* and reporter Joey Dauben over an article reporting this incident, and against the alleged authors and distributor of a flyer that repeated information from the newspaper article. After a four-day jury trial, the jury found for the defendants.

d. Verdict: For defendants

e. Length of Trial: Four days.

f. Length of Deliberation: Unknown.

g. Size of Jury: Twelve.

h. Issues Tried: Libel, falsity, actual malice.

i. Notes: The plaintiff also claimed that other members of the city council distributed an anonymously written political flyer that contained information from the defendants' article and also said that the Roots had been convicted of a crime.

The defendants' article included allegations by a councilman that Root's husband ignored a "no trespassing sign" and an oral request to leave, and that he flung the agenda packet at the council.

j. Post-Trial Disposition: Unknown.

Plaintiff's Attorneys:

Frank P. Hernandez
Law Office of Frank P. Hernandez
Dallas, TX

Defendant's Attorneys:

Todd Phillippi
Midlothian, TX

Robert M. Clark
Dallas, TX

6. Case Name: *Ronald Strength v. Frank Neely and Brian Lamont "Ryan B" Doyle and Rejoice Inc.*

Court: Georgia Superior Court, Richmond (Duncan Wheale, J.)
Case Number:
Verdict Rendered on: October 2007

a. Name and Date of Publication: "Ryan B" Radio Talk Show

b. Profile:

(1) Print _____; TV _____; Other _x_ (radio).
(2) Plaintiff: public _____; private _x_.
(3) Newsgathering tort _____; Publication tort _x_.

c. Case Summary: On his talk show, Doyle allegedly accused the plaintiff of murdering a criminal suspect in the 1970s, and claimed that drug dealers paid the plaintiff's dues at a country club. Plaintiff was not a police officer at the time of the broadcast.

The defendants answered the complaint but apparently did not cooperate with discovery. The plaintiff filed a motion to compel the defendants to respond, and the court, after finding that the defendants had woefully refused to comply with discovery, struck the defendants' responsive pleadings and placed the case in default.

In October of 2007, Judge Wheale conducted a bench trial on damages.

d. Verdict: For plaintiff, $6.35 million: $350,000 compensatory damages and $1.5 million punitive damages against Doyle; $5,000 compensatory damages and $4 million punitive damages against station owner Neely.

e. Length of Trial:

f. Length of Deliberation: N/A.

g. Size of Jury: N/A.

h. Issues Tried: Damages.

i. Notes: The Georgia Court of Appeals affirmed the judgment, *Neely v. Strength*, No. A08A0690, 2008 WL 1836358 (Ga. App. Apr. 25, 2008).

j. Post-Trial Disposition:

Plaintiff's Attorneys:	Defendant's Attorneys:
Emory Freddie Sanders, Sr.	Michael M. Calabro

2008 MLRC/NAA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL TRIALS

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

September 17, 2008
Denver, CO

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

A. INTRODUCTION

The methodology and results of this ninth 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 and discuss trends. The results show, among other things, (1) that we are achieving a steadily improving success rate but trying fewer cases; (2) the long-term trend in which print media have enjoyed a lower success rate than broadcast/cable/video media has, at least temporarily, come to an end; (3) the success rates for cases tried under negligence and actual malice standards remain roughly the same.

In section C. below, I will discuss common factors identified in the cases, and trial themes and tactics that have proven successful and those that have not.

B. SUMMARY OF RESULTS AND COMPARISON TO PRIOR STUDIES

This summary covers trials concluded from August 17, 2006 through August 8, 2008. During the two-year period covered by this survey, 19 trials, resulting in thirteen jury verdicts, one directed verdict, one full bench trial, two bench trials on damages after default, and one mistrial due to a hung jury were identified. The results, which do not reflect post-trial relief, were as follows:

	CASE	MEDIUM	VERDICT
1.	*Continental Inn, et al. v. Lake Sun Leader* Missouri Circuit Court, Miller Cty. Case No. 26VO50400241 August 3, 2006	print	Directed verdict for defendant

	CASE	MEDIUM	VERDICT
2.	*Johnny "J.D." Dixon v. Guy Martin, et al.* Ninth Judicial District of Texas Case No. 06-11-11017-CV July 11, 2008	Internet and print political newsletter	For defendants
3.	*Ralph A. Germak v. Sieber, et al. (Port Royal Weekly Times)* Pennsylvania Court of Common Pleas, Juniata Cty. Case No. 329-2000 February 16, 2007	print	For defendants
4.	*Thomas A. Joseph, et al. v. The Scranton Times, L.P.* Pennsylvania Court of Common Pleas, Luzerne Cty. Case No. 3816-C-2002 October 27, 2006	print	For plaintiff: $3,500,000 (bench judgment: $2,000,000 compensatory damages for plaintiff Joseph, $1,500,000 for Joseph's corporation, Accumark, Inc.)
5.	*Joanne Kerrick v. Kelly Monitz and Hazleton Standard-Speaker, Inc.* Pennsylvania Court of Common Pleas, Luzerne Cty. Case No. 2995-C-2004 October 11, 2007	print	For plaintiff: $305,250 ($16,500 for harm to reputation, $51,250 for emotional distress, $237,500 for economic loss)
6.	*Paul Lusczynski v. Tampa Bay Television, Inc. and Mike Mason* Florida Circuit Court, Hillsborough Cty. Case No. 03-CA-011424 September 11, 2006	TV	For defendants
7.	*Mandel v. The Boston Phoenix, Inc.* U.S. Dist. Ct., D. Mass. Case No. 03-10687 December 11, 2007	print	Hung jury
8.	*Jeff Maynard v. Terre Haute Tribune-Star* Indiana Superior Court, Sullivan Cty. Case No. 77C01-0406-CT-00219 July 25, 2008	print	For plaintiff: $1,500,000 ($500,000 compensatory damages, $1,000,000 punitive damages)

	CASE	MEDIUM	VERDICT
9.	*Elizabeth Murphy v. Jefferson-Pilot Communications* South Carolina Court of Common Pleas, Charleston Cty. Case No. 01-CP-10-1115 September 14, 2007	letter (on TV station letterhead)	For plaintiff: $2,950,000 ($2,700,000 in favor of plaintiff Elizabeth Murphy, $250,000 in favor of her husband Christopher Murphy)
10.	*Omega World Travel v. Mummagraphics, Inc.* U.S. Dist. Ct., E.D. Va. Case No. 05-2080 April 27, 2007	Internet	For plaintiff: $2,500,000 ($500,000 compensatory, $2,000,000 punitive) (remitted to $500,000 $10,000 compensatory, $100,000 punitive)
11.	*Austin Rhodes v. The Rejoice Network and Brian Lamont "Ryan B." Doyle* South Carolina Court of Common Pleas Case No. 06-CP-2-1075 March 28, 2008	radio	Bench judgment for plaintiff after default: $1,065,000 ($490,000 compensatory, $350,000 punitive damages, both on the defamation claim; $75,000 trebled to $225,000 under the S.C. Unfair Practices Act)
12.	*Travis S. Riddle v. Golden Isles Broadcasting, L.L.C.* Georgia Circuit Court, Glen Cty. (on appeal) Case No. A-08-A-0024 (Georgia Court of Appeals) 2006 (retried in January 2007 after rejection of remititur resulting in $25,000 verdict, but $100,000 verdict was reinstated on appeal)	radio	For plaintiff: $100,000
13.	*Linda Root v. Ellis County Press* Texas District Court, 116th District, Dallas Cty. Case No. 03-3487-F January 26, 2006	print	For defendants

	CASE	MEDIUM	VERDICT
14.	*William Stephens and Ray Jordan v. Wayne Dolcefino, et al.* Texas District Court, 215th District, Harris Cty. Case No. 99-43183 February 15, 2007	TV	For defendants
15.	*Ronald Strength v. Frank Neeley, Brian Lamont "Ryan B." Doyle and Rejoice, Inc.* Georgia Superior Court Ga. Ct. App. No. A 08A0690 October 2007	radio	Bench judgment for plaintiff after default: $6,350,000 ($350,000 compensatory damages, $1,000,000 punitive damages against Doyle; $5,000 compensatory, $4,000,000 punitive against station owner Neeley)
16.	*Robert Thomas v. Bill Page and Kane County Chronicle* Illinois Circuit Court, Kane Cty. Case No. 04-LK-013 November 13, 2006	print	For plaintiff: $7,000,000 ($1,000,000 economic loss, $1,000,000 emotional distress, $5,000,000 injury to reputation) (remitted to $1,000,000 for emotional harm, $3,000,000 for reputational harm, total $4,000,000)
17.	*Peter Tilton v McGraw-Hill Companies, Inc., et al.* U.S. Dist. Ct., W.D. Wash. Case No. 06-00098 December 11, 2007	print	For defendants

	CASE	MEDIUM	VERDICT
18.	*Roger Valadez v. Emmis Communications (KSN-TV, Wichita)* Kansas District Court, Sedgwick Cty. Case No. 05-CV-0142 October 20, 2006	TV	For plaintiff: $1,100,000 ($800,000 for emotional distress; $300,000 for damage to reputation)
19.	*Gail Weber v. Lancaster Newspapers, Inc., et al.* Pennsylvania Court of Common Pleas, Lancaster Cty. Case No. CI-98-13401 July 31, 2007	print	For defendants

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. I should also emphasize that the extraordinary low number of trials (thirteen completed jury trials) over the two-year period renders any statistical analysis of questionable significance. But they are nonetheless of interest in relation to past trends. My numbers are derived from slightly different criteria but are not wildly dissimilar from the results of the MLRC 2008 Report on Trials and Damages.

In the stats that follow, I omit the one full bench trial, the two bench trials on damages after default, the one directed verdict, and the hung jury. I also omit *Murphy v. Jefferson Pilot* because it did not involve media content as such. The defendants won 7 of 13, or 53.8% of the completed jury trials. These results compare to my prior surveys as follows: 2006 – 52.9%; 2004 - 48.6%; 2001 - 49.9%; 1999 - 34.6%; 1997 - 35.5%; 1995 - 35.7%. In the current survey, the overall rate of success, including the full bench trial and the directed verdict, was 8 of 15, or 53.3%. The steadily growing success rate suggests 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' jury awards was $2,084,208. This compares to $548,636 for the 2006 survey, $3,032,067 for the 2004 survey, $3,732,867 for the 2001 survey, and $2,545,875 for the 1999 survey. The median verdict was $1,300,000, as compared to $260,000 in 2006, $505,000 in 2004, $1,975,000 in 2001, $450,000 in 1999, $280,000 in 1997, and $300,000 in 1995. If we throw out the aberrational initial verdict in the *Omega World Travel* case, the average for 2008 is $2,001,050, the median $1,100,000.

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

print media having joined the electronic media in their willingness to settle the marginal or more dangerous cases.

For the third survey in a row, the electronic media continued to defy the long-term trend in earlier surveys showing them to be at greater risk of large verdicts than print media. In this survey, the average electronic media verdict was $1,233,333 and the median was $1,100,000. Omitting the aberrational and promptly remitted result in the *Omega* case, the average electronic media verdict was $600,000, and the median $600,000. The average print media verdict was $2,935,083, and the median $1,500,000.

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

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

Case		Plaintiff's Background	Fault Standard for Liability
Successful Plaintiffs/Recovery (000's)			
Kerrick	$305.25	mother of daughter who was under investigation as accessory accomplice to murder	negligence
Maynard	$1,500	deputy sheriff	actual malice
Omega World Travel	$2,500	travel promoter	negligence
Riddle	$100	rap singer	negligence*
Thomas	$7,000	Supreme Court justice	actual malice
Valadez	$1,100	retired wage earner	negligence
Unsuccessful Plaintiffs			
Dixon		minister, shoeshine vendor, and minor political activist	negligence
Germak		school board attorney, former district attorney	actual malice
Lusczynski		police sergeant	actual malice
Root		small town mayor	actual malice
Stevens		deputy controller and assistant police chief for Houston	intentional newsgathering tort
Tilton		mid-level corporate executive	breach of newsgathering promise
Weber		lawyer in private practice serving as town solicitor	negligence

* unconfirmed

In the past, the most frequent and successful plaintiffs have been lawyers and other professionals, judges, businesses and businesspersons, and celebrities. It is difficult to see much of a pattern in the above winners, except that a judge and a celebrity wanna-be appear in the mix.

This is the second survey in a row in which defendants have prevailed in most newsgathering cases, after a decade of mostly bad results in this area. In this survey, the defendants prevailed in an alleged eavesdropping case (*Stephens*), and also in a case of alleged breach of promise made while newsgathering (*Tilton*). *Kerrick*, which was tried on defamation issues, had newsgathering issues that caused problems for the defendant.

Another counterintuitive trend over the years has been that media defendants defending in content jury trials enjoy roughly the same success in cases in which the standard is negligence as they do in cases in which the standard is actual malice. In this survey, that trend did not continue with exactness, since 2 of 6 cases or 33% were won under a negligence standard, while 3 of 5 or 60% were won under an actual malice standard. However, with such a small sample, this deviation does not indicate a reversal of a trend indicating roughly the same success rate in negligence cases as has been achieved under the ostensibly much more difficult actual malice standard. Beginning in 1997, the results have been as follows: 1997 – 35% victory rate in negligence cases, 26.66% in actual malice cases; 1999 – 26.8% in negligence cases, 50% in actual malice cases; 2001 – 33.3% in negligence cases, 33.3% in actual malice cases; 2004 – 57.1% in negligence cases, 57.1% in actual malice cases; 2006 – 50% in negligence cases, 50% in actual malice case. The significance of this trend is discussed in the analysis section below, in connection with the *Mandel* case and the difficulty counsel faced in obtaining a win in a retrial under an actual malice standard after losing the original trial under a negligence standard.

C. 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. Ending Up with the Right (Wrong) Jury

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

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

> Over the fifteen years I have done this survey, I have reported defense counsels' (including my own) preferences for jurors in the defense of libel cases based upon socio-economic, educational, and employment background. However, the more I watch jury trials, the more I conclude that generalizations based upon background are the least useful criteria for jury selection. A much more important factor, in my opinion, is the personality type, and in particular

> whether the individual has high self-esteem, a tendency to run off her own gyroscope more than external influences, and the ability to accept and live with ambiguity, uncertainty, and unanswered questions. Such people are most likely to react favorably to an articulate defendant reporter, columnist, or producer, and understand and appreciate her role in stimulating thought and bringing issues to light.
>
> Related to personality, but even more difficult to delve into in *voir dire*, is the juror's life experiences and how those experiences have instilled biases. The most direct example of a relevant life experience, of course, would be a bad encounter with the media on the part of the juror or a relative or acquaintance. Jury consultant Jason Bloom tells me that the pro-plaintiff group also includes those who "generally carry with them a sense of entitlement, who have been taken advantage of by others, who have lost opportunities in life due to actions of others without a chance to defend themselves. For instance, they may feel they have been passed up for promotion in the workplace because they perceived that someone else is out to get them or that a rumor has been spread around the office that they have not had a chance to diffuse nor can they, or that a performance evaluation was unfair or incorrect. In other words, those most pro-plaintiff in a libel case are best able to parallel a life experience to the case fact pattern and conclude they have seen this movie before."

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

In this survey, the only case in which a counsel-prepared questionnaire was utilized was *Stephens v. Dolcefino* (the questionnaire is included in the survey response). Defense counsel in that case have used questionnaires in several media cases and swear by them. However, in this case, one of the best jury selection decisions was to keep a juror who had previously been qualified in a death-penalty case. Conventional wisdom counsels in favor of striking such a juror, but counsel had a feeling that the juror's personality and disposition were right. That instinct proved correct, and illustrates the importance of both approaches to getting to know your potential jurors. As you can see from the survey response, counsel in *Stephens* thought very highly of their jury, even more so than can normally be expected from a party who prevails.

In the cases on the losing side of the ledger, there does not appear to be any in which counsel felt they had adequately gotten to know their panel prior to seating the jury, notwithstanding considerable efforts on *voir dire* and through pre-trial research. *See Kerrick* and *Thomas*. There is no reason to believe that a better jury could have been selected in these cases,

but they nonetheless bring home that every effort should be made to learn about the jury through all available means.

2. Battle of Personas

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

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

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

In this survey, the best example of a party's persona as a trump card is provided by *Thomas v. Page*, in which the Chief Justice of the Illinois Supreme Court sued over opinion columns suggesting that his disposition on a disciplinary matter involving a high ranking prosecutor was motivated by a political *quid pro quo*. The defendants tried their case to several focus groups from the venue. In most, the jurors agreed with the defense that the matter under discussion was highly political and polemical, and that Justice Thomas had not suffered any real damage. At trial, the result and the post-verdict temperament of the jurors (hugging Justice Thomas) indicated that the defendant's mock trial exercises did not adequately replicate the persona of Justice Thomas (and also the not so lovable defendant publisher). The Justice sold both himself (including his background as a high-scoring placekicker for the Chicago Bears) and his case to this jury, to the point that the jurors were indifferent to the largely undisputed evidence that Justice Thomas suffered no real harm.

Another case in which the defense lost the battle of personas was *Kerrick v. Monitz*. This was an identity confusion case, between a mother and daughter with similar names. Such cases frequently turn on whether the plaintiff is perceived as the victim or a mere opportunist. The defendant's reporter and editor presented reasonably well at trial in explaining their error in misidentifying the plaintiff as involved in a murder investigation, and also in choosing to run a follow-up article rather than a correction as such. The reporter also had to explain a somewhat implausible tale of presenting herself at the plaintiff's home once the error was brought to the newspaper's attention, ostensibly out of concern for the plaintiff's safety when she did not answer the telephone. The visit resulted in the reporter's attempting to interview the plaintiff's teen-age daughter (who was in fact the suspect in the murder investigation) in the plaintiff's absence. It was also apparent that the jury sympathized with the plaintiff, although she was not overly personable or credible, on account of her having been hit by an erroneous newspaper article identifying her as a possible murder accomplice in the midst of the emotional trauma of

dealing with her daughter's legal and personal problems. This case is another illustration of how the common defense theme based on causation – in this case, that any emotional damage suffered by the plaintiff was due to the involvement of her daughter in the homicide investigation, not the newspaper article – proved to be a double-edged sword. Beware of the "thin skulled" plaintiff.

In *Mandel*, neither side was particularly ahead in the persona or sympathy game, although an accusation of child sexual abuse, very difficult to prove, will almost always cause sympathy for the plaintiff to emerge. The same dynamic likely played a role in *Valadez v. Emmis Communications*, in which the plaintiff was identified as a suspect in the BTK killings in Wichita, Kansas.

There were cases in which the defendant's success in the battle of personas appear to be a primary factor in achieving a defense verdict. *Germak v. Sieber* (*Port Royal Weekly Times*)was a suit by a school board attorney (former D.A.) over letters to the editor charging that he convened meetings at his home to undermine the current school administration. That issue at one point was quite heated politically, but by the time of trial the community polarization had subsided. While the plaintiff was not totally unengaging, the defendants carried the day through the testimony of the newspaper's editor and owner, who testified to fact checking she did concerning the letter's allegation of meetings in Germak's home. In *Lusczynski v. Tampa Bay Television*, the defense defeated a somewhat snarly plaintiff police sergeant with testimony from all levels of production of the television news segment concerning choices of words and language that negated the defamatory implications claimed by the plaintiff. In *Tilton v. McGraw Hill Companies*, the jury believed the defense claim that no promise was made to the plaintiff that he would not be identified in a story concerning the effect of family dynamics upon workplace conduct. The jury believed the reporter's testimony that she made no such promise, nor was confidentiality or anonymity even discussed. It did not hurt that her testimony was corroborated by copious notes of all interviews, which invariably indicated when a source requested and/or was promised confidentiality or anonymity. In *Weber*, the plaintiff was making a claim of libel by implication which failed, at least in part, due to the jury's inability to identify with the plaintiff. Probably for that reason, unlike *Kerrick*, the defense that plaintiff's injuries were the result of her own choices seems to have worked. An attempt by an African-American plaintiff to "play the race card" backfired in *Dixon v. Martin*.

3. Reporting on Investigations or Allegations

In the 2006 survey, I reported cases in which defendants achieved startling success in trying their case on a theory that ignored the "republication rule." This opportunity normally presents itself when the defendant has reported upon newsworthy allegations or the status of a criminal investigation, and the defendant takes care to provide the reader with an accurate snapshot of the status of the investigation, without taking a position on the merits. Even if the allegations ultimately prove untrue or remain unproven, defendants have succeeded in showing that the report concerning the allegations or the status of the investigation was accurate, or at least reflected a good faith attempt at that result. This genre of case presents challenges similar to libel by implication cases. The chances of success on this approach increase when: (1) the allegations are especially newsworthy; (2) the defendant's report makes 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. As I noted in the 2006 survey, such a trial theme could prove highly problematic if the court would ultimately given an instruction that incorporated the common law republication rule and instructed the jury that the defendant was required to support the truth of allegations that were repeated in its article. That is exactly what occurred in *Valadez v. Emmis Communications*, in which the judge instructed the jury:

> The evidence in this case proves that by certain information put out to the community by defendant, a reasonable person would conclude that a man under arrest over related charges was more than likely a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lives.

This instruction left defense counsel with very little to argue to the jury.

While the instruction in *Valadez* was arguably "off the wall," by a judge not in touch with the law or the evidence, a similar stance was taken by the judge presiding over a bench trial in *Joseph v. Scranton Times*. The defendant's lengthy series of articles occasionally used language unnecessarily accusatory, but for the most part indicated, by way of context, that the allegations being investigated were unproven, and represented more theories of investigators. In his findings of fact, the judge treated the investigators' hypotheses as being embraced by the newspaper. Even in hindsight, the decisions by defendants to take the risk of such results seems reasonable, for lack of any other defense themes that would be free false notes. But the risk of an unforgiving resurrection of the republication rule as occurred in these cases should not be taken lightly, and care should be taken to persuasively brief the issue.

4. <u>Explaining Actual Malice</u>

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

This was best exemplified in *Mandel v. Boston Phoenix*, in which plaintiff's counsel barely missed a beat when a retrial was ordered on the grounds that the plaintiff had been erroneously determined not to be a public figure. In the retrial, the plaintiff, who won a substantial verdict under a negligence standard, nearly prevailed in the retrial under actual malice, although the trial resulted in a hung jury. The instruction on "reckless disregard" contained a number of *Connaughton*-derived explanations that may have invited the jury to dilute that element. As a result, the defendant settled.

5. Spoliation

This is the plaintiff's lawyer's pet theme these days, and it arises in our cases when reporter's notes are pitched or videotape is recycled. It was an issue, although the judge declined to instruct on it, in *Stephens*. The station had dubbed the tape from a pagercam (a hidden videotaping device), and in that process, the pagercam tape including audio was erased, and the audio was not preserved. Counsel was able to effectively deal with the issue, but would have us learn that spoliation problems often become magnified during a jury trial and should be avoided wherever possible.

6. Corrections

In *Kerrick*, the defendant learned that it had misidentified the plaintiff as an individual being investigated for assisting a murderer in disposing of the body, when in fact the person who was the subject of the investigation was plaintiff's daughter with a similar name. The defendants chose to do a follow-up story, indicating plaintiff's lack of involvement, and otherwise portraying her favorably.

The biggest issue at the trial was whether the defendants shirked their responsibility and were reckless in failing to admit to an error and apologizing. This, notwithstanding full explanations at all levels of the editorial process, supported by the opinion of a well-versed expert that a follow-up story such as this is likely to be more effective in remedying the original false statement.

7. Expert Witnesses

In this survey, defendants made brilliant use of expert witnesses in explaining their positions. In *Kerrick*, the defendant presented Medill Journalism's Jack Doppelt to explain the use of a follow-up story as a preferred method of correcting an error. In finding for plaintiff, it was clear that the jury chose to ignore both the defendants and the expert. In *Lusczynski*, the defendants presented a journalism expert who was also credentialed in English, to address the question of meaning, the lack of applicability to plaintiff of certain quotations criticizing the police promotion process, and the use of language calculated to avoid that result. The jury found for the defendant, but reported that they had already agreed with the expert's conclusions before she assumed the witness stand. In *Tilton*, Tom Goldstein, now at U.C. Berkeley, bolstered the reporter's testimony and note-taking which showed that no promise of anonymity had been made to the plaintiff and apparently contributed to the defendant's successful outcome.

In *Joseph*, defense counsel was challenged by a difficult defense of coverage of an investigation based exclusively on confidential sources. The defendant did not use an expert on journalism even though the plaintiff did. Defense counsel believed any expert they might call would likely help the plaintiff to some degree, and that the plaintiff's expert was unimpressive. Counsel has the same view in hindsight.

8. Libel by Implication

In the three libel by implication cases of the season, *Germak*, *Lusczynski* and *Weber*, it was simply apparent to the jury that the plaintiff was overreaching and that the claimed implication was not warranted.

9. Mock Juries

Mock trials or focus groups were utilized in *Lusczynski*, *Stephens*, *Thomas*, and *Valadez*. *Thomas* and *Valadez* indicate the limitations inherent in the exercise: *Thomas*, because of the inability to replicate Justice Thomas' ability to captivate the jury from the witness stand, and the defendant's tendency to alienate; *Valadez* because of the defendant's surprise at the jury charge given at trial. In *Lusczynski*, the mock juries went both ways on liability, and thus provided significant instruction.

In *Stephens*, defense counsel adhered to their practice of utilizing a "shadow" jury during the trial. Note that in at least one instance, the shadow jury's assessment of a key witness proved to be off the mark. An informal shadow jury in *Mandel* (hung jury) thought the defendant would easily prevail on the issue of actual malice.

10. Confidential Sources

In *Joseph*, the defendant newspaper attempted to defend an article that relied entirely upon confidential sources. This proved to be too big of a challenge, notwithstanding a valiant effort. The same proved true in *Thomas*. Even with a good shield law, when a defendant declines to identify key sources, the judge will usually limit how and to what extent the defendant may tell the factfinder about them. Over the years, our experience has been that juries are satisfied only by the full story.

11. Conclusion

I usually reserve the Conclusion of this analysis for something bizarre or at least ironic from the world of the morality plays that are jury trials of media content cases. This time, my thoughts are fixed upon the unsettling prospect that that world may be coming to an end. The number of completed jury trials of media content-related tort cases has dropped from 21 trials in the 2001 survey to the current survey's 13. That trend continues with a vengeance: so far in 2008, there have been two (count 'em) jury trials of defamation or related cases. There is not much to be said for a "survey" of two or three trials. Thus, the curtain may be falling on this survey, and the related "Trial Tales" panel which has been part of the MLRC biennial conference since 1991.

What has caused the paucity of trials? My informed speculation blames several factors. Unquestionably, the economics of the industry, as well as the economics of litigation, have driven media organizations to settle more cases, and some to strive harder to avoid litigation in the first place. There is also tort reform, which limits recovery for non-economic losses in many jurisdictions to the point that plaintiff's lawyers find the prospects of outcome-based

compensation to be too chimerical to draw them. Even where tort reform has not been a factor, there is no question that the work of the MLRC in training and supporting the media defense bar has made the prosecution of a libel case too challenging and difficult for plaintiff's lawyers when there are other forms of tort litigation bearing less elusive fruit.

But at the end of the day, I speculate that the most significant factor in eliminating the libel case from the litigation landscape is the Internet. Nowadays, when a defamatory story appears in the morning edition of a newspaper, it is immediately attacked and dissected by all forms of bloggers and bulletin board posters. That immediate response by the information marketplace deprives the original story of the significance it would have enjoyed in earlier times. A person defamed in the morning has usually been restored as much of her reputation as she arguably deserves by brunch. That is not to say that the Internet does not lend itself to insidious and malicious defamation that is not effectively remedied by market corrections, as illustrated by *Omega World Travel v. Mummagraphics*. But in the mainstream of the flow of newsworthy information via the Internet, libel litigation has become largely irrelevant.

If libel trials become extinct, I will surely miss them, even though I have to reluctantly acknowledge that their disappearance would be a good thing. I guess we don't need libel cases for "trial tales," any more than we need war for war stories. Even so, it would be hard to say goodbye to a specialty in which our bar has learned to perform so well. Stay tuned.