MEDIA LAW RESOURCE CENTER (MLRC)

JURY DEBRIEFING COMMITTEE REPORT

NOVEMBER 2003

VERDICT DATE – 5/27/03

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT, OHIO

SWEENEY v. NEW YORK TIMES COMPANY and FOX BUTTERFIELD

1:00-cv-02942-DCN
USDC ND OHIO

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(All material in this document is the result of the work of George Freeman, and is based on his excellent and thorough article in the June, 2003 MLRC Report, and his post-verdict interviews with certain trial jurors)

After a two-week trial, a unanimous 12-person jury rejected a libel claim by Ohio Supreme Court Justice Francis Sweeney and returned a verdict on May 23, 2003 in favor of *The New York Times*. The case is an object lesson in the importance of many of the practical trial hints discussed at prior libel conferences, including the importance of jury instructions and a special verdict form. The victory keeps *The Times* record intact of never having lost an American libel case (or settling one for money) since well before *Times v. Sullivan*.

The Facts

The case had its origins in the notorious Dr. Sam Sheppard trials some 50 years ago. In 1954 Sheppard was convicted of killing his wife while his then 7-year-old son slept next door. As media lawyers know, his conviction was reversed by the U.S. Supreme Court on grounds of excessive publicity. In a second trial in 1966 – which was critical to the current libel case – Sheppard was found not guilty, but he died a few years later.

In the 1990s, DNA and other evidence appeared to exonerate Dr. Sheppard and point the finger at the family window washer, a convicted murderer in whose home a ring of Mrs. Sheppard's was found. The son, Sam Reese Sheppard, in or around 1996, began an action to get a declaration of innocence for his father and to recover monies from the State. Interestingly, at first the County Prosecutor's Office openly said that a new investigation was a good idea and that it was certainly possible that Sheppard was not guilty. However, it then made an abrupt about-face and took the position that Sheppard was clearly guilty and began fighting the son's case at every turn. This included filing a "Writ of Prohibition" in the Ohio Supreme Court in which the prosecutors moved to prevent the case from going to trial on some technical legal grounds.

In December 1998, the Ohio Supreme Court, 4-3, allowed the trial to go forward, with Justice Francis Sweeney dissenting. *The Times* and reporter Fox Butterfield ran some nine articles over a four-year period, from March 1996 to April 2000, about this battle, with a theme that this very visible, emotional and political battle regarding the guilt or innocence of Sam Sheppard, which had played out in the 50's and 60's, was still roiling Cleveland today, and that some of the same political crosscurrents that existed 40 years ago still were at the fore in today's Cleveland.

Ultimately, in an April 13, 2000 article which reported on the jury's rejection of Sam Reese Sheppard's claims, a story which ran on page 20 of *The Times*, included the following in its last two paragraphs:

"One of the abiding mysteries of the case is why the prosecutors fought so hard. Privately some of them had said earlier that they now believed Dr. Sheppard was innocent and that Mr. Eberling was the real killer. But decades after the murder, the case still divided Cleveland and Mr. Sheppard and his supporters maintained that some of the earlier generation of prosecutors had brought pressure on the current team of prosecutors. For example, Francis Sweeney, who was an assistant prosecutor in Dr. Sheppard's second trial, is now a justice on the Ohio Supreme Court. He voted unsuccessfully last year to block Mr. Sheppard's lawsuit from going forward in court. Despite his involvement in the earlier case, he declined to recuse himself."

The Libel Claim

Plaintiff Justice Francis Sweeney claimed that the above quoted passage was false and defamatory for three reasons:

- Though Sweeney was in the County Prosecutor's Office in 1966 at the time of the second trial, he was not actively involved in the case. He claimed that the factual statement was false, and *The Times* ultimately ran an Editor's Note correcting this. At trial, *The Times* argued that it was substantially true, since the office had only 12-15 lawyers and hence all prosecutors in the office, in Cleveland's most notorious case in a century, were emotionally invested of the case.

- Sweeney claimed that he had not declined to recuse himself, since, he argued, he never had been asked to recuse himself. Nonetheless, two letters were entered into evidence which went to him on the recusal issue, one from Sam Reese Sheppard as an amicus to the Writ of Prohibition proceeding (the State was the moving party in that proceeding against the trial judge) seeking recusal, the other opposing the recusal. Sweeney contended he never received either letter, just as he contended he never was given messages of the two phone calls Reporter Butterfield made to him when he was first mentioned in a *Times* story in 1998.

- Plaintiff claimed he had in no way pressured anyone, much less the current prosecutors, to take a position on the case. *The Times* argued that its report merely gave Sweeney's non-recusal as an example of one of the "pressures" Sam Reese Sheppard and his supporters believed had been put on the current prosecutors to win the case. Sweeney argued that this accused the judge of unethical and even criminal behavior, while *The Times* argued it was simply reporting on Sheppard's feelings and that "pressure" was used vaguely to indicate the political heat being put on the case.

Ohio Supreme Court Justice Sweeney did not ask for a correction. Rather, the first notice *The Times* had of an error in its report was when he sued – in state court – for defamation. Not surprisingly, *The Times* removed to federal court, where the case was assigned to Federal District Judge Donald Nugent, himself a former County Prosecutor. Judge Nugent denied *The Times* motion for summary judgment on the grounds of no evidence of actual malice, without an opinion. A later memorandum opinion, issued the week before trial, did not give any substantive discussion of the actual malice contention.

The Trial

At trial, Fox Butterfield vigorously rebutted the aggressive – and usually screaming – attacks of Plaintiff's attorney Don Iler. Butterfield was the only Times witness who appeared at

trial, which had the advantageous consequence of the Defendant truly being personified by its reporter with the giant institution pretty much kept out of the jurors' minds. (The trial began the day after *The Times* published its 14,000 word account of the Jayson Blair fiasco.) Moreover, since Justice Sweeney sat angry and distant at the trial and was not an especially sympathetic witness, the case appeared to be personified as Plaintiff's Attorney v. *The Times* Reporter.

Plaintiff's main arguments on actual malice were (i) that Butterfield had used the word "improbable" in a prior draft of an article about Justice Sweeney's non-recusing himself, thereby showing that he didn't believe it, as opposed to ascribing a meaning that the reporter just thought that it was strange; (ii) that Butterfield's mistake with respect to Sweeney's role in the prosecutor's office in 1966 could have been avoided if he had not "worn blinders," and he could have looked at the 37-year-old trial transcript or asked a number of other people with better knowledge than Sheppard's team; (iii) that he relied for the accusation of "pressure" on Sam Reese Sheppard, who had emotional trauma and psychological illness because of the murder of his mother and incarceration of his father, and hence, should not have been believed; and (iv) the reporter knew his story was false, but decided to twist the otherwise mundane story to attack Justice Sweeney so as to sensationalize his coverage.

On the other hand, *The Times* argued that there was no actual malice since Butterfield thought what he printed was true and certainly should be allowed to print what the loser of a hard-fought case "maintained" after the verdict came in. *The Times* also noted that Butterfield had reported essentially the same things about Justice Sweeney on two occasions in 1998, but had never received any call or other indication that such reporting was wrong. The reporter testified that in 1998 he had attempted to reach Sweeney for comment, but that his two calls went unreturned. Moreover, the testimony showed that there was no reputational damage for Justice Sweeney. No one in Ohio legal circles had heard of the article, or thought less of Justice Sweeney because of it. Neither his own secretary at the Ohio Supreme Court nor the County Prosecutor nor many in-the-loop Cleveland attorneys in between had been aware of the article. In addition, Justice Sweeney testified that only his family heard about the article and that, although no one talked to him about it, "people looked at me differently" after the article, and therefore his reputation had been destroyed "in one fell swoop."

The trial judge blocked most of the testimony concerning the fact that after similar articles had run in 1998, Justice Sweeney easily won a statewide election, and that though his opponent had criticized him on numerous grounds, the matters at issue here never came up.

The Jury Deliberations

Over *The Times*'s objection, the Judge allowed expert witnesses to testify with respect to journalistic standards, something seemingly irrelevant in a public official case where subjective state of mind is key. Moreover, at three different hearings at the end of the trial, the Judge rejected *The Times*'s urging that the jury instructions include the *St. Amant and Garrison v. Louisiana* definitions of actual malice, preferring to keep the actual malice instruction almost unreasonably short.

After the jury deliberated for four hours they sent a note asking for the definition of "probable" and "falsity" in the actual malice definition they were given which included the phrase "reckless disregard of probable falsity." *The Times* again urged that the jury should be given instructions as to "serious doubts as to the truth" or "high degree of awareness of probable falsity", but the judge again refused, preferring to give them dictionary definitions of those two words.

Shortly thereafter, the jury came back again with a question about whether actual malice required intentional conduct. Again *The Times* urged giving the jury the *St. Amant and Garrison v. Louisiana* definitions of actual malice and, finally, late Friday on Memorial Day weekend eve, the Judge read those definitions to them. Shortly thereafter, the jury returned its special verdict form finding that Plaintiff had made out a case of falsity and defamatory meaning, but not of actual malice.

Counsel

The New York Times was represented by Lou Colombo and Jim Wooley of Baker & Hostetler in Cleveland, assisted by George Freeman, Assistant General Counsel of The Times. Plaintiff was represented by Don Iler and John Halbauer, Cleveland, Ohio.

Jury Debriefing

George Freeman spoke at length to a juror (juror #7) and the foreman, (juror#11). Here is what they reported:

Juror #7

Juror #7 at first seemed a little bit reluctant to talk to a lawyer, but then agreed to, saying he would not talk about what other jurors felt, a stricture he more or less kept during the call. He started by asking "How is Fox doing; I am so glad for him". He said he had found Fox's phone number on Saturday and was close to calling him, and emphasized that he had held up very well during the harsh questioning.

However, he said that he also felt "sorry" for Justice Sweeney because he had been injured, his family had been distressed, etc.

He said there was a little discussion at the beginning of deliberations which seemed to point in the direction of a verdict for The Times. However, he said that they quickly decided to go through the questionnaire one by one, and that the first votes on #1 and #2 were about 9-3 for plaintiff. He noted that the jury did see the difference between the "preponderance of the evidence" called for in questions #1 and #2 and the "clear and convincing" evidence called for in question #3.

He said that with respect to actual malice "we pretty much figured out" what it meant. "It wasn't hard; most of us felt the same way."

With respect to falsity, he said that the jury felt that given the Editor's Note, it was clear that there was a false statement, with respect to Justice Sweeney's role in the prosecutors office, and with respect to the "pressure" the omission of the paragraph which had been taken out made that look bad also.

This juror made the following observations about the trial presentations:

1. He said that everyone bought into the defense closing that "what did this guy have to gain by sensationalizing the last paragraphs about this obscure judge?" He also said that he (and it seems the jury) did not buy the smears Plaintiff's counsel tried with respect to Fox's past record.

2. He said that Jayson Blair never came up, although he was aware of the situation. He said it didn't seem relevant to the current case.

3. He described the defense lawyers as "nice guys" although maybe not assertive enough. Interestingly, he said that he was very impressed by defense witnesses (who happen to be lawyers) Gilbert and Friedman who had the "balls" to stand up to plaintiff's counsel Iler. He found Iler pushy and bullying.

4. He criticized Plaintiff's expert who he said was clearly a paid gun with no experience in journalism. He questioned Jim's closing in which he said that both experts should be thrown out, because he thought that our expert far outdid Plaintiff's and had reasonable experience and a lot of credibility.

5. He noted many of the thing which Jim mentioned in closing, there was nothing in the headline, it was buried in the 19th paragraph, in short, why would Fox have done that intentionally. The jury seemed to understand that similar stuff had been written 18 months earlier and no one had questioned it before. They also thought it strange that Sweeney didn't ask for a correction.

6. He said that the jury was not contentious, but really wanted to make the right decision, and was prepared to stay a while to do so. He felt that they had come up with a clear and fair result.

7. As to the role of the jury interrogatories and the instructions which Judge Nugent finally gave at the end, he said the interrogatories were important, but that we would probably have gotten to the same place without them, although it probably would have taken longer. He said the same sort of things with respect to the final instructions. He said there wasn't much discussion of damages, but he found that there was "nothing there to give him money for".

Juror #11 (the foreman)

The foreman said roughly the same things. He thought that Fox Butterfield stood up "beautifully" to the badgering and aggressive questioning. He felt that Iler's overaggressiveness hurt him badly. Interestingly, he thought Sweeney also "overplayed" it. He thought it was staged that when the jury came out of the jury room the first or second day, Sweeney was standing by his lonesome looking out the window (which actually did not seem to us to be staged).

He said that last two hours were spent mainly inducing juror #9 to fully understand the definition of intent. It was for her benefit apparently that they went back to ask the additional questions of Judge Nugent. He agreed that the final instructions on intent given in answer to their questions were helpful, but that they were not going decide differently, only that they could then convince the holdout juror.

This juror made the following observations:

1. He said that on actual malice the first vote was 10-2 in favor of The Times.

2. He said that it was clear from the start that "we wanted to go for defendant" "it was a lack of evidence" "it was clear he didn't do it deliberately".

3. He also found very effective -- as did George Freeman -- the questioning at the end of almost every witness about whether they had ever heard of the article.

4. He termed Fox Butterfield and the defense expert as excellent witnesses.

5. He said that the element-by-element breakdown on the jury verdict form was very helpful.

6. When asked about falsity and defamatory meaning, he gave roughly the same answers as did juror #7. When asked specifically about the fact that "wasn't Sweeney invested in the Prosecutor's position because it was a small office", he said "obviously, you'll listen to you buddy next door in the Prosecutor's Office" but that they still found that the statement in the article was false.

7. Interestingly -- and critically -- he said that Plaintiff should have made more of the editor who had cut the intervening paragraph. He said then there would have been a real issue of malice because in large part the case would have depended on that editor's motive, something about which there was simply no evidence.

8. He said it was a "crock" that Sweeney didn't ask for a correction right away. Everyone on the jury seemed to think that if it happened to them, they would ask for a correction immediately, and that raised questions as to Plaintiff's motive.