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COMMITTEE REPORT

EXCLUDING EXPERT WITNESSES IN ACTUAL MALICE CASES

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I. THE ISSUE FRAMED

In defamation, invasion of privacy, and other types of cases in which a plaintiff must establish that the defendant acted with "actual malice," *i.e.*, knowing falsity or reckless disregard for the truth, plaintiffs will occasionally offer expert testimony to demonstrate actual malice. Such testimony almost always addresses whether the defendant followed standard journalistic practices in crafting the publication at issue. Plaintiffs have also offered the testimony of linguistics experts as evidence of actual malice, arguing that the linguistic analysis performed by the expert provides insight into the defendant's state of mind, as well as the impact of the publication on the average reader or viewer.

Defendants regularly contest the relevance and admissibility of expert testimony offered to establish actual malice, arguing primarily that whether or not a journalist followed standard journalistic practices—an objective test—is irrelevant to whether the journalist believed that the statements at issue were false or entertained serious doubts about their truth—a subjective test. Defendants have also successfully argued that the testimony of linguistics experts is not helpful to the jury and is inadmissible under federal and state rules of evidence. Attacks on expert testimony offered to establish actual malice arise in a variety of contexts, including summary judgment motions, motions to strike expert testimony, post-trial motions, and appellate review of trial court rulings.

II. COURTS GENERALLY REJECT OR DISCOUNT EXPERT TESTIMONY ON THE ISSUE OF ACTUAL MALICE

In addressing the relative value of expert testimony offered to prove that a defendant acted with actual malice, courts have generally ruled that such expert testimony is irrelevant or only marginally relevant to the issue of actual malice. As one court recognized, "courts have generally disfavored expert testimony in determining actual malice, which is essentially a determination of the defendant's subjective state of mind." Lohrenz v. Donnelly, 223 F. Supp. 2d 25, 36 (D.D.C. 2002); accord Harris v. Quadracci, 856 F. Supp. 513, 519 (E.D. Wis. 1994) ("[E]xpert opinion testimony generally is not helpful when determining actual malice against a subjective standard."); Gonzalez v. Hearst Corp., 930 S.W.2d 275, 283 (Tex. App.—Houston [1st Dist.] 1996) ("Expert testimony does not assist the jury in making the subjective determination of whether [a defendant] actually entertained serious doubts about the accuracy of the publication at issue.").

A. Expert Testimony Is Generally Insufficient to Establish Actual Malice

When offered in response to a defendant's motion for summary judgment, instructed verdict, or JNOV, most trial and appellate courts discount or reject expert opinions on standard journalistic practices, ruling that such opinions are insufficient to show actual malice when not accompanied by other more probative evidence.

- See, e.g., OAO Alfa Bank v. Ctr. for Pub. Integrity, 387 F. Supp. 2d 20, 56 (D.D.C. 2005) (holding that "plaintiffs cannot survive summary judgment on the shoulders of their journalism expert's opinion that defendants 'violated journalism ethics' and [that] the article does not 'hold[] up to normal standards of investigative reporting'" because

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the standard for actual malice is not satisfied by evidence of "negligence or bad journalism").

- Lohrenz v. Donnelly, 223 F. Supp. 2d 25, 36 (D.D.C. 2002) ("It is clear that the plaintiff may not establish malice, a subjective state of mind, solely through expert testimony . . .").

- Carr v. Forbes, Inc., 121 F. Supp. 2d 485, 495-96 (D.S.C. 2000) (holding that the opinions of "journalism experts" that the defendant departed from journalism standards by publishing an article that was not "balanced and fair" did not constitute evidence of actual malice).

- Russell v. Am. Broad. Cos., 1997 WL 598115, at *6 (N.D. Ill. Sept. 19, 1997) ("While the court finds ABC's alleged departure from broadcast standards relevant to whether ABC acted with actual malice, the court views the evidence to be of limited value. Standing alone, it is simply not enough to demonstrate ABC's subjective state of mind. Plaintiff must present additional evidence to demonstrate that a genuine issue of material fact exists as to whether ABC acted with actual malice.").

- Pfannenstiel v. Osborne Publ'g Co., 939 F. Supp. 1497, 1504 (D. Kan. 1996) (holding that expert testimony that the defendants did not follow basic journalistic practices did not create a fact issue with respect to actual malice because the expert applied his own objective definition to the term "actual malice" and not the appropriate subjective legal standard).

- Harris v. Quadracci, 856 F. Supp. 513, 519 (E.D. Wis. 1994) ("The [expert's] affidavit is not probative of actual malice because [the expert's] opinion relates to a reckless disregard for a standard of objectivity, not for the truth. It fails to put [the defendants'] conduct in material dispute or raise a genuine issue as to the existence of actual malice on behalf of [the defendants].").

- Brueggemeyer v. Am. Broad. Cos., 684 F. Supp. 452, 466 (N.D. Tex. 1988) (holding that "evidence of bias, and lack of objectivity and evenhandedness" supported by expert testimony was alone insufficient to find actual malice by clear and convincing evidence).

- Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 425-26 (N.J. 1995) (affirming the trial court's grant of summary judgment in favor of the defendants, concluding that the testimony of plaintiff's expert provided evidence of negligence or gross negligence, but did not show that the defendant-reporter "ever doubted" the truth of the statements at issue).

- Khan v. The New York Times Co., 269 A.D.2d 74, 76 (N.Y. App. Div. 2000) (reversing trial court's denial of defendants' summary judgment motion, ruling that the trial court's improper reliance on expert testimony that the defendants "ignored the basic tenants of journalism" and "acted with reckless disregard for the truth" indicated that the court "mistakenly applied an objective standard of gross irresponsibility . . . rather than applying the subjective actual malice standard").

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- Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 858-59 (Tex. 2005) (affirming the trial court's grant of summary judgment in favor of the defendant, finding that the "opinions of an 'expert journalist' criticizing the [paper's] handling of the story and finding a consistent pattern of biased reporting" did not establish actual malice).

- Wang v. Tang, 260 S.W.3d 149, 160 (Tex. App.—Houston [1st Dist.] 2008) (holding that expert opinion criticizing the paper's selective publication of "only half" of plaintiff's quotation "is not probative of actual malice" and did not raise a fact issue with respect to actual malice because the expert's opinion "was not based on evidence that gave particular insight into the defendant's mental state").

- New Times, Inc. v. Wamstead, 106 S.W.3d 916, 928 (Tex. App.—Dallas 2003) (holding that expert opinion that defendants failed to adequately investigate spoke only to "an alleged disregard of a standard of objectivity" and was "not probative of the Media-Defendants' conscious awareness of falsity or whether they subjectively entertained serious doubt as to the truth or falsity of the Statements as reported in the Article").

- Gonzalez v. Hearst Corp., 930 S.W.2d 275, 283 (Tex. App.—Houston [14th Dist.] 1996) (concluding that expert's objective testimony regarding standard journalistic practices "does not assist the trier of fact in determining the *subjective* truth of whether [the media defendants] entertained serious doubts as to the accuracy" of the article at issue) (emphasis in original).

B. Courts May Exclude Expert Testimony Offered to Establish Actual Malice

Some courts have held that expert testimony offered to establish actual malice is inadmissible under Federal Rules of Evidence 403 and/or 702 or comparable state rules of evidence. See, e.g., Green v. CBS Broad., Inc., 2000 WL 33243748, at *3-4 (N.D. Tex. Dec. 19, 2000) (excluding expert testimony that the plaintiff "is a private person" and that the defendants' "conduct rises to the level of actual malice" because such opinions amount to inadmissible legal conclusions that "are not helpful for the trier of fact").

- Tilton v. Capital Cities/ABC, Inc., 938 F. Supp. 751, 752-54 (N.D. Okla. 1995) (excluding testimony of expert linguist under Federal Rules of Evidence 702 and 403 because "it would not assist the jury in performing its task of determining what Defendants' subjective state of mind was in making the subject broadcasts" and any probative value of the testimony "would be confusing to the jury, would be a waste of time and would be unfairly prejudicial to the Defendants").

- World Boxing Council v. Cosell, 715 F. Supp. 1259, 1264-65 (S.D.N.Y. 1989) (excluding the analysis of plaintiff's media and linguistics expert because her analysis was "more apt to confuse than to enlighten, more unfairly prejudicial than probative" and "would waste the time of both the jury and the court").

- Brueggemeyer v. Am. Broad. Cos., 684 F. Supp. 452, 465-67 (N.D. Tex. 1988) (concluding that the opinions of the plaintiff's expert linguist were inadmissible under Federal Rules of Evidence 702 and 403 because her affidavit was unreliable and the

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"probative value of [her] opinions is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

- Early v. The Toledo Blade, 720 N.E.2d 107, 119 (Ohio Ct. App. 1998) (affirming trial court's exclusion of testimony about journalistic standards by communications and linguistics experts when both experts "had never studied journalism, did not teach journalism, and were not themselves journalists" and when their opinions were unreliable "because they were not provided with adequate records to study").

III. MANY COURTS HAVE BEEN RELUCTANT TO HOLD THAT EXPERT OPINION IS NEVER RELEVANT

In many cases, libel plaintiffs argue that actual malice may be shown by circumstantial evidence, including evidence of a story's fabrication, evidence that a story was based solely on a source the defendant had obvious reasons to doubt, and evidence that a reporter's failure to investigate amounted to a purposeful avoidance of the truth. See, e.g., Harte v. Hanks Comms., Inc. v. Connaughton, 491 U.S. 657, 668 (1989); St. Amant v. Thompson, 390 U.S. 727, 732 (1968). The United States Supreme Court has thus held that reliance on a "newspaper's departure from accepted standards" and on "evidence of motive" in reaching the conclusion that a defendant acted with actual malice is not improper. Harte v. Hanks Comms., Inc. v. Connaughton, 491 U.S. 657, 668 (1989). In Harte, the Supreme Court explained:

> Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.

Id. (internal citations omitted).

Relying on Harte, some courts have declined to rule that expert testimony is never relevant to the issue of actual malice, reasoning that such evidence may be relevant circumstantial evidence of a journalist's state of mind. See, e.g., Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 766 (Mass. 2007) (affirming trial court's decision to allow expert testimony on journalistic standards, concluding that "[a] plaintiff is entitled to prove the defendants' subjective state of mind through circumstantial evidence . . . and evidence concerning a reporter's apparent reckless lack of care may be one factor in the actual malice inquiry").

Accordingly, some courts have noted that journalism experts may offer relevant evidence in the appropriate case have permitted the testimony of journalism experts at trial. See, e.g., Suzuki Motor Corp. v. Consumer Union of U.S., 330 F.3d 1110, 1137 n.14 (9th Cir. 2003) ("Although expert testimony regarding [the defendant's] departure from accepted journalistic standards is not sufficient by itself to establish actual malice, . . . it does shed light on the propriety of [the defendant's] response to . . . evidence [that was contrary to the article] and, thus, is entitled to be given appropriate weight.").

- OAO Alfa Bank v. Ctr. for Pub. Integrity, 387 F. Supp. 2d 20, 56 (D.D.C. 2005) (granting summary judgment in favor of defendants, but noting that "[t]he Court cannot

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say that the views of an expert in the field could never be helpful in illuminating the options available to a publisher in investigating a piece—an essential element of an inquiry into whether a defendant was willfully blind is some understanding of what he should be looking for.").

- Russell v. Am. Broad. Cos., 1997 WL 598115, at *6 (N.D. Ill. Sept. 19, 1997) (finding that expert testimony providing "evidence of a significant departure from [journalistic] standards may have relevance to the question of whether [the defendant] acted with constitutional malice," but recognizing that such evidence is of "limited value" and insufficient to establish actual malice when "standing alone").

- Brueggemeyer v. Am. Broad. Cos., 684 F. Supp. 452, 465-67 (N.D. Tex. 1988) (noting that an expert's opinions detailing "evidence of bias, and lack of objectivity and evenhandedness, may be probative of intent to act with actual malice," but rejecting relevance of expert in particular case and granting defendant's summary judgment motion).

- Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 766 (Mass. 2007) (affirming trial court's decision to allow the testimony of a journalism expert at trial).

- Ky. Kingdom Amusement Co. v. Belo Ky., Inc., 179 S.W.3d 785, 792 (Ky. 2005) (affirming trial court's allowance of testimony of expert opining on "journalism standards and ethics," holding that while "[a]ctual malice cannot be based solely on expert evidence that [the defendant] deviated from accepted journalistic practices[,] . . . a journalism expert's testimony may assist the fact-finder in understanding the circumstantial evidence of actual malice").

- Godwin v. Daily Local News Co., 47 Pa. D. & C.3d 639, 653 (Pa. Ct. Com. Pl., Chester Co. 1987) ("We further note that in reaching their conclusion [that the defendant acted with actual malice], the jury was free to accept the testimony of the plaintiff's expert witness who opined that the defendant's actions constituted a serious breach of journalistic standards, and to draw reasonable inferences regarding the defendant's motives from the expert's testimony.").

- Sisler v. Gannett Co., 516 A.2d 1083, 1095 (N.J. 1986) (noting in dicta that "expert testimony regarding journalistic practices and customs may properly inform the jury, even when the burden of proof is actual malice").

- News Publ'g Co. v. DeBerry, 321 S.E.2d 112, 115-16 (Ga. Ct. App. 1984) (affirming trial court's allowance of testimony of expert opining on "generally recognized minimum standards in journalism" when trial court cautioned the jury that such opinion "would not be binding upon" the jury).

IV. ARGUMENTS FOR EXCLUDING EXPERTS ON ACTUAL MALICE

Media lawyers facing a plaintiff's attempt to employ an expert on the issue of actual malice should consider the following arguments:

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1. The Expert's Opinion Is Irrelevant to Actual Malice. In most cases, courts have concluded that expert opinion on whether the defendant followed standard journalistic practices is, at best, evidence of negligence and does not show whether the defendant knew that the statement was false or entertained serious doubts about its truth. See, e.g., Harris v. Quadracci, 856 F. Supp. 513, 519 (E.D. Wis. 1994) ("The [expert's] affidavit is not probative of actual malice because [the expert's] opinion relates to a reckless disregard for a standard of objectivity, not for the truth. It fails to put [the defendant's] conduct in material dispute or raise a genuine issue as to the existence of actual malice on behalf of [the defendants]."). But see Suzuki Motor Corp. v. Consumers Union of U.S., 330 F.3d 1110, 1136-39 (9th Cir. 2003) (considering, among other evidence, expert testimony that defendant "violated accepted journalistic standards in failing to engage in further investigation of contrary evidence" and concluding that plaintiff raised a fact issue "as to whether [the defendant] purposefully avoided information that would have undermined" the accuracy of the article); Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 766 (Mass. 2007) (affirming trial court's decision to allow expert testimony on journalistic standards, concluding that "[a] plaintiff is entitled to prove the defendants' subjective state of mind through circumstantial evidence . . . and evidence concerning a reporter's apparent reckless lack of care may be one factor in the actual malice inquiry").

2. The Expert's Opinion Is Not Helpful to the Jury. Under Federal Rule of Evidence 702 (or the appropriate state law equivalent), expert testimony must assist the fact-finder in understanding the evidence or in determining a fact in issue. Courts, however, have expressed skepticism about whether expert opinion will assist the trier of fact in determining whether the defendant acted with actual malice. See, e.g., Tilton v. Capital Cities/ABC, Inc., 938 F. Supp. 751, 752-54 (N.D. Okla. 1995) (excluding the testimony of the Plaintiff's linguistics expert under Federal Rule of Evidence 702 because it would not assist the jury in determining whether the defendant harbored actual malice).

3. The Expert Has Failed to Review the Entire Record. Under Federal Rule of Evidence 702 (or the appropriate state law equivalent), expert testimony must also be reliable. Several courts, however, have concluded that expert testimony on actual malice is unreliable when the expert fails to review the entire scope of the defendant's newsgathering efforts. See e.g., Brueggemeyer v. Am. Broad. Cos., 684 F. Supp. 452, 465-66 (N.D. Tex. 1988) (excluding expert testimony because the expert "grounded her research on too narrow a factual predicate to be reliable" and stating that "the actual malice determination is not to be so narrowly tailored where there is evidence, as here, that the publisher's newsgathering efforts were much broader in scope"); Early v. The Toledo Blade, 720 N.E.2d 107, 119 (Ohio Ct. App. 1998) (noting that neither of plaintiff's experts "had seen the actual internal affairs files used by the reporters" and concluding that the experts' "opinions were unreliable because they were not provided with adequate records to study").

4. The Expert Will Offer Impermissible Legal Conclusions. Several courts have held that expert opinion in the form of a legal conclusion, *e.g.*, the defendant acted with actual malice, is impermissible under Federal Rules of Evidence 702 and 704 (or the appropriate state law equivalent). See, e.g., Green v. CBS Broad., Inc., 2000 WL 33243748, at *4 (N.D. Tex. 2000) ("While Rule 704 allows an expert to offer opinions which may embrace an ultimate issue of fact, it does not allow legal conclusions. . . . Thus, opinions that tell the trier of fact what result

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to reach are not permitted."); Early v. The Toledo Blade, 720 N.E.2d 107, 119 (Ohio Ct. App. 1998) ("[A]n expert witness should not be allowed to testify about his or her interpretation of the law, as that is within the sole province of the court.") (internal quotations omitted).

5. The Expert's Opinion Is More Prejudicial than Probative. Several courts have concluded that expert opinion on actual malice is inadmissible under Federal Rule of Evidence 403 (or the appropriate state law equivalent) because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion on the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Defendants have successfully invoked Rule 403 when the plaintiff has offered a linguistics expert to provide an opinion about the defendant's state of mind or the public's reaction to the publication based on the expert's analysis of the content of the publication. See, e.g., World Boxing Council v. Cosell, 715 F. Supp. 1259, 1264-65 (S.D.N.Y. 1989) (concluding that the testimony of the plaintiff's proposed linguistics expert "transforms a common sense issue into a technical one, and relies on virtually incomprehensible pseudo-scientific jargon" and, thus, "must be excluded as more apt to confuse than to enlighten [and as] more unfairly prejudicial than probative"); Tilton v. Capital Cities/ABC, Inc., 938 F. Supp. 751, 752-54 (N.D. Okla. 1995) (holding that the testimony of plaintiff's linguistic expert should be excluded under Rule 403 because the "testimony would be confusing to the jury, would be a waste of time and would be unfairly prejudicial to Defendants").

6. The Expert Is A Linguistic or Communications "Expert." Courts appear to be most antagonistic to testimony of linguistics and communications experts, particularly when those experts have little or no experience in journalism. See, e.g., World Boxing Council v. Cosell, 715 F. Supp. 1259, 1264-65 (S.D.N.Y. 1989) (excluding the analysis of plaintiff's media and linguistics expert because her analysis was "more apt to confuse than to enlighten, more unfairly prejudicial than probative," and "would waste the time of both the jury and the court"); Early v. The Toledo Blade, 720 N.E.2d 107, 119 (Ohio Ct. App. 1998) (affirming trial court's exclusion of testimony about journalistic standards by communications and linguistics experts when both experts "had never studied journalism, did not teach journalism, and were not themselves journalists" and when their opinions were unreliable "because they were not provided with adequate records to study").

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