MLRC Media Law Conference
October 4-6, 2023
Lansdowne Resort Hotel, Leesburg, VA

Trial Tales: An in-depth analysis of leading media defamation trials.
Sarah Palin v. The New York Times (S.D.N.Y)
Norman Gaudette v. Mainely Media (Me. Super.)

With

David Axelrod is a first-chair trial lawyer at Ballard Spahr in New York and Philadelphia. He specializes in defending parties sued for defamation and was lead trial counsel in *Palin v. The New York Times*.

Dana R. Green is Senior Counsel in The New York Times Company's legal department, where she counsels the newsroom on legal issues and represents the paper in a wide range of content-related litigation.

Cynthia Counts is a partner at Fisher Broyles. She successfully represented the Biddeford-Saco-Old Orchard Beach Courier, a local Maine newspaper, at trial and appeal in a contentious libel suit over its reporting about sexual abuse and coverups by law enforcement.

Moderator: Michael Berry is a trial lawyer and partner with Ballard Spahr in Philadelphia. He regularly defends media companies in federal and state courts throughout the country.

Sarah Palin v. The New York Times

Court: U.S. District Court for the Southern District of New York
Judge: Jed Rakoff
Case Number: 1:17-cv-04853
Docket: https://www.courtlistener.com/docket/6081165/palin-v-the-new-york-times-company/
Plaintiff's Trial Attorneys: Kenneth G. Turkel, Shane B. Vogt, Turkel Cuva Barrios, P.A., Tampa, FL
Defendant's Trial Attorneys: David Axelrod, Jay Ward Brown, Tom Sullivan, Jacquelyn Schell, Ballard Spahr; Dana Green, New York Times
Verdict rendered on: Feb. 15, 2022

At issue in the case was the following New York Times editorial titled "America's Lethal Politics" published June 14, 2017 in response to the shooting of Congressman Steve Scalise and three staffers during a Congressional softball game in Virginia:

https://www.nytimes.com/2017/06/14/opinion/steve-scalise-congress-shot-alexandria-virginia.html

> America's elected representatives enjoying America's pastime on a ball field just across the Potomac from the Capitol: A particularly American form of terror changed that idyll early Wednesday morning into what Senator Rand Paul, who was there, called "basically a killing field."
>
> A gunman with a rifle fired dozens of rounds at members of Congress and current and former aides, who dove for cover. "He was hunting us," said Representative Mike Bishop, Republican of Michigan, who was at home plate when the gunman appeared. In all, four victims were hit, including Representative Steve Scalise of Louisiana, the House majority whip, who was in critical condition Wednesday night after surgery on a bullet wound to his hip.
>
> An American would once have been horrified and shocked by such savagery. An American today would be right to be horrified — and not very surprised. This was one of two mass shootings in the United States on Wednesday. At a San Francisco UPS facility, a gunman killed three people and himself.
>
> Not all the details are known yet about what happened in Virginia, but a sickeningly familiar pattern is emerging in the assault: The sniper, James Hodgkinson, who was killed by Capitol Police officers, was surely deranged, and his derangement had found its fuel in politics. Mr. Hodgkinson was a Bernie Sanders supporter and campaign volunteer virulently opposed to President Trump. He posted many anti-Trump messages on social media, including one in March that said "Time to Destroy Trump & Co."

Was this attack evidence of how vicious American politics has become? Probably. *In 2011, when Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a nine-year-old girl,* ***the link to political incitement was clear.*** *Before the shooting, Sarah Palin's political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.*

Conservatives and right-wing media were quick on Wednesday to demand forceful condemnation of hate speech and crimes by anti-Trump liberals. They're right. ***Though there's no sign of incitement as direct as in the Giffords attack****, liberals should of course hold themselves to the same standard of decency that they ask of the right.*[1]

Was this attack evidence of how readily available guns and ammunition are in the United States? Indisputably. Mr. Hodgkinson, by definition, should not have had a gun, but he was licensed in his home state, Illinois. And in any event it would have been easy for him to acquire a weapon in Virginia, which requires no background checks in private sales, requires no registration for most weapons and has few restrictions on open carry.

The reaction of some was that the only solution is yet more guns. Representative Mo Brooks of Alabama, who was among those who came under fire on Wednesday, said, "It's not easy to take when you see people around you being shot and you don't have a weapon yourself."

That's an entirely reasonable reflex. All people in that situation, unarmed and under fire, would long to be able to protect themselves and their friends. Yet consider the society Americans would have to live in — the choices they would all have to make — to enable that kind of defense. Every member of Congress, and every other American of whatever age, would have to go to baseball practice, or to school, or to work, or to the post office, or to the health clinic — or to any of the other places mass shootings now take place — with a gun on their hip. And then, when an attack came and they returned fire, they would probably kill or wound not the assailant but another innocent bystander, as studies have repeatedly shown.

That is the society the gun lobby is working toward. Is it the one Americans want? President Trump said just the right thing after the attack on Wednesday: "We may have our differences, but we do well in times like these to remember that everyone who serves in our nation's capital is here because, above all, they love our country. We can all agree that we are blessed to be Americans, that our children deserve to grow up in a nation of safety and peace."

[1] The italicized and bold language denotes the passages and phrases at issue in the case.

> Yet he will not help create that nation if he continues to advocate easy access to lethal weapons.
>
> *A correction was made on June 16, 2017*
>
> An editorial on Thursday about the shooting of Representative Steve Scalise incorrectly stated that a link existed between political rhetoric and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established. The editorial also incorrectly described a map distributed by a political action committee before that shooting. It depicted electoral districts, not individual Democratic lawmakers, beneath stylized cross hairs.

Litigation and Trial

The former Alaska Governor and Vice-Presidential candidate, Sarah Palin, brought this libel suit against the New York Times, over a 2017 editorial that allegedly implied that a map depicting crosshair targets on certain congressional districts, published by Palin's political action committee (SarahPAC) in 2011, was connected to the shooting in Tucson, AZ, in which six people were killed, and many others were injured, including then-Congresswoman Gabby Giffords. The occasion for the editorial, titled "America's Lethal Politics," was the June 2017 shooting at a baseball field in Alexandria, Virginia, in which four people were injured, including Congressman Steve Scalise. The editorial referred back to that earlier 2011 shooting to establish a pattern of gun violence that had intersected with politics and heated political rhetoric in America. In relevant part, the editorial claimed that the "link to political incitement was clear," and SarahPAC had "circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs."

In the next paragraph, the editorial states, by way of comparison to the Virginia shooting: "Though there's no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right." After publication there was immediate pushback on that statement, with readers arguing there was no evidence Giffords's shooter saw or was inspired by the SarahPAC map. Within hours, The Times published a correction: "An earlier version of this editorial incorrectly stated that a link existed between political incitement and the 2011 shooting of Representative Gabby Giffords. In fact, no such link was established." The Times also clarified that the crosshairs on the SarahPAC map were depicted over congressional districts, not members of congress themselves, who were listed separately.

An Irregular Motion to Dismiss Hearing

The Palin case is notable, not just for its high-profile plaintiff, but for some of the procedural decisions made by the federal district court judge, Jed Rakoff, both prior to, and at the conclusion of the trial. Early in the case, Judge Rakoff took the unusual step of holding an

evidentiary hearing to assess the plausibility of whether Palin had sufficiently pled the actual malice element of her defamation claim. Judge Rakoff ordered the *Times* to identify the author of the editorial, and it produced its then-lead editorial page editor, James Bennet, who was the only witness at the hearing. Bennet testified, among other things, that he had not read the prior opinion pieces, including those published in The Times, which had indicated that no connection between the Tucson shooter and SarahPAC had been established. Relying on the testimony of Bennet at the hearing, the district court ruled in favor of the defendants, dismissing Palin's complaint with prejudice, holding that plaintiff did not plausibly allege actual malice, and subsequently determining that attempts to amend the complaint would be futile.

Palin appealed the dismissal, and the Second Circuit reversed, finding that the district court, in holding a hearing and taking Bennet's testimony into consideration, impermissibly relied upon evidence outside the pleadings and also impermissibly made credibility determinations. The Court of Appeals further found that Palin's proposed amended complaint plausibly stated a claim for actual malice, taking into consideration allegations with respect to Bennet's elevated editorial position at The Times and his potential political bias based upon his brother being a Democratic U.S. Senator. The Court also noted that a hyperlink in a version of the editorial originally drafted by another editorial board member, Elizabeth Williamson, pointed to an article from ABC News that reported "no connection has been made" between the Tucson shooter and the SarahPAC map. Bennet made substantial rewrites to the draft, including the "political incitement" line that Palin alleged to be defamatory.

Palin subsequently amended her complaint naming Bennet as a co-defendant. At the close of discovery, the parties filed cross-motions for summary judgment, which were denied. Notwithstanding Judge Rakoff's apparent skepticism of Palin's claim during the motion to dismiss stage, he did not accept the defendants' invitation to dispose of the case on summary judgment. In particular, Judge Rakoff found the facts surrounding Bennet's rewrite of the Williamson draft, containing the hyperlinked ABC News article, raised an issue of material fact as to reckless disregard for the truth.

Some of the pre-trial motions were apparently meant to preserve arguments for higher courts. The plaintiff filed an unsuccessful motion for partial summary judgment, seeking to overrule the Supreme Court's landmark New York Times v. Sullivan decision and the application of the actual malice standard in the case. Meanwhile, the defendants argued successfully to the district court – in a motion for reconsideration of their motion for summary judgement – that New York's then newly-amended Anti-SLAPP law – which requires libel plaintiffs to prove actual malice in cases broadly defined as involving an issue of public interest – should be applied retroactively. This ruling, if upheld on appeal, renders plaintiff's effort to challenge Sullivan moot.

The Trial

A seven-day trial commenced on February 3, 2022. At trial, The Times's position was that the editorial was never intended to suggest a causal connection between Palin and the Tucson shooting. Rather, the editorial was commenting on the risks of violent rhetoric raising the temperature and noted the map as an example of such rhetoric targeting a later victim of violence. The idea for the editorial was originally introduced by Williamson who, in the wake of the Virginia baseball field shooting, sought to opine on gun control. Another editor, in an email, had noted how shocking the Gabby Giffords shooting had been six years earlier, but that the shooting of a congressman didn't seem as shocking now. In another email, Bennet first raised the question of whether there's a point to be made about the "rhetoric of demonization and whether it incites people to this kind of violence."

Williamson was principally responsible for researching and writing the piece, and she testified that she "was researching the political rhetoric that was circulating in our discourse in the run-up to the 2011 shooting in Arizona," not "the shooting itself" or "the state of the mind of the gunman." During the course of her research, she reviewed – and shared with Bennet – several past *Times* editorials and columns on the 2011 shooting which commented on violent political rhetoric as part of the atmospherics prior to the shooting, but also acknowledged the lack of evidence regarding the shooter's motivations and influences.

A column by Frank Rich, written a week after the Giffords shooting, had noted that it was unknown if the shooter had seen the crosshairs map, and that he was likely "insane, with no coherent ideological agenda." A prior *Times* editorial noted that the shooter's "paranoid Internet ravings about government mind control place him well beyond usual ideological categories." Williamson's original draft included some of the language Palin objected to, noting that her PAC had "circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized crosshairs," arguably implying that faces of the Democrats were used when it was only the districts that were depicted under crosshairs. This draft was circulated along with the link to the ABC News article from the day after the 2011 shooting, which noted that "[n]o connection had been made between this graphic and the Arizona shooting."

Bennet testified that upon receiving the draft, he didn't click on the link or read the ABC News story. Another editor, Linda Cohn, went to Bennet's office with some feedback on the draft; according to Bennet's testimony, Cohn "did not think it was a great draft." Bennet thought it looked more like a news story than an opinion piece and did not capture the shock of the recent attack. He initially intended to give Williamson comments, but ultimately decided to rewrite the piece himself when he realized how late it was considering the deadline for getting the piece into the next day's print edition.

Among the changes Bennet made, he added to the piece the language Palin objected to: that the "link to political incitement was clear," and later in referring to the then-recent Virginia shooting, "Though there's no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right."

Bennet testified that he made the changes to the draft to show that the Tucson shooting was an example of incitement or incendiary rhetoric, but said he, "didn't think then and don't think now that the map caused Jared Loughner to act. I didn't think we were saying that, and therefore … [it] didn't enter my mind to research that question … My goal was to make it … a clearer argument and [a] more compelling description of what happened that day, a more vivid description of what happened that day." He testified that in his mind, "when politicians get shot, … it has something to do with politics," and "that an atmosphere of highly charged political rhetoric makes such … terrifying events more likely."

Bennet recirculated the draft, and invited Williamson and other editors to fact-check the piece. Williamson testified that she only "glanced" at the revision. Minor changes were made by other editors, but not altering the statements at issue in the litigation.

An hour after publication, Bennet received an email from *Times* columnist, Ross Douthat, noting, in particular, that there was no evidence that Jared Loughner had been incited by Sarah Palin or anyone else. Bennet testified that he "took away from [it that Douthat] was reading the editorial to say that Loughner was incited by Sarah Palin or somebody else, and that is not the message we intended to send." Bennet further saw that others on Twitter felt The Times had gotten it wrong. Early the next morning he emailed Williamson and another editor to follow-up on whether they had mischaracterized the Giffords shooting as related to incitement. Communications between Williamson and Bennet reflected that Bennet felt deep regret about his choice of words. At trial, Bennet testified, "This is my fault. I wrote those sentences. I'm not looking to shift the blame."

The Times subsequently issued two corrections, changing the challenged language. The final correction noted that no link had been established between the Giffords shooting and political rhetoric, and that the SarahPAC map targeted districts, not lawmakers, under stylized cross hairs.

Former Governor Palin testified that she had recalled the original accusations against her in the wake of the 2011 Tucson shooting – that she helped incite the violence – and testified that they were "mortifying, because I knew what the truth was." As to the 2017 editorial, she testified that "[i]t was devastating to read, again, an accusation, a false accusation that I had anything to do with murder, murdering innocent people." But she stumbled in asserting that The Times had "lied" about her "again," even though there had been no prior accusation about The Times publishing false statements about her. She asserted that The Times had taken "a lot of liberties" after the 2011 shooting and that it had "led the charge" against her then, years before the editorial at issue had been published, but couldn't back up her claims with any reference to past articles that had falsely attacked her. On cross-examination, she struggled to articulate how she or her reputation had been harmed by the 2017 editorial, other than losing some sleep. She also conceded that she never asked The Times for a retraction, correction, or apology, but she filed suit two weeks later.

Rule 50 Decision and Jury Verdict

Following the close of evidence, on Thursday, February 10th, the court struck Palin's request for punitive damages, ruling that she had introduced insufficient evidence the issue to reach the jury, and the defendants moved for judgment as a matter of law under Federal Rule 50, on a number of bases. The motion was argued in five sessions outside the presence of the jury, and included written submissions made over the intervening weekend. The jury began deliberating on Friday, February 11th. The following Monday morning, Judge Rakoff indicated that he was leaning in the direction of granting the defendants' motion as to actual malice with respect to the falsity of the statements, but that he wanted to hear further argument on the matter, and also stated that he would allow the jury to reach a verdict in any event. That afternoon, after arguments had concluded, and while the jury was still deliberating, the court decided the issue of actual malice in the defendants' favor, effectively granting judgment as a matter of law. The jury was allowed to continue to try to reach a verdict, at least for the purposes of appeal, should the court's dismissal be reversed. To observers of the trial, the decision to make the Rule 50 ruling in the middle of jury deliberations seemed almost certain to create controversy.

At the end of the day Monday, the court asked the parties if they sought further instructions to the jury about avoiding media coverage. Although the plaintiff did not seek further warnings, the defendants' counsel presciently advised the court that there was a risk that jurors would be alerted to the court's decision via smartphone push notifications. The court again admonished the jury to turn away from media coverage, but the judge did not specifically address push notifications.

The following afternoon, the jury reached a verdict in favor of the defendants, after which, Judge Rakoff advised them of the Rule 50 decision and discharged them. As was the court's routine practice, a law clerk was asked to speak to the jurors about any problems they had encountered during their service, and a few of them volunteered that they had become aware of the judge's decision through smartphone push notifications. However, the jurors maintained that this limited information did not impact their deliberations or decision. The judge made timely disclosure of this information to the parties and the public, but in yet another wrinkle to the chronology, a Bloomberg reporter had gotten the story about jurors receiving push notifications and sought comment from Judge Rakoff, who responded with a statement about what had happened. The story ended up running about an hour before the judge's electronic notice to the parties, which conveyed largely the same information.

The Court's Written Opinion on the Rule 50 Dismissal

In a follow-up written opinion, dated March 1, 2022, Judge Rakoff clarified a point of confusion with respect to the operability of his Rule 50 decision and/or the jury verdict. He stated that it was his dismissal on Rule 50 that was controlling. And while he continued to express "confidence in the integrity of the jury's verdict, notwithstanding that a few jurors became aware

of the court's intent to dismiss the case," the "verdict could only acquire legal significance if the Court's Rule 50 decision were overturned on appeal and the Court of Appeals then decided to give effect to the verdict rather than remand for retrial." 588 F. Supp. 3d 375, 410.

The written opinion provided a more thorough rationale for the court's conclusion that Palin had failed to prove actual malice against Bennet and The Times. The judge had indicated, both in court and in his written decision, that he was particularly persuaded by the Second Circuit's decision in Contemp. Mission Inc. v. New York Times Co., which holds that a plaintiff must adduce some affirmative, "concrete evidence from which a reasonable juror could return a verdict in h[er] favor" to establish a jury question on actual malice, and that it is "[i]t is not enough for the plaintiff merely to assert that the jury might, and legally could, disbelieve the defendant's denial of legal malice." 842 F.3d 612, 621-22 (2d. Cir. 1988). Moreover, the court noted that liability is barred unless Palin adduced clear and convincing evidence supporting the conclusion that, at a minimum, "a false publication was made with a high degree of awareness of probable falsity," citing Liberman v. Gelstein, 80 N.Y.2d 429, 438 (1992).

First, the court concluded that even assuming that Bennet had read and understood the three prior *Times* opinion pieces that had circulated among the editorial staff during the drafting of the piece in question, "none presents any definitive facts about the Arizona shooting that would have put Bennet on notice (or led him to strongly suspect) that no link had been established between the crosshairs map and Loughner's attack." 588 F. Supp. 3d at 402. Moreover, the court rejected Palin's argument that Bennet acted unreasonably by (per his unrefuted testimony) not clicking on the link to the ABC News article, in Williamson's draft, which had stated that no connection had been made between the SarahPAC map and the Arizona shooting. The judge posited that it wasn't clear that failing to click the link was even negligent, but that it certainly didn't constitute subjective awareness of probable falsity. Next, the judge pointed to the lack of evidence – apart from the prior *Times* opinion pieces – that Bennet was aware of a lack of evidence that the map influenced the shooter, noting that Bennet testified that he wasn't trying to convey that assertion. The court also noted that all of the evidence on how the editorial came together, including all of the correspondence between the editors on the piece at issue, was inconsistent with a finding that Bennet acted with actual malice. Notably, it was undisputed that Bennet didn't seek out the opportunity to edit this piece at all, and the editorial went through all of the normal fact-checking procedures, albeit ones that did not catch the errors in question. The judge also took note of the timely action on the part of Bennet to have corrections made, and his expressions of regret, as inconsistent with willful disregard for the truth.

Post-Trial Motions and Appeal

On a February 23, 2022, telephonic conference with the court, Palin's counsel initially indicated that they intended to seek several different types of post-trial relief: (1) disqualification of Judge Rakoff; (2) authorization to interview members of the jury; (3) disclosure of any communications between the Court and the media during trial; (4) reconsideration of the Rule 50

decision; and (5) a new trial and to set aside the verdict. As a response to the plaintiff's inquiry about the judge's contact with the press, Judge Rakoff volunteered that he had no communications with the press during the trial and explained that his reason for issuing a statement to the Bloomberg reporter was so that no misinformation would be conveyed to the public if the story was published prior to the judge being able to issue his own statement. On February 28, 2022, the plaintiff filed her motion for post-trial relief, but did not include a request for the judge's contacts with the media or for juror interviews. Further, on March 25, the plaintiff sought a writ of mandamus from the Second Circuit, which would have prohibited Judge Rakoff from deciding the post-trial motions and reassigned the case to another district judge. The Court of Appeals stayed the decision on the petition, indicating that it would benefit from reading Judge Rakoff's decision on the post-trial motions.

A May 31, 2002, opinion from the district court denied the relief sought by the plaintiff in its entirety. In denying the motion to disqualify Judge Rakoff, the court observed that most of Palin's arguments relied upon the supposition that multiple adverse decisions against the plaintiff, during various stages of the case, evidenced bias against the plaintiff. The court noted that adverse decisions cannot *per se* create the appearance of bias. Palin also the raised the issue of Judge Rakoff responding to the Bloomberg reporter's request for comment on the push notification issue as an improper extrajudicial communication about the case. To that, the judge indicated his belief that the statement to the press was a permissible "explanation of court procedures" to the public, which is allowed under the Code of Conduct for United States judges, and in any event, did not in any way raise questions about his impartiality.

The plaintiff also sought a new trial on the basis of various claimed erroneous rulings on evidence, *voir dire*, responses to jury questions, and the timing of the Rule 50 decision. The court pointed out that these grounds for a new trial related to jury questions that are largely irrelevant, since they have no bearing on the decision to dismiss under Rule 50, but otherwise held them to be non-meritorious.

Finally, Palin argued that the decision to dismiss the case under Rule 50 was erroneous, some of which focused on the court allegedly giving too much credit to the unchallenged testimony of the defendants. The court noted that the plaintiff pointed to no authority which requires the court to disbelieve uncontested testimony. Palin further argued that the Second Circuit, on the appeal from the motion to dismiss, had held that the presence of the ABC News hyperlink was circumstantial evidence of actual malice that should have gone to the jury. But the court noted that the Second Circuit had only ruled on the improper crediting of Bennet's testimony during the unusual motion to dismiss hearing, and that it was entirely proper for the court to accept Bennet's uncontested trial testimony – that he never clicked on the link – in weighing a Rule 50 motion.

Palin subsequently filed a notice of appeal with the Second Circuit. The case has been fully briefed and oral argument has been proposed for November 2023.

Norman Gaudette v. Mainely Media

Court: Maine Superior Court
Judge: Richard Mulhern
Plaintiffs' Attorneys: Gene Libby, Libby O'Brien Kingsley & Champion, LLC, Kennebunk, Maine
Defense Attorney: Cynthia Counts, Fisher Broyles, Atlanta.
Verdict rendered on: March 30, 2022

At issue in the case: A six-week series of 29 investigative news reports published in the *Biddeford-Saco-Old Orchard Beach Courier* about the Biddeford Police Department's and Attorney General's handling of sexual assault charges dating back to the 1970s. The civil trial focused on just two of those stories that pertained to allegations against former Biddeford Police Captain Norman Gaudette

Background

In 2015, former police Captain Norman Gaudette sued Mainely Media and the journalists who spearheaded the investigation – Molly Lovell-Keely and Ben Meiklejohn – after the *Biddeford-Saco-Old Orchard Beach Courier* published a series of stories documenting an early 1990s criminal investigation by the Maine Attorney General, which had been kept secret from the general public for over thirty years. Lovell-Keely was the managing editor of the *Courier*. Meiklejohn was the lead reporter.

Allegations that Gaudette sexually abused teenage boys in the late 1970s and 1980s first surfaced in 1990. At that time, the Maine Attorney General's Office assigned Detective Michael Pulire to serve as lead investigator into allegations that Gaudette, then Chief of Detectives at Biddeford Police Department, had sexually abused several adolescent boys.

Although at least five young men (four of whom were in their late teens or early twenties) were initially reluctant to talk to law enforcement, Detective Pulire, along with two other Biddeford detectives, ultimately obtained and transcribed official statements from them. A grand jury investigation led by the state Attorney General followed, but no indictments were issued. Because there was never a conviction, the records remain sealed. Gaudette, who had been suspended, returned to active duty. He publicly maintained he had been exonerated.

Decades later, in 2015, a Biddeford man claimed in a social media post that when he was in high school, he had been sexually assaulted by a different Biddeford police officer. After that post, others came forward, including several men who accused Gaudette of sexually abusing them when they were teenagers. The weekly *Courier*, which was owned by Mainely Media, began looking into the allegations.

During an over month-long investigation, the journalists uncovered and interviewed numerous sources familiar with the allegations against Gaudette and other officers. Reporters Lovell-Keely and Meiklejohn investigated the claims, contacting alleged victims, family members, Gaudette

and his attorney, state Attorney General investigators, and current and former Biddeford officers.

Getting sources to talk was not easy. The newspaper decided to publish the news articles only after the journalists were able to obtain "on the record" interviews with two of Gaudette's victims. (Although both men were identified by their names in the articles and at trial, they were identified in the Appellate decision as "R.K. and L.O."). In the following months, Lovell-Keely and Meiklejohn convinced more sources to give on the record accounts of the past scandal and an apparent orchestrated cover-up by those in power.

The *Courier* published its findings over six weeks in a series of 29 news reports, detailing allegations by several different men against Gaudette and another Biddeford Police Officer. In June 2015, Gaudette and his wife filed a complaint for defamation, false light, and loss of consortium, specifically alleging the articles had portrayed Gaudette as "a sexual predator who has evaded justice."

Following discovery, a summary judgment order was entered finding that most of the statements at issue in the complaint were either substantially true or opinions. The court also ruled that Gaudette was either a public official or limited purpose public figure required to show actual malice. But the court held that there was a question of fact as to whether Defendants acted with actual malice with regard to two articles – both dated April 9, 2015 – that detailed allegations of abuse by two accusers.

The case proceeded to trial on those two articles in the Spring of 2021.

The Trial / Basis for the Appeal

Prior to trial, the presiding judge, Judge Mulhern, ruled that the parties could not introduce any evidence relating to other alleged victims or information about the prior investigation of Gaudette, to the extent that information was not known to the reporters during their reporting. That ruling prevented the plaintiffs from cherry-picking evidence from the Attorney General's investigation. But it also prevented the defense from attempting to prove substantial truth through evidence that several other people had made similar accusations against Gaudette.

Judge Mulhern also ruled that testimony about the grand jury investigation was admissible only if it was known to the reporters prior to April 9, 2015. This ruling permitted the plaintiffs to introduce evidence that published reports from the 1990s reported that Gaudette's attorney, Gene Libby, had told the newspaper that Gaudette had been allowed to return to his position on the police force, had been "cleared of all charges," and had been "exonerated" by a grand jury, while still excluding evidence about what actually happened in the past investigations. Despite allowing Gaudette's 30-year narrative of his alleged exoneration, the trial court ruled Defendants could not call the Gaudettes' lead attorney or the lead investigator, Detective Pulire, to testify since neither had spoken to the reporters about the past – unless the parties "opened the door" to such evidence during the trial.

Seeking to establish falsity and the reporter's alleged journalistic failures, the Gaudettes both testified. Their other witnesses were their daughter, journalism expert Tony Lame, other Biddeford police officers and Biddeford's Police Chief. The Gaudettes also called the journalist defendants to testify at the beginning and end of their case.

Throughout plaintiffs' case, which lasted nearly two weeks, the defense team objected that lead counsel for the Gaudettes, Gene Libby, who also was Gaudette's personal attorney during the 1990s, was testifying via his questions and commentary. For example, he challenged the journalist for not contacting him – personally – during their investigation and asking "Was there anybody else in the entire universe who knew more about this case than me?" A defense objection to this question was sustained and it was rephrased as "wouldn't I be an obvious source, Mr. Meiklejohn?" Defendants did not object to this reformulation but added in an aside "Can we put an exhibit sticker on Mr. Libby's head?" The judge struck this remark.

Judge Mulhern continued to enforce his pre-trial orders and the claims about a past exoneration of Gaudette were a concern to the defense. Finally, near the close of plaintiffs' case, Judge Mulhern ruled the parties had "completely opened the door" to testimony about the 1990s investigation after Gaudette's counsel cross-examined reporter Lovell-Keely about the recitation of facts in his extensive "retraction" demand letter written months after the publication of the two April 9, 2015 articles. In so ruling, Judge Mulhern allowed the media Defendants to call Detective Pulire so that the jury could hear directly from him about the specific facts discovered during his 1990 investigation, including his interviews of at least five accusers, perceived improprieties in the AG's handling of a grand jury hearing and the relationship between Gaudette's lawyer Gene Libby and an Assistant AG that Pulire characterized as "illicit."

At the end of direct examination, the following exchange occurred (which formed the basis for the appeal):

> Q: Now, there's been some testimony that the Attorney General's investigation exonerated Norman Gaudette. Did your investigation into Norman Gaudette exonerate him?
>
> A: It did not.
>
> Q: Why not?
>
> A: There was clear and convincing evidence that Mr. Gaudette was more likely than not a sexual predator.

Plaintiffs' counsel vehemently objected and moved to strike the testimony. The trial court refused in part because the exoneration issue was already clearly before the jury and, as the court further explained, "This is the investigating detective, and he was asked his opinion on that, and he responded." After the Court overruled a motion to strike the testimony, plaintiff's counsel conducted a heated cross-examination in which he was able to elicit some favorable testimony about some limited exculpatory evidence in Gaudette's favor.

After approximately an hour of deliberations, the jury returned with a unanimous verdict for Defendants. Responding to a series of questions on a special verdict form, the jury found that Gaudette had failed to show, by a preponderance of the evidence, that the specific detailed allegations of sexual abuse against Gaudette were false or that Defendants had placed Gaudette in a false light. Based on this finding, the jury was directed that they did not have to answer any questions as to whether the journalists acted with actual malice.

Maine Supreme Court Affirms

Norman Gaudette et al. v. Mainely Media, 2023 ME 36 (July 6, 2024).
https://www.courts.maine.gov/courts/sjc/lawcourt/2023/23me036.pdf

On appeal, the Gaudettes raised only one issue: whether Judge Mulhern abused his discretion in denying plaintiffs' motion to strike Detective Pulire's statement – "there was clear and convincing evidence that [Norman] Gaudette was a sexual predator" – on the grounds that it was highly inflammatory, prejudicial, and confusing under Rule 403. The Maine Supreme Court held that there was no abuse of discretion.

Five of the Court's six justices joined in the opinion by Justice Andrew Mead affirming the jury verdict. A sixth justice, Joseph Jabar, concurred in a separate opinion.

Justice Mead, writing for the majority, explained that "[i]n the unique circumstances of this case, the trial court could properly determine, in its broad discretion, that the probative value of Pulire's testimony about the result of his investigation was not substantially outweighed by the danger of unfair prejudice arising from the use of the generally inflammatory term 'sexual predator.'"

Justice Mead and his high court colleagues concluded that Pulire's testimony "explained the results of the full [attorney general's] investigation" and that Pulire's testimony "that the Attorney General's investigation did not exonerate Gaudette was highly probative of issues raised in the case." Unlike the cases cited by the Gaudettes where the High Court found reversible error, the detective here was not injecting an inflammatory characterization of the evidence that was completely irrelevant or only minimally related to the issues being tried."

To the contrary, as Justice Mead explained, the Gaudettes used the term in their complaint, alleging that Mainely Media had falsely depicted Gaudette as a "sexual predator" in the challenged articles and repeatedly suggested that to the grand jury. Moreover, throughout the trial, plaintiffs' counsel quoted articles from the 1990s to insist the Attorney General investigation had "exonerated" Norman Gaudette of all charges.

"As to Pulire's references to 'clear and convincing evidence,' and the standard of 'more likely than not'," Justice Mead concluded, "although these phrases could suggest that Pulire was conveying a formal evidentiary finding reached by the grand jury or some other entity, we defer to the broad discretion of the trial judge in deciding to admit the testimony…."

As Justice Mead emphasized, Pulire was subject to cross-examination by plaintiffs' counsel to clarify the meaning/limitations of Pulire's testimony and his lack of recollection regarding details of his investigation in the early 90s.

In a separate concurrence, Justice Jabar – while agreeing with the majority decision to affirm the jury verdict – opined that the trial judge erred in allowing Pulire's testimony and his use of the term "sexual predator" to stand, calling the phrase "highly inflammatory." As Justice Jabar pointed out, evidence can be prejudicial, but it cannot be "unfairly prejudicial" and he thought it was here. But, he said, the error was not a basis to reverse the jury's unanimous verdict.

"Gaudette challenges the admission of one statement in the context of a lengthy trial, and we must consider that context in determining whether the error in admitting the reference to Gaudette as a 'sexual predator' was harmless," he wrote. "Pulire made the challenged statement at the end of his testimony to explain why he did not consider Gaudette to have been 'exonerated' by Pulire's investigation." And, Justice Jabar added, "During twelve days of testimony, the jury heard from multiple other witnesses that Gaudette had abused children by grooming them for abuse and escalating his conduct toward them over time."

Justice Jabar then summarized in three pages some of the trial testimony that supported the jurors' finding that Gaudette had not proven the allegations against him were false. This included explicit testimony of witnesses who accused Gaudette of abuse and other testimony by Pulire, including a report Pulire provided to the Police Chief that contained evidence that was more than sufficient to fire Gaudette.

Considering that overall context, Justice Jabar concluded, the error was harmless. As he wrote:

> Given the extent of the evidence supporting the jury's findings, and the paucity of evidence—independent of Gaudette's and his family members' testimony—to suggest that the accusations against Gaudette were false, it is highly probable that the error in refusing to strike Pulire's single statement, which Pulire delivered only to explain why he did not consider Gaudette to have been 'exonerated' through Pulire's investigation, did not affect the verdict.