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**FILED**  
MAY 24 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II

11 MAY 19 PM 3:34

STATE OF WASHINGTON  
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NO. 39447-2-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

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IN THE SUPREMENT COURT  
OF THE STATE OF WASHINGTON

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DUC TAN, a single man; and VIETNAMESE COMMUNITY  
OF THURSTON COUNTY, a Washington corporation,

Plaintiffs/Petitioners,

NORMAN LE and PHU LE, husband and wife; PHIET X. NGUYEN and  
VINH T. NGUYEN, husband and wife; DAT T. HO and "JANE DOE"  
HO, husband and wife; NGA T. PHAM and TRI V. DUONG, wife and  
husband; and NHAN T. TRAN and MAN M. VO, wife and husband,

Defendants/Respondents.

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PETITION FOR DISCRETIONARY REVIEW

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### CONSTITUTIONAL PROVISIONS

First Amendment to the Constitution of the United States	<i>passim</i>
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**A. IDENTITY OF PETITIONER**

Duc Tan and the Vietnamese Community of Thurston County (VCTC) petition the Supreme Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this petition. Petitioners were plaintiffs in the trial court and respondents before the Court of Appeals.

**B. COURT OF APPEALS DECISION**

Petitioners request review of the Court of Appeals' decision entered herein on April 19, 2011, by Division II, which reversed a jury verdict in favor of Petitioners and remanded to Thurston County Superior Court for dismissal. (A copy of the decision is in the Appendix at pages A-1 through A-25.) No motion for reconsideration was filed.

**C. ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals err when it held that accusing a Vietnamese American refugee of acting in support of the Communist government of Vietnam is protected speech under the First Amendment?

2. Did the Court of Appeals err when it characterized the publications at issue as arising out of a "political debate," and thus inviting "mischaracterizations, exaggerations, rhetoric [and] hyperbole"?

3. Did the Court of Appeals misapply the law set forth in *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981) and *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989), when it held that publishing false facts which corroborated the assertion that plaintiffs were supporting the Vietnamese Communist government was not actionable because it did not "lead to a distinct and separate damaging implication,"

where those facts stripped the readers' ability to decide for themselves whether the overarching assertion was true?

4. Did the Court of Appeals err when it held that these false statements of fact were "equivocal at best" and not provably false statements of fact?

5. Did the Court of Appeals err when it simultaneously acknowledged factual inaccuracies in the defamatory publication and held that the "disclosure of facts allowed recipients of the [publication] to judge for themselves the validity of the defendants' conclusions"?

6. Did the Court of Appeals err when it held that clear and convincing evidence of actual malice was not supported in the record?

7. Did the Court of Appeals misapply the First Amendment standard of independent review in public figure defamation cases by deciding not whether clear and convincing evidence of actual malice existed in the record, but whether they, the Court of Appeals, were persuaded by the clear and convincing evidence which existed?

**D. STATEMENT OF THE CASE**

All the parties to this case, plaintiffs and defendants, were born in Vietnam and immigrated to the United States on varying dates after the fall of South Vietnam to the Communists in 1975. (RP V, 896; RP VI, 1071, 1125; RP VIII, 1277, 1365.) All the parties left Vietnam to escape and be free of the Communist government. In the United States, they have all been involved with organizations and events which demonstrate their opposition to the current Vietnamese government and its human rights abuses. (RP III, 415, 558-60; 567; RP V, 909-11; RP VII 1335-36.)

## **1. Duc Tan and the VCTC**

The Vietnamese Community of Thurston County (VCTC) is a nonprofit entity that was formed by refugees in the 1970s. (RP IV, 633-34.) It underwent several name changes over the years, but its underlying purpose has always been to provide cultural support for refugees in Thurston County. (RP IV, 634-35, 687; RP II, 341.) This has included running a language school to teach Vietnamese, organizing community cultural gatherings, and organizing events to protest the human rights abuses of the current Vietnamese government.

Duc Tan escaped Vietnam, at great personal risk to himself and his family, and arrived in the U.S. in 1979. (RP V, 906-09.) Since settling in Thurston County, Mr. Tan has expended considerable personal time and effort devoting himself to events and organizations which protested the current Vietnamese government. (RP V, 909-10; RP II, 291-96.) Mr. Tan has been involved with the VCTC for many years, although he has never served in an executive capacity with this organization. Mr. Tan's greatest contribution has been to donate his skills as a former teacher in Vietnam by serving as principal to the language school sponsored by the VCTC. (RP V, 832-33.) This school borrows classroom space in the evenings from St. Michaels High School in Olympia. (RP V, 835.)

## **2. Defendants (Committee Against Viet Cong Flag)**

The defendants are all members of an organization which they titled the Committee Against the Viet Cong Flag. (CP 50.) They formed in 2003 in order to jointly oppose the displaying of the Communist Vietnamese flag at South Puget Sound Community College (SPSCC). (RP V, 865.) The school was displaying flags from all countries in the world, but Vietnamese immigrants find any display of the current flag of Vietnam offensive.

The defendants have been involved in other events and organizations affecting Thurston County, including participation in the VCTC. (RP IV, 652-53; RP V, 909-11; RP VII 1335-36.) Most, if not all, of the defendants were familiar with Mr. Tan, having served on committees with Mr. Tan to organize other anti-communist events. (*Id.*)

The Committee Against the Viet Cong Flag held an exploratory first meeting in January 2003 to discuss their plans for attempting to convince the college to remove the Communist flag. (RP V, 865.) This event was not well attended, gathering only about 16 attendees. Despite this, the defendants voted themselves into leadership positions within the Committee. In February, the Committee met again, but this time the event was attended by Vietnamese refugees from Seattle and Tacoma, and gathered a much larger crowd. (RP III, 555; RP V, 866.)

Mr. Tan attended both meetings. At the second meeting, he was extremely vocal about the fact that the Committee should re-elect leadership positions so that all of the newcomers would be represented. (RP III, 561-2, 568-70.) He also suggested that one of the defendants, Mr. Norman Le, should step down as co-chair because he had a contentious past with many organizations. After much debate, the defendants refused to relinquish their leadership positions. (RP III, 570.) As a result, over half of the room walked out and withdrew their support for the defendants' organization. (RP VII, 1333.)

Mr. Tan, members of the VCTC, and members of a similar organization in Tacoma continued to demonstrate their support for removal of the flag from SPSCC, but did so separately from the defendants' organization. (RP IV, 777-79.) Many public meetings were held at the college, and Mr. Tan attended these meetings and spoke publicly in favor of removing the Communist flag. (RP III, 419-22, 569-71.) Additionally, Mr. Tan and the VCTC organized a private meeting with the President of the college to thank him for the college's historic support of Vietnamese refugees and to lobby personally for removal of the flag. (*Id.*)

### **3. Defamatory Publications at Issue**

In July 2003, the same year as the SPSCC flag dispute, the VCTC

held its annual fundraiser by operating a food booth at Olympia's "Lakefair" celebration. (RP V, 855-56.) They did this every year; operating out of a booth that was painted yellow and red to signify the South Vietnamese flag. On this occasion, one of the volunteers found an apron on a vending machine outside the food booth. (RP II, 364.) The apron had an image of Santa Claus, with two red stars that reminded the volunteer of the Communist flag of Vietnam.

Other VCTC volunteers did not know where the apron came from. (RP II, 366.) The volunteer wore the apron backwards to hide the symbols, and then took it home after volunteering. Ten days later, the volunteer was at a church choir practice and told one of the defendants about the apron. (RP II, 366-69.) The defendants asked if he could have the apron and the volunteer gave it to him.

Shortly thereafter, in August 2003, the Committee Against the Viet Cong Flag distributed the "Public Notice," which is at issue in this case. (Attached hereto as Appendix B.) This document was published in Vietnamese but an English translation was relied upon at trial. (CP 50.) In the preamble to this document, they asked anyone with "access to the Internet or newspapers, radio stations, television" to further distribute the Public Notice.

The document is divided into three parts. The first, entitled "Facts," is a relatively straightforward recitation of the fact that a Santa Claus apron was found and worn at the VCTC food booth that resembled the Communist flag. The defendants asserted that "the intention of displaying the above symbols is to show the presence of the Hanoi Communist regime."

The second section is entitled the "Records of the Tan Thuc Duc Gang."<sup>1</sup> This section contains the opening remarks: "Since its establishment, the Vietnamese Community in Thurston County has been accused of doing activities for the Vietnamese Communists by several organizations against the Communists in this state, having correct and true evidences." The section then proceeds to list six numbered "incidents" which support the defendants' theory that Mr. Tan and the VCTC are supporting the Communists of Vietnam. The plaintiffs have asserted that these facts are either outright falsehoods or so badly malign the true facts that they create a false impression for the reader. Moreover, the plaintiffs have asserted that these facts were published by the defendants with knowledge of their falsehood, and/or knowledge that the version related would create a false impression in the mind of the reader. The plaintiffs also assert that these facts, if true, are such that a reader in the Vietnamese

community would have little doubt that they were indeed supporting the Vietnamese Communists.

One example of these facts, is the allegation that Mr. Tan “refused to display the National [South Vietnamese] flag” at his language school. At trial, the defendants conceded that he did indeed display the flag, which they had personally witnessed. (RP VI, 1165-67.) Another example includes the allegation that the plaintiffs organized an “Autumn 2002 Meeting to commemorate the Fall Revolution.” The Fall Revolution is a celebration of Ho Chi Minh and the Vietnamese Communists. (RP IV, 772.) At trial, one of the defendants conceded that the only knowledge they (the defendants) actually had was that the plaintiffs had held a cultural event in the fall of 2002, but they did not know the purpose or subject matter of that gathering. (RP VI, 1170, 1173-74.) The plaintiffs have asserted that a Vietnamese American reading that someone is refusing to display the South flag (which is the symbol of their fallen country) and is organizing events to celebrate Ho Chi Minh, could not help but believe that the plaintiffs are indeed supporting the Communist government of Vietnam.

The document concludes with a third section which they title an “Alert and Summon[s].” This section concludes that these “proofs” are

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<sup>1</sup> Tan Thuc Duc is Mr. Tan's name as it appears in Vietnamese.

more than enough to conclude that Mr. Tan and the VCTC are indeed supporting the Communists. It implores refugees everywhere to “strongly condemn” the plaintiffs, and to “boycott and expel” them from the community so that “they would not have any ground to conduct activities on behalf of the evil communists.” Finally, it urges people to “keep following the news.”

In addition, one of the defendants, Mr. Norman Le, published several newspaper articles in local Vietnamese publications which repeat these allegations and “proofs” that plaintiffs are acting on behalf of the Communists. (CP 32:20.) These articles reprise many of the untrue facts used to support section two of the Public Notice. Together, these publications formed the basis for plaintiffs’ defamation action.

#### **4. Proceedings Below**

On March 4, 2004, the plaintiffs filed suit for defamation against the defendants in Thurston County Superior Court. (CP 91-133.) In summary judgment proceedings, the trial court refused to dismiss the action but did find that the plaintiffs’ involvement in public events affecting the local community rendered them “public figures,” as that designation is applied to defamation proceedings. (CP 31:17.)

The case was tried to a jury before the Honorable Wm. Thomas McPhee. The trial lasted 11 days, from March 30, 2009, through April 16,

2009. At the conclusion of trial, the jury returned four special verdicts finding in favor of the plaintiffs. (CP 146-155.) On May 8, 2009, the trial court entered judgments on the jury verdicts. In favor of Mr. Tan, one judgment in the amount of \$150,000 was entered against all defendants and a second in the amount of \$75,000 was entered solely against Mr. Le. (CP 177-179.) In favor of the VCTC, one judgment in the amount of \$60,000 was entered against all defendants and a second judgment in the amount of \$25,000 was entered solely against Mr. Le. (CP 178-180.)

On May 29, 2009, the trial court denied the defendants' motions for a new trial and judgment notwithstanding the verdict. The defendants appealed. (CP 24-25.) On April 19, 2011, the Court of Appeals, Division II, filed a published opinion reversing the judgment and remanding for dismissal. (Appendix A.) The Court of Appeals held that the published statements were not actionable under the First Amendment; that even if some of the statements published by defendants were false, the plaintiffs failed to identify any separate or distinct harm resulting from the untrue statements; and that the plaintiffs had failed to prove actual malice by clear and convincing evidence.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Review of the Court of Appeals decision is appropriate under the Rules of Appellate Procedure (RAP) 13.4(b)(1)(3) and (4), in that it

conflicts with decisions of the Supreme Court, involves a significant question of law under the United States Constitution, and presents an issue of substantial public interest that should be determined by the Supreme Court.

**1. Review is appropriate under RAP 13.4(b)(1).**

The Court of Appeals decision should be reviewed under RAP 13.4(b)(1) because it is contrary to decisions of the Supreme Court and other Court of Appeals' decisions.

a. Misapplication of the test under *Heron* and *Mark*.

In both *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981) and *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989), the Supreme Court recognized that false statements are not actionable when they do not contribute “significantly greater opprobrium” to the “sting” of the publication. *Mark*, 96 Wn.2d at 496.

In *Mark*, a pharmacist was found guilty of larceny and fraud charges stemming from his forgery of Medicaid prescriptions. Although it was alleged that he stole over \$200,000, the prosecuting attorney’s office at trial could establish only about \$2500 in charges. *Id.* at 477. Despite this, many news stations reported the story, listing the \$200,000 figure.

In a defamation case, the elements that must be shown are: (1) falsity; (2) an unprivileged communication; (3) fault; and (4) damage.

*Mark*, 96 Wn.2d at 486. The *Mark* court conceded, as to the issue of falsity, that “there is no doubt . . . that some of the reported statements were inaccurate, and may have left false impressions. *Id.* at 493. In examining the issue of damages; however, the court found that this element could not be established because there was no “evidence that the inaccurate statements caused him any further damage than has resulted from the conviction and sentence on a grand larceny charge.” *Id.* at 496. In other words, the amount stolen did not damage the plaintiff’s reputation more than being arrested, charged, and convicted of the crimes. The arrest and charging was the “sting” of the stories, and this was true.

The *Herron* decision was a review of a summary judgment dismissal and, unlike the *Mark* court which examined the damages prong, this court examined the element of falsity. The trial court judge granted dismissal, holding that the plaintiff could not meet the element of material falsity. *Herron*, 112 Wn.2d at 520. The Supreme Court reversed, holding that the inaccuracies contained in the news reports at issue were capable of creating a materially false impression. *Id.* at 522-23. The court reasoned that the “sting” of the story was altered by the untrue facts, which created the impression that a candidate had accepted unethical campaign contributions. These untrue facts left a “materially different impression on the reader” than would the true facts alone. *Id.*

Here, the Court of Appeals borrows this concept to find that even if the defendants published inaccurate facts about the plaintiffs, the “sting” of the document was that the plaintiffs are Communist supporters, and “any factual misstatements in the Public Notice do not cause additional distinct and separate harm.” (Appendix A, p. 14). In this holding, the Court of Appeals misunderstood and misapplied these two prior Supreme Court decisions. These two decisions are not aptly analogous to the facts at issue here. The Court of Appeals is trying to fit a square peg into a round hole.

The crucial fact that the Court of Appeals overlooks is that the plaintiffs are not Communist supporters, and proved this overwhelmingly at trial. The Court of Appeals acknowledges that being labeled a Communist supporter is an odious and shameful allegation among Vietnamese Americans. (Appendix A, p. 14). They simply conclude that no additional harm results from these factual misstatements.

This misreads the standards established in *Mark* and *Herron*. Neither case stands for the proposition that someone may publish an odious and derogatory allegation in the form of an opinion, then support that allegation with factual misstatements, causing the allegation more

likely to be true. This contradicts the logical reasoning behind *Mark* and *Herron*.

In the facts here, significantly greater opprobrium does attach because the untrue facts are persuasive, and serve to hijack the reader's ability to judge whether the allegations are true. In other words, the untrue facts compel the reader to believe the defendants' assertions regarding the plaintiffs' alleged Communist activities. The test established under *Mark* is whether the inaccurate statements "have a materially different effect on a viewer, listener, or reader than that which the literal truth would produce," and whether the inaccurate statements caused "further damage." *Id.* at 496. The untrue facts here do cause greater damage because a reader who might be inclined to dismiss the connection between an apron and Communism, will be left with no choice but to believe that plaintiffs are Communist supporters when they read that plaintiffs are celebrating Ho Chi Minh.

b. Misapplication of *Dunlap*.

The Court of Appeals also looks to the decision in *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986). The *Dunlap* case establishes several factors for determining whether statements are actionable, the most crucial of which is whether the statement implies that undisclosed defamatory facts form the basis of the opinion. *Id.* at 538.

However, when audience members know the facts underlying an assertion and can judge for themselves whether the defendants allegations are true or not, then the publication is not actionable. *Id.* at 540.

Despite acknowledging factual inaccuracies in the statements used by the defendants to support their allegations, the Court of Appeals finds that “no statement in the Public Notice implies the existence of undisclosed facts. To the contrary, the letter painstakingly outlines ‘correct and true evidences’ to support the conclusion that Tan and the VCTC” are Communists. (Appendix A, p. 12).

Once again, the Court of Appeals is trying to fit a square peg into a round hole. An example of “implied undisclosed facts” would be where someone states: “I think Mr. Smith is a thief, and you would too if you saw what I saw.” Here, the allegation is not that the defendants implied undisclosed facts, but that they disclosed facts in support of their allegation which were not true, and made these statements with knowledge of their falsity.

The Court of Appeals simultaneously finds that the publication is not actionable because it is written in a context inviting hyperbole and exaggeration then also finds that it is not actionable because the defendants “painstakingly” outline “correct and true evidence.”

The Supreme Court should grant review because the Court of Appeals' decision conflicts with and misapplies those previous cases discussed in this section.

**2. Review is also appropriate under RAP 13.4(b)(3).**

This Court should accept review under RAP 13.4(b)(3) because this matter involves significant questions of law under the United States Constitution. This case requires analysis of whether speech is protected under the First Amendment and not actionable in a defamation suit. There are two significant constitutional issues raised by this case: (1) whether the speech at issue is protected because it constitutes the speaker's "opinion," and (2) whether the First Amendment requirement of independent review in public figure defamation cases, established under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), was appropriately and accurately applied to determine whether actual malice had been proven.

Both of these issues, whether speech is protected as opinion and whether sufficient evidence of actual malice exists, have an extended legal history, both in the State of Washington and under the United States Supreme Court. These "numerous decisions . . . establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues." *Milkovich v. Lorain*

*Journal Co.*, 497 U.S. 1, 22, 110 S.Ct. 2695 (1990). “But there is also another side to the equation; we have regularly acknowledged the ‘important social values which underlie the law of defamation,’ and recognized that ‘[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.’” *Id.* (citing *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669 (1966)). As stated by U.S. Supreme Court Justice Steward: “The right of a man to the protection of his own reputation . . . reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty.” *Rosenblatt*, 383 U.S. at 92.

Thus, the interplay and conflict between the fundamental protection of speech under the First Amendment and the right to protect one’s reputation and dignity have received considerable judicial attention. The issues brought forward by this case represent a continuation of that important debate, and deserve review by this Court.

**3. Review is also appropriate under RAP 13.4(b)(4).**

Review is also appropriate because this petition presents an issue of substantial public interest that should be determined by the Supreme Court.

This case involves important policy considerations which are of substantial public interest. As noted, *supra*, the appropriate interplay

between First Amendment protections and the right to redress one's reputation and essential dignity from unwarranted attacks represent "competing interests which underlie all defamation cases." *Mohr v. Grant*, 153 Wn.2d 812, 821 n.5, 108 P.3d 768 (2003).

**F. CONCLUSION**

This Court should accept review of the Court of Appeals' decision reversing the trial judgment in favor of plaintiffs and remanding for dismissal.

RESPECTFULLY SUBMITTED this 19th day of May, 2011.

YOUNGLOVE & COKER, P.L.L.C.



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# APPENDIX A



FACTS

A. Parties

Tan was a teacher in Vietnam when the Southern Vietnamese Army drafted him for military training in 1968. After training, he returned to teaching, retaining his military ranking. The Vietnamese Communist Army captured Saigon in April of 1975, and sent Tan to a Communist reeducation camp. They released him after six months to resume his teaching position. His release was contingent upon signing a loyalty pledge to the Communist party. Tan maintains that he signed the pledge to secure his release, not because he believed in what he was signing.

Tan worked for the Communist party as a teacher until September 1978, when, fearing for his safety, he fled Vietnam with his family. After spending time in a Malaysian refugee camp, the family settled near Olympia where Tan became active in the Vietnamese community as the principal of a Vietnamese language school and member of the VCTC.

The VCTC was started in the 1970s and became a nonprofit corporation in 1997. Duc Hua was elected its president in 1995. Tan is its director of education and is recognized as one of the organization's leaders. The VCTC engages in political activities, stating its purpose as developing the cultural, economic, and political potential of the Vietnamese community in Thurston County. In recent years, however, its membership has dwindled and the organization's focus tends to be less political. Although the organization is in good standing today, there have been issues concerning filings with the State of Washington: for example, Tan filed a document stating that the organization had no members with voting rights.

Norman Le, Dat Ho, Phiet Nguyen, Nhan Tran, and Nga Pham, five of the defendants,<sup>1</sup> were all born in Vietnam. Tran and Ho escaped Vietnam when Saigon fell in 1975. Le was imprisoned in a labor camp for nine years and seven months. Nguyen was imprisoned in a labor camp for six-and-a-half years.

Like Tan, the defendants are politically active in the Vietnamese community. Le was the VCTC's secretary for several years. The defendants are all members of the Committee Against the Viet Cong Flag, which was formed in 2003 to seek removal of the Socialist Republic Vietnamese flag from the lobby of South Puget Sound Community College. Many Vietnamese refugees view Vietnam's current flag as the "Communist flag," eliciting painful memories and emotions. VII Report of Proceedings (RP) at 1252. The activities surrounding the flag issues have divided the Vietnamese community.

B. Background

Several incidents form the basis of the allegedly defamatory statements, culminating in the "apron incident." We discuss them in chronological order.

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<sup>1</sup> The remaining defendants are their respective spouses. Tuan Vu, who also signed the e-mail message, was dismissed from the lawsuit.

1. Name Change of the VCTC

The VCTC was formed in 1975 as the Vietnamese Mutual Assistance Association. In 1995, the organization voted to change its name. Le, one of the defendants, suggested that the new name include the word "national" or "nationalist" to signal a clear anti-communist agenda. Le's proposal was defeated, ostensibly because the title was too long. The organization was re-named the "Vietnamese Community Association of Thurston County," which was later shortened to VCTC.

2. VCTC Allegedly Receiving Money from the Viet Cong

Following the name change, Le raised concerns about a local market owner's monetary contribution to the VCTC. Le believed the market owner to be a Communist because he previously distributed free calendars that had been printed by the Communist party in Ho Chi Minh City. The VCTC called a meeting to ask the owner why he had printed the calendars in Ho Chi Minh City. Satisfied that the owner printed the calendars in Vietnam because it was cheaper, the VCTC accepted his monetary donation. Le testified that at the meeting, Hua, president of the VCTC, stated, "[W]hat's wrong with receiving Viet Cong's [sic] money as long as we don't listen to them." VII RP at 1398. Hua denies saying this, testifying that he said only that the VCTC accepts any donation as long as no conditions are attached.

3. Playing of National Anthem

In 1997, the VCTC organized an event to honor a Vietnamese poet. At the start of the event, the hired band began to play Vietnam's current national anthem. After the first few notes, the band apologized for playing the wrong anthem and proceeded with the national anthem of the Republic of South Vietnam. Witnesses gave conflicting testimony about the crowd's reaction:

some claimed the crowd barely noticed while others claimed there was a negative reaction. Two local Vietnamese papers wrote about the incident. The VCTC held a press conference to apologize for the mistake.

#### 4. Scheduling Events on Communist Holidays

In the fall of 1999, the VCTC newsletter suggested scheduling a cultural event on September 2. The event, Armed Forces Day, commemorates the establishment of the Southern Vietnamese Army and is typically held on June 19. The Vietnamese community knows September 2 as the date of the "Fall Revolution," when the Communist party declared independence against the French. Later, in the fall of 2002, the VCTC organized an annual meeting. Additionally, one of the defendants testified that events sponsored by the VCTC sometimes occurred on April 30, the anniversary of the fall of Saigon. Community members testified that these dates were inappropriate for any Vietnamese celebration or event.

#### 5. Flag Display at Language School

Tan ran a Vietnamese language school for children of Vietnamese refugees. Lacking its own facility, the language school borrowed classrooms from a private high school. Before every class, the students gathered in the hallway to salute the flag of the Republic of South Vietnam and sing its national anthem. One of the classrooms displayed flags from around the world, including the current flag of the Socialist Republic of Vietnam. Tan testified that because the classroom was on loan, the language school's policy was not to touch or modify the display. One student's parent asked, however, that the flag be removed. One of the defendants subsequently became involved and asked Tan to replace the current flag with the nationalist flag. Facing resistance from the classroom's teacher, the private school principal decided not to

display any Vietnamese flag. Although the defendants knew Tan had the students honor the nationalist flag before every class, the defendants sent a delegation to the school to meet with the teacher and the principal. Eventually, the principal agreed they could display the nationalist flag at the school.

#### 6. Leadership of the Committee Against the Viet Cong Flag

In early 2003, several concerned community members met to discuss how to stop the community college from displaying the Communist flag of Vietnam. Two of the defendants, including Le, were elected co-chairs of the committee at the first meeting. At the second meeting, which many more people attended, Tan proposed holding new elections and that Le step down given his controversial involvement in other organizations. Tan's proposal failed and Le remained one of the co-chairs. According to one of the defendants, many of those in attendance left the meeting and withdrew their support when reelections were not held. He also claimed that Tan, without advising the committee members, met with the president of the community college to discuss the issue. Several years after the initial dispute, the college agreed to remove the flag.

#### 8. The Apron Incident

Every year, the VCTC sponsors a food booth at the Lakefair celebration in Olympia. In 2003, a volunteer working in the booth found an apron on top of a vending machine outside of the booth. The apron was decorated with an image of Santa Claus and several gold stars. The volunteer, who had served in the Southern Vietnamese Army, believed the apron bore Communist symbols and must have been placed there by "some kind of bad people." II RP at 364-65. No one knew where the apron came from, but Tan dismissed the idea that it was

Communist propaganda. The volunteer turned the apron inside-out and wore it that way for the rest of his shift. He took the apron home with him at the end of the day.

Ten days later, the volunteer told Vu, one of the initial defendants, about the apron. Vu said that he would like to keep the apron as a "souvenir." II RP at 366-67. Shortly thereafter, on August 7, 2003, the defendants signed a letter (the "Public Notice") describing the incident as an intentional displaying of Communist symbols to show the presence of the Communist regime in the Vietnamese community. The letter called for a press conference and meeting to debate the allegations, but neither Tan nor any other VCTC representative attended the meeting.

C. The Defamatory Statements

1. The Public Notice

The defendants disseminated the Public Notice by e-mail and posted it on the internet. The first section of the letter describes the "apron incident." The second section accuses the VCTC of "doing activities for the Vietnamese Communist[s]," enumerating the following conduct by Tan and the VCTC as "correct and true evidences":

1. When choosing a name (for the organization), the Duc Thuc Tan and Khoa Van Nguyen gang insisted that the name "National Vietnamese Committee" . . . be denied. . . Mr. Duc TT claimed . . . he "does not have members". . . . It is obvious that . . . [the] Vietnamese Community in Thurston County had been impersonating the representatives of the community with illegal political intentions.
2. Duc Minh Hua, . . . President [of VCTC], . . . declaring . . . "there [was] nothing wrong with receiving VC money."
3. Suggest[ing] the idea of organizing the yearly anniversary of September 2 [the Fall Revolution].
4. The band that Duc TT brought . . . played the whole portion . . . of the [communist national anthem at the 1997 event].
5. [The] VC flag was hung in [Duc Tan's] classroom. . . . [u]ntil . . . organizations . . . convince[d] the Administration to remove the VC flag and let fly the National flag.

6. Organized the Autumn 2002 Meeting to commemorate the Fall Revolution.

7. Had sabotaged the fight of the Committee . . . from the unit in charge of the Community Against Viet Cong Flag . . . [and] had "gone under the table" with the administration of . . . SPCC to send the secret message . . . [that] there is no need for removing the bloody communist flag.

8. [C]leverly [covering] up, cheating [our] people, all those 28 years [as shown by Duc Tan's admission the VCTC had no voting members].

Ex. 8. The third section concludes that Tan and the VCTC have abused people's names, hidden under the "Nationalist coat" to serve the Communist regime in Vietnam, and betrayed the Vietnamese community "continuously and systematically." The letter states that no one—referring to Tan and the leaders of the VCTC—has a background guaranteeing they are Nationalists. Finally, the letter asks that community members condemn, boycott, and expel Tan and the VCTC, who allegedly "worship the Communists" and conduct activities on behalf of "evil communists." Ex. 8.

## 2. Newsletter Articles

Three additional newsletter articles, written by Le, contain allegedly defamatory statements. The first two articles were published on November 15, 2002, in the *Community Newsletter*, an informal publication of the "Vietnamese Community of Washington State." The first article describes the flag display issues at the language school. It states that after the delegation came to the school and convinced the principal to allow them to permanently display the Vietnamese Nationalist flag, Tan refused to help display it. The second article warns of an "evil axis" made up of organizations that assist the Viet Cong. The article identifies the VCTC as one such organization, noting that it played the Viet Cong national anthem and called for a celebration on September 2. The article claims that the leadership of the VCTC is part of a plot "to form the Evil Axis in Thurston-King-Tacoma aiming at a total control over the whole

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Vietnamese community in Washington State by the VC.” Ex. 14A, 18. Finally, the article notes that “they” never use the word “Nationalist” in any of their organization’s names. These articles were translated and admitted into evidence at trial.

The third article was published in October 2003, in a newsletter called *New Horizon: The Voice of the Vietnamese Community in Washington State*. This article refers to Tan’s organization as an “under-cover agent[.]” Ex. 14A. It asserts that for many years undercover agents, including Tan, have attempted to display Viet Cong flags in schools while disguised as Nationalists. Excerpts of this article were translated and admitted into evidence.

D. Procedural History

In March 2004, Tan and the VCTC sued the signatories to the Public Notice for defamation, including Le, his wife, and five other married couples.

The trial court granted partial summary judgment for the defendants, ruling that Tan and the VCTC “are public figures as a matter of law.” Clerk’s Papers at 31. After an 11-day trial, the jury found by special verdict that the defendants had defamed Tan and the VCTC; the jury awarded Tan damages of \$225,000 and the VCTC damages of \$85,000.

## ANALYSIS

### I. ACTIONABLE STATEMENTS

The defendants argue that the statements made in the Public Notice are political opinions, protected by the First Amendment. They reason that the “gist” or “sting” of the Public Notice is that Tan is a Communist or Communist sympathizer; opinions that cannot support a defamation action. Br. of Appellant at 33.

Tan and the VCTC respond that the statements about their political affiliation go beyond opinion by accusing them of taking tangible steps to support the Communist party. Alternatively, they maintain that even if the Public Notice's overarching assertions qualify as statements of opinion, the underlying facts used to support the claim are untrue and therefore actionable as defamation.

A defamation action consists of four elements: (1) a false statement; (2) lack of privilege; (3) fault; and (4) damages. *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989). Generally, a statement must be one of fact to be actionable. *Dunlap v. Wayne*, 105 Wn.2d 529, 538, 716 P.2d 842 (1986); *see also Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 590, 943 P.2d 350 (1997) ("A defamation claim must be based on a statement that is provably false"). In contrast, because there is no such thing as a false idea, most expressions of opinion are protected by the First Amendment and are not actionable. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59 P.3d 611 (2002); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."):

An opinion can support a defamation claim if it implies that undisclosed defamatory facts form the basis of the opinion. *Dunlap*, 105 Wn.2d at 538 (quoting RESTATEMENT (SECOND) OF TORTS § 566); *see also Milkovic v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (there is not a wholesale exception to defamation for anything that might be labeled an opinion). But a defamation claim fails when the audience members know the facts underlying an assertion and can judge the truthfulness of the alleged defamatory statement themselves. *Dunlap*, 105 Wn.2d at 540. We will not seek to impose a rigid distinction between

fact and opinion. *Dunlap*, 105 Wn.2d at 538-39; *see also* RESTATEMENT (SECOND) OF TORTS § 566, comment *b* (an opinion may be ostensibly in the form of a factual statement if it is clear from the context that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated). Whether an allegedly defamatory statement is actionable is a threshold question of law for the court. *Benjamin v. Cowles Publ'g Co.*, 37 Wn. App. 916, 922, 684 P.2d 739 (1984).

In considering whether an allegedly defamatory statement is actionable, we examine all the circumstances surrounding it. *Dunlap*, 105 Wn.2d at 539. Three factors guide us in this analysis: (1) the medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implied undisclosed facts. *Dunlap*, 105 Wn.2d at 539. The third circumstance is the most crucial of the three factors. *Dunlap*, 105 Wn.2d at 539.

Generally, audiences should expect statements of opinion in contexts such as political debates. *Dunlap*, 105 Wn.2d at 539. And we view such statements "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Tan and the defendants are prominent community leaders engaged in a protracted debate over how best to achieve the political goals of the Vietnamese refugee community. The political activities of their respective organizations and committees, such as efforts to remove displays of the Communist flag across Washington State, are matters of public concern to the Vietnamese community. The defendants sought an exchange

of ideas by inviting representatives of the VCTC to a public hearing to “present its side of the matter.” Ex. 8. Undeniably, the Public Notice was written and disseminated in the context of political debate. Thus, we presume the audience was prepared for mischaracterizations, exaggerations, rhetoric, hyperbole, and biased speakers. *Dunlap*, 105 Wn.2d at 539. Accordingly, we accept that the Vietnamese community, as recipients of the Public Notice, understood the context of the statements and the authors’ biases.

Finally, no statement or assertion in the Public Notice implies the existence of undisclosed facts. To the contrary, the letter painstakingly outlines “correct and true evidences” to support the conclusion that Tan and the VCTC support the Communist party. Given the nature of this disclosure, there is no reason to believe that the defendants withheld facts that would have bolstered their assertions. And even though several of their assertions—that Tan is actively supporting the Communist party—are presented like facts, we reject labeling them as actionable. See *Dunlap*, 105 Wn.2d at 540 (quoting KEETON, *Defamation & Freedom of the Press*, 54 TEX. L. REV. 1221, 1250-51 (1976) (where an author makes an assertion of fact based on disclosed information; he simply deduces a particular fact from known facts)); see also *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (even apparent statements of facts may assume the character of opinion when made in a political debate). The disclosure of facts allowed the recipients of the Public Notice to judge for themselves the validity of the defendants’ conclusions about Tan’s political views. In addition, the public was invited to the hearing to examine the “evidences” and evaluate the accuracy of the accusations. All three of the *Dunlap* factors support our conclusion that the defendants’ claim that Tan and the VCTC are Communists or Communist sympathizers are protected political opinions. *Snyder v. Phelps*,

--- U.S. ---, ---, 131 S. Ct. 1207, 1219, --- L. Ed. 2d --- (2011) (“in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.”) (quoting *Boos v. Barry*, 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)).

Nonetheless, Tan and the VCTC maintain that the underlying untrue facts are actionable. A defendant who bases his derogatory opinion of the plaintiff on his own statement of false and defamatory facts can be subject to liability for the factual statement but not for the expression of opinion. RESTATEMENT (SECOND) OF TORTS § 566, comment *c*; *Dunlap*, 105 Wn.2d at 538 (adopting the rule of RESTATEMENT § 566). But not every misstatement of fact is actionable: it must be apparent that the false statement presents a substantial danger to the plaintiff’s personal or business reputation. *Mark v. Seattle Times*, 96 Wn.2d 473, 493, 635 P.2d 1081 (1981); *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int’l Union, Local 1001*, 77 Wn. App. 33, 44, 888 P.2d 1196 (1995). When a report contains a mixture of true and false statements, a false statement affects the “sting” of the report only when “significantly greater opprobrium” results from the report containing the falsehood than would result from the report without the falsehood. *Herron*, 112 Wn.2d at 769. The “sting” of a report is the gist or substance of a report when considered as a whole. *Herron*, 112 Wn.2d at 769. To be actionable, the allegedly false statements here must lead to a distinct and separate damaging implication not otherwise conveyed in the general message of the Public Notice. *See Herron*, 112 Wn.2d at 774.

In *Mark*, the court found that the inaccurate reporting of the amount of misappropriated money did not alter the “sting” of the story, reasoning that the amount involved did not affect the damage done to the plaintiff from being called a thief. *Mark*, 96 Wn.2d at 496. In contrast, the

*Herron* court found that a similar inaccuracy regarding the amount of money that the plaintiff received in campaign contributions *did* alter the sting of the story. *Herron*, 112 Wn.2d at 774. The court reasoned that while a small percentage of the total campaign contributions constituted a reasonable donation, the statement that a group contributed over 50 percent of all campaign contributions implied that the plaintiff had taken a bribe. *Herron*, 112 Wn.2d at 774. Because the impression that the plaintiff had sold his integrity as a public official was an implication not otherwise made in the report, the statement was actionable. *Herron*, 112 Wn.2d at 774.

Here, the "sting" of the Public Notice is that Tan and the VCTC are Communists. This is clear not only from reading the Public Notice as a whole but also from the plaintiffs' characterization of their case at trial. In opening statements, plaintiffs' counsel explained that "[t]here could be nothing more odious, nothing more hateful, and nothing more hurtful than calling my client a communist." IRP at 195. Then, in closing arguments, counsel reiterated that being called a Communist is not just an insult, "[i]t is the insult." IX RP at 1612. Where the plaintiff's theory before the jury was that being labeled a Communist is the most severe and shameful accusation in the world of Vietnamese refugee politics, any factual misstatements in the Public Notice do not cause additional distinct and separate harm. In fact, rather than impugning some other aspect of Tan's character or the VCTC's associations, all the statements were presented as evidence supporting the claim that Tan and the VCTC are Communists.

Moreover, many of the allegedly false statements are equivocal at best. Tan and the VCTC highlight the following statements as false: (1) that Hua declared there is nothing wrong with receiving Viet Cong money, (2) that the audience "protested violently" when the band played the Viet Cong anthem, (3) that Tan "refused to display" the national flag at the language

school and claimed that a delegation was sent there to intimidate him, (4) that the VCTC organized an annual meeting to commemorate the Fall Revolution, and (5) that Tan had “gone under the table” with the administration of the community college and sent a secret message that there was no need to remove the Communist flag. Br. of Resp’t at 30-34. While a defamatory statement must be provably false, these statements are the defendants’ characterizations or interpretations of events that took place. Their characterizations, though biased and perhaps exaggerated, fall under the type of rhetoric to be expected throughout a political debate. *Dunlap*, 105 Wn.2d at 539.

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). That labeling Tan a Communist is inflammatory is precisely the reason the First Amendment affords it near perfect protection. *Milkovic*, 497 U.S. at 20 (First Amendment protections extend to rhetorical hyperbole, which has traditionally added much to the discourse of our nation). Considering the whole document, all of the allegations—whether true, inaccurate, or false—are merely iterations of the defendants’ conclusion that Tan and the VCTC are Communists. Even if some of the statements are in fact inaccurate, Tan and the VCTC have failed to identify any separate or distinct harm resulting from each untrue statement.<sup>2</sup>

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<sup>2</sup> At January 14, 2011 oral argument, the defendants’ counsel claimed that even if the allegedly false statements support the overarching assertion that Tan is a Communist, they are equally defamatory in their own right. But counsel is incorrect in separating each statement from the gist of the letter. See *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 37, 723 P.2d 1195 (1986) (in determining whether a publication is defamatory, it must be read as a whole and not in part or parts detached from the main body).

Turning to the newsletter articles, the defendants urge us to collapse our analysis of the articles into our review of the Public Notice. They reason that the overarching assertion of the newsletter articles is the same as the Public Notice—that Tan and the VCTC are Communists—and that the articles differ only by asserting one factual basis at a time instead of an exhaustive list. Tan and the VCTC concede that the news articles fit within the general analysis of opinion accompanied by specific supporting facts, and that we can analyze them similarly to the Public Notice. Although we do not reject their concession—indeed, our discussion above resolves any claims arising from the articles that contain facts in support of the assertion that Tan is Communist—we note some differences between the Public Notice and the newsletters. In particular, the *Community Newsletter* article detailing the events surrounding the display of the flag at the school does not editorialize. The *New Horizon* article describes members of the VCTC as undercover Viet Cong agents disguised as nationalists but does not disclose facts in support of this statement. Thus, we discuss the sufficiency of the plaintiffs' actual malice evidence to show that even if we considered any of the factual statements to be actionable, their claims would fail.

## II. ACTUAL MALICE

The defendants argue that the plaintiffs failed to prove they acted with actual malice. Specifically, they argue that Tan and the VCTC failed to prove that, at the time of publication, the defendants had serious doubts about the truth of their statements or knew that their statements were probably false.

A public figure defamation plaintiff must prove with clear and convincing evidence that the defendant made the statements with "actual malice." *Sullivan*, 376 U.S. at 279-80. A

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defendant acts with malice when he knows the statement is false or recklessly disregards its probable falsity. *Sullivan*, 376 U.S. at 279-80. A defamation plaintiff proves reckless disregard by showing that the defendant published with a "high degree of awareness of . . . probable falsity," or entertained serious doubts as to the truth of the publication. *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 1094 (1964); *Herron*, 112 Wn.2d at 775.

In reviewing for evidence of actual malice, we focus on whether the defendant believed in the truth of the challenged statement. See *Margoles v. Hubbard*, 111 Wn.2d 195, 200, 760 P.2d 324 (1988). We do not measure reckless conduct by asking whether a reasonably prudent person would have published or would have investigated before publishing. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Actual malice can, however, be inferred from circumstantial evidence, including a defendant's hostility or spite, knowledge that a source of information about a plaintiff is hostile, and failure to properly investigate an allegation. *Margoles*, 111 Wn.2d at 200. These factors in isolation are insufficient to establish actual malice; they must cumulatively amount to clear and convincing evidence of malice to sustain a verdict in favor of a plaintiff. *Margoles*, 111 Wn.2d at 200.

In reviewing a defamation verdict, the First Amendment requires us to independently evaluate whether the record supports a finding of actual malice. *Richmond v. Thompson*, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law.") Although we still defer to the fact finders' credibility determinations, we have considerable latitude in deciding whether the evidence supports a finding of actual malice. See *Harte-Hanks*

*Comm'n, Inc. v. Connaughton*, 491 U.S. 657, 689 n.35, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) (appellate court should not disregard a jury's opportunity to observe live testimony and assess witness credibility). In *Bose*, the issue was whether the author of the defendant's article reviewing the plaintiff's sound system truthfully described the apparent movement of the sound from the speakers. *Bose*, 466 U.S. at 494-95. The United States Supreme Court accepted the trial court's determination that the author was not credible in explaining his choice of wording. *Bose*, 466 U.S. at 512. But unlike the trial court, the Supreme Court was unwilling to infer actual malice where "the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." *Bose*, 466 U.S. 512-13 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971)). The court held that even if the witness knew that his wording was inaccurate, his disingenuous trial testimony was insufficient to prove that he wrote the challenged statement with actual malice. *Bose*, 466 U.S. at 512-13.

In *Harte-Hanks*, the United States Supreme Court considered whether the Sixth Circuit's independent review of the jury's finding of actual malice was consistent with *Bose*. *Harte-Hanks*, 491 U.S. at 659. In that case, the defendant newspaper published a story claiming that the plaintiff, a candidate for municipal court judge, had promised sisters Alice Thompson and Patsy Stephens jobs and vacations in return for making allegations of corruption against the incumbent judge's court administrator. *Harte-Hanks*, 491 U.S. at 660. The plaintiff allegedly made the promises in a tape-recorded meeting with six persons present in addition to the plaintiff and his wife. The newspaper interviewed the plaintiff, who denied making the promises. It also interviewed five of the other witnesses, all of whom denied that the plaintiff had made any

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promises. Nonetheless, the newspaper published the story with Thompson as the only source. *Harte-Hanks*, 491 U.S. at 691. But the newspaper failed to interview Stephens, the remaining and critical witness, and failed to listen to the tape recording of the meeting, which the plaintiff had made available. *Harte-Hanks*, 491 U.S. at 682-83. Like the appellate court, the Supreme Court affirmed the jury's finding that the newspaper published with actual malice, but it rejected the appellate court's reliance on facts the jury *could* have found. *Harte-Hanks*, 491 U.S. at 690. Searching for less speculative grounds to support actual malice, the court analyzed the trial court's instructions, the jury's answers to the three special interrogatories, and the undisputed facts to ascertain that the jury *must* have rejected the defendant's explanations for its omissions. *Harte-Hanks*, 491 U.S. at 690-91. The court held that when considered alongside the undisputed evidence—that the newspaper never listened to the tape recording and never interviewed Stephens—the jury's findings supported the conclusion that the defendant purposefully avoided learning facts that would have proved its story false. *Harte-Hanks*, 491 U.S. at 690-91.

The Washington State Supreme Court engaged in a *Bose* analysis in *Richmond*, 130 Wn.2d at 389. There, a Washington State Patrol Trooper, Davis Richmond, sued Woodrow Thompson for publically accusing the trooper of pushing him, pointing a gun at him, and telling him that he would blow his brains out. *Richmond*, 130 Wn.2d at 373-74. The court accepted the trial court's finding that Thompson acted with actual malice based on two eyewitnesses who testified that the trooper did not push Thompson or unclip his weapon, the trooper's testimony that he did not threaten to blow Thompson's brains out, and the fact that Thompson first alleged the trooper's misconduct six months after the incident. *Richmond*, 130 Wn.2d at 388-89. In reaching this conclusion, the court accepted that the jury gave great weight to the trooper's

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testimony, but also relied on the "direct evidence" of the eyewitnesses and the timing of Thompson's allegations. *Richmond*, 130 Wn.2d at 388-89.

A finding that the defendant or his spokesperson has not been credible may be sufficient to prove malice "when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves." *Bose*, 466 U.S. at 512 (quoting *Time, Inc.*, 401 U.S. at 285). But it is inadequate where an allegedly defamatory statement is only "one of a number of possible rational interpretations" of events that "bristle with ambiguities." *See Bose*, 466 U.S. at 512 (quoting *Time, Inc.*, 401 U.S. at 285); *see also Harte-Hanks*, 491 U.S. at 689-90. Moreover, we cannot assume that in a complex trial with multiple defendants and over 20 witnesses, the jury disbelieved or rejected all the testimony of the defense witnesses. Where we can only speculate as to the jury's assessment of each witness, and where the events underlying the alleged defamation are wrapped in obscurity and capable of being interpreted or described in more than one way, we require evidence independent of possible credibility determinations to support a jury's finding of actual malice. *See Harte-Hanks*, 491 U.S. at 690-91.

Turning to the evidence, Tan and the VCTC contend that the jury obviously rejected the defendants' assertions that they wrote the Public Notice statements in good faith. They point out that the disclosure of information about Tan's release from a reeducation camp after signing a loyalty pledge and his continued employment as a teacher by the Communist party occurred *after* the Public Notice was written, thereby undermining the defendants' assertions of good faith regarding that publication. But discredited testimony is not sufficient to support a contrary conclusion. *Bose*, 466 U.S. at 512 (relying on *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 575, 71 S. Ct. 428, 95 L. Ed. 547 (1951)). In *Bose*, the court held that although the

discredited testimony did not rebut any inference of actual malice, it alone did not prove actual malice by clear and convincing evidence. *Bose*, 466 U.S. at 512. Here, it is possible the jury rejected all of the defendants' professions of good faith and believed that the defendants were disingenuous in citing Tan's history with the Communist party as a basis for their good faith claim. Even so, the discredited testimony fails to meet the clear and convincing standard where the underlying events are capable of being honestly perceived very differently by different people.

Tan and the VCTC also argue that the defendants knew their statements were false because the defendants must have been "aware" of the truth.<sup>3</sup> Br. of Resp't at 31-32, 34. But where the events are not sufficiently clear to "speak for themselves," arguing that the defendants unreasonably construed the facts imposes a negligence standard on the defendants that is at odds with the plaintiffs' burden of proving the defendants' actual beliefs. *See Bose*, 466 U.S. at 512. That a reasonable person would have been aware of the inaccuracies is not enough to establish a defendant's actual malice, particularly where, as here, the underlying incidents are colored in shades of gray, not black or white. *Bose*, 466 U.S. at 511-12.

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<sup>3</sup> Specifically, Tan and the VCTC cite the following examples to prove that the defendants knew their statements were false: (1) defendants knew that people did not boycott the VCTC because Le remained associated with the VCTC after the name change, (2) Le knew that Hua never said he would accept Viet Cong money because Le was present when Hua spoke, (3) the VCTC newsletter did not advocate for organizing on the anniversary of September 2, (4) the defendants were aware that the playing of the Vietnam national anthem was an accident and that the reports of violent protests were exaggerated impressions, (5) none of the defendants testified that Tan actually refused to display the nationalist flag and Ho even testified that he was aware that Tan displayed the national flag at the language school, and (6) the defendants admitted that if the VCTC had held a meeting to commemorate the Fall Revolution, there would have been an uproar and significant media attention.

Finally, Tan and the VCTC argue they proved actual malice with the following: (1) the committee members made no attempt to contact Tan before publishing the Public Notice, (2) the defendants had previously worked with Tan to organize events opposing communism until the divisive flag committee meetings in 2003, (3) the defendants had a history of acrimony with Tan, (4) some of the defendants had witnessed Tan speak publicly on flag issues, most likely in support of displaying the nationalist flag, (5) the defendants failed to investigate any of the facts before publication, including the authenticity of the apron, and (6) the defendants were upset that Tan arranged a meeting with the dean of the community college because it diverted attention from their committee.

But these factors, whether considered alone or together, fail to prove that the defendants published their accusations with actual malice. Their failure to contact Tan or investigate the authenticity of the apron suggests, again, only that the defendants were negligent. In *Harte-Hanks*, the court distinguished the failure to investigate from the purposeful avoidance of the truth. *Harte-Hanks*, 491 U.S. at 692; *see also Sullivan*, 376 U.S. at 287-88 (failure to investigate is not sufficient to prove recklessness). Unlike the newspaper in *Harte-Hanks*, whose inaction was a deliberate decision not to acquire knowledge, the defendants called for a public hearing and asked Tan and the VCTC to participate. Although the hearing was scheduled after the letter was published, the defendants' willingness to engage in further debate about the issues rebuts any inference that they sought to purposely avoid the truth. Moreover, the defendants never admitted they had concerns about the truthfulness of their charges, as opposed to the authors in *Harte-Hanks* who admitted to Thompson that they had concerns about whether Stephens would corroborate her story. *Harte-Hanks*, 491 U.S. at 682. In contrast, the defendants' belief that the

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apron was Communist propaganda is entirely plausible given their experience and political perspective, and nothing in the record suggests that they thought otherwise. There is no evidence that the defendants deliberately ignored contrary evidence or otherwise sought to avoid the truth. *See Harte-Hanks*, 491 U.S. at 692-93.

Unlike the records in *Harte-Hanks* and *Richmond*, the evidence here does not clearly and convincingly set forth direct or undisputed facts that support a finding of actual malice. In *Harte-Hanks*, the court relied primarily on two pieces of undisputed evidence in holding that the newspaper deliberately ignored evidence that would undermine its story: the newspaper's failure to interview a key eyewitness, and its failure to listen to the plaintiff's recording of the conversation where he allegedly offered bribes to the sisters. *Harte-Hanks*, 491 U.S. at 692. And in *Richmond*, the direct evidence consisted of testimony from the trooper and two eyewitnesses that flatly contradicted Thompson's account of the incident. The circumstantial evidence that Thompson did not accuse the trooper until six months after the incident merely supported the testimony by the trooper and the two eyewitnesses. *Richmond*, 130 Wn.2d at 389. Thus, concrete, factual evidence of actual malice supported credibility determinations made in the plaintiffs' favor in both *Harte-Hanks* and *Richmond*.

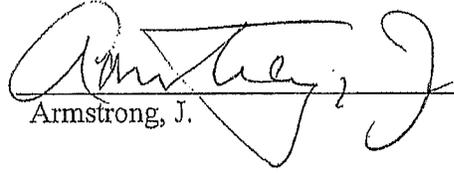
Here, the history of acrimony between Tan and the defendants and the fact that Tan had previously worked with the defendants on political issues bolsters the plaintiffs' case theory but offers no concrete support for their claim of actual malice. That the defendants had worked with Tan to oppose communism and knew he had spoken in favor of displaying the nationalist flag is equivocal and does not eliminate the possibility that they thought Tan was secretly working for the Communists. It is also impossible to pinpoint the cause of the acrimony between Tan and the

defendants; it may have stemmed from the defendants' perceptions that Tan was sympathetic to the Communists. If so, this acrimony offers no support for the notion the defendants falsely accused Tan of being a Communist. A showing of ill will or malice, in the ordinary sense, is insufficient to prove "actual malice." *Harte-Hanks*, 491 U.S. at 666. Without evidence that unequivocally shows that the defendants knew or entertained serious doubts that Tan was a Communist or Communist supporter, the circumstantial evidence offered by the plaintiffs shows, at best, that a reasonable person would question the charge. This is insufficient to prove that the defendants subjectively believed their statements false or even probably false.

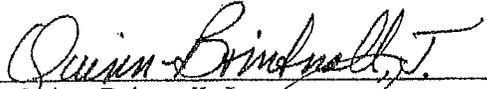
In sum, Tan and the VCTC contend that clear and convincing evidence shows that the defendants simply seized upon the apron incident as an opportunity to defame them. The context of this case suggests otherwise: the Vietnamese community takes seriously what it perceives to be a very real threat of communism. Within this context, the defendants attacked Tan and the VCTC for being Communists or Communist sympathizers. During the course of the conflict, the defendants used the tools people frequently use to advance a political position—vitriol and hyperbole. The defendants may also have been overly quick to build a conspiracy theory from facts too scant and equivocal to persuade a jury that the conspiracy existed in fact. Nonetheless, the defendants' mischaracterizations, exaggerations, and seemingly improbable inferences took place in an ongoing political discussion protected by the First Amendment. And to the extent the defendants made factual statements not encompassed by the opinion framework, the plaintiffs failed to prove actual malice.

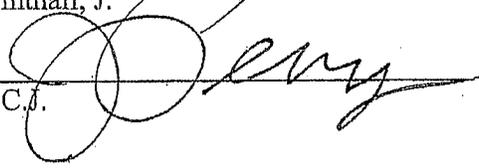
No. 39447-2-II

We reverse and remand for dismissal.

  
Armstrong, J.

We concur:

  
Quinn-Brintnall, J.

  
Penoyar, C.J.

# APPENDIX B

From: Tuan Vu [tvu2020@yahoo.com]

Sent: Thursday, August 07, 2003 8:24 AM

To: viet.nguyen@comcast.net; Shphaml@Attbi.Com; normanle@netzero.net; khavous@yahoo.com; thanhnguyenusa@hotmail.com; danghi@vncac.org; Tan Duc; sdn23066@premier1.net; Nam Lai; svu@co.kitsap.wa.us; dsteussy@highline.com; hdao@webtv.net; TIEN NGUYEN; nvtb86@aol.com; Julien Pham; lily.iftner@dbmengineers.com; Dan Nguyen; pr@tetinseattle.org; kietaly@u.washington.edu; nhanvodao@yahoo.com; nguoihien\_98104@yahoo.com; dieuhien@u.washington.edu; mongmo@u.washington.edu; uyen.t.le@rssmb.com; vinhx@hotmail.com; thanh\_tan@hotmail.com; tvinh@seattletimes.com; sngo@windermere.com; mbach@u.washington.edu; mariehb@u.washington.edu; xiulan@u.washington.edu; radi011568@aol.com; Mai Nguyen; f5ttang@hotmail.com; biet-hai@pacbell.net; t\_nambinh@yahoo.com; baodacbui@yahoo.com; vamco13@hotmail.com; baokiendam@aol.com; dat\_ho@hotmail.com; huynhpq@yahoo.com; rhuynh@spccc.ctc.edu; thuyhrmt@hotmail.com; dieu81@hotmail.com; Nguyen, Hieu; tcyevnus@hotmail.com; nguyenanquy@hotmail.com; I taokng@aol.com; nguyentj1@juno.com; npham@hcc.ctc.edu; tongmai@msn.com; stonthat@online.no; huongviet19@hotmail.com; duocmy@aol.com; rickn@rpne.net; huytuong@hotmail.com; vuthuy@u.washington.edu; tvu2020@yahoo.com

Subject: Public Notice regarding The Vietnamese Community in Thurston County displaying VC Flags .

To the Communist Refugees Compatriots in the whole world,

The Committee Against Viet Cong Flag in Olympia invites you to follow up and have appropriate and legal (*legal in English*) actions in regard of The Vietnamese Community in Thurston County displaying Viet Cong flag (*VC Flag in English*) in the Lakefair booth in Olympia, Washington, USA, July 17, 2000. (2003?)

People have the access to the Internet or newspapers, radio stations, television ... are asked to further distribute this Public Notice.

To have more details and clearly see the evidence (*evidence in English*), please attend the first press conference in Seattle from 2:00pm to 4:00, Sunday August 17, 2003 at Rainier Community Center, 4600 38th Avenue South, Seattle, near Rainier South and Alaska Way.

We also invite the Vietnamese Community in Thurston County to send representatives to this press conference and subsequent conferences, if any, to present its side of the matter.

Sincerely,

Tuan Vu  
Co-Chair (*in English*)  
Committee Against Viet Cong Flag

P.S. (*in English*) Sorry (*we*) cannot attach the picture (*in English*) of Old Ho (*Ho Chi Minh*) due to overload.

Please come to the press conference to see the evidence.

(NOTE: the translator for better comprehension added Words in *Italic*).

COMMITTEE AGAINST VIET CONG FLAG

P.O. Box. 83, Kirkland, WA 98083

PUBLIC NOTICE

RE: The Vietnamese Community in Thurston County  
displaying disguised VC Flags at Lakefair, Olympia Washington State

I. FACTS

In the NVHB Choir practice on Saturday night 7/26/03 at the Fern Ridge Community House, Olympia, Washington, a member of the choir, Mr. DP, reported an incident that just happened on the 16 of July, 2003 at the Lakefair booth belonging to the Vietnamese Community in Thurston County of Mr. Duc Minh Hua, Mr. Duc Thuc Tan, Mr. Dieu Nguyen and Mrs. Bich-Que (*her First name*). Mr. DP is a person hired by the management of the CDNVQT booth (*acronym of Vietnamese Community in Thurston County in Vietnamese*) to cook for the duration of the Fair. At the inauguration of the Fair, when Mr. DP went to the kitchen to start his cooking duties, he found an apron (*tablier/apron in English*) in the kitchen (*redundancy in original text*). He wore it to work. On the dark blue (*or dark green – the color green or blue was not specified*), there is a printed picture of Santa Claus wearing a red hat with a yellow star. Across the chest, there are two pockets printed on each of them is a boxing glove red back ground yellow star (*words bolded and underlined is grammatically incorrect in Vietnamese*). On the red flag there are numbers of American flags, scattered and swallowed by the VC flag. (*This sentence is in Italic*). At the bottom, are printed 7 yellow stars in a horizontal line. (Please see attached picture)

Every Vietnamese political refugee having experiences with the Communists understand right away: (*following section in Italic*) the picture printed on that shirt (*apron?*) wants to show the public the red flag and yellow star of the Vietnamese Communist. And the picture of Santa Claus reminds the viewers, of the picture of Old Ho. The Vietnamese Communist Party tactfully put on Santa Claus' head a hat with a red crescent, representing the International Communist Party flag. Santa Claus represents love and brings gifts to people. VC boxing glove swallowing the American flag insinuated the idea of "the Vietnamese Communist Party (CSVN) defeats America" (*end of Italic section*).

The intention of displaying the above symbols is to show the presence of the Hanoi Communist regime in the Vietnamese community, to about 250,000 Lakefair goers, just like they intentionally displayed the VC flag at SPSCC and some other places.

It is unknown for how long Mr. DP has been wearing Old Ho's picture with 2 red flags with yellow stars, and if anyone had taken a picture. After discovering these Viet Cong symbols, Mr. DP, the cook, promptly turned the apron inside out and wore it.

At the end of the Fair, Mr. DP asked the key persons of the Vietnamese Community in Thurston County (Mr. Duc Minh Hua, Mr. Duc Thuc Tan, Mr. Dieu Nguyen and Mrs. Bich-Que) and others working his shift to find out who owns that apron in order to give it back, but nobody identifies it as his/hers! The cook took it home with the intention of erasing (*removing?*) the picture of Old Ho and the VC flag to "recycle" it. But, on Sunday morning, the 27 of July, 2003, Mr. TV obtained the apron and took it home for evidence. This evidence will be displayed at the next press conferences so the public can see it in person.

## II. RECORDS OF THE TAN THUC DUC GANG.

Since its establishment, the Vietnamese Community in Thurston County has been accused of doing activities for the Vietnamese Communist, by several organizations against the communists in this state, having correct and true evidences.

1. The Vietnamese Community in Thurston County was established under the guidance of Cong Da Le, who guided Nguyen Tan Dung (VC Deputy Prime Minister) in the visit to Boeing, when he came to Seattle. When choosing a name (*for the organization*), the Duc Thuc Tan and Khoa Van Nguyen gang insisted that the name "National Vietnamese Committee" suggested by the H.O. Association, and other National associations, be denied. Therefore, all the local anti-communist organizations, societies, had boycotted and did not recognize it from the beginning. In the records filed at the Washington State Department of the Interior, Mr. Duc TT claimed with the authorities that he "DOES NOT have members" (*in Italic*), meaning not representing anybody at all. It is obvious that CDNVQT (Vietnamese Community in Thurston County) had been impersonating the representatives of the community with illegal political intentions. They also abused the name of the local community in order to be awarded a booth at the annual Lakefair, getting around \$10,000.00 that nobody knows for what!
2. Mr. Duc Minh Hua, "First and for life President", when answering to questions about the Cao Son calendar and the receiving money from Cao Son, did declare at St Michael school "there is nothing wrong with receiving VC money"
3. Suggested the idea of organizing the yearly anniversary of September 2 in the Olympia Newsletter of the Vietnamese Community in Thurston County;
4. Inaugurated the 1997 Autumn Poems, Songs, Music (Ha Huyen Chi Poems and Music Night) by playing the "VC anthem": The band that Duc TT brought from Portland played the whole portion "Doan Quan Viet Nam di, chung long cuu quoc" of the VC Tien Quan Ca song. Immediately, the audience stood up and protested violently, the band had to switch to the VNCH (*Republic of Viet Nam*) anthem.
5. VC flag was hung in his Viet Ngu Hung Vuong classroom, a class teaching Vietnamese language at St Michael school, for many years but the "Principal Duc Thuc Tan" intentionally ignored. Until the Catholic Community of Olympia, the Protestant Community of Olympia and other organizations, members of the National Vietnamese Community of NW Washington (H.O. Association of Olympia, Association of the Elderly people, Association of Me-Linh Women, Voters' Consortium), organized a delegation ??? to convince the Administration to remove the VC flag and let fly the National flag. Mr. Duc Thuc Tan refused to display the National flag, in the contrary, he falsely claimed that "Mr. Ngo Thien Le brought with him 18 adolescents to intimidate the superintendent" (*in Italic*).
6. Organized the Autumn 2002 Meeting to commemorate the Fall Revolution, exactly as the 1997 Autumn Flag Saluted with VC anthem incident.

Most recently and most importantly, the Duc Thuc Tan gang had sabotaged the fight of the Committee Against VC Flag (UBCCVC), by false accusations and wanting to eliminate the true nationalists who fervently fight the communists, from the unit in charge of the Committee Against Viet Cong Flag, and had tried by all means to isolate the UBCCVC (*Committee Against VC Flag*) from anti-communist organizations of Tacoma and Seattle to exterminate the UBCCVC ability to fight. In the mean time, the Duc Thuc

Tan gang had "gone under the table" with the administration of South Puget Sound Community College (SPSCC) to send the secret message to the Dean that the Vietnamese community is deeply divided, therefore there is no need for removing the bloody communist flag hung at SPSCC. The Duc Thuc Tan gang also used the Internet to continue making stories to distort the truth about the failure of UBCCVC, in a 17-page letter. Now everybody knows why the UBCCVC failed so miserably!

This Public Notice is an opportunity to point out the "hypocritical nature" ("xanh vo do long") of Duc Thuc Tan and the gang heading the Vietnamese Community of Thurston County that they had cleverly covered up, cheating (*our*) people, all those 28 years. (*This sentence is awkward in Vietnamese language*).

### III. ALERT AND SUMMON

That many proofs in addition to the Viet Cong flag display at Lakefair 2003 are more than enough for us to conclude that the Duc Thuc Tan gang had abused people's name, hidden under the Nationalist coat to serve the common enemy of the Vietnamese refugees that is the Communist Hanoi. The organization of Duc Thuc Tan gang had betrayed our Vietnamese community, continuously and systematically since its establishment date. Other proofs are, Duc Thuc Tan and his companions, NO ONE had a clear background, enough to guarantee that they are Nationalists (not in the military to protect the South Vietnam, not been imprisoned by the Communists, etc...). And no one ever saw the Vietnamese Community in Thurston County participate in anti-communist activities, such as the Tran Truong, Nguyen Xuan Phong, Nguyen Tam Chien, VC delegation attending WTO, etc!...

The Committee Against Viet Cong Flag summons the Communist refugee compatriots, the companions in arms, and anti-communist organization in Washington State and everywhere, to strongly condemn Duc Thuc Tan and gang that are "fed by the Nationalists and worship the Communists". Duc Thuc Tan and gang are in the Vietnamese Community of Thurston County and the Vietnamese Language School Hung Vuong.

Please boycott and expel the above people from the organizations of refugees such as the Vietnamese Community of Thurston County and the Vietnamese Language School Hung Vuong so they would not have any ground to conduct activities on behalf of the evil communists and harm our compatriots and poison our children's mind.

The Committee Against Viet Cong Flag will use all means of communication to expose more details of this matter to people everywhere, in the coming days. Please keep following the news.

Olympia, August 7, 2003

For The Committee Against Viet Cong Flag

On Duty Section

Tuan Anh Vu  
Co-Chair

Dat Tan Ho  
Commissioner

Phiet Xuan Nguyen  
Commissioner

Ngo Thien Le  
Co-Chair

Nhan Thanh Tran  
Commissioner

Nga Thi Pham  
Commissioner

**CERTIFICATE OF SERVICE**

11 MAY 19 PM 3:34

STATE OF WASHINGTON

I certify that on the 19th day of May, 2011, I caused a true and correct copy of the Petition for Discretionary Review to be served on the following in the manner indicated below.

DEPUTY

Washington State Court of Appeals  
Division Two  
950 Broadway, Suite 300  
Tacoma WA 98402-4454

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- Hand Delivery
- E-mail: \_\_\_\_\_
- ABC Legal Services

Counsel for: Appellants/Defendants  
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Attorney at Law  
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 19th day of May, 2011, at Olympia, Washington.

A handwritten signature in cursive script, appearing to read "Angie Dowell", is written over a horizontal line.

Angie Dowell, Paralegal  
Younglove & Coker, P.L.L.C.