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STATE OF WASHINGTON
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STATE OF WASHINGTON

NO. 86021-1
COA NO. 39447-2-II

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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A. INTRODUCTION

Petitioners have sought review of the decision below in *Tan v. Le*, ___ Wn. App. ___, 2011 WL 1491697 (April 19, 2011) (copy attached as Appendix A). The Court of Appeals held that the petitioners' defamation claim is a nonactionable opinion. It further held that even if it were an actionable defamation claim, the petitioners' failed to present evidence sufficient to meet the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Petitioners make no claim that the Court below failed to identify the correct rules of law; instead they confine their argument to the contention that the Court of Appeals' opinion contains a "misapplication of the test" adopted by this Court 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) to the facts of this case. *Petition for Review ("PFR")*, at 11-14. Similarly, Petitioners assert that the opinion below contains a "misapplication" of this Court's opinion in *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), *PFR*, at 14-15; and that the Court of Appeals "misappl[ied] the First Amendment standard of independent review in public figure defamation cases . . ." *PFR*, at 2.

Instead of identifying any significant point of law which must be

decided or clarified, Petitioners urge this Court to grant review to correct what they perceive to be a misapplication of well settled principles. But “RAP 13.4 does not allow review simply to correct isolated instances of injustice.” 2 Washington Appellate Practice Deskbook, § 27.11 (3d ed. 2005). Moreover, the Court below not only identified the correct legal rules to analyze petitioners’ defamation claim, it also followed the rules previously laid down by this Court and correctly applied them to the facts of this case.

B. DECISION BELOW

Respondents published a “Public Notice” on the internet and three newsletter articles, warning the Vietnamese-American community about Duc Tan. Tan was the education director of the Vietnamese Community of Thurston County (“VCTC”), a nonprofit corporation which “engages in political activity stating its purpose as developing the cultural, economic, and political potential of the Vietnamese community of Thurston County.” *Tan v. Le*, ¶ 4. Respondents stated their opinion that, contrary to his professed anti-Communism, Duc Tan was actually a Communist who had “hidden under the ‘Nationalist coat’ to serve the Communist regime in Vietnam and betrayed the Vietnamese community ‘continuously and systematically.’” *Id.*, ¶ 16. The Public Notice enumerated several specific

instances of Tan's conduct which it described as the "correct and true evidences" which supported Respondents' opinion. *Id.*, ¶ 16. The listed "evidences" included several undisputed facts, such as the fact that in 1975, after "signing a loyalty pledge to the Communist Party," Tan was released from a Communist reeducation camp. *Id.*, ¶ 2. Thereafter "Tan worked for the Communist party as a teacher until September 1978" when he left Vietnam, came to the United States, and settled in Thurston County, Washington. *Id.*, ¶ 3. There he became active in the VCTC, ostensibly an anti-Communist organization.

Many of the "evidences" offered to support the Respondents' opinion that Tan was a Communist supporter were undisputed. For example:

- At a VCTC cultural event to honor a Vietnamese poet, "the hired band began to play Vietnam's current [Communist] national anthem." *Id.*, ¶ 10.
- In the fall of 1999, a VCTC newsletter suggested holding a cultural event on September 2 even though the Vietnamese community knows September 2 as a Communist holiday that celebrates the date when the Communist Party of Vietnam declared independence against the French. *Id.*, ¶ 11. Other events sponsored by the VCTC sometimes were held on April 30, the anniversary of the fall of Saigon. *Id.*
- Duc Tan opposed including the word "nationalist" or "national" in the name of the organization, even though that word conveys an anti-Communist meaning to the Vietnamese community. *Id.*, ¶ 16.
- When Norman Le and another one of the Respondents were elected co-chairs of an organization formed to oppose the display

of the Communist flag of Vietnam at a local community college, Tan proposed that Le step down from this position and that new elections be held to choose different leaders. *Id.*, ¶ 13.

Other “evidences” offered by Respondents were disputed by Tan and the VCTC. For example, a volunteer working at a VCTC sponsored cultural event found an apron at the VCTC booth. While it was undisputed that the apron was found and that it bore the image of a figure with a red hat, the parties disputed the meaning of the image. Tan and the VCTC said that the man depicted on the apron was Santa Claus, but the Respondents said that it was actually Ho Chi Minh, and that the placement of political symbols on the hat and gloves worn by the faux “Santa Claus” figure showed that the apron was actually celebrating Ho Chi Minh’s victory over the American forces in Vietnam. *Id.*, ¶ 14.

Duc Tan and the VCTC sued Respondents for defamation. The Superior Court determined that they were public figures and that the actual malice standard of *New York Times v. Sullivan, supra*, applied. Petitioners won a jury verdict in their favor, but the Court below threw out the judgment against the Respondents: “We agree that the statements in the email and newsletters are not actionable and that Tan and the VCT failed to show that the [Respondents] published the statements with actual malice. Accordingly we reverse and remand for dismissal.” *Id.*, ¶ 1.

C. REASONS WHY REVIEW SHOULD NOT BE GRANTED

- 1. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OF THIS COURT'S DECISIONS REGARDING EITHER (a) THE NONACTIONABILITY OF STATEMENTS OF POLITICAL OPINION OR (b) THE RULE THAT FALSE STATEMENTS ARE NOT ACTIONABLE WHEN THEY DO NOT CONTRIBUTE SIGNIFICANTLY GREATER OPPROBRIUM TO THE "STING" PORTION OF A PUBLICATION.**

a. The Rule of *Dunlap*

In *Dunlap v. Wayne*, 105 Wn.2d 529, 540, 716 P.2d 842 (1986), this Court held that a statement of opinion that is based on disclosed facts is not actionable "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." Recognizing that it is sometimes difficult to determine whether a statement is nonactionable opinion, this Court identified three factors upon which a court's analysis should focus:

- (1) The medium and context in which the statement was published, (2) the audience to whom it was published, and (3) whether the statement implies undisclosed facts.

First, the nature of the medium can affect whether a statement is received as "fact" or "opinion": *statements of opinion are expected to be found much more often in certain contexts, such as editorial pages or political debates.* The court should consider the entire communication and note whether the speaker qualified the defamatory statement with cautionary "terms of apparenecy." [Citation].

Second, the nature of the audience is important. As one commentator writes: "Paramount are audience

expectations. *In the context of ongoing political debates, the audience is prepared for mischaracterizations and exaggerations, and is likely to view such misrepresentations with an awareness of the subjective biases of the speaker.* [Citation]. The court should thus consider whether the audience expected the speaker to use exaggeration, rhetoric or hyperbole.

The third and perhaps most crucial factor to consider is whether the statement of opinion implies that undisclosed facts support it. *The Restatement specifically defines an opinion as actionable only if it "implies the allegation of undisclosed defamatory facts".* Restatement § 566. Comment c elaborates, at page 173:

A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently.

Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves.

Dunlap, 105 Wn.2d at 539-540 (emphasis added).

b. The Rule of Mark

In *Mark*, this Court held that not every false statement of fact is actionable and that there is no liability for defamation if the statement made was "substantially true":

It is now generally agreed that *a defamation defendant need not prove the literal truth of every claimed defamatory statement*. W. Prosser, Torts 798 (4th ed. 1971). A defendant need only show that the statement is substantially true or that the gist of the story, the portion that carries the sting, is true.

Mark, 96 Wn.2d at 494 (emphasis added).

In *Mark* the “gist” of the news stories was that Mark had been arrested for Medicaid fraud. However, the stories were inaccurate as to the amount of money that Mark was suspected of garnering through fraudulent billing practices. This Court found that the gist of the news stories was true, and that the inaccuracy as to the dollar magnitude of the fraud did not alter the “sting” of the story:

[W]e think it apparent that the gist of the KIRO-TV and KOMO-TV reports was the arrest for Medicaid fraud involving large amounts of funds. *No significantly greater opprobrium attaches* for a statement that a person “bilked the State out of at least \$300,000” (KOMO-TV Clerk’s Papers, at 420. *The inaccuracy, if any, does not alter the “sting” of the publication as a whole* and does not have a materially different effect on a viewer, listener or reader than that which the literal truth would produce.

Mark, 96 Wn.2d at 496 (emphasis added). Since the false allegation did not materially alter the sting of the story, this Court held that Mark’s claim for defamation was properly dismissed.

c. **The Rule of Herron**

In *Herron* this Court elaborated on the rule of *Mark* and held that a

false statement of fact does *not* alter the “sting” of a news story unless “that false statement has resulted in damage which is distinct” from that caused by the rest of the news story. *Herron*, 112 Wn.2d at 771.

If it has not, then whatever damage the plaintiff has suffered does not amount to defamation because it is not solely attributable to the falsehood.

Herron, at 771.

d. Application of These Settled Rules by the Court of Appeals

Applying these principles the Court of Appeals correctly held as follows:

An opinion can support a defamation claim if it implies that undisclosed facts form the basis of the opinion. Dunlap, 105 Wn.2d at 538, 716 P.2d 842 (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 the alleged defamatory statement themselves. Dunlap, 105 Wash.2d at 540, 716 P.2d 842. We will not seek to impose a rigid distinction between fact and opinion. Dunlap, 105 Wash.2d at 538-39, 716 P.2d 842; 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, 716 P.2d 842. **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, 716 P.2d 842. The third circumstance is the most crucial of the three factors.**

Tan v. Le, at ¶¶ 24-25 (emphasis added).

Analyzing the first two *Dunlap* factors, the Court noted that it was indisputable that the statement of opinion was made in the context of a political discussion, that the audience of readers knew that, and therefore the audience expected the statement to contain vigorous political rhetoric:

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.

Tan v. Le, ¶ 26 (emphasis added), citing *Dunlap*, 105 Wn.2d at 539.

Petitioners submit that this case presents the following issue:

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?”

PFR, at 1, issue statement number 2.

Petitioners seem to say that the Respondents’ statements of opinion did *not* “arise out of a political debate.” If that is what they mean to suggest, then that suggestion is absurd. The statements contained an assertion of the Respondents’ opinion that Petitioner Tan was a supporter of a particular political party -- the Communist Party of Vietnam. It is hard to conceive of a more “political” issue than whether Tan is pro-Communist or anti-Communist. Petitioners have not cited to anything in the record which suggests that this debate took place outside the political arena. Moreover, such a contention is not even remotely plausible. This is not the type of issue that falls under the rubric of idle social gossip such as, “I think so-and-so dyes his hair.” When a citizen states his or her opinion that President Obama is a “socialist” or a “supporter of socialized medicine,” such a statement occurs in the context of political debate and is a nonactionable opinion. The same is true of the Respondents’ opinion that Duc Tan is a Communist.

Alternatively, if Petitioners intended to suggest that the Court of Appeals erred when it stated that statements of opinion that arise out of

political debate are not actionable, then the Petitioners' quarrel is actually with this Court's decision in *Dunlap*. If this is their argument, then what they are really saying is that the opinion below is *consistent* with this Court's opinion in *Dunlap* and that they do not like the *Dunlap* decision and wish the Court of Appeals had not followed it. This is not a reason for granting discretionary review.

The Court below also analyzed the third *Dunlap* factor – whether the publications implied the existence of any undisclosed facts – and concluded that they did not:

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 VCT 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 Wash.2d at 540, 716 P.2d 842* (quoting Keeton, *Defamation & Freedom of the Press*, 54 Tex. L. Rev. 1221, 1250-51 (1976) (where an author makes an assertion 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 VCT are Communists or Communist sympathizers are protected political opinions.*

Tan v. Le, at ¶ 27 (emphasis added).

Petitioners make no claim that the statements of opinion implied the existence of undisclosed facts. On the contrary, they expressly *admit* that no such implication was ever made; but they confuse the concept of disclosure with the concept of accuracy. Their petition for review states:

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.

PFR, at 15 (emphasis added).

Petitioners are simply oblivious to the fact that the pertinent inquiry is *not* whether all of the Respondents’ statements of fact were entirely accurate; the pertinent question is whether all of the facts they were relying upon as support for their opinion were disclosed.¹ As this Court

¹ On page 15 of their *Petition for Review* the Petitioners make this complaint:

“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.’”

Without citing to the place in the opinion where this comment was made, (¶ 27) Petitioners misrepresent what the Court of Appeals actually said. First, the Court of Appeals did not put any quotation marks around “painstakingly.” But it did put quotation

noted in *Dunlap*, in the context of ongoing public debates “the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective bias of the speaker.” *Dunlap*, 105 Wn.2d at 539. “Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves.” *Id.* at 540. Since it is undisputed that Respondents did not imply the existence of undisclosed facts, the Court below properly determined that the third *Dunlap* factor (as well as the first and second factor) weighed against actionability.

Petitioners claim that the decision below is in conflict with this Court’s statement in *Mark* “that false statement are not actionable when they do not contribute ‘significantly greater opprobrium to the ‘sting’ of the publication.” PFR, at 11, quoting *Mark*, 96 Wn.2d at 496. Petitioners also claim that the decision below conflicts with the holding of *Herron* that

marks around the phrase “correct and true evidence.” Second, the phrase inside the quotation marks uses a plural form of the noun -- “true and correct evidences,” – not “true and correct evidence.” (See ¶ 16 and ¶ 27). Petitioners falsely imply that the Court of Appeals *itself* believed that the “evidence” indicating that Tan was a Communist was “true and correct” In fact, the Court of Appeals was actually referring to the *Respondents’* belief that the evidence they had collected was “true and correct.” By distorting the punctuation and ignoring the fact that the Court of Appeals was quoting the Respondents, the Petitioners have attempted to portray the Court of Appeals as making two conflicting statements by stating that it viewed the Respondents’ evidence as both “true and correct” and “hyperbole and exaggeration” at the same time.

unless a false statement results in some additional distinct and separate harm which was not inflicted by other nonactionable parts of the publication, the plaintiff has not suffered from any actionable defamation.²

The *Herron* decision states that when analyzing the “sting” of a publication “[t]he question is whether the false statement has resulted in damage which is distinct” from that caused by the rest of the news story.

Herron, 112 Wn.2d at 771.

If it has not, then whatever damage the plaintiff has suffered does not amount to defamation because it is not solely attributable to the falsehood.

Id.

Petitioners seek to evade the holdings of *Mark* and *Herron* by arguing that even if a false statement does not cause “distinct damage” by alleging some new defamatory fact not already implicated by the “sting” portion of the publication, it is nevertheless actionable if the new false fact increases the probability that the audience will tend to find the other “stinging” portion of the publication to be more persuasive. According to Petitioners, if the untrue facts are “persuasive” and “compel the reader to believe the

² Petitioners consistently miscites the *Herron* opinions. The first *Herron* opinion was reported in volume 109 of the Washington (Second) Reports and begins on page 514. The second *Herron* opinion was reported in volume 112 of the Washington (Second) Reports and begins on page 762. On page 12 of their Petition for Review the Petitioners consistently cite to pages of the *Herron* decision that are supposed to be in volume 112

defendants' assertions regarding the plaintiffs' alleged Communist activities," then the untrue fact does cause significantly greater opprobrium" by making the allegation that bears the "sting" more believable. *PFR*, at 14.

Petitioners do not try to give an example of what they are talking about, perhaps because any example would serve only to illustrate how illogical their contention is. For example, in this case everyone agrees that the "sting" of the publications is the assertion of the Respondents' opinion that Duc Tan is a Communist. Moreover, it is undisputed that at a VCTC cultural event the band hired by Duc Tan initially played some of the national anthem of the Communist government of Vietnam. It is disputed, however, how much of a negative reaction and outcry from the audience the playing of the Communist anthem provoked. The Petitioners say there was not much of a reaction at all; the Respondents say that it caused quite a ruckus. According to Petitioners interpretation of *Mark* and *Herron*, if the statement that there was a big reaction was false, then this false statement added to the "sting" of the statement that Respondents believed Tan to be a Communist. Petitioners claim is *not* based on the argument that the statement that there was a big negative audience reaction itself

which are not in fact references to any actual pages of the second *Herron* decision. They appear to be citations to the first opinion which is reported in volume 109.

carried a significant “sting.” They make no contention that the allegation that there was a big audience reaction caused “significantly more opprobrium” by inflicting reputational damage which is separate and distinct from the statement that petitioners believed Duc Tan to be a Communist. Instead, Petitioners’ claim that it causes “distinct” reputational damage because it makes the statement of opinion that Duc Tan is a Communist more believable. But this logic distorts the meaning of the word “distinct” and utterly ignores the holding of *Herron* that false statements which do not cause “distinct” reputational damage are not actionable because “whatever damage” they cause “is not solely attributable to the falsehood.” *Herron*, 112 Wn.2d at 771.

If accepted, Petitioners’ interpretation of the meaning of “distinct” reputational damage would render the holdings of *Herron* and *Mark* utterly meaningless. Since every false statement, no matter how minor, would have some tendency to make the gist of the entire statement more “persuasive,” no false statement would ever cause “distinct” reputational damage. Thus, the statement in *Herron* requiring “distinct” damage “solely attributable” to the falsehood would have no meaning because every false statement would cause distinct damage. Similarly, *Mark* explicitly holds that so long as the gist of a publication is true, “a

defamation defendant need *not* prove the literal truth of every claimed defamatory statement.” *Mark*, 96 Wn.2d at 494 (emphasis added). But every false defamatory statement would have some tendency to make the “gist” of the publication more believable. Thus, Petitioners’ interpretation of these cases is also in direct conflict with *Mark* because it would mean that in every case a defamation defendant *would* have to “prove the literal truth of every claimed defamatory statement,” even if the “gist” of publication was substantially true or nonactionable opinion.

2. THE DECISION BELOW CORRECTLY APPLIED THE CONSTITUTIONAL RULE REQUIRING INDEPENDENT DE NOVO REVIEW OF THE EVIDENCE OF ACTUAL MALICE.

Petitioners have asserted that the Court of Appeals misapplied the First Amendment standard of review. In their petition they set forth this issue:

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

PFR, at 2, issue statement number 7. Having set forth this issue statement, Petitioners then completely fail to address it in their petition. No argument is made addressed to this alleged issue.

In one respect this is not surprising since it would be impossible for

Petitioners to cite to any case law which supports their contention that an error was committed. In fact, an overwhelming body of case law conclusively establishes that appellate court judges “have a constitutional duty to exercise independent judgment and to determine de novo whether the record establishes actual malice with convincing clarity.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989). “[T]he rule of independent review assigns to judges a constitutional duty that cannot be delegated to the trier of fact, whether that factfinding function be performed in the particular case by a jury or by a trial judge.” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). “The simple fact is that First Amendment questions of constitutional fact compel this Court’s de novo review.” *Id.* at 508, n.27. When the appellate court conducts such an independent review, it must ask not whether there was sufficient evidence to convince the trier of fact, but whether the judges of the appellate court themselves are convinced that actual malice was proved by clear and convincing evidence. *See, e.g., Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (“we have undertaken an independent examination of the record as a whole ‘so as to ensure *ourselves* that the judgment does not constitute a forbidden intrusion on the field of freedom of expression.’”) (emphasis added).

This Court has consistently followed the *Harte-Hanks/Bose* rule requiring independent de novo review of the evidence of actual malice in public figure defamation cases. See, e.g., *Richmond v. Thompson*, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996); *Tilton v. Cowles Pub'g Co.*, 76 Wn.2d 707, 720, 459 P.2d 8 (1969).

In sum, not only was it *not* error for the Court below to have engaged in independent de novo review of the evidence of actual malice, but *it would have been error* if the Court of Appeals had *failed* to engage in such de novo review.

D. CONCLUSION

The decision below is fully consistent with this Court's past decisions in *Mark*, *Dunlap* and *Herron*. There was no error in applying an independent de novo standard of appellate review to the issue of whether there was clear and convincing evidence of actual malice. That is exactly what this Court has done before in *Richmond* and *Tilton*, and that is what is constitutionally required by several decisions of the United States Supreme Court. Thus, there is no substantial issue of constitutional law presented by this case.

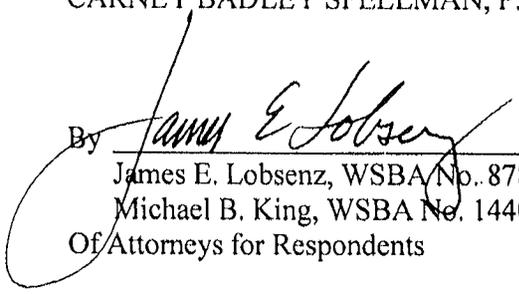
Well settled principles of defamation law were properly applied to the facts of this case and the Court below correctly threw out the judgment.

None of the criteria of RAP 13.4(b) for granting discretionary review are met here. Respondents respectfully submit that review should be denied.

DATED this 17th day of June, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By


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APPENDIX A

--- P.3d ----, 2011 WL 1491697 (Wash.App. Div. 2)
 (Cite as: 2011 WL 1491697 (Wash.App. Div. 2))

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
 Division 2.

DUC TAN, a single man; and Vietnamese Community of Thurston County, a Washington corporation, Respondents,

v.

Norman LE and Phu Le, husband and wife; Tuan A. Vu and Huynh T. Vu, 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 Duong, wife and husband; and Nhan T. Tran and Man M. Vo, wife and husband, Appellants.

No. 39447-2-II.

April 19, 2011.

Background: Vietnam refugee, and nonprofit corporation for county's Vietnamese community, in which Vietnam refugee was a leader, brought defamation claims against Vietnam natives who were members of organization that disseminated an e-mail message and several newsletter articles throughout state's Vietnamese community accusing plaintiffs of being Communists or Communist supporters. The Superior Court, Thurston County, Wm Thomas McPhee, J., entered judgment on jury's verdict awarding plaintiff refugee \$225,000 and awarding plaintiff nonprofit corporation \$85,000. Defendants appealed.

Holdings: The Court of Appeals, David H. Armstrong, J., held that:

- (1) e-mail message did not contain a statement implying existence of undisclosed facts underlying the opinion expressed in the message;
- (2) allegedly false statements in the message did not affect its "sting"; and
- (3) evidence did not establish actual malice.

Reversed and remanded for dismissal.

West Headnotes

[1] Libel and Slander 237

237 Libel and Slander

2371 Words and Acts Actionable, and Liability Therefor

237k1 k. Nature and Elements of Defamation in General. Most Cited Cases

A defamation action consists of four elements: (1) a false statement; (2) lack of privilege; (3) fault; and (4) damages.

[2] Constitutional Law 92 2165

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2165 k. Opinion. Most Cited Cases

Because there is no such thing as a false idea, most expressions of opinion are protected by the First Amendment and are not actionable as being defamatory. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 2165

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2165 k. Opinion. Most Cited Cases

An opinion can support a defamation claim, as exception to general rule of First Amendment protection against defamation claims relating to expressions of opinion, if it implies that undisclosed defamatory facts form the basis of the opinion. U.S.C.A. Const.Amend. 1; Restatement (Second) of Torts § 566.

[4] Constitutional Law 92 2165

92 Constitutional Law

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92XVIII(X) Defamation

92k2160 In General

92k2165 k. Opinion. Most Cited Cases

First Amendment protection against defamation claims applies to an opinion that implies defamatory facts, if audience members know the facts underlying the assertion and can judge the truthfulness of the alleged defamatory statement themselves. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ⚡963

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)I In General

92k963 k. Questions of Law or Fact.

Most Cited Cases

Whether an allegedly defamatory statement is actionable, in light of First Amendment protection of expressions of opinion, is a threshold question of law for the court. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law 92 ⚡2165

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2165 k. Opinion. Most Cited Cases

In considering whether an allegedly defamatory statement is actionable, in light of First Amendment protection of expressions of opinion, the court examines all the circumstances surrounding it, and is guided by three factors.: (1) the medium and context in which the statement was published; (2) the audience to whom it was published; and, as the most crucial factor, (3) whether the statement implied undisclosed facts. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ⚡2165

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2165 k. Opinion. Most Cited Cases

In considering whether an allegedly defamatory statement is actionable, in light of First Amendment protection of expressions of opinion, generally, audiences should expect statements of opinion in contexts such as political debates, and courts 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. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ⚡2168

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2167 Particular Issues and Applications

92k2168 k. In General. Most Cited Cases

Libel and Slander 237 ⚡6(1)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k6 Actionable Words in General

237k6(1) k. In General. Most Cited Cases

Nonparty members of Vietnamese community, as recipients of e-mail message accusing plaintiff **Vietnam** refugee and a nonprofit corporation of which he was a leader of being Communists or Communist supporters, understood the context of the statements and the authors' biases, as factor weighing in favor of finding that the statements were opinions protected by First Amendment, in defamation action against **Vietnam** natives who were members of organization that disseminated the

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message throughout state's Vietnamese community; plaintiff refugee and defendants were prominent community leaders engaged in protracted debate over how best to achieve political goals of Vietnamese refugee community, political activities of their respective organizations and committees, such as efforts to remove displays of the Communist flag across state, were matters of public concern to Vietnamese community, and defendants sought exchange of ideas by inviting representatives of non-profit corporation to public hearing to present corporation's side of the matter. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 ↪2168

92 Constitutional Law
 92XVIII Freedom of Speech, Expression, and Press
 92XVIII(X) Defamation
 92k2167 Particular Issues and Applications
 92k2168 k. In General. Most Cited Cases

Libel and Slander 237 ↪6(1)

237 Libel and Slander
 237I Words and Acts Actionable, and Liability Therefor
 237k6 Actionable Words in General
 237k6(1) k. In General. Most Cited Cases
 E-mail message accusing plaintiff **Vietnam** refugee and a nonprofit corporation of which he was a leader of being Communists or Communist supporters did not contain a statement implying existence of undisclosed facts, as factor weighing in favor of finding that the statements were opinions protected by First Amendment, in defamation action against **Vietnam** natives who were members of organization that disseminated the message throughout state's Vietnamese community; message painstakingly outlined what it called "correct and true evidences [sic]" to support the conclusion that plaintiffs supported the Communist Party. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 ↪2165

92 Constitutional Law
 92XVIII Freedom of Speech, Expression, and Press
 92XVIII(X) Defamation
 92k2160 In General
 92k2165 k. Opinion. Most Cited Cases
 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, under the First Amendment, for the expression of opinion. U.S.C.A. Const.Amend. 1; Restatement (Second) of Torts § 566 cmt. c.

[11] Libel and Slander 237 ↪6(1)

237 Libel and Slander
 237I Words and Acts Actionable, and Liability Therefor
 237k6 Actionable Words in General
 237k6(1) k. In General. Most Cited Cases
 Not every misstatement of fact is actionable as being defamatory; it must be apparent that the false statement presents a substantial danger to the plaintiff's personal or business reputation.

[12] Libel and Slander 237 ↪6(1)

237 Libel and Slander
 237I Words and Acts Actionable, and Liability Therefor
 237k6 Actionable Words in General
 237k6(1) k. In General. Most Cited Cases
 When a report contains a mixture of true and false statements, a false statement affects the "sting" of the report, for purposes of determining whether the false statements are actionable as being defamatory, only when significantly greater opprobrium results from the report containing the falsehood than would result from the report without the falsehood.

[13] Libel and Slander 237 ↪6(1)

237 Libel and Slander

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237k6 Actionable Words in General

237k6(1) k. In General. Most Cited Cases

The "sting" of a report, for purposes of determining whether false statements in a report containing a mixture of true and false statements are actionable as being defamatory, is the gist or substance of a report when considered as a whole.

[14] Constitutional Law 92 ↪2168

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2167 Particular Issues and Applications

92k2168 k. In General. Most Cited Cases

Libel and Slander 237 ↪6(1)

237 Libel and Slander

237I Words and Acts Actionable, and Liability Therefor

237k6 Actionable Words in General

237k6(1) k. In General. Most Cited Cases

Even if e-mail message accusing plaintiff **Vietnam** refugee and a nonprofit corporation of which he was a leader of being Communists or Communist supporters, which accusation was an opinion that was protected under First Amendment from defamation claims, contained a mixture of underlying true and false statements, false statements did not affect message's "sting," as would make false statements actionable, in defamation action against **Vietnam** natives who were members of organization that disseminated the message throughout state's Vietnamese community; plaintiffs' theory was that being labeled a Communist was the most severe and shameful accusation in the world of Vietnamese refugee politics, and allegedly false statements did not impugn some other aspect of plaintiff refugee's character or corporation's associations, and instead were presented in message in support of message's

assertion that plaintiffs were Communists. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 ↪1555

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)3 Particular Issues and Applications in General

92k1555 k. Matters of Public Concern. Most Cited Cases

Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law 92 ↪2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General. Most Cited Cases

In light of First Amendment protection of speech, a public figure defamation plaintiff must prove with clear and convincing evidence that the defendant made the statements with actual malice. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law 92 ↪2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General. Most Cited Cases

A defendant acts with "actual malice," as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure, when he knows the statement is false or reck-

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lessly disregards its probable falsity. U.S.C.A. Const.Amend. 1.

[18] Constitutional Law 92 ↪2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.

Most Cited Cases

A defamation plaintiff proves "reckless disregard," for purposes of actual malice requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure, 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. U.S.C.A. Const.Amend. 1.

[19] Constitutional Law 92 ↪2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.

Most Cited Cases

Inquiry regarding actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure, focuses on whether defendant believed in the truth of the challenged statement, and the court does not measure reckless conduct by asking whether a reasonably prudent person would have published or would have investigated before publishing. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law 92 ↪2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.

Most Cited Cases

Actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure, can 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, but 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. U.S.C.A. Const.Amend. 1.

[21] Appeal and Error 30 ↪987(4)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and

Findings

30XVI(1)1 In General

30k987 Power and Duty to Review

30k987(4) k. Duty to Review. Most

Cited Cases

Appeal and Error 30 ↪1001(1)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and

Findings

30XVI(1)2 Verdicts

30k1001 Sufficiency of Evidence in

Support

30k1001(1) k. In General. Most

Cited Cases

Constitutional Law 92 ↪2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.

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Most Cited Cases

In reviewing a defamation verdict in favor of a public figure, the First Amendment requires the appellate court to independently evaluate whether the record supports a finding of actual malice, and while the appellate court still defers to the fact finders' credibility determinations, the appellate court has considerable latitude in deciding whether the evidence supports a finding of actual malice. U.S.C.A. Const.Amend. 1.

[22] Constitutional Law 92 ⚡2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.

Most Cited Cases

A finding that the defendant or his spokesperson has not been credible may be sufficient to prove actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure, when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves, 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. U.S.C.A. Const.Amend. 1.

[23] Appeal and Error 30 ⚡1001(1)

30 Appeal and Error

30XVI Review

30XVI(1) Questions of Fact, Verdicts, and Findings

30XVI(1)2 Verdicts

30k1001 Sufficiency of Evidence in Support

30k1001(1) k. In General. Most

Cited Cases

Constitutional Law 92 ⚡2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.

Most Cited Cases

Where the appellate court can only speculate as to jury's assessment of each witness, and where events underlying the alleged defamation are wrapped in obscurity and capable of being interpreted or described in more than one way, appellate court requires evidence independent of possible credibility determinations to support a jury's finding of actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure. U.S.C.A. Const.Amend. 1.

[24] Constitutional Law 92 ⚡2169

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2167 Particular Issues and Applications

92k2169 k. Public Figures. Most Cited Cases

Libel and Slander 237 ⚡112(2)

237 Libel and Slander

237IV Actions

237IV(C) Evidence

237k112 Weight and Sufficiency

237k112(2) k. Intent, Malice, or Good Faith. Most Cited Cases

Even if jury, in defamation action relating to newsletter articles distributed throughout state's Vietnamese community and accusing plaintiff Vietnam refugee of being a Communist or Communist supporter, rejected all of defendants' professions of good faith and believed that defendants were disingenuous in citing plaintiff's history with Communist party as basis for their good faith claim, the dis-

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credited testimony failed to meet the clear and convincing standard for establishing actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure, where the underlying events were capable of being honestly perceived very differently by different people. U.S.C.A. Const.Amend. 1.

[25] Constitutional Law 92 2169

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation
 92k2167 Particular Issues and Applications
 92k2169 k. Public Figures. Most Cited Cases

Libel and Slander 237 51(5)

237 Libel and Slander

237II Privileged Communications, and Malice Therein

237k51 Existence and Effect of Malice
 237k51(5) k. Criticism and Comment on Public Matters and Publication of News. Most Cited Cases

Evidence that defendants made no effort to contact plaintiff Vietnam refugee, or to investigate authenticity of apron that allegedly bore Communist symbols, before defendants distributed throughout state's Vietnamese community an e-mail message accusing plaintiff of being a Communist or Communist supporter, did not establish actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure; such conduct merely suggested the defendants were negligent. U.S.C.A. Const.Amend. 1.

[26] Constitutional Law 92 2163

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(X) Defamation

92k2160 In General

92k2163 k. Public Figures in General.
 Most Cited Cases

A showing of ill will or malice, in the ordinary sense, is insufficient to prove actual malice, as requirement, in light of First Amendment protection of speech, for a defamation claim by a public figure. U.S.C.A. Const.Amend. 1.

Appeal from Thurston Superior Court; Honorable Wm Thomas McPhee, J. Michael Barr King, James Elliot Lobsenz, Carney Badley Spellman PS, Howard Mark Goodfriend, Smith Goodfriend PS, Seattle, WA, Nigel Stephen Malden, Nigel Malden Law, Rebecca Marie Larson, Davies Pearson PC, Tacoma, WA, for Appellants.

Gregory M. Rhodes, Younglove & Coker, PLLC, Olympia, WA, for Respondents.

PUBLISHED OPINION

ARMSTRONG, J.

*1 ¶ 1 In 2004, members of the Committee Against the Viet Cong Flag disseminated an e-mail message and several newsletter articles throughout the Olympia Vietnamese community accusing Duc Tan and the Vietnamese Community of Thurston County (VCTC), a nonprofit corporation, of being communists or communist supporters. Tan and the VCTC sued the committee members for defamation. A jury found the defendants liable for defamation and awarded Tan and the VCTC \$310,000 in damages. On appeal, the defendants argue, in part, that (1) the statements in the letter are opinions and therefore not actionable and (2) even if some of the supporting factual statements are false, the plaintiffs failed to prove that the defendants published the defamatory statements with actual malice. We agree that the statements in the e-mail and newsletters are not actionable and that Tan and the VCTC failed to show that the defendants published the statements with actual malice. Accordingly, we reverse and remand for dismissal.

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FACTS

A. Parties

¶ 2 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.

¶ 3 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.

¶ 4 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.

¶ 5 Norman Le, Dat Ho, Phiet Nguyen, Nhan Tran, and Nga Pham, five of the defendants,^{FNI} 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.

*2 ¶ 6 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

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

1. Name Change of the VCTC

¶ 8 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 renamed the "Vietnamese Community Association of Thurston County," which was later shortened to VCTC.

2. VCTC Allegedly Receiving Money from the Viet Cong

¶ 9 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 mon-

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etary 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

¶ 10 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

¶ 11 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

*3 ¶ 12 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

¶ 13 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

¶ 14 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

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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.

¶ 15 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

*4 ¶ 16 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

¶ 17 Three additional newsletter articles, written by Le, contain allegedly defamatory statements. The first two articles were published on November

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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 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.

*5 ¶ 18 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

¶ 19 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.

¶ 20 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

¶ 21 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.

¶ 22 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.

[1][2] ¶ 23 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 Wash.2d 762, 768, 776 P.2d 98 (1989). Generally, a statement must be one of fact to be actionable. *Dunlap v. Wayne*, 105 Wash.2d 529, 538, 716 P.2d 842 (1986); see also *Schmalenberg v. Tacoma News, Inc.*, 87 Wash.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 Wash.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.").

[3][4][5] ¶ 24 An opinion can support a defamation claim if it implies that undisclosed defamatory facts form the basis of the opinion. *Dunlap*, 105 Wash.2d at 538, 716 P.2d 842 (quoting Re-

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statement (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 Wash.2d at 540, 716 P.2d 842. We will not seek to impose a rigid distinction between fact and opinion. *Dunlap*, 105 Wash.2d at 538-39, 716 P.2d 842; *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 Wash.App. 916, 922, 684 P.2d 739 (1984).

*6 [6] ¶ 25 In considering whether an allegedly defamatory statement is actionable, we examine all the circumstances surrounding it. *Dunlap*, 105 Wash.2d at 539, 716 P.2d 842. 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 Wash.2d at 539, 716 P.2d 842. The third circumstance is the most crucial of the three factors. *Dunlap*, 105 Wash.2d at 539, 716 P.2d 842.

[7][8] ¶ 26 Generally, audiences should expect statements of opinion in contexts such as political debates. *Dunlap*, 105 Wash.2d at 539, 716 P.2d 842. 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 Wash.2d at 539, 716 P.2d 842. Accordingly, we accept that the Vietnamese community, as recipients of the Public Notice, understood the context of the statements and the authors' biases.

[9] ¶ 27 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 Wash.2d at 540, 716 P.2d 842 (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

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to the hearing to examine the "evidences" and evaluate the accuracy of the accusations. All three of the *Dunlop* 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, 131 L.Ed.2d 1193 (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)).

*7 [10][11][12][13] ¶ 28 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 Wash.2d at 538, 716 P.2d 842 (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 Wash.2d 473, 493, 635 P.2d 1081 (1981); *Ernst Home Cir., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001*, 77 Wash.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 Wash.2d at 769, 776 P.2d 98. The "sting" of a report is the gist or substance of a report when considered as a whole. *Herron*, 112 Wash.2d at 769, 776 P.2d 98. 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 Wash.2d at 774, 776 P.2d 98.

¶ 29 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 Wash.2d at 496, 635 P.2d 1081. 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 Wash.2d at 774, 776 P.2d 98. 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 Wash.2d at 774, 776 P.2d 98. 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 Wash.2d at 774, 776 P.2d 98.

[14] ¶ 30 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." 1 RP 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.

*8 ¶ 31 Moreover, many of the allegedly false

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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 Wash.2d at 539, 716 P.2d 842.

[15] ¶ 32 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. FN2

¶ 33 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 news-

letter 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

*9 ¶ 34 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.

[16][17][18] ¶ 35 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 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.

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209, 13 L.Ed.2d 1094 (1964); *Herron*, 112 Wash.2d at 775, 776 P.2d 98.

[19][20] ¶ 36 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 Wash.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 Wash.2d at 200, 760 P.2d 324. 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 Wash.2d at 200, 760 P.2d 324.

[21] ¶ 37 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 Wash.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.

*10 ¶ 38 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 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 ap-

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pellate 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.

¶ 39 The Washington State Supreme Court engaged in a *Bose* analysis in *Richmond*, 130 Wash.2d at 389, 922 P.2d 1343. 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 Wash.2d at 373-74, 922 P.2d 1343. 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 Wash.2d at 388-89, 922 P.2d 1343. In reaching this conclusion, the court accepted that the jury gave great weight to the trooper's testimony, but also relied on the "direct evidence" of the eyewitnesses and the timing of Thompson's allegations. *Richmond*, 130 Wash.2d at 388-89, 922 P.2d 1343.

*11 [22][23] ¶ 40 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.

[24] ¶ 41 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.

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¶ 42 Tan and the VCTC also argue that the defendants knew their statements were false because the defendants must have been "aware" of the truth. 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.

*12 [25] ¶ 43 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.

¶ 44 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 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.

¶ 45 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 Wash.2d at 389, 922 P.2d 1343. Thus, concrete, factual evidence of actual malice supported credibility determinations made in the plaintiffs' favor in both *Harte-Hanks* and *Richmond*.

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*13 [26] ¶ 46 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.

¶ 47 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 infer-

ences 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.

¶ 48 We reverse and remand for dismissal.

We concur: QUINN-BRINTNALL, J., and PENO-YAR, C.J.

FN1. The remaining defendants are their respective spouses. Tuan Vu, who also signed the e-mail message, was dismissed from the lawsuit.

FN2. 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 Wash.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).

FN3. 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 testi-

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fied 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.

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