

NO. 39447-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

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

Respondents,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS
LE, HO, TRAN & VO

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A. ARGUMENT IN REPLY

1. BECAUSE THERE WAS NO IMPLICATION THAT THE DEFENDANTS HAD KNOWLEDGE OF ADDITIONAL UNDISCLOSED FACTS, THE OPINION THAT DUC TAN WAS A COMMUNIST IS NONACTIONABLE.

a. Plaintiffs Ignore the Law Set Forth In Instruction No. 9 and The *Dunlap* Criteria for Determining Whether There Is Liability for A Defamatory Opinion.

The trial judge's jury instruction No. 9 read as follows:

A defamatory statement is a false assertion of fact or implied fact.

A statement consisting solely of pure opinion is not defamatory, and is to be contrasted with a statement of fact, which is either provably true or provably false.

A defamatory statement may consist of a statement in the form of an opinion, but *a statement of this nature is defamatory only if it implies the existence of undisclosed defamatory facts as the basis for the opinion.*

CP 165, (emphasis added). The last paragraph of the instruction is a nearly verbatim quotation from *Dunlap v. Wayne*, 105 Wn.2d 529, 538, 716 P.2d 842 (1986) (the instruction uses the word "defamatory" where the opinion uses the word "actionable"). *Dunlap* sets forth three factors to be used when determining when a statement is nonactionable opinion. The plaintiffs ignore these factors and fail to address them at all, an error that should prove fatal to the legal tenability of their judgment.

b. When There are No Undisclosed Facts, The Reader Has All the Data Necessary to Evaluate the Writer's Opinion and To Decide Whether He Agrees With It. Under These Circumstances, No Matter How Unreasonable or Derogatory the Opinion May Be, It Is Not Actionable.

"[W]hether the statement of opinion implies that undisclosed facts support it," is identified in *Dunlap* as "perhaps the most crucial factor" in

deciding whether opinion is actionable. *Id.* at 539-540. The opinion in that case was nonactionable because no undisclosed facts were implied. “Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the alleged defamatory statement themselves.” *Id.* at 540. When the facts upon which an opinion is based are fully disclosed, there can be no action for defamation “no matter how unjustified and unreasonable the opinion may be or how derogatory it is.” *Dunlap*, 105 Wn.2d at 540.

Literally dozens of cases have rejected defamation liability as a matter of law by applying the same rule. For example, the issue in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), was whether attorney Yagman’s derogatory remarks about Judge William Keller constituted defamation that was not protected by the First Amendment. Like the defendants in this case, attorney Yagman offered his opinion as to what was going on inside the mind of another person. Yagman said he thought Judge Keller was an anti-Semite; the defendants said they believed that Duc Tan was a Communist.

Yagman was quoted in a newspaper article as saying that Judge Keller “has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-Semitism.” *Id.* at 1434. The Ninth Circuit held that because that statement “conveys Yagman’s personal belief that Judge Keller is anti-Semitic,” it was an opinion. *Id.* at 1438. “As such, it may be the basis for sanctions only if it could reasonably be understood as declaring or implying actual facts capable of

being proved true or false.” *Id.* at 1438-39. The court then distinguished between an opinion which implies the existence of undisclosed facts, and an opinion which does not:

The statement, “I think Jones is an alcoholic,” for example, is an expression of opinion based on implied, undisclosed facts, [citation] because the statement “gives rise to the inference that there are undisclosed facts that justify the forming of the opinion,” [citation]. Readers of this statement will reasonably understand the author to be implying he knows facts supporting his view – e.g., that Jones stops at a bar every night after work and has three martinis. If the speaker has no such factual basis for his assertion, the statement is actionable, even though phrased in terms of the authors’ personal belief. [Footnote omitted].

A statement of opinion based on expressly stated facts, on the other hand, might take the following form: “[Jones] moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair . . . with a drink in his hand. I think he must be an alcoholic.” [Citation]. This expression of opinion appears to disclose all the facts on which it is based, and does not imply that there are other unstated facts supporting the belief that Jones is an alcoholic.

Yagman, 55 F.3d at 1439. As the court explained, the second statement is not actionable, even though it is both derogatory and unreasonable:

The rationale behind this rule is straightforward: When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author’s interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional undisclosed facts. [Citations]. Moreover, an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea”; readers are free to accept or reject the author’s opinion based on their own independent evaluation of the facts.

Yagman, 55 F.3d at 1439.¹

¹ Many other courts have reached similar conclusions. *See, e.g., Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983) (attorney claimed he had been defamed by article calling him a “shady practitioner” but since the article set forth the facts upon which the opinion was based, the appellate court reversed and set aside a judgment in favor of the attorney
(footnote continued on next page)

Since Yagman disclosed the factual basis for his opinion and did not imply that he had any other undisclosed basis for holding it, his opinion was fully protected speech and he could not be sanctioned for it. *Id.* at 1440. The same is true in this case. Since the defendants disclosed all the facts that led them to believe that Duc Tan was a Communist, and did not imply that they knew of any additional undisclosed facts, the First Amendment precludes holding them liable for voicing their opinion.²

c. **Here, As in *Nat'l Ass'n of Government Employees v. Central Broadcasting, Imposition of Defamation Liability for Expressing the Opinion That Someone Is a "Communist" Would Violate the First Amendment.***

Over thirty years ago, the highest court in Massachusetts dealt with a very similar set of facts and concluded that, as a matter of law, the First

plaintiff); *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1995) (holding that there could be no defamation liability for expressing opinion that plaintiff was an incompetent attorney because defendants set forth all the facts upon which opinion was based);¹ *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993) (opinion that charity was making large profits due to "hefty" mark-up was not actionable because the basis for that opinion was fully disclosed); *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730 (1st Cir. 1992) (opinion that producers of musical were deceptively trying to pass off their show named Phantom of the Opera as the musical with the same name written by Andrew Lloyd Webber was not actionable because of author's "full disclosure of the facts underlying his judgment"); *Troy Group, Inc. v. Tilson*, 364 F.Supp.2d 1149, 1159 (C.D. Cal. 2005) (statement that plaintiffs were "crooks" accompanied by list of documents was nonactionable statement of opinion because reader would understand it was based entirely and exclusively upon these documents); *Thomas v. Los Angeles Times*, 189 F.Supp.2d 1005, 1016 (C.D. Cal. 2002) (statement of author's opinion that plaintiff lied was not actionable because it was "based on disclosed facts").

² In his closing argument, plaintiff's counsel acknowledged that the defendants' Public Notice was a statement of opinion, but he argued that the defendants should have taken Tan aside and asked him to clarify his past conduct before they published their opinion: "That is extremely hard to believe that Vietnamese etiquette allows them to publicly defame someone in this manner but yet not privately take the person aside to clarify *their opinions* before they are published." RP IX, 1608 (emphasis added).

Amendment protected the defendant's statement of opinion. In *National Association of Government Employees v. Central Broadcasting Corp.*, 379 Mass. 220, 396 N.E.2d 996 (1979), a radio talk show host made statements on the air in which she agreed with a caller's statement that a union was engaging in Communist tactics. The union had been attempting to negotiate a collective bargaining agreement with the town of Ware, Massachusetts. Abraham Goodman, the chairman of the town board of selectman, opposed approval of the contract. The union had tried to pressure Goodman into not making any statements critical of the proposed CBA. Angered by the attempt to silence him, Goodman called the radio station and made remarks to the talk show host that people needed to "get together and stop the inroad of communism" that the union represented. The talk show host said on air that she agreed with everything Goodman was saying. The union then sued the radio station for defamation. On appeal, the court held that as a matter of law, the statement of opinion by the talk show host was constitutionally protected opinion and ordered that judgment be entered for the defendant.

Since the talk show host had disclosed all of the facts underlying her statement of opinion, the court held that her statement could not be the basis for a defamation action:

Those facts were that the plaintiff union had warned Goodman against speaking adversely at the town meeting the substance of the letter of February 2; and had sought an FCC investigation of the defendant's right to retain its station license. ***Murphy's statement at the end of the broadcast pointed to these facts*** and gave her opinion, in effect, that they amounted to an attempt to subvert free speech (and in that sense resembled communist tactics). ***In the light***

of the facts, hearers could make up their own minds and generate their own opinions or ideas which might or might not accord with Murphy's. These circumstances remove the case from the category of actionable defamation, no matter how invidious or derogatory the expression "communism" is conceived to be. In a larger view, a state of affairs in which opinion is recognizable as such because its factual ingredient is known or assumed, presents a clear case for full First Amendment protection including freedom from civil liability.

Central Broadcasting, 396 N.E.2d at 1000 (emphasis added).

This case is virtually indistinguishable from *Central Broadcasting*. Indeed, in this case the defendants not only listed all the facts upon which their opinion was based, they also explicitly invited the public to examine these facts and to form their opinions. Moreover, in addition to listing all the evidence they relied upon in the Public Notice,³ the defendants stated that the key piece of physical evidence -- the Santa Claus apron -- "will be displayed at the next press conferences [sic] so the public can see it in person." Trial Exhibit No. 8. Here, as in *Central Broadcasting*, because the "factual ingredients" underlying the defendants' opinion were explicitly disclosed, the defendants were entitled to "full First Amendment protection including freedom from civil liability."

³ See Trial Exhibit No. 8. As defendants' counsel noted: "But one thing about this public announcement, they listed all of the information on which they were basing their opinion." RP IX, 1643. "The defendants didn't just say, well, he's a communist. No. They said we've got a lot of things we're concerned with. It's a long history dating way back to 1995. And this apron is the last thing here. And here's a photo of the apron, and if they don't think there's anything wrong with it, they can make up their own minds. That's how we do it in the United States of America. We allow people to express their views, and others can read it, agree with it, or disagree or write their own response or write their own theory." RP IX, 1645-46.

d. When a Writing Contains a Mixture of True and False Statements, It is Actionable Only If Significantly Greater Opprobrium Results from Inclusion of the False Statements Than Would Have Resulted Had They Not Been Included.

The plaintiffs seek to evade the conclusion that the defendants' opinion was nonactionable by arguing that they were defamed by some of the statements of the underlying facts relied upon to justify the opinion. Some of those statements contained allegedly false assertions. But it is well established that a defamation defendant is not liable merely because some factual misstatements are included in support of the statement -- here, the charge of being a Communist -- that is the gist of the plaintiff's case. *See Mark v. Seattle Times*, 96 Wn.2d 473, 494, 635 P.2d 1081 (1981). *Accord Mohr v. Grant*, 153 Wn.2d 812, 825, 108 P.3d 768 (2005). For example, in *Mark*, since the gist of the story was that Mark had been arrested for Medicaid fraud, the court held that an inaccuracy about the amount of money that was fraudulently billed was irrelevant because it did not alter the "sting" of the news story.

Where a report contains a mixture of true and false statements, a false statement (or statements) affects the "sting" of a report *only when "significantly greater opprobrium" results* from the report containing the falsehood than would result from the report without the falsehood.

Herron v. KING Broadcasting Co., 112 Wn.2d 762, 769, 776 P.2d 98 (1989) (emphasis added); *see also Mohr*, 153 Wn.2d at 826.

e. The "Sting" of the Public Notice Was The Statement of the Defendants' Opinion That Duc Tan Was a Communist.

The "sting" of the defendants' Public Notice was their opinion that Duc Tan (and, through him, the VCTC as an organization) was

Communist. In closing argument, plaintiffs' counsel readily acknowledged that this assertion was the essence of Tan's claim that he was defamed. Asserting that Tan's alleged devotion to anti-Communism was "[a]t the core of who he is," plaintiffs' counsel said that this was why the accusation that Tan was pro-Communist "are so incredibly hurtful for my client." RP IX, 1591-92. "[F]or him, there is no insult that could be greater than being called a communist." RP IX, 1614.⁴

f. **Even Assuming There Were Factual Misstatements, Such as The Contention That There Was a "Violent Protest" When a Band at a VCTC Event Started Playing the Communist National Anthem, Such Inaccuracies Did Not Cause "Significantly Greater Opprobrium" Than Would Have Been Caused By The Expression of The Defendants' Opinion – That Tan Was A Communist -- Without Such Inaccuracies.**

The plaintiffs argue that since there were *some* misstatements of fact, the verdict in their favor can be affirmed. For example, they take issue with the statement in the Public Notice that "the audience stood up and protested violently" when the band at the October 4, 1997 event started playing the Communist national anthem. Tr. Exhibit No. 8, Section II, ¶ 4. The defendants testified that this "shocked a lot of people" and "stirred up" the community. RP VI, 1083. The plaintiffs put on contrary evidence that there was little or no reaction. RP III, 414; RP IV, 667, 791; RP V, 855. The plaintiffs contend that the statement that a violent protest

⁴ See also RP IX, 1611-12 ("[F]or someone who at the core of his whole being is opposed to the communists and has spent his whole life devoted to that cause, to be labeled this way is potentially – it is not just an insult. It is the insult. It is the one accusation that entirely strips away Mr. Tan's dignity and honor . . .").

occurred was a false statement of fact. *Respondents' Brief*, at 16. But the plaintiffs ignore the fact that the “sting” of the Public Notice was the assertion by the defendants that they believed Tan was a Communist. *That* was the gist of the claim of defamation and *that* assertion may have caused a loss of reputation. But even assuming, *arguendo*, that there was no violent audience reaction to the playing of the Communist national anthem, misstating the degree of adverse audience reaction to the anthem did not cause “significantly greater opprobrium” than would have been caused if the Public Notice had not included an assertion regarding the level of audience protest. How violently the audience reacted to the “wrong” national anthem did not materially affect that sting, and thus it cannot provide support for the verdict in plaintiffs’ favor.

Similarly, the defendants asserted that Duc Hua said: “There’s nothing wrong with receiving VC money.” (Tr. Exhibit No. 8, Section II, ¶ 2). The plaintiffs maintain that what Duc Hua really said was: We will accept VC money but if they say they will give us the money only on “condition that we have to do this or do that” then we “would not comply to it.” RP IV, 663. Yet even assuming that the plaintiffs’ version of the statement is the more accurate one, the exact words Hua used is precisely the type of factual detail which as a matter of law cannot be deemed to affect the “sting” of the Public Notice. Either way, what “stings” is the opinion of the defendants that Tan was a Communist and the VCTC was a Communist organization. The sting of this opinion would not have been significantly less had the Public Notice included the disclamatory words of

the plaintiffs to the effect of “but we won’t comply with any VC conditions.” And for that reason, that the jury might reasonably have concluded that either were certain inaccuracies in the proffered factual bases for the defendants’ opinion that Duc Tan was a Communist cannot salvage the plaintiffs’ judgment.

g. Conclusion: As a Matter of Law, Neither The Defendants’ Opinions, Nor Their Statements Regarding the Facts Upon Which They Were Based, Are Actionable.

In sum, the judgment entered below cannot be sustained because as a matter of law it is based on the assertion of constitutionally protected opinion. Nor can it be sustained on the theory that there were some inaccuracies in the defendants’ statement of the facts which they relied upon to support their opinion. The overwhelming majority of the facts offered in support of the opinions are admitted to be true. The few alleged factual inaccuracies identified by the plaintiffs did not affect the sting of the assertion of their belief that Duc Tan was a Communist, and therefore they cannot support the judgment entered below. Accordingly, this Court should reverse the judgment against them and remand this case with directions that the suit against them be dismissed be prejudice.

2. THE RECORD LACKS CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE BECAUSE THERE WAS NO EVIDENCE THAT THE DEFENDANTS ENTERTAINED SERIOUS DOUBTS ABOUT THE TRUTH OF THEIR STATEMENT THAT DUC TAN WAS A COMMUNIST.

Incredibly, the plaintiffs seem to concede that they have no evidence that the defendants acted with a high degree of awareness of the probable falsity of their statement that they believed Duc Tan to be a Communist.

Certainly, in their brief on appeal the plaintiffs fail to point to any evidence that tends to show such knowledge. Instead, they seem to argue that when one considers evidence that the defendants were hostile towards them, together with the evidence suggesting that the defendants failed to thoroughly investigate Duc Tan, the combination of these two is sufficient to establish actual malice.

It has long been established that evidence of “spite, hostility, or deliberate intention to harm” has no bearing on whether a defamation defendant acted with “actual malice.” The plaintiffs cite to *McDonald v. Murray*, 83 Wn.2d 17, 515 P.2d 151 (1973), for the proposition that actual malice cannot be established “solely” by evidence of personal hostility, vindictiveness or spite. *Respondents’ Brief*, at 21. In fact, the *Murray* opinion makes it abundantly clear that such evidence is completely irrelevant.⁵

The plaintiffs attempt to rely on evidence which suggests that the defendants did not conduct a thorough investigation of Duc Tan before they published their articles. Here they purport to rely on *Margoles v. Hubbart*, 111 Wn.2d 195, 201, 760 P.2d 324 (1988), for the proposition that, while actual malice cannot be established *solely* upon evidence of a failure to investigate, when combined with other evidence such as the

⁵ That the term ‘actual malice’ does not include hostility, vindictiveness, nor spite is also stated in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed2d 248 (1967), and *Greenbelt Co-op Pub. Ass’n, Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).” *Murray*, 83 Wn.2d at 19.

making of defamatory allegations which are “so inherently improbable that only a reckless man would have put them in circulation,” a merely negligent failure to investigate plus general hostility plus inherent improbability can suffice to establish knowledge of probable falsity. *Respondents’ Brief*, at 21-22.

As to the failure to investigate: *Margoles* actually confirms the point that a “public figure’s critics have no affirmative duty to search out the truth or to substantiate their statements, nor are they required to corroborate their sources information.” *Margoles*, 111 Wn.2d at 204, quoting *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 171, 736 P.2d 249 (1987).⁶ As the United States Supreme Court said in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989), even “an extreme departure from professional standards” of responsible investigation is *not* a sufficient basis for finding actual malice. “[R]eckless conduct is not measured by whether a reasonably prudent man . . . would have investigated before publishing.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

The plaintiffs purport to rely upon the statement in *Richmond v. Thompson*, 130 Wn.2d 368, 389, 922 P.2d 1343 (1996), that “a reviewing court should respect credibility choices made by the fact finder even in defamation cases involving independent review.” From this statement, the

⁶ Moreover, the plaintiffs also fail to note that *Margoles* actually held that the trial *erred* when it failed to grant summary judgment for the defendant because the plaintiff failed to demonstrate even a triable issue on actual malice. 111 Wn.2d at 208.

plaintiffs leap to the conclusion that (1) if a defamation defendant in a public figure case testifies that he sincerely believed that his statement was true, and (2) the jury returns a verdict for the plaintiff, then (3) the jury must necessarily have found the defendant not to be credible, and therefore (4) the reviewing court must affirm the determination of the jury that the defendant acted with actual malice. But if this reasoning were accepted it would render the constitutional obligation of independent appellate review completely meaningless. In defamation cases the defendant almost always testifies. Thus, except for the rare case where the defendant did not testify at all, adoption of the plaintiffs' logic would mean that in every case where the jury found for the plaintiff the appellate court would necessarily have to hold that there was clear and convincing evidence of "actual malice." This would effectively overturn decades of United States Supreme Court law mandating independent *de novo* review of a jury's determination of actual malice.

In fact, if one examines the facts of *Richmond*, it is clear that it was the *not* the questionable veracity of defendant Thompson which supported the determination that he acted with actual malice. Thompson claimed that during a traffic stop a State trooper pushed him, gestured towards his gun, and verbally threatened to blow Thompson's head off. But two witnesses with a clear view of the incident testified that these things simply never happened. Thus, it was the testimony of the two eyewitnesses which provided substantive proof that Thompson acted with actual malice when he accused the trooper of threatening to shoot him. *Richmond* does not

stand for the proposition that whenever a defamation defendant testifies that he believed what he was saying and the jury returns a verdict for the plaintiff, that the appellate courts are to required to defer to an implied jury determination that the defendant spoke with knowledge that his statements were not true (or were very likely untrue).

Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 497 (1984), illustrates the very same principle. In that case the maker of a sound system sued for product disparagement because an author made critical statements about the way the plaintiff's loudspeakers reproduced musical sounds. Despite the fact that the trial judge expressly found that the testimony of the author of the allegedly defamatory article "is not credible," the Supreme Court nevertheless held that there was insufficient evidence to establish actual malice by clear and convincing evidence. The Court held that while the District Court did not believe that the witness had testified truthfully at trial, nevertheless "the District Court did not identify any independent evidence that Seligson realized the inaccuracy of [his] statement, or entertained serious doubts about its truthfulness at the time of publication." *Id.* at 498. Therefore, even though the "trial judge found it impossible to believe that Seligson continued to maintain that the word 'about' meant 'across[,]'" the Supreme Court reversed the judgment for the plaintiff because "Seligson's testimony . . . does not constitute clear and convincing evidence of actual malice." *Id.* at 512.

The key issue in the determination of whether a defamation defendant acted with actual malice is whether he "in fact entertained serious doubts

as to the truth” of his statement. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The high standard of clear and convincing evidence that the defendant did in fact entertain such serious doubts would be meaningless if an appellate court was required to defer to a jury’s verdict for the plaintiff because such a verdict necessarily constituted a “credibility determination” that the defendant *did* have such doubts notwithstanding his testimony that he did not. Since the plaintiffs produced no evidence that the defendants in this case “entertained serious doubts” about the truth of their statement that they believed Duc Tan to be a Communist, this Court should find that they failed to establish actual malice. Here, as in *Bose*, even if the jury did not find the defendants’ testimony to be credible (and unlike the specific credibility finding of a judge in a bench trial such as *Bose*, a general verdict in a jury trial tells a reviewing court virtually nothing about who the jury found to be credible), the judgment for the plaintiff must nevertheless be set aside because an assessment that a defendant is not credible is *not* sufficient to affirmatively establish actual malice by clear and convincing evidence.

3. THE FAILURE TO PROPERLY INSTRUCT THE JURY ON THE CORRECT BURDEN OF PROOF APPLICABLE TO THE ELEMENT OF FALSITY CAN NEVER BE HARMLESS ERROR.

The plaintiffs urge this Court to follow the minority view that the element of falsity in a public figure case need only be established by a preponderance of the evidence. They rely on cases, such as *Robertson v. McCloskey*, 666 F.Supp. 241, 248 (D.D.C. 1987), which assert that as a

practical matter it is hard for a jury to apply different standards of proof to different elements of a claim for defamation.⁷ Therefore, the plaintiffs argue, the jury must have applied the same burden of proof rule to both the elements of falsity and actual malice. *Respondents' Brief*, at 35-36.

The defendants *agree* that it is difficult for a jury to apply different burden of proof rules to different elements of a claim. But even assuming that the jury applied the same burden of proof rule to both falsity and actual malice, that does not tell us whether the jury applied the higher burden of proof (clear and convincing) to both elements, or the lower burden of proof (preponderance of the evidence) to both elements. The plaintiffs blithely assume the jury must have applied the higher burden to both, but there is no basis for such an assumption. It is equally likely that they applied the *lower* burden of proof rule to both elements. Since one has no way of knowing which direction the jury went (up, to clear and convincing, or down to preponderance of the evidence), there is no basis for concluding that it was harmless error to fail to instruct the jury that the higher burden of proof rule applied to falsity.

The plaintiffs also argue that since the evidence was sufficient to establish falsity by clear and convincing evidence, any instructional error

⁷ Plaintiffs' reliance on *Robertson* ultimately is misplaced since the *Robertson* Court decided to apply the *higher* clear and convincing evidence standard to falsity as well as to actual malice and denied summary judgment because it found that the higher burden of proof rule could be satisfied: "[A] reasonable jury could find by clear and convincing evidence that McCloskey's statement concerning plaintiff's 1981 letter was false." 666 F.Supp. at 248.

regarding the burden of proof rule was harmless error. *Brief of Respondents*, at 37-38. The flaws in this argument are several.

First, the plaintiffs' assertion that "they proved" falsity rests upon their faulty assumption that if any one of the factual assertions made by the defendants was shown to be false (e.g., the crowd did not react violently to the Communist national anthem, there was no boycott of the VCTC), then they have established the element of falsity. But the plaintiffs have overlooked the fact that they must prove that the gist or the "sting" of the defendants' Public Notice is significantly greater because of the inclusion of one of these minor factual misstatements than it would be had the misstatement not been included. Since the "sting" flowed from a nonactionable opinion that the defendants believed Tan to be a Communist, the inclusion of such allegedly false misstatements on things such as the degree of crowd reaction are not separately actionable.

Second, the plaintiffs fail to recognize that the defendants have not raised a claim of insufficiency of the evidence. They have raised a claim of instructional error. Even assuming, for the sake of argument, that there was *sufficient* evidence from which a jury *could* have found by clear and convincing evidence that the statement that Duc Tan was a Communist was false, *that does not mean that they did so find*. We have no way of knowing that they did. And since they were expressly told that they did *not* have to find falsity by clear and convincing evidence, there is no particular reason to think that they voluntarily saddled themselves with a more onerous burden of proof.

Third, since the defendants have a constitutional right to require that the proof of falsity be sufficiently compelling to meet the clear and convincing standard, the constitutional harmless error standard applies. Under this standard an error can only be deemed to be harmless if the reviewing court can say that the error is harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

Fourth, whenever there is an error in the instructional definition of the burden of proof such that there is a reasonable possibility that the jury made a finding based on a degree of proof lower than that which is constitutionally required, such an error is deemed structural error and thus can never be treated as harmless. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (where “the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury’s findings[] [a] reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, ‘the wrong entity judge[s] the defendant ...’”). In *Sullivan*, the misdescription of the burden of proof occurred in a criminal case and here it occurred in a civil case. That distinction, however, is not material. As in a criminal case, the defendants in this case had a constitutional right to have a jury decide their fate. Wash. Const., art. I, § 21. This Court cannot speculate as to what a properly instructed defamation jury would have done in this case, because to do so would be to permit “the wrong entity [to] judge” the defendants.

4. **THE PLAINTIFFS FAIL TO CITE TO ANYTHING IN THE RECORD THAT DEMONSTRATES THAT THE DEFENDANTS' CONDUCT WAS THE PROXIMATE CAUSE OF THE SENDING OF THE DEATH THREAT LETTER. INSTEAD, PLAINTIFFS ARGUE THAT THEIR CONDUCT WAS A "BUT FOR" CAUSE OF THAT ACT.**

Plaintiffs concede on appeal, as they did in the court below, that there is no evidence that any of the defendants sent Duc Tan the death threat letter. They further concede that "proximate cause is an underlying principle and consideration in almost every tort case." *Brief of Respondents*, at 39.

At this juncture, the plaintiffs simply swap the terms "but for" cause and "proximate" cause and proceed to argue that the defendants' conduct must have been the "but for" cause of the sending of the death threat letter. This is followed by the pronouncement that since it was obviously a "but for" cause, it was also "clearly" a "proximate" cause of the sending of the letter. The plaintiffs argue as follows:

The timing of the letter and the fact that it had Norman Le's picture on it both support the fact that whoever sent the letter would not have sent it *but for* the defendants' defamatory communication. ***There was clearly a proximate connection*** between the letter and the defendants' actions.

Respondents' Brief, at 40 (emphasis added).

But not every "but for" cause is a "proximate cause." That is why both terms exist. The only way in which the death threat letter was shown to be "proximate" to the defendants' conduct was that the letter was sent after the defendants made their statements which were the subject of their defamation claim. Temporal proximity, however, is not enough to establish that the defendant's were the proximate cause of the sending of

the letter. In this case, there was speculation that plaintiff Duc Tan sent this letter to himself. There was also speculation that one of the defendants sent it. But there was no evidence of *either*. Without some evidence that one of the defendants sent it, the letter had no relevance to the plaintiffs' defamation claim. Since it had *no* relevance whatsoever, and was extremely prejudicial, it was an abuse of discretion to admit it. Moreover, the plaintiffs simply do not respond to the contention that admitting the letter violated the First Amendment by imposing personal liability for the conduct of others, contrary to the rule of *NAACP v. Claiborne Hardware*, 458 U.S. 886, 916-17 (1982) that the free speech guarantee of the Constitution "imposes restraints on the grounds that may give rise to damages liability and on the people who may be held accountable for those damages."

The plaintiffs attempt to rely upon *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 730 P.2d 1299 (1987), but that case is easily distinguishable for several reasons. In that case, over the defendant's ER 402 and 403 objections, the trial court admitted evidence that anonymous threatening phone calls were received by the plaintiff. The defendants argued that there was no evidence to link the defendant union to any of these calls. The trial court admitted the evidence, "reasoning that a link, if any, between Local 690 and the callers was for the jury to find." *Id.* at 537. But "[t]o guard against unfair prejudice, the court allowed an instruction which limited the use to be made of the calls." *Id.* at 538. This instruction "informed the jury that evidence of the calls was for a limited

purpose.” *Id.* “*Under these circumstances,*” the court held “it was not an abuse of discretion to admit this evidence.” *Id.* (italics added).

In the present case, *no limiting instruction was given.* Moreover, unlike *Caruso* where it was an open question whether the union had anything to do with initiating or sanctioning the threatening calls, in this case it was *conceded* by the plaintiffs’ counsel that “we do not have any proof nor do we believe that Mr. Le had anything to do with sending that letter.” RP V, 915. The trouble is, although this concession was made in open court, the jury was not present when it was made and never heard it. Thus, the jury was left to speculate whether Norman Le sent the death threat letter, even though the plaintiffs’ had conceded that he did not. Worse, the plaintiffs’ counsel “said he knew the letter was likely intended by someone to frame Norman Le.” CP 203. But the jury was never told this, either. Thus, the plaintiffs’ counsel exploited the ability to get the jury to speculate that there was a link between Norman Le and the death threat letter, when he knew that there was no link. Believing that the letter was intended to frame defendant Le, the plaintiffs’ counsel assisted in that frame-up. Under these circumstances, *Caruso* is clearly distinguishable.⁸

⁸ It is also distinguishable because the defendant union in that case never argued that admission of the evidence violated the First Amendment by allowing for tort liability for the conduct of third parties without any showing that the defendants encouraged, assisted, or even knew of the conduct of the third parties. Here, the defendants have explicitly raised that point.

5. THE EXCLUSION OF DAT HO'S TESTIMONY WAS AN ABUSE OF DISCRETION AND VIOLATED THE FIRST AMENDMENT BECAUSE IT SUPPORTED THE DEFENSE OF TRUTH.

The plaintiffs *concede* that if there was evidence that Duc Tan opposed Dat Ho's efforts to get the Post Office to recall the manual that contained the Communist flag of Vietnam, such evidence would be relevant. *Respondents' Brief*, at 45. But they argue that there was no such evidence because Duc Tan never did that, and that there was evidence to the contrary. *Id.* at 44-45.⁹ They point to evidence (which was not before the jury, but which was put before the trial court in an earlier summary judgment motion, which indicated that Duc Tan accused Dat Ho of trying to steal the credit for having persuaded the Post Office to recall that manual. But simply because Duc Tan claimed that he never opposed Dat Ho's efforts, that does not render irrelevant the proffered testimony of Dat Ho that Duc Tan *did* in fact oppose his efforts. Had the trial court admitted Dat Ho's testimony, Duc Tan could have testified and could have contradicted Dat Ho's testimony. Had this occurred, the jury would have had conflicting evidence and could have decided who to believe. The fact that there would have been conflicting testimony does not serve to make Dat Ho's excluded testimony irrelevant. Since it had a tendency to make a disputed fact (Duc Tan is a Communist) more probable, it was clearly relevant and its exclusion violated both the rules of evidence and the First Amendment.

⁹ "Duc Tan did not oppose anyone's efforts to remove the Communist flag from U.S. Post office brochures."

6. EXHIBIT NO. 70 WAS ERRONEOUSLY ADMITTED.

a. Lack of Authentication

The plaintiffs confuse and conflate the twin rulings of *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000), that evidence from the internet was properly excluded *both* because it was (1) not self-authenticating and (2) because it was inadmissible hearsay. The plaintiffs do not make any meaningful response to the contention that Exhibit 70 was inadmissible because it was never authenticated.

Davis held that: “An unauthenticated printout obtained from the internet does not meet the public records exception to the hearsay rule under RCW 5.44.040. Nor does it qualify as a self-authenticating document under ER 902(e).” *Id.* at 854. The plaintiffs argue that Exhibit 70 “is indeed an advertisement” and that “The inherent authenticity of the document is not affected by the fact that it came from the internet . . .” *Respondents’ Brief*, at 47. But there is no such thing as “inherent authenticity.” There are some documents that are “self-authenticating.” They are identified in ER 902, where it specifically states: “Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following[.]” The plaintiffs make no argument that Exhibit 70 falls within any of the enumerated classes of documents. They argue instead that if parties can make authentication challenges to documents obtained from the internet, then “[t]hese same challenges might be made if the advertisement was clipped from the Sunday newspaper.” *Respondents’ Brief*, at 48. But ER 902 *specifically*

lists newspapers as self-authenticating documents. ER 902(f). Thus, if Exhibit 70 been clipped from a newspaper it *would* have been self-authenticating. ER 902 does not list documents printed from the Internet, and with good reason. While the authenticity of a document purportedly taken from a newspaper can be easily checked, the authenticity of a document posted on the Internet cannot.

Without even using the word “authenticated” the plaintiffs argue that “a proper foundation was laid” for the exhibit’s admission by witness Nguyen, because he testified “that he saw the advertisement and printed it out because it looked like the same apron” as the one found by Mr. Pham. *Respondents’ Brief*, at 48. But authentication of a document obtained from the internet is not provided by testimony from a witness that “this document is what I saw when I went to the internet.” Authentication is provided by “some type of proof that *the postings* were actually made by the individual or organization to which they are being attributed[.]” *Boim v. Holy Land Foundation*, 549 F.3d 685, 703 (7th Cir. 2008)(en banc). Nguyen never gave any such testimony. On its face the document appears to be something posted by Starshows.com, Inc. which is identified as being located in Sewell, New Jersey. Tr. Exhibit 70. But no one testified as to what Starshows.com, Inc. was, and there was no testimony as to who posted this document on the internet. It could have been posted by one of the plaintiffs. It could have been posted by the Communist Party of Vietnam. Starshows.com, Inc. might actually be a corporation organized under the laws of some State, or it might simply be the name that someone trying to “impersonate” a company decided

to affix to what he or she was posting on the Internet. Since *no evidence* was offered as to who posted the document on the Internet, there was no authentication whatsoever and so the document should have been excluded.

b. The Document Was Offered (and Used) For the Truth of Matters Stated Within It and Therefore Was Inadmissible Hearsay.

This is not a case like *State v. Modest*, 88 Wn. App. 239, 944 P.2d 417 (1997), where the document -- a telephone bill -- was offered simply to prove that a telephone call was made on a certain day. In this case the document *did* contain assertions, and it was offered to prove the truth of these assertions. The document asserted that a particular item -- a Santa Claus apron -- had been commercially available and had been offered for sale at the cost of \$7 per apron. Moreover, the plaintiffs' counsel specifically argued that he should the exhibit should be admitted to "rebut the assertion this appeared to be suspicious and that it was a homemade garment that clearly was not stock-made as stated by the defendants." RP VIII, 1514. As a preliminary matter, no defendant ever testified that the apron appeared to be a homemade item, and therefore the exhibit did not "rebut" anything any defendant ever said. But even assuming that the item tended to rebut some implied assertion of a defendant that the apron was a homemade item, the exhibit could not "rebut" anything unless it was offered for the truth of what was asserted in it. Unless it was *true* that the item was mass-produced and sold commercially, then the Exhibit did not "rebut" the implication that the item was homemade. Therefore, its alleged "rebuttal" value depended upon its being offered *for the truth of the matter stated*.

7. DEFENDANTS' REMAINING CLAIMS

With respect to the defendants' remaining claims on appeal (identified in their opening brief as Nos. 9, 10 and 11, in the Statement of Issues Pertaining to Assignments of Error), the defendants stand on the arguments set forth in their opening brief.

B. CONCLUSION

For the reasons stated above in Argument sections 1 & 2, the defendants ask this Court to vacate all the judgments in favor of the plaintiffs, and to remand with directions to dismiss the plaintiffs' suit.

For the reasons stated in Argument sections 3 through 7, the defendants ask this Court to vacate all the judgments in favor of the plaintiffs, and to remand for a new trial on all issues.

For the reasons stated in Argument Section 10 of their opening brief on appeal, defendant Norman Le asks this Court to vacate the judgments against him and to remand for a new trial on the defamation claims related to the three newspaper articles.

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

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ORIGINAL

NO. 39447-2

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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

Plaintiffs/
Respondents,

vs.

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 V.
DUONG, wife and husband and
NHAN T. TRAN and
MAN M. VO, wife and husband,

Defendants/
Appellants.

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON
JUL 16 2010 7:31 AM
FILED
CLERK OF COURT

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

CERTIFICATE OF SERVICE - 1

2. On August 20, I served one copy of the foregoing documents on:

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entitled exactly:

**Appellants' Reply Brief
Motion for Acceptance of Over Length Reply Brief**

DATED: August 20, 2010.



PATTI SAIDEN

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