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## A. INTRODUCTION

The defendants' argument characterizes the defamatory language in this case as content accusing Mr. Duc Tan and the Vietnamese Community of Thurston County (VCTC) of being "pro-Communist." This misstates the facts, and deemphasizes the nature and foundation of the plaintiffs' case. If this quote had been the extent of defendants' accusations, there would not have been a basis for litigation. Notwithstanding the plaintiffs' deep-seated, anti-Communist convictions, the statement that someone is "pro-Communist" is arguably a statement of opinion concerning someone's political persuasion. That is not what the defendants published, however.

Instead, the defendants overtly accused the plaintiffs of taking substantive steps to advance the interests of the Communist government of Vietnam, and of acting as subversive agents of that Communist government by engaging in clandestine actions designed to show their support. Trial Exhibit (hereinafter Tr. Ex.) 8.

Moreover, the defendants summarized their "proofs" that plaintiffs were serving the Communist Vietnamese government by reciting a litany of facts that could not help but persuade a reader of Vietnamese descent that this was indeed true. *Id.* This list of facts contained outright statements of falsehood, which the defendants knew were false, and omissions of material facts that created a false impression, where the defendants were aware of the

falsity. These statements, in addressing all of defendants' arguments, will be examined herein.

**B. COUNTERSTATEMENT OF ISSUES**

1. Whether the statements made by defendants in the "Public Notice" and by Norman Le in the newspaper articles were constitutionally protected speech.

2. Whether clear and convincing evidence existed from which a reasonable jury could conclude that the defendants made the statements at issue with knowledge of their falsity and/or reckless disregard of their falsity.

3. Whether the First Amendment and/or the Washington State Constitution mandate that falsity be proven by clear and convincing evidence, and/or whether the instructions, as given in this case, created confusion mandating reversal or remand.

4. Whether the trial court abused its discretion by admitting evidence of a death threat letter and whether damages can be attributed to the defendants where the threat was proximately related to the defendants' actions.

5. Whether the trial court abused its discretion by sustaining objections as to plaintiffs' statements regarding Dat Ho's efforts to remove a communist flag from U.S. Postal Service publications.

6. Whether allowing Exhibit Number 70 into evidence was an abuse of discretion.

7. Whether it was error to exclude testimony from Robert Cavanaugh substantiating the subjective offensiveness of the Santa Claus apron.

8. Whether the trial court abused its discretion by limiting the purpose for which Exhibits 66 and 67 would be admitted.

9. Whether the fact that only a portion of one of the defamatory newspaper articles was presented to the jury amounted to error and whether this argument is properly before the court when no objection was made to the specific jury instruction.

10. Whether the court erred by failing to give the jury an instruction inviting the jury to find the speech privileged based upon the common interest doctrine.

11. Whether the court erred by denying defendants' motion for directed verdict and/or new trial based upon the jury's damage awards.

**C. COUNTERSTATEMENT OF THE CASE**

The defendants' have accurately summarized the procedural history leading to this appeal. The plaintiffs will provide a brief history and addendum to the substantive facts underlying the case.

1. ***Plaintiffs' History.***

a. **Duc Tan.**

Duc Tan was a teacher in Vietnam when he joined the Southern Army to fight with the United States against the Communist government in the North. RP V, 897. After basic training and military school, he was assigned to resume his teaching position. RP V, 898. He was teaching high school in Saigon when the city fell to the Communists in April 1975. RP V, 899. He was sent to a "reeducation camp" for six months and then, like many other professionals, was released to resume his former profession. RP V, 901-05; RP III, 484. Also like many other individuals, Mr. Tan's release was contingent on his signing a loyalty pledge to the Communists. RP V, 902-03. This was a routine happening, and no one who signed these pledges took them seriously—they signed to be free of the concentration camp. RP II, 398; RP III, 527, 597-98. The defendants in this case were not aware of this history until after the lawsuit, as a result of discovery requests. RP V, 936.

After release, Mr. Tan worked under intolerable conditions, where the government encouraged everyone, including students, to inform on one another. RP V, 900. In order to facilitate his escape from the country, Mr. Tan requested a transfer to a teaching position in a coastal city, where he would have access to boats. RP V, 906. When he did manage to arrange for

escape, the boat he was in capsized and his wife and infant daughter almost drowned. RP V, 907-09. Eventually, Mr. Tan made it to Olympia, Washington, via a refugee camp in Malaysia. RP V, 909.

Upon arrival in the United States in 1979, Mr. Tan devoted himself to organizing and attending anti-Communist rallies, and protesting the human rights abuses in Communist Vietnam. RP V, 909-10; RP II, 291-96; RP IV, 606. Mr. Tan made it his objective to serve the community in the United States by fighting for civil rights in Vietnam. RP V, 911. Mr. Tan filed the lawsuit for defamation because the accusations published by the defendants to the local Vietnamese Community that he was a supporter of and/or agent for the Communist government in Vietnam caused him unthinkable amounts of pain, sorrow, and humiliation. RP V, 910-11, 922-23.

**b. VCTC History.**

The Vietnamese Community of Thurston County was first formed in 1975 as the Vietnamese Mutual Assistance Association. RP IV, 633-34. The organization eventually became the Vietnamese Community Association of Thurston County, and then was shortened to the current title. RP IV, 634-35. The organization provides cultural support to Vietnamese immigrants, which includes organizing rallies to protest Communism. RP IV, 687; RP II, 341.

When the organization shortened its name, a committee of forty-four individuals took part in the process. RP IV, 635-37. As a part of that committee, defendant Norman Le made the suggestion that the name should include the word "National" or "Nationalist" to ensure an outwardly anti-Communist stance. During discussions, committee members expressed the opinion that this addition to the title of the organization would make the name too long and cumbersome. RP VIII, 1385-87. A vote was taken and Mr. Le's suggestion was rejected. *Id.*

At an unspecified time following this name change, Mr. Le brought forward a concern regarding a market owner who was distributing calendars that had been printed in Vietnam. RP IV, 659. This individual had previously made a donation to the VCTC, and he was asked to come before the organization and explain his actions. RP IV, 660. The committee accepted the man's explanation that it was cheaper to have the calendars printed in Vietnam, and rejected Mr. Le's demands that the VCTC reject his donation. RP IV, 661-64, 779-81. In response to what was testified to as "harsh words" by Mr. Le against Mr. Duc Hua, Mr. Hua stated that the VCTC could accept a donation as long as they did not acquiesce to any demands from the person donating. RP IV, 663, 781. Mr. Le testified that Mr. Hua stated: "What's wrong with receiving Viet Cong's money as long as we don't listen to them." RP VII, 1398. Mr. Hua testified at trial that the

VCTC would unequivocally refuse money from the Vietnamese government. RP IV, 663-64.

In 1997 the VCTC organized an event to honor a poet. A band was brought from Portland to play the South Vietnamese anthem to begin the event. RP III, 412-13. The guitar player started playing the first notes of the Communist national anthem but was immediately stopped, and the customary anthem was played. RP III, 413. There was no reaction from the audience and no one at the event seemed to notice the mistake. RP III, 414; RP V, 855. Although Norman Le did not attend the event, he heard about the error and he raised concerns publicly, in part by writing and paying to have the article in *Chin Luan* newspaper published that was offered as Trial Exhibit 66. RP VII, 1399; RP VIII, 1357, 1378. In response, the VCTC organized a press conference so that an explanation and apology could be given. RP V, 846-47. The band leader apologized and explained that the young guitar player had recently immigrated from Vietnam, where he was frequently required to play the Communist anthem. RP IV, 700.

## **2. *History With the Committee Against the Viet Cong Flag.***

In response to the South Puget Sound Community College (SPSCC/College) displaying the Communist Flag of Vietnam, members of the local Vietnamese Community met to discuss opposition strategies. RP V, 865. At the first meeting in January 2003, only sixteen people attended. *Id.* At the

second meeting in February, approximately sixty people attended, including members of the Vietnamese Community in Tacoma and Pierce County, an organization similar to the VCTC. RP III, 555; RP V, 866. At this meeting, the majority of those in attendance, including Duc Tan and Dr. Dung Nguyen, the President of the Tacoma Association, asked that a reelection for leadership of the group take place to allow for greater representation. RP III, 561-62, 568-70. Defendants Norman Le and Phiet Nguyen objected to this proposal. RP III, 570; RP V, 866. The group which had been previously elected refused to hold new elections and as a direct result, over half of those in attendance left the meeting and withdrew support for the Committee Against the Viet Cong Flag. RP VII, 1333.

Duc Tan, Dr. Nguyen and others within the VCTC continued to be involved with the opposition to the flag display at SPSCC, but did so separately from the defendants' group. RP IV, 777-79; RP III, 419-20, 569-71. In addition to speaking against display of the flag at public meetings held by the College, Duc Tan and the VCTC arranged a meeting with the President of the College to further advocate for removal of the flag. *Id.* When the College finally acquiesced to removal of the flag, Duc Tan attended this event, along with many of the defendants. RP VI, 1098-99.

### 3. *History With the Apron and the Public Notice.*

Each summer the VCTC held a fundraiser by operating a food booth at the annual community "Lakefair" celebration in Olympia. RP V, 855-56. The same booth was used every year, and it was painted to resemble the South Vietnam Nationalist flag. *Id.*; Tr. Exs. 1 and 2. In 2003 a volunteer working in the booth, Dai Pham, found an apron on top of a vending machine outside of the booth. RP II, 364. The apron was decorated with a Santa Claus image and had red stars and colors that reminded Mr. Pham of the Communist flag of Vietnam. RP II, 364. He asked other VCTC members whose apron it was, but no one knew. RP II, 365. Because of his objection to the image, Mr. Pham immediately turned the apron inside-out and wore it in this fashion for the duration of the day. RP II, 365.

Ten days later, Mr. Pham was at a choir practice and told defendant Tuan Vu<sup>1</sup> about the apron. RP II, 366. Mr. Pham told Tuan Vu that he found the apron outside of the booth and had worn it backwards. RP II, 368. Tuan Vu told Mr. Pham that he wanted to have the apron as a "souvenir" and Mr. Pham gave him the apron. RP II, 366-69. Shortly thereafter, the defendants published and affixed their names to the Public Notice giving rise to this lawsuit. Tr. Ex. 8. The defendants did not approach Duc Tan or any members of the VCTC to ask for an explanation about the apron or any of

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<sup>1</sup> Tuan Vu was not a defendant at trial because he entered into a settlement agreement with plaintiffs prior to trial.

the other accusations in the Public Notice prior to publishing the document. RP VI, 1118; RP VIII, 1379. Mr. Le testified that this would have been culturally unacceptable. RP VIII, 1379. Following publication of the Notice, defendants conducted a press conference to further disseminate the message in the Public Notice and to display the apron. RP II, 371. At this press conference, the defendants stated that Dai Pham was too scared to attend because of reprisals from the Communists. RP II, 372. Mr. Pham testified that this was not true. *Id.*

#### **D. ARGUMENT**

**1. *The Defendants Published Statements of Fact, Both Impliedly and Explicitly, That Duc Tan and the VCTC Were Serving the Vietnamese Communist Government By Advancing Its Causes.***

The defendants assert that the defendants in this case were merely opining on the political persuasion of Duc Tan and the VCTC. This is not supported by the plain language and context of the Public Notice and newspaper articles at issue. The Public Notice is not couched in editorial terms, but rather as a serious, factual document that purports to bring a matter of great importance to the attention of the Vietnamese Community in Washington State and around the world. Tr. Ex. 8. The Notice begins with the heading "Facts." It then continues with a recitation of "Records" which

the document describes as "correct and true evidences."<sup>2</sup> Tr. Ex. 8. From these "correct and true evidences," the defendants issue an "Alert and Summons" that Duc Tan had "hidden under the Nationalist coat to serve the common enemy of the Vietnamese refugees that is the Communist Hanoi." Further, it stated that Duc Tan had "betrayed the Vietnamese community, continuously and systematically since its establishment date." Finally, the document asks the community to "condemn" Duc Tan and the VCTC because they are "**fed by the Nationalists and worship the Communists.**" Tr. Ex. 8 (emphasis in original). The document concludes by asking that community members:

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

Tr. Ex. 8 (emphasis added).

The Public Notice is clearly asserting that Duc Tan and the VCTC are outwardly performing acts of support for the Communist government, and are acting as agents of the Communist government. This is far different from a vague assertion that the plaintiffs are "pro-Communist." The core of the document is the second section in which the defendants assert that the

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<sup>2</sup> At trial, the interpreter called by the defendants stated that, in his opinion, the word "evidences" is most appropriately translated as "proofs." RP VI, 1062.

VCTC has been "accused of doing [past] activities for the Vietnamese Communists," and then lists these allegations as "correct and true evidences" that plaintiffs are indeed performing outward acts of support for the Vietnamese Communists.

Within this list of proofs are a myriad of factual assertions that are either true or not true. They cannot be construed, in any fashion, as someone's opinion. Some of these facts are outright falsehoods, and others contain references to half-true events while deliberately omitting key facts to alter the perception of these events and references. All of these proofs are listed in order to support the defendants' overarching assertion that plaintiffs are indeed Communist agents, or at a minimum, are conducting activities to show support for the Communists. The following headings are a recitation of some of these assertions contained within the Public Notice.

- a. **"When choosing a name (*for the organization*), the Duc Thuc Tan and Khoa Van Nguyen gang<sup>3</sup> insisted that the name "National Vietnamese Committee" suggested by the H.O. Association, and other National associations, be denied. Therefore, all the local anti-communist organizations, societies, had boycotted and did not recognize it from the beginning."**

Defendant Norman Le acknowledged that a vote took place when the VCTC was renamed which opted by majority opinion not to include the word "Nationalist" in the name, because it made the title too long and

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<sup>3</sup> The plaintiffs stipulated that any negative connotation associated with the term "gang" did not constitute any part of their claim for defamation. RP VII, 1268.

cumbersome. RP VIII, 1385-86. Most importantly, as it pertains to this statement, there was no boycott and non-recognition of the VCTC by all the local anti-Communist organizations. RP IV, 655. Moreover, Mr. Le himself did not boycott the organization at this time, and remained very much involved. RP IV, 652-53. Whether an organization is boycotted, or not, is more than someone's opinion.

**b. "Mr. Duc Minh Hua, 'First and for life President', when answering questions about the Cao Son calendar and the receiving of money from Cao Son, did declare at St Michael school 'there is nothing wrong with receiving VC money.'"**

This passage attributes a direct quote to Mr. Hua that he either said or did not say. Moreover, the evidence at trial proved that this quote, if said, would be extremely controversial and incendiary. Mr. Hua testified that he only said that the organization could accept donations so long as they did not come with conditions. RP VIII, 1502. This is a substantially different statement than: "there is nothing wrong with receiving VC money." Defendant Phiet Nguyen acknowledged that putting quotation marks around a statement implied a direct quote. RP VII, 1327. Whether Mr. Hua made this statement is a question of fact, not opinion.

**c. "Suggested the idea of organizing the yearly anniversary of September 2 in the Olympia Newsletter of the Vietnamese Community in Thurston County."**

In April 1999 the VCTC published a newsletter. Tr. Ex. 44. This newsletter had the following content:

And there are other activities that I suggest that the Vietnamese Community in Thurston County needs to pay attention to and improve was [sic]—And the National Mourning Day of the 30<sup>th</sup> of April, the Armed Forces Day on the 2<sup>nd</sup> of September, teaching your compatriots how to drive, and assisting in the test material for those who want to take the nationalization test, for those with limited English.

Tr. Ex. 44; RP VIII, 1371-72.

It was established at trial that "Armed Forces Day" is the title of a recognized event/holiday commemorating the South Vietnamese Nationalist Army. RP VIII, 1373, 1464. It was also established that September 2 is a holiday for Communist Vietnam. RP VIII, 1369-70. Thus, at most, the content of this newsletter creates a contradiction, because it suggests celebrating Armed Forces Day, an event honoring the Nationalist forces, on a day which has significance for the Communists. The defendants, without citing the actual text of the newsletter, turned this into the assertion that the VCTC: "Suggested the idea of organizing the yearly anniversary of September 2."

This is not true, and twists the words of the newsletter to fit the desired implication that the VCTC was actually organizing an event to com-

memorate the Communists. If the defendants had said: "the VCTC suggested celebrating the South Vietnamese Army on a day recognized by the Communists," this would have been an accurate statement and not actionable as defamation. Individuals reading this latter statement could have drawn their own conclusions based upon the true facts. The defendants' version did not give readers this chance, and created a highly charged recitation of "evidence" that the VCTC actually celebrates Communist events.

It should be noted that the content of this newsletter, and the cultural event organized by the VCTC in Autumn 2002, are completely separate events and references. The Appellants' Brief seems to confuse the two and meld them into one allegation and occurrence.<sup>4</sup> There was no evidence presented that the VCTC actually held an event on September 2, in 1999 or any other year.

- d. **"Inaugurated the 1997 Autumn Poems, Songs, Music (Ha Huyen Chi Poems and Music Night) by playing the "VC anthem": The band that Duc TT brought from Portland played the whole portion "Doan Quan Viet Nam di, chung long cuu quoc" of the VC Tien Quan Ca song. Immediately, the audience stood up and protested violently, the band had to switch to the VNCH (*Republic of Vietnam*) anthem."**

At trial, it was established that a band member at the referenced

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<sup>4</sup> See Appellants' Brief, p. 35: "The VCTC sponsored a cultural event on September 2<sup>nd</sup>, a date which is celebrated by the Communists as their independence day."

cultural event mistakenly played the first nine notes of the Communist national anthem for approximately two to three seconds. RP III, 413. It was also established that there was no reaction from the crowd because no one really noticed. RP III, 414; RP V, 855. Afterwards, because of the attention drawn to the event by defendant Norman Le, who heard about it later, a press conference was held where the band leader apologized and explained that it was a mistake. RP V, 846-47.

This statement asserts several defamatory, untrue facts, including that the VCTC "inaugurated" an event by playing the Communist anthem, and that there was a violent protest, which forced the band to stop playing. These statements are not true, and twist the occurrence to fit the stated objective of the Public Notice—proving that Duc Tan and the VCTC are overtly trying to show support for the Communists.

e. **"Mr. Duc Thuc Tan refused to display the National flag  
...."**

This statement concerns the occurrence at the language school where Duc Tan was principal. The language school met at night, and borrowed space from a private high school. RP V, 834-35. In one of the classrooms, a high school teacher had displayed flags from around the world and, as would be expected, the current flag of Vietnam was among them. RP V, 836. Defendants Norman Le and Phiet Nguyen raised concerns about this flag and

contacted the principal of the high school, who indicated that they could display the Nationalist flag. RP V, 840. When Norman Le contacted Duc Tan about the display of the flag, Mr. Tan told him that it was not necessary because the language school already had a Nationalist flag that they displayed and saluted prior to every class. RP V, 841. Despite this, Norman Le and Phiet Nguyen showed up at the school and brought a Nationalist flag to display. RP V, 842-43. Mr. Tan allowed them to display it permanently on a cabinet at the school. RP V, 845; RP VII, 1324.

From this series of events, the defendants assert that Duc Tan "refused to display the National flag." This is a statement of fact that is either true or not true.

**f. "Organized the Autumn 2002 Meeting to commemorate the Fall Revolution, exactly as the 1997 Autumn Flag Saluted with VC Anthem incident."**

The "Fall Revolution" is an historic event in the history of Ho Chi Minh and the Communists in Vietnam. RP VI, 1100. The VCTC held an event in the fall of 2002, but it had nothing to do with the Fall Revolution or celebrating Communist Vietnam. RP IV, 773-74. That the event took place in the fall is the only information that the defendants had when they made this statement. RP VI, 1170, 1173-74.

This statement alleges that the plaintiffs organized an event to commemorate Ho Chi Minh and the Communists. Either this is true or it is

not true.

**g. Legal conclusions.**

"Defamation by implication occurs where 'the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts.'" *Mohr v. Grant*, 153 Wn.2d 812, 823, 108 P.3d 768 (2005) (quoting PROSSER AND KEETON ON THE LAW OF TORTS 116, at 117 (W. Page Keeton ed., 5<sup>th</sup> ed.1984, Supp.1988). Here, the defendants have recited a series of defamatory "evidences" that either deliberately state falsehoods, or omit such key facts surrounding the referenced events that a false impression is conveyed. They cite these facts in support of the overarching defamatory assertion that plaintiffs are supporting the Communist government of Vietnam. In other words, the plaintiffs have done all these things in the past; therefore, the Santa apron must also be a deliberate attempt to celebrate Communism. The cited facts—holding events to celebrate the Communists, refusing to display the Nationalist flag, etc.—are such that, if true, a reader would have good cause to believe the overarching assertion regarding Communist support and the Santa apron.

The defendants ultimately use these assertions of fact as a foundation to state: "That many proofs in addition to the Viet Cong flag display at Lakefair 2003 are more that [sic] enough for us to conclude that the Duc Tuc

Tan gang had abused people's name, hidden under the Nationalist coat to serve the common enemy of the Vietnamese refugees that is the Communist Hanoi." Tr. Ex. 8. Indeed, if true, these "proofs" would be more than enough for any Vietnamese-American to reach similar conclusions. The reason that they are actionable as defamation, and not statements of opinion, is that they are untrue facts. Moreover, the accusation that plaintiffs are Communist subversive agents is equally untrue.

Plaintiffs argue that a cause of action for defamation is sufficiently pled based solely upon the published allegations that they were "worshiping" and "serving" the Communists. These assertions go beyond the statement analogized to by defendants that "Joe Lieberman is really a Republican." In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court refused to establish a "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. This would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.* Here, even though defendants may label their assertions as opinion, they overtly imply that plaintiffs are taking tangible steps to support the Communists.

This is a statement of fact, even if it is couched as opinion. If the defendants had said: "in our opinion, Duc Tan and the VCTC are pro-Communist," this would clearly fall under the category of protected speech.

As in *Milkovich*, the dispositive question is whether a reasonable fact finder could conclude that the statements imply an assertion of fact. *Id.* at 21. The defendants are clearly asserting, and even warning others, that plaintiffs are conducting "activities on behalf of the evil communists." Tr. Ex. 8.

Even if this court were to decide that these overarching assertions of Communist support qualify as statements of opinion, the plaintiffs have a remaining cause of action for defamation, because the defendants rely on untrue assertions of fact to support this "opinion" and make it more likely to be true in the eyes of a reader. In the test for determining whether a statement is actionable as defamation, the court in *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986), cites as the most crucial factor, "whether the statement of opinion implies that undisclosed facts support it." *Id.* at 539. Here, the defendants do not just rely on undisclosed facts, they cite the facts that support their opinions, and these facts are false and, as will be discussed, *infra*, were made with knowledge of their falsity.

**2. *Clear and Convincing Evidence Exists From Which a Reasonable Trier of Fact Could Conclude That the Defendants Made the Defamatory Statements With Knowledge of Their Falsity and/or With a High Degree of Awareness of Their Probable Falsity.***

A reviewing court is tasked with conducting an independent review of the record to determine whether there is sufficient evidence of actual malice. *Richmond v. Thompson*, 130 Wn.2d 368, 388, 922 P.2d 1343

(1996). "Clear and convincing proof of actual malice cannot be established solely by evidence of personal hostility, vindictiveness or spite." *Margoles v. Hubbart*, 111 Wn.2d 195, 200, 760 P.2d 324 (1988) (citing *Herron v. KING Broadcasting Co.*, 109 Wn.2d 514, 523-24, 746 P.2d 295 (1987); *McDonald v. Murray*, 83 Wn.2d 17, 19, 515 P.2d 151 (1973)). "However, when reviewing the record the court will consider cumulatively such factors as hostility, knowledge that sources are hostile to the plaintiff, failure to investigate, and use of unreliable sources to determine whether a clear and convincing inference of actual malice has been raised." *Id.* at 200 (citing *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 172, 736 P.2d 249 (1987); *Herron v. KING Broadcasting Co.*, 109 Wn.2d at 524-25; *Rye v. Seattle Times Co.*, 37 Wn. App. 45, 54, 678 P.2d 1282, *review denied*, 102 Wn.2d 1004, *cert. denied*, 469 U.S. 1087) (1984).

While the standard for actual malice does hinge on the subjective belief of the defendants, "professions of good faith are unpersuasive" if the defamatory allegations are "so inherently improbable that only a reckless man would have put them in circulation." *Margoles*, 111 Wn.2d at 201 (citing *Herron v. Tribune Pub'g Co.*, 108 Wn.2d at 172). Additionally, a "reviewing court should respect credibility choices made by the factfinder even in defamation cases involving independent review." *Richmond*, 130 Wn.2d at 389 (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510,

104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

In this case, the jury was presented with abundant evidence, both direct and circumstantial, that the statements made by the defendants were inherently improbable, that the acrimonious history between the defendants and plaintiffs spurred the defamatory publications and that the defendants knew, in fact, that a great majority of the statements were false. The defendants asserted that they made the statements in good faith, and this assertion rested at the heart of the credibility determination that confronted the jury. Independent review was not meant to take these credibility determinations away from the province of the jury.

Similar to the previous analysis involving the constitutionality of the protected speech, actual malice must be examined as to both the "evidences" cited by the defendants in support of their assertion, and the overarching assertion itself that plaintiffs were attempting to show support for the Communists by secretly displaying the Santa apron.

**a. Defendants did not have subjective knowledge of Duc Tan's history.**

In their Statement of the Case, the defendants cite to a series of events in Duc Tan's past as both "incidents which gave rise to defendants' belief that Duc Tan was pro-Communist," (Appellants' Brief, p. 7) and "evidence regarding the incidents and circumstances which caused the

defendants to believe Duc Tan was a communist or communist-sympathizer" (Appellants' Brief, p. 10). Among these alleged circumstances contributing to the subjective reasonableness of the defendants' beliefs were the facts that Duc Tan had been released after six months in a reeducation camp, that his release was contingent on signing a "loyalty" pledge to the Communists, that he had been allowed to resume teaching in Saigon after release, and that he did not disclose in immigration paperwork that he had "worked" for the Communists.

It was undisputed at trial that these were facts unknown to the defendants when they published the Public Notice, and were disclosed after the lawsuit had commenced by way of discovery responses. RP VII, 1317. It is disingenuous then for the defendants to cite these facts as a basis for the subjective good faith of the defendants when publishing the defamatory communication. Moreover, the defendants testified at trial that these facts formed a basis for subjectively believing that the statements in Exhibit 8 were true. RP VII, 1316. The jury was able to take into account that the defendants were defending their actions by citing to information that they did not have at time of publication.

Additionally, while the defendants attributed great weight to the fact that Duc Tan worked as a teacher under the Communist government, the jury was told that Norman Le actually helped train the Communists to take over

his job of running a government-owned fertilizer plant. RP VIII, 1382. Once again, the jury could make a credibility determination based on the fact that Norman Le did not attach any significance whatsoever to the fact that he had worked for the Communists.

**b. Failure to Investigate.**

While a failure to investigate facts before publication cannot alone sustain a finding of actual malice, it is a factor to be considered cumulatively with other facts. *Margoles*, 111 Wn.2d at 200. It was undisputed that the defendants made no attempt to contact Duc Tan or the VCTC to inquire about the apron incident prior to publishing Exhibit 8. RP VI, 1118; RP VII, 1220. When asked why they did not approach plaintiffs and ask for an explanation, Mr. Le stated: "To the Vietnamese culture, we don't do such a thing." RP VIII, 1379. The jury was able to contrast this statement with the event involving the calendar from a market owner, where Norman Le was very comfortable with summoning this individual for an explanation. RP IV, 779. The jury was able to conclude that Mr. Le was not telling the truth in saying that it was culturally impermissible to approach someone privately for an explanation before publicly making incendiary allegations.

**c. Articles as Basis for Subjective Belief.**

The defendants presented two newspaper articles, one of them written by Norman Le, which covered the event in 1997 concerning the

national anthem. RP VII, 1211-15; RP VIII, 1357; Tr. Ex. 66 and 67. These articles were admitted to show that the defendants had a subjective belief that Duc Tan was a Communist, because of what they read in the media. These are the only two articles that the defendants submitted which referenced the plaintiffs, and they were apparently written solely about the national anthem incident in 1997. Despite this, at trial the defendants repeatedly reaffirmed their subjective beliefs in the truth of what they had written by referencing a litany of articles covering every single allegation and subject raised by their publication. RP VI, 1083, 1094-96, 1104, 1168-69; RP VII, 1312, 1330; RP VIII, 1463. According to the defendants' testimony, everything from the September 2<sup>nd</sup> newsletter reference in 1999, to the statement by Duc Hua regarding receiving VC money (which occurred sometime after the name change in 1995), to the refusal to display the flag at the language school, were covered extensively by Vietnamese newspaper articles. *Id.*

When one of the defendants was asked how they knew about a prior event, they would invariably respond by stating "I read about it." RP VI, 1083, 1094-96, 1104, 1168-69; RP VII, 1312, 1330; RP VIII, 1463. Despite the alleged plethora of media coverage which irrevocably shaped the defendants' opinions of Duc Tan and the VCTC, the defendants were able to submit only the two articles (Tr. Ex. 66 and 67), both in 1997, and both

covering the incident with the national anthem. The jury was able to make a credibility determination that the defendants were being untruthful in referencing so many articles, in part based on the fact that no other articles were submitted, and in part on the corroborating testimony of the defendants themselves. For example, when defendant Dat Ho was asked about Duc Tan's background, he testified: "From 1997 to 2003 I do not hear or know of anything about his background." RP VII, 1216. This statement has a ring of truth to it, as opposed to the frequent references to newspaper articles that were never produced.

Pertaining to the articles in 1997, defendant Phiet Nguyen went so far as to say that they were not very convincing to him and that they did not cause him to believe Duc Tan was a Communist. RP VII, 1354. In fact, in 2001, Mr. Nguyen accepted an invitation from Mr. Tan to speak at the Vietnamese Language School because he thought what Mr. Tan did was a "good deed." RP VII, 1300. Additionally, in 2002, Duc Tan helped organize an event entitled the "Great Cause Day" to protest land given away to China by Communist Vietnam. RP III, 558-60, 567; RP VII, 1335-36. The organization of this event occurred during a meeting at Phiet Nguyen's home, which both Duc Tan and Norman Le attended. *Id.* Mr. Nguyen, Mr. Le and Mr. Tan all later attended this event which took place at the State Capitol grounds. *Id.*

Thus, as late as 2002 the defendants were inviting Duc Tan into their home, working with him to organize community events opposing the Communists, and attending these events with Mr. Tan. It was only after the divisive events of the meetings in January and February 2003 that Mr. Tan became an object of their scorn and suspicion.

**d. Acrimony Between the Defendants' Organization and Plaintiffs.**

As with a failure to investigate, hostility and knowledge that the defendants are hostile to the plaintiffs will not alone support a finding of actual malice, but may be considered cumulatively by the trier of fact. *Margoles*, 111 Wn.2d at 200. Here, the Public Notice was issued by the Committee Against the Viet Cong Flag approximately six months after a heated dispute over leadership of that organization caused over half of the room to walk out on a meeting and withdraw support for the organization. RP VII, 1333. The withdrawal of support came primarily because Duc Tan and others insisted that many of the defendants give up their previously elected positions for the greater good of the cause. RP V, 866-67. Defendants Norman Le and Phiet Nguyen opposed Mr. Tan's suggestions. *Id.*

The fact that this incident, and the animosity it generated, was a motivating factor in drafting the Public Notice is demonstrated clearly within

the document itself. The defendants write:

Most recently and most importantly, the Duc Thuc Tan gang had sabotaged the fight of the Committee Against VC Flag (UBCCVC), by false accusations and wanting to eliminate the true nationalists who fervently fight the communists, from the unit in charge of the Committee Against Viet Cong Flag, and had tried by all means to isolate the UBCCVC from anti-communist organizations of Tacoma and Seattle to exterminate the UBCCVC ability to fight. In the mean time, the Duc Thuc Tan gang had gone "under the table" with the administration of South Puget Sound Community College (SPSCC) to send the secret message to the Dean that the Vietnamese community is deeply divided, therefore there is no need for removing the bloody communist flag hung at SPSCC.

Tr. Ex. 8.

The final part of this passage refers to the fact that Duc Tan and others arranged a meeting with the President of the SPSCC. RP III, 419, 421. At this meeting, Duc Tan and the VCTC representatives presented the College with a plaque to show appreciation for all that the College had done to support the new Vietnamese population in Thurston County. RP III, 423. These individuals also lobbied the College to remove the Communist flag by diplomatically explaining their position on the matter. RP III, 424-25.

Other than the fact that Duc Tan and the VCTC met with College officials, the defendants presented no evidence to justify their belief that he "went under the table" to send the secret message that "there is no need for removing" the Communist flag. RP VII, 1308. Indeed, Phiet Nguyen

admitted that he witnessed Duc Tan get up and speak at several public forums held by the College to address the flag issue. RP VII, 1320-21. Mr. Nguyen claimed that he could not hear what Mr. Tan was saying, but admitted that there would have been an "uproar" if Mr. Tan was advocating for any other position than removing the Communist flag. RP VII, 1321. Mr. Dat Ho also testified that many people got up and spoke in favor of removing the Communist flag but that he didn't know if Duc Tan had, because he didn't know who Duc Tan was at that time. RP VI, 1193-94. Yet, Mr. Ho testified that he was aware of who Mr. Tan was at the meeting where everyone withdrew support (RP VI, 1152), and that he was aware of Mr. Tan arranging meetings with SPSCC (RP VI, 1197).

Clear and convincing evidence exists to suggest that the defendants did not actually believe that Duc Tan and others were privately lobbying to have the Communist flag remain. Rather, the evidence suggests that they were upset that Mr. Tan and others were stealing their thunder by arranging meetings without them,<sup>5</sup> and were upset that they had broken off from their group. As defendant Nga Pham suggested, these incidents really amounted to a "power struggle." RP VIII, 1472.

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<sup>5</sup> See RP VI, 1197: "So how come he lead a group of people to go and try to have a private conversation without notifying us?"

**e. Statements Made With Knowledge of Their Falsity and/or Omissions.**

The defendants stated that when choosing a name, Duc Tan and others insisted that the word National be rejected, and therefore: "all the local anti-communist organizations, societies, had boycotted and did not recognize it from the beginning." Tr. Ex. 8. As discussed, *supra*, defendant Norman Le knew that this was not true because he himself remained associated with the VCTC long after the majority vote rejected the suggested name. RP IV, 652-55; RP VIII, 1385-86. The defendants presented no evidence of a "boycott" or rejection of the VCTC by anyone other than themselves.

The defendants attributed the quote to Duc Hua that "there is nothing wrong with receiving VC money." Tr. Ex. 8. Norman Le testified that Mr. Hua said "What's wrong with receiving Viet Cong's money as long as we don't listen to them." RP VII 1398. Duc Hua testified that he said he would accept a donation as long as no conditions were placed on it. RP IV, 663; RP VIII, 1502. Testimony from another witness to the exchange between Norman Le and Duc Hua established that Mr. Le said "you cannot accept any more money from Cao Son," to which Mr. Hua replied "if somebody would like to donate something for the Association, then we should accept it, as long as we do not do whatever they want us to do." RP IV, 781.

Either Mr. Hua said the comment attributed to him in quotes, or he did not. If he did not, then Norman Le was aware of the truth because he was present when the true comment was made. The jury obviously decided that Mr. Hua had not made the statement, and relied on credibility determinations to arrive at that conclusion. Further, all of the surrounding testimony at trial established that it would be more than slightly shocking if Duc Hua had actually uttered the words "there is nothing wrong with receiving VC money." Clear and convincing evidence established that Norman Le knew in fact that this was an inaccurate quote, because he was present when the quote was made. Further, clear and convincing evidence established that all of the other defendants had to be aware that this was a highly unlikely comment for Duc Hua to have made.

The defendants next assert that the VCTC "[s]uggested the idea of organizing the yearly anniversary of September 2 in the Olympia Newsletter." Tr. Ex. 8. It was established that the newsletter actually read: "Armed Forces Day on the 2<sup>nd</sup> of September." Tr. Ex. 44; RP VIII, 1371-72. It was also established that, while September 2<sup>nd</sup> was apparently a day recognized by the Communists, everyone commonly understood that "Armed Forces Day" was a recognized celebration of the South Vietnamese Army. RP VIII, 1373, 1464. Thus, at most, the newsletter suggests celebrating the Nationalist Army on a day also recognized by the

Communists. The newsletter does not advocate "organizing the yearly anniversary of September 2."

The defendants were aware of the actual content of the newsletter, but chose to report the content of the newsletter in a manner that left no doubt that the VCTC was organizing a celebration for the Communists. Thus, the defendants were aware of the falsity of their statement. They deliberately chose to omit key facts concerning the content of the newsletter, from which people could have made up their own minds.

The defendants next report the anthem incident by stating that the VCTC "inaugurated" an event by playing the Communist national anthem, and that the band was only forced to stop playing because the "audience stood up and protested violently." Tr. Ex. 8. It was established at trial that none of the defendants attended this event, and that there was no audience protest. RP III, 414; RP V, 855. The defendants were all aware that a press conference was held where an apology and explanation was given. RP V, 846-47.

Even if the defendants actually believed that Duc Tan secretly arranged for this "mistake" to occur, they were aware of the surrounding circumstances and explanations given. To report that the VCTC "inaugurated" the event with the anthem distorts the truth, of which the defendants were aware. To report that the audience protested violently is

also untrue, and all of the evidence taken collectively suggests clearly that the defendants were aware of the exaggerated impressions created by the manner in which they refer to this event. To state that the plaintiffs inaugurated an event with the Communist National anthem, without also explaining that the plaintiffs called a press conference to apologize and explain that it was a mistake, represents defamation by omission.

The defendants next state that Duc Tan "refused to display the National flag." It was established at trial that Duc Tan actually allowed the defendants to display the National flag permanently on a cabinet at the language school, even though, as Mr. Tan stated, it was unnecessary because the school already had a Nationalist flag that was celebrated to start each class. RP V, 841-45; RP VII, 1324. None of the defendants asserted that Mr. Tan actually refused to display the Nationalist flag. Mr. Dat Ho stated that he was aware that Mr. Tan displayed the flag, but disagreed with displaying it on the cabinet because the principal had said it could be displayed in the hallway. RP VI, 1165-67.

Anyone in the Vietnamese-American community reading that the principal of a Vietnamese language school "refused" to display the Nationalist flag would have serious concerns. The defendants all agreed that this statement was not true and therefore made the statement with knowledge of its falsity.

Finally, the defendants assert that the VCTC "[o]rganized the Autumn 2002 Meeting to commemorate the Fall Revolution." Tr. Ex. 8. It was established that the "Fall Revolution" is a well-recognized celebration of Ho Chi Minh and the Communists. RP VI, 1100. It was also established that, while the VCTC held a cultural event in the fall of 2002, there was nothing outwardly suggesting that it had anything to do with the "Fall Revolution." RP VI, 1170, 1173-74. All of the evidence at trial taken collectively suggests that if a local Vietnamese organization had indeed held a celebration of the Fall Revolution, there would have been an uproar and significant media attention.<sup>6</sup> If the defendants had said "the VCTC held an event in fall, and we believe they secretly did so to commemorate the Fall Revolution," this would constitute nonactionable opinion. Instead, the defendants reported as fact that the VCTC did actually hold an event to celebrate the Fall Revolution, and clear and convincing evidence suggests they were aware that this was highly unlikely.<sup>7</sup>

**f. The Santa Claus Apron.**

The defendants seized upon Dai Pham's impression of the apron as a platform to publicly denounce the plaintiffs and allege that plaintiffs are secretly supporting the Communists. Whether the defendants actually

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<sup>6</sup> This Court can take note of the reaction that an inadvertent nine notes elicited from the local community.

<sup>7</sup> Dat Ho testified that he was unaware of the actual objective in organizing the cultural event. RP VI, 1170.

believed that the apron was an instrument of the Communists was a secondary consideration for the jury, in parallel with the truth or untruth of the other statements examined herein. Clear and convincing evidence suggests that the defendants simply seized upon this event as a fortuitous means of bashing a group that caused significant loss of support for the defendants' own organization.

The jury heard from a former Colonel in the South Vietnamese Army, who was imprisoned by the Communists for thirteen years. RP III, 595-96. This individual was so offended by the sight of the Communist flag that he asked defense counsel to please place the flag out of his sight after counsel was done using it as an illustration during cross-examination. RP IV, 609. However, when this individual was shown the apron in question, he did not find it offensive, because it was just an apron. RP IV, 616.

For all of the reasons stated herein, the plaintiffs met their burden of showing, by clear and convincing proof, that the defendants published false, defamatory statements of fact, which the defendants either knew outright were false, or had serious doubts about.

3. ***The Jury Was Properly Instructed As to the Burden of Proving Falsity, and/or the Instruction Constituted Harmless Error Because the Jury Could Not Have Found Actual Malice By Clear and Convincing Evidence Without Also Attributing That Standard to Falsity, and/or It is Harmless Error Because the Plaintiffs Did Prove Falsity By Clear and Convincing Evidence.***

**a. The Jury Was Properly Instructed as to the Law in Washington State.**

As noted by the defendants, the law in Washington State, which has not been overruled by the U.S. Supreme Court, is that a public figure defamation plaintiff must only prove actual malice, not falsity, by clear and convincing evidence. *Richmond*, 130 Wn.2d at 385-86. This is also the law in the Federal Ninth Circuit. *Rattray v. City of National City*, 36 F.3d 1480, 1487-88 (9th Cir.1994). The defendants assert that this ruling is uncertain, and that the Washington State Supreme Court has backtracked significantly based upon comments made in *Mohr v. Grant*, 153 Wn.2d at 822. That comment, pertaining to whether "a private plaintiff facing . . . summary judgment must make a prima facie showing of all of the elements of defamation with convincing clarity or by a preponderance of the evidence," does not leave the decision in *Richmond* unsettled. *Mohr*, 153 Wn.2d at 822. It is a stretch to state that this comment relates to the decision in *Richmond*, much less "backtracks significantly" from that decision.

Thus, the plaintiffs and the trial court properly instructed the jury as to the existing law in Washington State.

**b. In Practicality, Proving Actual Malice With Clear and Convincing Evidence Requires Applying the Same Standard to Falsity.**

Many of the cases cited by defendants recognize that, "[p]ractically

speaking, it may be impossible to apply a higher standard to 'actual malice' than to the issue of falsity." *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 413, 664 P.2d 337 (1983). This is because the element of actual malice "to a large extent subsumes the issue of falsity." *Robertson v. McCloskey*, 666 F.Supp. 241, 248 (D.D.C. 1987).

The defendants argue that this interrelatedness creates confusion and invites error, because once the jury has applied the preponderance standard to the issue of falsity, the jury will "find it impossible" to apply a different standard to the element of actual malice. Appellants' Brief, p. 54. Plaintiffs argue that this underestimates our State's jury pool, and argue further that the opposite is more likely true—if properly instructed on the element of actual malice, the jury will find it almost impossible to find actual malice by clear and convincing evidence without also inadvertently applying that standard to the interrelated question of falsity.

**c. The Plaintiffs Proved Falsity By Clear and Convincing Evidence.**

If Constitutional protections mandate that falsity, in addition to actual malice, be proved by clear and convincing evidence for a public figure defamation plaintiff, then this court would have the same obligation and responsibility of independent review as to falsity that is applied to actual malice. In this case, the court can review the record and determine that

plaintiffs did indeed prove falsity by clear and convincing evidence, both as it applies to the assertion that Duc Tan and the VCTC are undercover advocates for the Communists, and as to the falsity of all of the supporting facts utilized by the defendants as proof of this assertion.

The plaintiffs put on extensive testimony concerning their history of opposing Communist Vietnam. Duc Tan's daughters both testified that from an early age, they understood that the Communists were bad, and that their father's opposition to the Communists ran deep. RP II, 291-96, 337-39. Numerous other individuals testified that they had served for many years alongside Duc Tan and other members of the VCTC, and there was no doubt as to the deep-seated anti-Communist feelings of Mr. Tan and the VCTC. RP III, 405, 557, 598-99; RP IV, 606, 725-26.<sup>8</sup>

If this court finds that falsity must be proven by clear and convincing evidence, then this court also has the authority and obligation to make an independent determination regarding the sufficiency of this evidence. In this case, it was harmless error to omit this instruction because the plaintiffs did prove falsity by more than clear and convincing evidence.

**4. *Testimony Regarding the Death Threat Was Properly Admitted as a Proximate Cause of Duc Tan's Damages and the Defendants Had Every Opportunity at Trial to Rebut the Connection.***

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<sup>8</sup> "If Mr. Tan was labeled as a communist supporter, then nobody is safe."

The admission or refusal of evidence is within the trial court's discretion and the court will only be reversed for abuse of discretion. *Maehren v. Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979), *cert. denied*, 452 U.S. 938 (1981).

As quoted by defendants, "a defamation plaintiff can recover damages only if he or she proves harm factually caused by the defendant's wrongful conduct." *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 602, 943 P.2d 350 (1997). This is not a particularly shocking or revelatory exclamation, as proximate cause is an underlying principle and consideration in almost every tort case. The underlying assertion by defendants is that the death threat letter had no connection to defendants' wrongful conduct. The plaintiffs vehemently disagree. The letter was sent in March 2004, approximately six months after the Public Notice was published and a few weeks after plaintiffs filed their lawsuit in Thurston County Superior Court. Tr. Ex. 8; CP 91-133; CP 202-216. The letter had a picture of Norman Le on it that read: "If against me I will kill you like a dog . . . ." CP 202 (Police Report attached to Declaration of Nigel Malden). Duc Tan told police that "he takes the threat seriously." CP 202. The letter had Norman Le's return address on it. *Id.* The police investigated, found no fingerprints to establish who sent the letter, and closed any further investigation. *Id.*

Duc Tan clearly felt the letter was connected to the defendants'

Publications and accusations that he was a Communist, and certainly did not think the letter was a hoax. RP V, 912. 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. The testimony at trial proved that accusing someone within the Vietnamese Community of being a Communist was foreseeably likely to cause that person to receive death threats. RP III, 492. There was no proof that any of the defendants had sent the letter, but there was abundant evidence to determine that but for the defendants' actions, there would not have been a letter and the letter itself was a very real death threat.

If the defendants felt that the content of the letter and circumstances surrounding its receipt clearly demonstrated that the purpose of the letter was to frame Norman Le, as opposed to threatening Duc Tan, they were free to enter the letter and police report into evidence and explain their theory to the jury through testimony. The fact that plaintiffs' counsel was mentioned in the police report as having helped Mr. Tan make the report would certainly not have presented any great evidentiary hurdle or quandary for the trial court to address. That fact is not relevant to the investigation and conclusions reached by the police, and it is not hard to imagine that

stipulations could have been reached which would have precluded the necessity of plaintiffs' counsel testifying.

The plaintiffs voluntarily chose to refrain from entering the letter as an exhibit, because they deemed Norman Le's face on the letter as being highly prejudicial, when no evidence existed connecting Mr. Le to the letter. RP V, 915-16. If defendants felt that Norman Le's face being on the letter, and the fact that someone had put Mr. Le's address on the envelope, clearly refuted the threatening nature of the letter and proved that it was actually a hoax, they were free to pursue this defense. As the trial court instructed defendants' counsel:

The jury is going to hear from the plaintiff, Mr. Malden, that he received a threatening letter. If you contend that he's lying, that he didn't receive a threatening letter, you can submit proof of that. If you want to bring up that the threatening letter suggested that it was your client who was making the threats, you can do that. You have a wide variety of choices that you can make here. And I'm sure that you will act in the best interests of your client.

RP V, 919.

Defendants' counsel argued in their Motion for New Trial that plaintiffs' counsel had admitted that the letter was a hoax. CP 202-216 (Declaration of Nigel Malden stating: "Mr. Rhodes told me that he knew the letter was a hoax"). In response, plaintiffs' counsel filed a Declaration in Opposition to New Trial which stated:

The death threat was real and I never told defense counsel that it wasn't. I told defense counsel that we did not believe that the letter had actually come from Norman Le, or at the very least, knew we could not prove that it did. For this reason we had elected not to actually present the letter as a trial exhibit.

CP 217-218. The plaintiffs believed that the death threat was real, that it was very much connected to the defendants' publications, and that it obviously affected Duc Tan. If the defendants did not believe any of these points, they were free to assail them at trial.

This precise evidentiary question in a defamation case was examined in *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 730 P.2d 1299 (1987). In *Caruso* it was anonymous telephone threats that began coming into a business after publication of a "do not patronize" notice in a union newsletter. *Id.* at 537-38. The defendants objected to admission of this evidence because there was no link between the threatening phone calls and the union. *Id.* The trial court ruled that the evidence was relevant because the calls "contributed greatly to the depression and anxiety of the plaintiff." *Id.*, at 537. The Supreme Court resolved the issue by stating:

Here, Local 690's concern was that the jury would infer that the union initiated or sanctioned the anonymous calls. But there was no trial testimony which would imply such sanctioning or even knowledge. Moreover, counsel for plaintiff never tried to establish such a link. Finally, an instruction informed the jury that evidence of the calls was

for a limited purpose. Under these circumstances, it was not an abuse of discretion for the trial judge to admit this evidence.

*Id.* at 538.

Although no special jury instruction was submitted in this case, the plaintiffs explicitly testified under oath that they were not accusing the defendants of sending the letter. RP V, 962. This clearly protected the defendants from any unfair prejudice. As *Caruso* states, it is then up to the jury to find a link, if any, between the threat and the defendants. In this case, the jury was instructed that they must find that the published statements "proximately" caused damage to the plaintiffs. RP IX, 1577; CP 212. Additionally, the jury was instructed that: "A cause of damage is a proximate cause if it is related to the damage in two ways: (1) The cause produced the damage in a direct sequence; **and** (2) The damage would not have happened in the absence of the cause." RP IX, 1579; CP 156-176. The defendants were free to challenge proximate cause, but did not explore the issue further at trial. The trial judge did not abuse the court's discretion by admitting this clearly relevant piece of evidence.

**5. *Limiting Dat Ho's Testimony Regarding the Post Office Flag Incident Did Not Abuse the Trial Court's Discretion Because Duc Tan Did Not Oppose Mr. Ho's Efforts to Remove the Communist Flag From Post Office Pamphlets.***

No evidence could have been presented that Duc Tan "criticized" Mr.

Ho for his efforts to remove the Communist flag, because Mr. Tan committed no such action. The defendants filed counterclaims for defamation and malicious prosecution. CP 134-145 (First Amended Answer With Affirmative Defenses and Counterclaims). These causes were dismissed voluntarily prior to trial. RP I, 28. The defamation counterclaim was, in part, based upon a statement made by Duc Tan relating to Dat Ho's efforts regarding the Post Office pamphlet. It was alleged that Mr. Tan wrote in an email dated June 14, 2003:

And your last words pretended that, 'Right in the State of Washington, there were some instances where the VC flag was taken down', then you mentioned 3 cases one of which was that '*USPS ordered the recall of the materials (with a VC flag) from the 11,000 locations nationwide*', and the credit of this success must go to you (or your group) in WA St., **Mr. Dat Ho, you are a thief.** The USPS' action was due to the great efforts of the Vietnamese Community in San Jose. It was such a big achievement that everybody knows it, why did you steal it so deliberately.

CP 141.

This issue was briefed to the trial court in motions involving summary judgment, and Mr. Dat Ho, then acting as a pro se litigant, filed a Motion in Opposition to Summary Judgment, which reiterated that Duc Tan's comments amounted to an allegation that Mr. Ho stole credit for the success of removing the Communist flag from the pamphlet. CP 338-412.

Thus, Duc Tan did not oppose anyone's efforts to remove the

Communist flag from U.S. Post Office brochures. To the contrary, Mr. Tan apparently called this effort a "success," a "great effort" and a "big achievement." Mr. Tan did, however, accuse Mr. Ho of taking credit for the achievement where credit was not due.

The issue at trial was whether Mr. Ho subjectively believed that Duc Tan was a Communist supporter. If Mr. Tan had actually "criticized" Mr. Ho for making the efforts to remove the flag, or minimized the action of removing the flag, or made statements that it was not necessary to remove the flag, then this might be relevant to whether or not Mr. Ho thought Mr. Tan wavered in his support of anti-Communist causes. Instead, Mr. Tan apparently sent an email in June 2003 questioning Mr. Ho's involvement with the "great effort" of removing the flag.

This testimony would not have justified Mr. Ho's belief that Duc Tan was a Communist supporter. If anything, this evidence would have supported the plaintiffs' position that the defamatory communications were motivated by anger and spite toward the plaintiffs, rather than a genuine belief in the truth of the accusations.

**6. *The Trial Court Did Not Abuse Its Discretion By Admitting Exhibit 70 Because the Issue of the Apron's Origin Was Relevant, the Exhibit Was Not Hearsay, and a Proper Foundation Existed.***

One of the issues at trial was whether the apron was indeed advanced

by Communist supporters with subversive intentions. Additionally, the defendants testified that their belief was justified because the apron was not "designed by an American or made at any regular plant." RP VI, 1158. Additionally, they testified that the design and fabric of the apron was such that "it came from somewhere with some certain purpose," and the "design of this display is a very special one." RP VII, 1380. The plaintiffs offered Exhibit 70 to rebut the assertions that the apron was not available commercially.

A trial court's admission of evidence is reviewed for an abuse of discretion. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). The Exhibit at issue was not offered for the truth of any statement contained within the four corners of the document, but rather to show a picture of the apron in a commercial advertisement. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). And "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, it is intended by the person as an assertion." ER 801(a).

Here, the picture of the exact apron at issue was properly admitted because it was contained in a commercial advertisement for sale. It was the photograph of the apron and the context in which it was displayed that was relevant. The decision to admit photographic evidence lies within the sound

discretion of the trial court, and will not be disturbed on appeal absent "a clear showing of abuse of discretion, that is, manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *State v. Elmore*, 139 Wn.2d 250, 284-85, 985 P.2d 289 (1999) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The cases cited by the defendants in their brief properly excluded evidence because it was being offered for the truth of the matter asserted. For instance, in *State v. Davis*, 141 Wn.2d 798, 10 P.3d 977 (2000), the defendants offered documents specifically to prove the truth of population statistics contained in the offered document. In these cases, it is the accuracy of the facts and assertions offered within the four corners of the document that were not properly authenticated. The fact that the apron could be found in a commercial setting is not an assertion. "[A]ny spoken word, writing or nonverbal conduct that is not intended to be assertive is not hearsay." *State v. Modest*, 88 Wn. App. 239, 249, 944 P.2d 417 (1997) (citing *In re Dependency of Penelope B.*, 104 Wn.2d 643, 652, 709 P.2d 1185 (1985); *State v. Collins*, 76 Wn. App. 496, 498, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995)).

Here, the defendants assert that there is nothing authenticating that Exhibit 70 is indeed an advertisement. The inherent authenticity of the document is not affected by the fact that it came from the internet, however.

These same challenges might be made if the advertisement was clipped from the Sunday newspaper. The person testifying that they had clipped the item from the newspaper could just as easily have "created" the document. The cases cited by defendants are concerned with the authenticity of electronic evidence when those items are being offered to establish the truth of facts and statistics contained within the documents, which is not the case here.

In this case, a proper foundation was laid by Mr. Nguyen's testimony that he saw the advertisement and printed it out because it looked like the same apron. RP 1537-38. Mr. Nguyen was not vouching for the Web site or any of the statements contained therein, solely that he viewed the document on the internet in a commercial context, and printed it out. Under ER 901, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by testimony from a witness with knowledge "that the matter is what it is claimed to be." ER 901(b)(1); see *State v. Kinard*, 109 Wn. App. 428, 436, 36 P.3d 573 (2001), *review denied*, 146 Wn.2d 1022 (2002).

The evidentiary issue before this court is akin to that in *State v. Modest, supra*. In that case, a telephone bill was admitted on rebuttal "only after defense witnesses testified that they had not seen Mr. Modest use the jail telephone frequently." *Id.* at 248-49. The court held that "[c]learly a telephone bill is not an assertive statement and is not excludable as hearsay."

*Id.* at 249. "The admissibility of nonassertive statements as circumstantial evidence of a fact in issue is governed by principles of relevance rather than hearsay." *Id.* (citing *In re Dependency of Penelope B.*, 104 Wn.2d at 652-53).

The picture of the exact apron at issue in a commercial context is not an assertive statement, and it was relevant in light of defense testimony that called into question the uniqueness of the apron. The trial court did not abuse its discretion in admitting Exhibit 70.

**7. *It Was Not An Abuse of Discretion to Exclude Mr. Cavanaugh's Testimony.***

The decision to exclude expert testimony is within the sound discretion of the trial court and will not be overturned absent a clear showing of abuse. *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003) (citing *State v. Kalakosky*, 121 Wn.2d 525, 541, 852 P.2d 1064 (1993)). Mr. Cavanaugh served two tours of duty in Vietnam in the years 1964 and 1966. RP VII, 1236. He was apparently trained by the military to spot Communist propaganda in the villages of Vietnam in 1964 and 1966. RP VII, 1246. He had no knowledge of the conditions in Vietnam after this time. RP VII, 1258. The only thing Mr. Cavanaugh could do was "empathize" with how the immigrants who had been forced to flee Vietnam after the fall of Saigon felt. RP VII, 1253. Additionally, Mr. Cavanaugh did not establish that he

had any specialized knowledge in the current efforts of the Vietnamese government, if any, to disseminate propaganda in the United States.

With this background and set of qualifications, Mr. Cavanaugh was shown a picture of the apron and asked: "Is there anything about this apron that you believe is related to any communist symbol?" RP VII, 1259. The court sustained an objection on the fact that Mr. Cavanaugh's state of mind is "not relevant to the state of mind of someone who is an immigrant from Vietnam." RP VII, 1260. Defendants' counsel argued that his testimony was relevant because Mr. Cavanaugh had "specialized expertise in recognizing communist propaganda," and was therefore qualified to express an expert opinion. *Id.* The court addressed this argument by correctly noting that Mr. Cavanaugh's training was related to conditions in Vietnam in 1964 and 1966, and that "he is not established as an expert in conditions here in the United States in this community." *Id.*

Defendants' counsel then questioned why Mr. Cavanaugh could not simply give his opinion about the existence of Communist symbols without expert status being conferred, and the court properly responded that someone not connected to the case could not be allowed to come into court and offer their opinion absent being deemed an expert. RP VII, 1260-61. Defense counsel then attempted to establish Mr. Cavanaugh's connection to the local Vietnamese Community, presumably so that he could qualify to give his

opinion. RP VII, 1261. When asked what community activities he was involved in, Mr. Cavanaugh responded: "Oh, I've been involved in a lot of community activities, but not with the Vietnamese people." *Id.* Following this exchange, counsel then reiterated his request for expert status being conferred on the witness, and the court once again denied that request because the witness's training had to do only with Vietnam in 1964 and 1966. RP VII, 1262.

The bottom line is that Mr. Cavanaugh had no personal knowledge about life in Vietnam after 1966, could only empathize with what the subjective state of mind would be of someone who spent months or years in a reeducation camp and then fled Vietnam, and was not involved to any great degree with the local Vietnamese Community in Washington State. Under these circumstances, the trial court did not abuse its discretion in denying Mr. Cavanaugh's testimony about whether he thought the apron was Communist propaganda.

**8. *It Was Not Abuse of Discretion for the Trial Judge to Limit the Purpose for Which Exhibits 66 and 67 Were Admitted.***

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The admission or refusal of evidence is within

the trial court's discretion and the court will only be reversed for abuse of discretion. *Maehren v. Seattle*, 92 Wn.2d at 488.

In this case, the two articles were properly admitted to show that the defendants' subjective state of mind—*i.e.*, their opinion that Duc Tan was a Communist—was justified by the fact that they had read these 1997 publications. RP VII, 1212, 1215. The articles were not allowed to be offered for the truth of the assertion in the articles that Duc Tan was actually a Communist. For all of the reasons that hearsay is impermissible, it would be incredibly unfair for the defendants to assail the element of falsity through articles written by individuals who are not able to be cross-examined. Whether or not Duc Tan was a Communist was an issue that pertained to the element of falsity, and the only purpose for allowing the jury to consider the statements in the articles for the truth of the matter asserted would be to prove the relative truth of this element of the case.

The defendants' argument that the jury was not allowed to consider the statements in the articles for the purpose of attacking actual malice is not substantiated by the record. Defense counsel was allowed to quote from these articles, and then ask the defendants whether or not this affected their belief in the truth of the matter that Duc Tan was a Communist. RP VII, 1212-15. The court did not limit defense counsel from liberally quoting from the articles in examining how this content affected the witnesses' state

of mind. Therefore, the defendants cannot argue that the jury was prevented from considering the contents of these articles, as it pertains to their state of mind, because this is precisely what was allowed to happen.

The articles were admitted, as argued and requested by defense counsel, to show "what the defendants believed at the time." RP VII, 1211. The court properly exercised its discretion in limiting the scope of the articles. Despite the court's cautionary instructions to the jury, the court did allow defense counsel to quote passages from the articles to the witness and ask how this content affected his/her state of mind. Moreover, defense counsel never objected to the limiting instruction of the court.

9. ***There Was No Error in Submission of the Newspaper Articles to the Jury Because No Exception Was Taken to This Jury Instruction, the Defendants Stipulated to the Admissibility of Exhibit 14A, and the Law Does Not Mandate That Entire Publications Must Be Submitted to a Jury to Sustain An Award.***

The defendants stipulated to the admissibility of Exhibit 14A, containing the excerpts that they now argue warrant vacating all damages associated with this article. RP VI, 1024-26. Additionally, the defendants took no exception to the instructions given to the jury that are now raised as errors warranting a reversal of damages. RP IX, 1560-61. Jury instructions not objected to become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998). The defendants should not be allowed to

raise this issue now, when they did not object to either the exhibit containing the article excerpt or the jury instructions referencing this content.

Additionally, none of the cases cited by defendants mandate that the entire portion of a defamatory article or communication must be submitted to the jury. They stand solely for the proposition that if there is any challenge to "determining whether a publication is defamatory," this question should be resolved by looking to the document as a whole. *Camer v. Seattle P.I.*, 45 Wn. App. 29, 37, 723 P.2d 1195 (1986), *cert. denied*, 482 U.S. 916 (1987). Here, the plaintiffs cited the portions of the document that they alleged to be defamatory. If the defendants felt that the article in its entirety negated the defamatory meanings alleged, it was up to defendants to make this challenge. They did not and no error should attach.

10. ***The Court Did Not Err By Refusing to Allow the Jury to Consider Whether the Communications Were Privileged As a Matter of Law Based on the Common Interest Doctrine.***

The common interest privilege applies to communications made between persons involved "in the same organizations, partnerships, associations, or enterprises who are communicating on matters of common interest." *Moe v. Wise*, 97 Wn. App. 950, 958, 989 P.2d 1148 (1999) (citing Restatement (Second) of Torts, sec. 596 cmts. (d), (e) (1977)). "Washington courts have applied the common interest privilege to communications among officers of an unincorporated, nonprofit association about their members and

officers' qualifications and their participation in association activities." *Moe*, 97 Wn. App. at 958 (citing *Ward v. Painters' Local Union No. 300*, 41 Wn.2d 859, 865-66, 252 P.2d 253 (1953) (members of union discussing officers and members)). "Washington law also gives protection to communications among partners about partnership litigation to recover money owed to the partnership." *Id.* (citing *Parry v. George H. Brown & Assoc., Inc.*, 46 Wn. App. 193, 197, 730 P.2d 95 (1986)).

The only connection that the plaintiffs and defendants have in this matter is that they are Vietnamese immigrants living in Thurston County, Washington, and share a similar history and language. The communications at issue did not arise during any meetings convened on behalf of a particular organization or group, whether the VCTC or the defendants' Committee Against the Viet Cong Flag. The plaintiffs do not have a "common interest" with the defendants as it pertains to any of the allegations made within the communications at issue in this case. The court properly withheld this instruction from the jury.

**11. *The Court Did Not Abuse Its Discretion By Declining to Vacate the Jury Award Based on Excess Passion and Prejudice.***

In order to grant a new trial based upon a claim of excessive damages under CR 59(a)(5), "the damages must be so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice." *Nord v.*

*Shoreline Sav. Ass'n*, 116 Wn.2d 477, 486, 805 P.2d 800 (1991). The amount of the damages must be "so excessive as to be outside the range of evidence or so great as to shock the court's conscience." *Id.* at 487 (citing *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 531, 554 P.2d 1041 (1976)). And the passion or prejudice "must be of such manifest clarity as to make it unmistakable." *Bingaman v. Grays Harbor Comty. Hosp.*, 103 Wn.2d 831, 836, 699 P.2d 1230 (1985).

[W]here it can be said that the jury . . . could believe or disbelieve some of [the evidence] and weigh all of it and remain within the range of the evidence in returning the challenged verdict, then it cannot be found as a matter of law that the verdict was unmistakably so excessive or inadequate as to show that the jury had been motivated by passion or prejudice solely because of the amount.

*James v. Robeck*, 79 Wn.2d 864, 870-71, 490 P.2d 878 (1971). Moreover, courts should be "reluctant to interfere with a jury's damage award when fairly made" because determination of damages is the duty of the jury. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

The jury in this case clearly had ample evidence to arrive at the determinations rendered. Dr. Mariam Lam testified that, in a general social sense, it was "devastating" to be labeled a Communist because it dismisses all that a Vietnamese-American has gone through to survive and recreate their lives. RP III, 491-92. Duc Tan testified that the accusations caused him great "pain and sorrow" (RP V, 910), that he was "publicly humiliated"

that it was "unthinkable" (RP V, 922), and that it "ruin[ed] his honor completely." RP V, 923. Substantial evidence was also put forward demonstrating the crippling effect these accusations had on the non-profit organization, the VCTC. RP III, 428-31; 441; RP IV, 725. Additionally, the plaintiffs demonstrated that as of March 2004, over 13,000 people had viewed the Public Notice as posted on the defendants' Web site. RP IV, 783.

While substantial, the amounts awarded in damages are certainly probable and not anywhere close to being outside of a reasonable range. It cannot be said, with manifest clarity, that passion and prejudice unfairly skewed the award of damages in this case. Of note is the fact that the jury awarded damages less than the amounts suggested by plaintiffs' counsel in closing argument. RP IX, 1616-18. Clearly, the jury applied rational thought, based upon the evidence at hand, to arrive at their final amount.

It is understandable that the defendants disagree with both the amount and the basis for the awards; however, they do not put forth evidence that remotely comes close to meeting the substantial burden necessary to prove unfair prejudice.

#### **E. CONCLUSION**

For the reasons stated herein, the plaintiffs ask this court to affirm the judgment that was entered based upon the jury's verdict.

DATED this 8<sup>th</sup> day of June, 2010.

Respectfully submitted,

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



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Gregory M. Rhodes, WSBA #33897  
Attorney for Plaintiffs

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STATE OF WASHINGTON

BY  \_\_\_\_\_  
DEPUTY

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 PHY 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,

Appellants.

NO. 39447-2

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I certify that on the 8th day of June, 2010, I caused a true and correct copy of the Respondents' Brief, the Motion for Acceptance of Over-length Brief of Respondents, and this Certificate of Service to be served on the following in the manner indicated below.

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

- U.S. Mail
- Hand Delivery
- E-mail: [coa2filings@courts.wa.gov](mailto:coa2filings@courts.wa.gov)
- ABC Legal Services

Counsel for: Appellants/Defendants  
Nigel S. Malden  
Attorney at Law  
711 Court A, Suite 114  
Tacoma WA 98402

- U.S. Mail
- Hand Delivery
- Fax: (253)573-1209
- E-mail: nmalden@nigel  
maldenlaw.com
- ABC Legal Services

Counsel for: Appellants/Defendants  
Rebecca M. Larson  
Davies Pearson, P.C.  
920 Fawcett – PO Box 1657  
Tacoma WA 98401

- U.S. Mail
- Hand Delivery
- Fax: (253) 572-3052
- E-mail: rl Larson@dpearson.com
- ABC Legal Services

Counsel for: Appellants/Defendants  
Michael B. King  
James E. Lobsenz  
Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle WA 98104

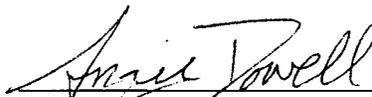
- U.S. Mail
- Hand Delivery
- Fax: (206) 467-8215
- E-mail: king@carneylaw.com  
lobsenz@carneylaw.com
- ABC Legal Services

Counsel for: Appellants/Defendants  
Howard M. Goodfriend  
Edwards, Sieh, Smith & Goodfriend, P.S.  
1109 First Avenue, Suite 500  
Seattle WA 98101-2988

- U.S. Mail
- Hand Delivery
- Fax: (206) 624-0809
- E-mail: howard@washington  
appeals.com
- ABC Legal Services

I declare under penalty of perjury under the laws of the state of  
Washington that the foregoing is true and correct.

Dated this BH day of June, 2010, at Olympia, Washington.

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