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Appendix C	Trial Exhibit No. 14A – Summaries of Community Activity Reporting on New Horizon Articles – English translation by Vuong Nguyen
Appendix D	<i>Declaration of Nigel Malden in Support of Motion for New Trial</i> attaching Police Reports from Olympia Police Department and Washington State Patrol <i>Appendix A</i> (CP 202-216)
Appendix E	Jury Instruction No. 15 (CP 168)
Appendix F	Trial Exhibit No. 70

A. ASSIGNMENTS OF ERROR

The trial court erred when it:

1. Denied defendants' JNOV motion;
2. Denied defendant's motion for a new trial;
3. Gave jury instruction number 15;
4. Admitted testimony that plaintiff Duc Tan received a death threat;
5. Excluded testimony that plaintiff Duc Tan opposed defendant Dat Ho's efforts to persuade the United States Postmaster General not to distribute post office literature which contained the Communist flag of Vietnam;
6. Entered judgments in favor of the plaintiffs;
7. Excluded the opinion of defendant's expert Robert avanaugh that the design on the apron was a Communist propaganda symbol meant to portray Ho Chi Minh and the communist's victory over the United States;
8. Admitted Exhibit No. 70, an allegedly authentic internet ad;
9. Sustained a hearsay objection to Exhibits 66 and 67 and admitted them for a limited purpose only, refusing to admit them for the purpose of showing their effect on the minds of the defendants regardless of whether the assertions in the articles were true or not; and
10. Permitted entry of a judgment for defamation based on evidence of less than the entire contents of a newspaper article alleged to be defamatory.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the statements made by the defendants in their "Public Notice" statements of opinion only, and therefore incapable of constituting actionable defamation because there was no implied assertion that there were undisclosed facts which supported the asserted opinion?
2. Was there insufficient evidence to establish "actual malice" because there was no evidence that the defendants had serious doubts about the truth of their publications or that they acted with a high degree of the probable falsity of their statements?

3. Does the First Amendment require that the element of falsity be proved by clear and convincing evidence in public figure defamation cases?
4. Does Article 1, Section 5 require that the element of falsity be established by clear and convincing evidence?
5. Did the trial court err by admitting evidence of a death threat received by plaintiff Duc Tan and bearing the phony signature of Norman Le, when it was conceded by the plaintiff that the death threat was not made by any one of the defendants?
 - (a) Under these circumstances, was it legally improper to permit the imposition of civil liability for any emotional distress caused by receipt of this letter when no act of any defendant was either the cause-in-fact, or the proximate cause, of such distress?
 - (b) Should this evidence have been excluded under ER 401 because it had no probative value?
 - (c) Assuming *arguendo*, that it had some minimal probative value, should it have been excluded under ER 403?
6. Did it violate the First Amendment rule of *Mine Workers v. Gibbs* and *NAACP v. Claiborne Hardware* to permit the imposition of civil liability for damages on persons who were not individually responsible for the criminal act of making a death threat?
7. Did the trial court err in excluding evidence regarding defendant Dat Ho's knowledge of plaintiff Duc Tan's opposition to his efforts to persuade the Post Office not to display the Communist flag of Vietnam where such evidence pertained to the defendant's subjective, good faith belief that Duc Tan was pro-Communist?
8. Was it error to admit Trial Exhibit No. 70, an internet advertisement, when it
 - (a) was not authenticated;
 - (b) was inadmissible hearsay; and
 - (c) was legally completely irrelevant since it was offered only to show that the defendants acted negligently by failing to investigate the facts before speaking, and it is established law that a failure to investigate does not tend to show the actual subjective knowledge of the falsity, or probable falsity, of the

statements made by a defamation defendant which is required in a public figure defamation case?

9. Did the trial court abuse its discretion when it ruled that Robert avanaugh was not qualified to give his opinion as to whether the symbols on the apron were Communist propaganda symbols?
10. Did the trial court err in sustaining a hearsay objection to newspaper articles which were offered not for the truth of the matters asserted in them, but only to show the effect such articles had on the subjective state of mind of the defendants?
11. Was it error to allow the jury to consider whether newspaper articles written in Vietnamese were defamatory, when the plaintiffs only offered English translations of parts of one of those articles, while simultaneously instructing the jury in instruction No. 8 that when deciding whether a publication is defamatory they must consider the publication as a whole? Can the defamation judgments for these newspaper articles stand when there is insufficient evidence of the defamatory character of one of the articles and the jury verdicts do not segregate the amount of damages awarded for each article?

C. STATEMENT OF THE CASE

1. PROCEDURE

On March 4, 2004, Duc Tan and a corporation called the Vietnamese Community of Thurston County (“VCTC”) filed suit for defamation against Norman Le, his wife Phu Le, and five other married couples. CP 91-133.¹

The trial court granted defendants’ motion for summary judgment in part, ruling that the plaintiffs “are public figures as a matter of law[,]” CP 31:17, but denied the rest of the motion, ruling that the plaintiffs were entitled to a trial on their claims that they were defamed by various

¹ One of those couples, Tuan Vu and his spouse, was later voluntarily dismissed from the case. RP I, 16.

statements made by the defendants in a notice published on the internet and in several newspaper articles. CP 31:18-32:20.

The case was tried to a jury before the Honorable Wm. Thomas McPhee. The eleven day trial was held during the period from March 30, 2009 through April 16, 2009.² When the plaintiffs rested, the defendants moved for a directed verdict on the grounds that there was insufficient proof of falsity, actual malice, and damages. RP VI, 1029-1034. The trial judge denied this motion. RP VI, 1038-1040.

On April 16, 2009, the jury returned four special verdicts finding in favor of the plaintiffs. CP 146-147; 148-149; 150-152; 153-155. On April 27, 2009, defendants filed a motion for new trial. CP 55-67.

On May 8, 2009, the Superior Court entered judgments on the jury verdicts in favor of the plaintiffs. Two judgments were entered in favor of plaintiff Duc Tan: one judgment in the amount of \$150,000 was entered against all defendants, and a second judgment for \$75,000 was entered solely against defendant Norman Le. CP 177-179. Two judgments were entered in favor of the plaintiff VCTC: one judgment in the amount of \$60,000 was entered against all defendants, and a second judgment in the

² The verbatim report of proceedings consists of nine volumes as follows: RP I – March 30, 2009; RP II – March 30 & 31, 2009; RP III – March 31 & April 1, 2009; RP IV – April 1, 2 & 7, 2009; RP V – April 7 & 8, 2009; RP VI – April 8, 9 & 13, 2009; RP VII – 13 & 14, 2009; RP VIII – April 14 & 15, 2009; RP IX – April 15 & 16, 2009. There is an *error* in pagination in Volume VIII. Although Volume VII ends on page 1400, Volume VIII begins on page 1343. Thus there are *two volumes* – Volumes 7 and 8 -- which *both* contain pages which bear the numbers 1343 – 1400. There is also an error in Volume 2. Court Reporter Kathy Beeler filed a declaration with this Court on November 24, 2009, which alerts the Court to the error in that volume on pages 239-248.

amount of \$25,000 was entered against defendant Norman Le. CP 178-180. On May 18, 2009, the defendants filed a motion for judgment as a matter of law, notwithstanding the verdict. CP 68-74.

On May 29, 2009, the trial judge denied the defendants' motions for a new trial and for judgment notwithstanding the verdict. CP 24-25. The defendants appealed. CP 5-25 (notice); CP 26-29 (amended notice).

2. SUBSTANTIVE FACTS

a. Introduction: The Allegedly Defamatory Documents and the Gist of the Dispute.

Plaintiff Duc Tan and the defendants in this case were all born in Vietnam. RP V, 896; RP VI, 1071, 1125; RP VII, 1277, 1365. They all came to this country after the Vietnam War. Some escaped Vietnam shortly after the fall of Saigon on April 30, 1975. RP VI, 1131-1132. Others were imprisoned in communist labor camps for many years before they were released,³ and only then were they able to escape Vietnam and to immigrate to the United States. All of the defendants are strongly anti-Communist and deeply committed to opposing the present government of Vietnam. Plaintiff Duc Tan also professes to be a committed opponent of the Communist regime. A series of incidents, however, caused the defendants to conclude that Duc Tan was actually a supporter of the Communist regime. The defendants publicized their belief that Duc Tan

³ For example, Norman Le was imprisoned for nine years and seven months before he was released. RP VII, 1376. Phiet Nguyen was imprisoned in a labor camp for six and a half years. RP VII, 1286. Plaintiff Duc Tan, however, was only imprisoned for six months. RP V, 902. He came to the United States in 1979. RP V, 830, 909.

was a Communist within the Washington State community of resettled refugees from Vietnam, the contention that someone is pro-Communist is a very harsh accusation. This case involves Duc Tan's claim that he was falsely accused of being pro-Communist, and the defendants' responding contention that they believed, and continue to believe, that their statements about Duc Tan and the organization he leads, the VCTC, were true.

The plaintiffs made three claims of defamation in this case. The first claim pertains to a document entitled "Public Notice" which was disseminated by email and posted on the internet on August 7, 2003. This document, which was written in Vietnamese, was "signed" by six members of the Committee Against the Viet Cong Flag, all of whom were sued by the plaintiffs.⁴ The original Vietnamese version of the "Public Notice" was admitted into evidence at trial as Exhibit 7. CP 50. This document was translated into English and that English version was admitted in evidence as Exhibit 8 (App. A). CP 50.

The plaintiffs brought three additional defamation claims solely against defendant Norman Le, based on his authorship of three articles published in Vietnamese newsletters.⁵ The first two articles were published on November 15, 2002, in Issue No. 20 of the *Community Newsletter*, an informal publication of the "Vietnamese Community of

⁴ Norman Le "signed" the Public Notice -- the document posted on the internet -- using his complete Vietnamese name of Ngo Thien Le; he did not use his adopted English first name of "Norman" on that document.

⁵ See Instruction No. 7 in which the trial court summarized the plaintiffs' claims, CP 163.

Washington State.” The original Vietnamese versions of these two articles were admitted into evidence as Exhibit 9 and 10. CP 50-52; RP V, 882-886. These articles were translated into English and that English translation was admitted in evidence as Exhibit 18 (App. B). CP 52. The third article was published in October 2003 in a newsletter called *New Horizon: The Voice of the Vietnamese Community in Washington State*. The original Vietnamese version of this third article was admitted in evidence as Exhibit 11. CP 52; RP V, 887-890. Some of the statements made in this second article were translated into English, and these translated excerpts were admitted into evidence as Exhibit 14A (App. C). CP 52.

It was not disputed that the defendants wrote and published these documents. While there were some disputes as to whether the Vietnamese words in the documents had been correctly translated into English, in general there was agreement as to what these documents said. The gist of the dispute was the defendants’ asserted belief that plaintiff Duc Tan was a Communist, or a Communist sympathizer. Duc Tan took offense at this asserted belief, and sued alleging the statements about him were defamatory.

b. The Incidents Which Gave Rise to Defendants’ Belief That Duc Tan was Pro-Communist.

A series of incidents led the defendants to believe that Duc Tan was faking his anti-communism, and that he had actually been surreptitiously trying to advance the interests of the present communist government of

Vietnam, while simply pretending to be a devoted anti-Communist. The defendants' Public Notice (Exhibit No. 8), identified the following incidents as a basis for their belief that Duc Tan was pro-Communist:

- In 1995, the Vietnamese Mutual Assistance Association, a Washington corporation for the advancement of the interests of Vietnamese refugees living in Washington State, decided to change its name. Defendant Norman Le suggested that the group be called the Nationalist Vietnamese Community of Thurston County to insure that the organization's anti-Communist stance was clearly demonstrated. But Duc Tan opposed this idea and argued that including the word "Nationalist" would not be a good idea. Duc Tan's position prevailed and the name selected was simply the Vietnamese Community of Thurston County ("VCTC").
- In 1997, at an event sponsored by the VCTC, a band hired by Duc Tan began to play the national anthem of the current Communist government of Vietnam.
- The Communist flag of the country of Vietnam (now officially called the Socialist Republic of Vietnam) was flown for many years at South Puget Sound Community College. In 2002 a group of Vietnamese refugees formed an organization called Committee Against Viet Cong Flag (CAVCF) and elected officers. Defendant Norman Le was elected as a co-chairman of the Committee at a meeting held in January. Duc Tan attended the next meeting and he objected to Norman Le being elected as a co-chair of the Committee and demanded that Norman Le step down and refrain from taking any leadership role. He argued unsuccessfully that the Committee should scrap the first election and hold a new election for officers.
- In July of 2003, an apron bearing an image of bearded man with a red hat was found at the booth maintained by the VCTC (Duc Tan's organization) at the Lakefair summer fair. There were seven gold stars on the apron. Although superficially the man appeared to be an image of Santa Claus, Dai Pham, the man who found the apron, immediately recognized what he believed to be an image of Ho Chi Minh and symbolism showing the victory of the Viet Cong over the United States.
- At the private Catholic school where Duc Tan taught Vietnamese language classes for many years, the Communist flag of Vietnam was displayed in the classroom where Duc

Tan taught. Although Tan arranged for permission to keep a nationalist flag of Vietnam outside the classroom, and to use it when he taught class, he made no effort to persuade the school to remove the Communist flag.

- The VCTC organized a cultural community event and held it on September 2, which is the day the Communist government of Vietnam celebrates as independence day.
- After many years serving as a leader of VCTC, Duc Tan finally disclosed that he had been released after only six months from a communist political reeducation camp when he signed an oath pledging his loyalty to the Communist regime.
- After he was released from prison Duc Tan the Communists allowed him to resume his post as a teacher.
- After the VCTC received a donation from a business owner who had distributed free calendars printed in Ho Chi Minh City, Mr. Duc Hua, the President of the VCTC at that time, made a comment about the source of donations to the VCTC. The exact words of his comment were disputed. The defendants claimed that he said there was nothing wrong with receiving V.C. money. Duc Hua denied that he said this.
- Scheduling the fall meeting of the VCTC to coincide with the “Fall Revolution” which is the name the Communists give to celebrate the day they decided to declare war against the French.
- Although the Public Notice stated “we...invite the Vietnamese Community in Thurston County to send representatives to this press conference” held by defendants to discuss the Public Notice, the VCTC did not send anyone to that press conference.
- In 2004 the Politburo of the Communist Party of Vietnam passed a resolution known as Resolution 36 which publicly affirmed the Communist Party’s intention to try to influence Vietnamese people living in other countries, such as the United States, to have a favorable view of the Communist government of Vietnam.

The evidence admitted at trial pertaining to each of these incidents, plus others, is summarized below.

c. Evidence Regarding the Incidents And Circumstances Which Caused the Defendants to Believe That Duc Tan Was A Communist or Communist Sympathizer.

(1) NAME CHANGE FOR A COMMUNITY ORGANIZATION

In 1995 the Vietnamese Mutual Assistance Association, which was founded in 1978, voted to change its name to the Vietnamese Community of Thurston County (“VCTC”). RP IV, 634. At that time defendant Norman Le was the secretary of the organization, and he suggested that the name be changed to the Nationalist Vietnamese Association of Thurston County. RP IV, 636; RP VII, 1392-93. Defendant Dat Ho explained that without the word “nationalist” in the name of the organization, “anybody that is a Vietnamese Communist or a pro Communist can join that organization because the word ‘national’ does not distinguish them from the rest of us.” RP VII, 1210. *See also* RP VIII, 1385 (many people said if the word “nationalist” is not included “it’s an open door for the other type of member to join.”). The proposal to include the word “nationalist” was defeated and the name VCTC was chosen, ostensibly because it was a shorter name. RP IV, 636. Although Norman Le’s proposal was defeated, he remained secretary of the organization. RP IV, 652-653. Duc Hua was elected as President.

(2) COMMENT ABOUT ACCEPTING MONEY FROM THE VIET CONG

The owner of a Vietnamese grocery called the Caoson market made a monetary contribution to the VCTC. RP IV, 659. This donation gave rise to a controversy due to suspicions that the Caoson owner was a

Communist. The owner had given away free calendars to his customers, and Norman Le pointed out that the calendars had been printed in Ho Chi Minh City (the name the Communists gave to Saigon following the Fall of South Vietnam in 1975). RP IV, 659-660; RP VII, 1395. It was undisputed that the calendars actually bore writing which stated that they had been printed “by the Communist Party in Ho Chi Minh City.” RP V, 814; RP VII, 1329. A meeting was held to inquire of the Caoson owner why he had his calendars printed in Ho Chi Minh City, and the owner responded that it was cheaper to have them printed there than in the U.S. RP IV, 660, 780. The owner agreed to stop giving away the calendars, and Duc Hua, the president of VCTC, decided that it would accept the owner’s monetary donation. RP IV, 661-663.

Norman Le testified that at that meeting Duc Hua said “What’s wrong with receiving Viet Cong’s [sic] money as long as we don’t listen to them.” RP VII, 1398. Duc Hua denied that he said this. RP IV, 662. Instead, he testified that he said the VCTC would “accept any donation, but we would not comply to [sic] any requests when receiving these donations.” RP IV, 663. When asked to explain, he said, “If somebody is giving out some donation to us, we will accept it. But we will not accept any requests from them. If they ask us that they would give that donation in [sic] a condition that we have to do this or do that, then we’ll not do – we would not comply to it.” RP IV, 663.

(3) WRONG NATIONAL ANTHEM

On October 4, 1997, the VCTC sponsored an event to celebrate a famous Vietnamese poet named Ha Huyen Chi. RP III, 412. At the start of the event, a band started to play the national anthem for the present Communist government of Vietnam. RP III, 413. According to the plaintiffs, it was only the lead guitarist for the band, a young man in his 20's who had been in the United States less than two years, who played the wrong anthem. RP III, 413. The band was signaled to stop playing; did so, apologized for playing the Communist anthem; and then played the national anthem of the Republic of South Vietnam. RP III, 414.

Conflicting testimony was given as to what reaction the crowd had when the band started playing the wrong anthem. Plaintiffs' witnesses testified that there was little or no reaction. RP III, 414; RP IV, 667, 791; RP V, 855. Defendants' and defense witnesses testified there was an uproar. RP VI, 1083-1084.⁶ It was undisputed that two Vietnamese newspapers wrote articles about the wrong national anthem incident. RP V, 847.⁷ Duc Hua, the President of the VCTC, testified that the VCTC held a press conference to explain why the mistake occurred, and to make an apology to the Vietnamese community for the mistake. RP IV, 700.

⁶ An article published on October 31, 1997 in a Vietnamese newspaper called *GOP GIO* was admitted into evidence (Trial Exhibit No. 67), but only for the limited purpose of showing that there was such an article. RP VII, 1212, 1215. Although this article described the crowd's reaction to the playing of the anthem, the jury was not allowed to consider the article either for the truth of its statements, or for the effect the article had on the subjective state of mind of the defendants.

⁷ An English translation of some passages from one of those articles published in the "*GOP GIO*" newspaper was admitted in evidence as Exhibit No. 38. RP VIII, 1530.

(4) THE “SANTA CLAUS” APRON WITH COMMUNIST SYMBOLS

The VCTC sponsored a booth at the Lakefair celebration in July of 2003 and Mr. Dai Pham was employed by the VCTC to work in the booth preparing barbecue. RP II, 362; RP V, 926. Pham found the apron on top of a Coke machine right behind the VCTC booth. RP II, 363-364. Pham had served in the army of South Vietnam for many years, and when he saw the apron he thought that it bore symbols of communism and that it had been placed there by “some kind of bad people.” RP II, 364-65. He asked who owned the apron but no one admitted to owning it. RP II, 365. He talked to Duc Tan about the apron, but Tan told him the figure on the apron was “just a design and not to worry about it.” RP II, 374-75.

Pham did not feel comfortable wearing it because he did not want to display these symbols. RP II, 365, 375. But he needed an apron so he turned it around and wore it backwards. RP II, 365; RP V, 857. At the end of the day, he brought the apron home with him. RP II, 366, RP, 857. Later he talked to defendant Tuan Vu, who was a member of his church choir, and he told Vu how he found the apron behind the VCTC booth. RP II, 366-68. Vu said he wanted it so Pham gave it to him. RP II, 369. The apron was later displayed at a press conference and several witnesses testified that they believed the apron was a disguised symbol of the Communist flag. RP VI, 1085 (Thanh-Nhan Tran); RP VII, 1309 (Phiet Nguyen); RP VII, 1379-80 (Norman Le).

(5) SCHEDULING EVENTS ON A COMMUNIST HOLIDAY

It was undisputed that the Communists celebrate September 2 as the day that they declared war against the French, that they call this date “the fall revolution” and that they consider it the birth date of the Communist revolution. RP IV, 772; RP V, 806; RP VIII, 1368-1370. It was also undisputed that in the fall of 1999 the VCTC newsletter contained an announcement that a cultural event was going to be held on September 2nd. RP IV, 774, 794; RP V, 806; RP VIII, 1368. That newsletter was admitted into evidence as Exhibit 44. RP VIII, 1368-1369. According to one plaintiff witness the VCTC was so busy in the summer that they had to delay the event until the fall. RP IV, 774. The same witness also testified that the VCTC actually intended to hold that event on June 19th, which is the date celebrated by nationalists as their Armed Forces Day, but “by some mistake that I can never understand he [the writer of the VCTC newsletter] used that date September 2nd.” RP IV, 795.⁸

According to defendant Phiet Nguyen, the VCTC also scheduled association events on April 30th, even though that was the day that Saigon fell to the Communists. RP VII, 1337-38. Nguyen said since April 30th was the day that “we lost our country...[w]e should try to avoid all the festivities and music and all that” on that date. RP VII, 1338. He said celebrating an event on April 30th in the Vietnamese-American community was akin to celebrating an event on September 11th “with magic and

⁸ “The person who wrote this mentioned about the South Vietnamese army’s day. But he also used the date of September 2nd.” RP V, 806.

festivity,” thereby giving the impression that one was celebrating the terrorist attack on the World Trade Center. RP VII, 1338.

(6) LOYALTY PLEDGE TO THE COMMUNISTS

Plaintiff Duc Tan testified he taught as an elementary school teacher before he was drafted into the military where served as a warrant officer. RP V, 897-98. After four months of military training for officers and four months of artillery training, he was assigned to go back and teach school again. RP V, 898. He eventually was assigned to teach high school and remained so until the fall of the South Vietnamese government on April 30, 1975. RP V, 899. Throughout the time he was teaching he retained his military rank and was eventually promoted to Lieutenant. RP V, 899.

Tan testified that, when the Communists took over, they sent him to a reeducation camp because of his military training. RP V, 901. He was kept there for six months and then released along with several hundred other people. RP V, 902. Tan said that all of them were required to sign papers stating that they would “accept to work for or to cooperate with the revolution.” RP V, 902-903. Tan said that although he signed it, he did not truly support the Communists. RP V, 903. When he was released he was sent back to resume his teaching duties. RP V, 904.

Duc Tan told one of his daughters that he was forced to sign an oath of loyalty to the Communist government as a condition of ever getting to see his wife. RP II, 320. His other daughter testified that he never told her that he signed an oath of loyalty to the Communists. RP II, 344.

There was conflicting testimony on the point of whether the Communists always made people sign loyalty oaths as a condition of getting released from prison. Dr. Dung Nguyen, a witness for the *plaintiffs*, testified that he was imprisoned by the Viet Cong for two years and was then released in 1977. RP III, 552. He said he was *not* required to sign a pledge of loyalty to the Communist government as a condition of his release, only a pledge that he would obey the instructions of that government. RP III, 573. He was not allowed to resume the practice of medicine when he was released, and he lost all his civil rights. RP III, 574-75. He said that the same rules applicable to him, as a doctor, were also applicable to teachers. RP III, 576.

Similarly, defendant Phiet Nguyen testified that he was not asked to sign any kind of loyalty oath when he was let out of prison after six and a half years. RP VII, 1289. Nguyen testified that only the Viet Cong had to sign a loyalty oath to the Communist government. Those who had allied themselves with the Army of South Vietnam and with the Americans were the “hated people” and they were never asked to sign a loyalty oath. RP VII, 1290. And defendant Le testified that when he was finally let out of prison after 9 years, he was not required to sign an oath either. RP VII, 1386. He testified that “for people in my category” -- people who had opposed the Communists -- the Communists never required loyalty oaths because they never intended to trust them to do anything at all. RP VIII, 1407-08. Instead, the Communists denied them any opportunity to work and simply required them to report to the police every day to tell the police

who they had been talking to and what they had been doing all day. RP VIII, 1408.

On the other hand Mr. Vuong Nguyen, another of plaintiffs' witnesses, testified that he knew people who were released from prison after periods of many years on the condition that they promise to be loyal to the Communists and agree to spy for them. RP II, 398. Nguyen said these people signed loyalty oaths in order to be set free and then once freed they found a way to escape from Vietnam. RP II, 398. And Witness Len Hua, who was imprisoned for a total of 13 years; said he was required to sign a loyalty oath before his release. RP III, 597. He said he signed it so he could be released, but he did not take it seriously. RP III, 598.

Dr. Mariam Lam, an expert witness called by the plaintiffs, also testified to the Communist practice of requiring some people to sign loyalty oaths as a condition of their release. RP III, 478-479, 482. But Lam acknowledged that getting released after signing a loyalty pledge was not automatic because the Communists studied the oath signers carefully to see if their profession of loyalty appeared to be genuine. RP III, 526. Lam testified that some people who were released from prison were kept under supervision after their release and had to report regularly as to what they were doing. RP 485.

(7) DUC TAN'S RESUMPTION OF HIS TEACHING POSITION UNDER THE COMMUNISTS AND HIS DENIAL TO U.S. IMMIGRATION THAT HE EVER WORKED FOR THE COMMUNISTS.

It was undisputed that, after he was released from prison, the Communists allowed Duc Tan to resume his job as a school teacher. RP V, 815-816. Tan acknowledged that he was "technically working for the communists," RP V, 904-05, but claimed that it was his understanding that the majority of all teachers who had been teaching in Saigon before the city's fall were allowed to return to their teaching jobs by the Communists. RP V, 938.⁹ (Tan also testified that he had been teaching in the capitol before its fall in April 1975.) Tan *agreed* that "it is a factually true statement for someone to say about Duc Tan that he worked for the communists in Vietnam after the fall of Saigon." RP V, 934.¹⁰ Yet Tan testified that, when he applied for entry into the United States and was asked "did I ever work for the communists" he answered this question "No." RP V, 954-55.¹¹

⁹ This point was sharply disputed. For example, defendant Phiet Nguyen testified that only people the Communists trusted were allowed to teach school in Saigon. RP VII, 1316. And Norman Le testified that when imprisoned people were released the Communists generally would not allow them to work at all, and yet the Communists allowed Tan to work and allowed him to live in Saigon, which was very unusual. RP VIII, 1352-1353.

¹⁰ Tan also admitted that in 1977 after his release he was contacted by the Communist Secret Police. RP V, 976. But he denied that he was required to stay in touch with the secret police during the entire time he was teaching in Saigon after his release. RP V, 977. He admitted that the Secret Police assigned him to spy on his neighbors who were opposed to the government, and he said he decided to flee the country because he knew he could not do this. RP VII, 1224.

¹¹ Although he was applying for entry into the United States having up until that point spent his whole life in Vietnam, Tan claimed that he understood the question to be asking whether he had ever worked for the Communists in the United States. RP V, 955.

(8) LEADERSHIP OF THE COMMITTEE AGAINST THE VIET CONG FLAG

In January and February of 2003 two organizational meetings were held to form the Committee Against the Viet Cong Flag, which intended to lobby to have the Communist flag of Vietnam removed from the student hall at the South Puget Sound Community College. RP III, 571; RP V, 818. At the first meeting Norman Le and Tuan Vu were elected to the Committee. RP III, 568; RP VII, 1303. The second meeting was attended by Duc Tan, and he proposed that Le and Vu should not keep their positions as co-chairs and that new elections be held. RP III, 568; RP IV, 776; RP V, 866; RP VI, 1152; RP VII, 1304. Duc Tan acknowledged that he suggested that Norman Le should step down as co-chair “because Norman Le have created some – a lot of controversial things with other organizations in the area” and therefore keeping him as a co-chair might discourage others from participating. RP V, 867. Tan’s proposal failed and Norman Le remained a co-chair. RP V, 867.

(9) COMMUNIST FLAG DISPLAYED AT SOUTH PUGET SOUND COMMUNITY COLLEGE

All parties agreed that for a period of time the Communist flag of Vietnam was displayed in the Student Hall at South Puget Sound Community College, and all parties testified that they objected to that and lobbied the college President to take that flag down. RP III, 419, 424-25. The embassy of the Socialist Republic of Vietnam sent letters to the Mayor of Tumwater and to the student senate at South Puget Sound

Community College encouraging the continued display of the flag of Communist Vietnam. Trail Exhibits 47 & 48.

(10) FAILURE TO HELP GET MUNICIPAL RESOLUTIONS PASSED.

Defendant Dat Ho testified that he worked to persuade cities and the Community College to pass resolutions supporting the display of the Nationalist flag of Vietnam (See Trial Exhibit No. 62), and that neither Duc Tan nor the VCTC helped him get these resolutions passed. RP VI, 1147-48, 1150-51.¹²

(11) COMMUNIST FLAG DISPLAYED AT SCHOOL WHERE DUC TAN TAUGHT VIETNAMESE LANGUAGE CLASSES

While he was the principal at the Hung Vuong school, Duc Tan taught Vietnamese language classes on Friday evenings; his students were primarily the children of Vietnamese refugees. RP V, 832-33. The language school did not have its own facility, but was allowed to use a room in the St. Michael's church. RP V, 834. In the day the room was a regular classroom for elementary school students. RP V, 835.

Duc Tan testified that when his language class began at 7 p.m. he gathered his students in the hallway where they saluted the flag of the Republic of Vietnam and sang its national anthem. RP V, 835. It was undisputed, however, that inside the classroom at St. Michaels there was a

¹² The trial judge only admitted this evidence for the limited purpose of demonstrating the truth of the statement in the Public Notice that the plaintiffs had not participated in any anti-communist activities. RP VI, 1151. Thus, the jury could not consider this evidence as evidence of the defendants' lack of actual malice.

display of the flags of many countries, and that one of the flags displayed there was the Communist flag of the Socialist Republic of Vietnam. RP V, 819, 836. Duc Tan explained that he had been told by the former principal of the Vietnamese language school that the flags inside the classroom belonged to St. Michael's and since they were only borrowing the classroom for a night language class they should not touch or modify the flags displayed inside the classroom. RP V, 838. The defendants accused Duc Tan of not acting vigorously enough to oppose the display of the Communist flag; Tan testified that the VCTC and the regular principal of the church school eventually worked out a compromise which allowed the VCTC to keep a flag on top of a cabinet in the hallway outside the classroom.¹³

(12) FAILURE TO APPEAR AT THE PRESS CONFERENCE

It was undisputed that the VCTC decided not to send anyone to the defendants' press conference in response to the defendants' invitation to come and explain these incidents. RP V, 859-860. Thanh Tran testified that they invited Duc Tan and the VCTC "three times to come and tell their story," but they did not come. RP VI, 1090. Duc Tan testified they did not attend because the statement in the Public Notice "is not a formal

¹³ Initially, because of expressed opposition to the Communist flag, the principal of St. Michael's regular school decided to remove both the Communist flag displayed inside the classroom (which belonged to the church school) and a Nationalist flag which had been placed inside the classroom by one of the defendants, Mr. Phiet Nguyen. When Mr. Nguyen complained about the removal of the Nationalist flag, the principal partially relented and allowed the language school to keep a Nationalist flag on display in the hallway outside the classroom. RP V, 838-840. Duc Tan testified that he showed that Nationalist flag to Norman Le when he visited the school. RP V, 843.

letter of invitation to our association at all.” RP V, 860. Tan also said they felt the meeting might lead to some physical violence so they thought it might not be safe to attend. RP V, 860.

(13) RESOLUTION NO. 36

Defendant Than-Nhan Tran fled a remote village in Central Vietnam controlled by the Communists, then in April 1975 left Vietnam with her husband and resettled in the United States. RP VI, 1072, 1075-1076. She became a teacher’s assistant in Longview, Washington, and at the time of trial she was the President of Women of Vietnam and a member of Washington State’s Commission on Asian Pacific-American Affairs. RP VI, 1069-1070.

Tran testified regarding Resolution No. 36, passed in 2004 by the Politburo of the Communist Party in Vietnam. RP VI, 1078-79. She testified that it confirmed that it was “the strategy of the Hanoi regime to try to control the Vietnamese overseas in all respects.” RP VI, 1078. She noted that many Vietnamese newspapers in the United States had discussed the Resolution for months and had warned the refugee community about it. RP VI, 1079.

Plaintiff Duc Tan admitted that Resolution No. 36 made it the official policy of the Communist Party to involve itself in the activities of Vietnamese refugee communities in the United States. RP V, 929. He agreed that this was a “scary” thing and that the Vietnamese refugee community “ha[d] to be very careful, watchful about it,” because the

Communist Party in Vietnam “really plan[s] to influence the political view of the United States as a whole.” RP V, 929.

The embassy of the Communist government of Vietnam sent letters (Trial Exhibits 63 & 64) to the City of Tumwater, and to the Student Senate at South Puget Sound Community College, urging the continued display of the Communist flag of Vietnam. RP VI, 1154-1156. Duc Tan claimed he was concerned that the Vietnamese embassy in Washington, D.C. was poking its nose into the business of citizens in Olympia, Washington. RP V, 959.

d. Testimony of Dr. Mariam Lam Regarding Harm Caused By Accusations of being Pro-Communist.

Dr. Mariam Lam testified as an expert witness for the plaintiff. RP III, 470-548. Dr. Lam has a Ph.D. in literature with a focus on literature which involves “Vietnamese diasporic issues” – literature discussing Vietnamese people who live outside of Vietnam – and she teaches courses of Vietnamese-American culture at the University of California at Riverside. RP III, 471-72.

Lam testified that there is a long history in the United States of refugees making accusations against other Vietnamese that they are Communist sympathizers, or against newspaper reporters that were not sufficiently critical of the Communist regime. RP III, 486-87. Lam said that in the U.S. “most” of the Vietnamese community is staunchly anti-Communist. RP III, 489. According to Lam, the stigma attached to being accused of being a Communist is “devastating.” RP III, 491. She

recounted examples of people who were victims of violent attacks after they had been accused of being pro-Communist:

[T]here [were] periods where it got very bad, in the sense like many of these newspaper editors were – their cars were firebombed. They got death threats. There are some university-type faculty who would bring speakers over [from Vietnam] who were actually dissident [anti-Communist] writers and such, but just the fact that they came from Vietnam alone . . . was enough to incite death threats to the people who sponsored their visits and that sort of thing.

RP III, 492-93.

Lam then discussed protests directed against a video store owner in southern California because he displayed a poster of Ho Chi Minh in his video rental store and the current flag of Vietnam. RP III, 493-94.

I have a whole book chapter on the high tech video store incident and then several protest situations following that incident in the 2000s. And part of the discussion is that for these families that lived through communism and fled it, this kind of wounding of their histories, you know, they – they feel like it's reopening the kinds of wounds they have struggled so hard to overcome.

And so by – by having these sort of symbols that they – they read very critically as still aligned with the socialist regime, they will get very angry and animated and aggressive. And they will go out and not only demonstrate, but often it can be very dangerous. And I mean, my – well, I don't know if I'm allowed to say, but my – I went out to, you know, cover some of these protests to see what it was like. And there were people were [sic] spitting on him. People were throwing cigarette butts at the video store owner. They had to be led away with police escorts. And they vandalized the store.

RP III, 496-97.

Lam agreed that for many people who lived in South Vietnam at the time of its fall to the Communists, and who then came to the United States, the sight of the flag of the Socialist Republic of Vietnam makes

them very upset, and any sign or symbol that incorporates the design of that flag is something they find offensive. RP III, 509.¹⁴

e. **Admission of Duc Tan’s Testimony About Receiving Letter With A Death Threat.**

Duc Tan testified that he was familiar with the protests lodged against the video store owner in California, and said that he himself traveled to California to participate in one of those protest rallies. RP V, 862-863. Tan further testified that “right after [he] was wrongfully accused of being a Communist, [he] received a letter threaten – threaten to kill me.” RP V, 912.

The defense promptly objected, and outside the jury’s presence the trial judge was informed that Tan had filed a report about the threatening letter with the police and that the police had investigated the matter. RP V, 913. Defendants’ counsel, Mr. Malden, told the court that “Norman Le’s name and address [was] up on the sender’s spot of the envelope.” RP V, 913. Police interviewed Norman Le and he denied having anything to do with the letter. RP V, 913. The police found no fingerprints on the letter. RP V, 913. Attorney Malden further informed the court that it was the plaintiffs’ attorney, Mr. Rhodes, who actually reported the incident to the police. RP V, 913. Mr. Malden argued that the letter was an example of “the typical type of frame-up job that communist agents do,” RP V,

¹⁴ She compared it to the reaction one might get to a display of Osama bin Laden’s photo in New York City. RP III, 510.

913-914, and he argued that testimony about the letter was of questionable probative value and would be highly prejudicial if admitted. RP V, 914.

In response, Mr. Rhodes noted that despite the fact that Norman Le's address was on the envelope containing it, neither he nor his client believed that Norman Le was the one who had sent the letter:

MR. RHODES: Your Honor, we intended to go no further than Mr. Tan's testimony that he had received a threatening letter. We certainly, it had Norman Le's picture on it, and it shows my client in a dog collar with somebody -- with Norman Le's picture on it holding it. The envelope itself had Norman Le's address on it.

We do not have any proof, nor do we believe that Mr. Le had anything to do with sending that letter. For that reason, we did not intend to submit this letter or make any accusations that Norman Le sent this letter. We intended -- our intent was -- and I told [defendants'] counsel that I would not submit the letter, because we did not want to publicly make any accusation against Mr. Le.

My intent was to solely have my client identify the fact that he had received a threatening communication and go no further than that. And I do think it's relevant.

RP V, 915-16. Mr. Rhodes told the court that he did not recall whether he was the one who contacted the police about the letter, and that his recollection was that he instructed Mr. Tan to report it. RP V, 916. But he acknowledged "it is very possible that I may have assisted him by putting him in touch with a police department." RP V, 916.

The trial judge further ruled that Tan's testimony could not go beyond the mere fact that he received a threatening letter. RP V, 916-917.

Mr. Malden argued that Mr. Rhodes conduct towards the police -- suggesting that Norman Le sent the letter -- was inconsistent with what he had just told the court: that he and Mr. Tan did not believe Norman Le

sent the letter. Attorney Malden complained that if Mr. Tan's testimony about receiving a threatening letter was allowed to stand, then he might have to call attorney Rhodes as a witness to dispel the inference that one of the defendants sent the threatening letter.

MR. MALDEN: Okay. Well then, I guess it needs to be said that we may call Mr. Rhodes as a witness. Because this police report says that "Greg Rhodes, the attorney for," had called to report that his client had received a threatening letter. And Mr. Rhodes talked about the fact that there was a defamation case going on. And he tries to tell the police that he thinks there's a suspect in that the suspect relates to the filing of the suit two weeks ago. Mr. Rhodes talks about how Mr. Le had repeatedly and publicly accused Mr. Tan of being a communist. And it goes on and on.

So if the witness is going to be permitted to say that I got a letter – my wife got a letter, without the letter being produced, without any connection of that letter to my client or to the defendants, it's clearly improper. And it's going to require a situation now where I have to possibly call Mr. Rhodes as a witness. We may have to subpoena members of the Olympia Police Department to explain what really happened here. . .

RP V, 917-918 (bold italics added).

The trial judge responded:

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 you will act in the best interests of your client.

RP V, 918-19.

The trial judge ruled that Duc Tan's testimony was relevant to the issue of what amount of damages he should recover, and would be admitted for that reason. RP V, 916, 921. The jury was called back into

the courtroom, and the trial judge advised the jury that he had ruled on the defendants' objection and that Mr. Tan's answer would stand. RP V, 921. On cross-examination Duc Tan admitted that he was not "accusing any of the defendants in this courtroom of sending" him or his wife a death threat. RP V, 962. The jury was left to speculate as to *who* might have sent it. Tan testified that even though he received the death threat letter six years ago, "the fear that emanate [sic] from that threat linger on until today." RP V, 962.¹⁵

Mr. Rhodes mentioned the death threat in the course of his closing, linking it to the testimony given by plaintiff's expert witness about the violence in other parts of the country:

The actions of that video store owner that elicited that response are the exact allegations that the defendants have made and accused my clients of doing. ***They have accused them of displaying intentionally an image that causes extreme reactions and in many instances violence*** as testified to by Dr. Lam who told you that newspaper reporters who were seen as being too objective, too soft on communism, that ***bombings have actually resulted. We know that Mr. Duc Tan actually received a death threat letter.***

RP IX, 1595 (bold italics added).¹⁶

¹⁵ The translator clarified that what Tan had said (in Vietnamese) was that his fear started on the day that the defendants started to defame him. RP V, 963.

¹⁶ The second time (but not the first time) Mr. Rhodes mentioned the death threat letter he was discussing the concept of damages: "Granted, Mr. Tan is sitting here today, and he is not injured, and he is not harmed, and we cannot show you that there were indeed protests of him. But that's how inflammatory these allegations were. ***We have told you that Mr. Tan received a death threat letter.***" RP IX, 1613-14 (bold italics added).

f. Post Trial Motion for New Trial and Elicitation of Additional Evidence Regarding the Death Threat Letter.

In their post-trial motion for new trial, defendants renewed their objection to the admission of Duc Tan's death threat testimony. CP 60-61. Attorney Malden supported the motion with a declaration to which he attached a copy of the investigative police reports from the Olympia Police Department (App. D) and the Washington State Patrol. CP 202-216. The Olympia Police Department report showed that attorney Malden was correct when he advised the trial judge that attorney Rhodes had been the one to make the report to the police, and that Rhodes advised the police of the facts regarding the filing of the defamation suit.¹⁷ The police report contained a copy of the letter, which was in the nature of a cartoon drawing of a man with a photo of Norman Le's head superimposed upon it. The man is holding two dogs on leashes, and bears the typewritten message "Would you like to become one of my two dogs. If against me, I will kill you like I kill a dog. You are behind him[.]" CP 211 (App. E). Although the first language of both defendant Norman Le and plaintiff Duc Tan is Vietnamese, the message is typed in English, and the purported signature is in English. Underneath the purported signature "Norman Le" appear the typed words "Dr. Norman Le (aka Ts. Le Thien Ngo)." CP 211. It is more than passingly strange to think that anyone who would

¹⁷ The report states: "Greg Rhodes, the attorney for [redacted] called to report that his client had received a threatening letter in the mail. Greg advised that he was representing [redacted] in a Defamation case, and the suspect in the threats had been served paper [sic] in the suit about two weeks ago." CP 207 (Appendix A).

send a death threat in the mail would sign his name to the death threat and put a return address sticker on the envelope; it is equally hard, moreover, to imagine a man born in Vietnam referring to his real Vietnamese name as an “a.k.a.”

In attorney Malden’s sworn declaration he stated the following:

Mr. Rhodes assured me that he had no intention of raising the letter or the threat. Mr. Rhodes told me that he knew the letter was a hoax. Mr. Rhodes said he knew that Norman Le would not sign his name or put his address on a threatening letter. Mr. Rhodes said he knew that the letter was likely intended by someone to frame Norman Le.

CP 203.

D. ARGUMENT

1. THE STATEMENT THAT THE DEFENDANTS BELIEVED DUC TAN TO BE PRO-COMMUNIST WAS A STATEMENT OF OPINION AND THEREFORE CANNOT BE THE BASIS FOR A CLAIM OF DEFAMATION.

There are four elements that make up an action for defamation: (1) false statement; (2) an unprivileged communication; (3) fault; and (4) damage. *Herron v. KING Broadcasting Co.*, 112 Wn.2d 762, 768, 778 P.2d 98 (1989). To be actionable, a defamatory false statement must be one of fact. *Dunlap v. Wayne*, 105 Wn.2d 529, 537, 716 P.2d 842 (1986). A statement of fact can be provably false if it “falsely describes the act, condition or event that comprises its subject matter.” *Schmalenberg v. Tacoma News, Inc.*, 87 Wn.App. 579, 590, 943 P.2d 350 (1997); *Eubanks v. North Cascades Broadcasting*, 115 Wn. App. 113, 120, 61 P.3d 368 (2003). On the other hand, a statement of *opinion* that is based on

disclosed facts is not actionable “no matter how unjustified and unreasonable the opinion may be or how derogatory it is.” *Dunlap*, 105 Wn.2d at 540 (citing and quoting Restatement of Torts, § 566, comment c).

In *Dunlap* the Washington Supreme Court noted the following rule set forth in the Restatement of Torts, Section 566:

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

Dunlap, 105 Wn.2d at 538. The court approved of and adopted this rule. *Id.* Recognizing that it is sometimes difficult to determine whether a statement was a nonactionable opinion, the court also noted three factors upon which this analysis should focus. First, if analysis of the context in which the statement was published showed that it was made in the course of editorial pages or political debates, this weighed in favor nonactionability. *Id.* at 539. The second factor is the nature of the audience and audience expectations: “In the context of ongoing public debates, the audience is prepared for mischaracterizations and exaggerations,” which further supports a conclusion of nonactionability. *Id.* Finally, the court held:

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

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

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

Dunlap, 105 Wn.2d at 539-540 (bold italics added). *Accord Robel v. Roundup Corp.*, 148 Wn.2d 35, 57, 59 P.3d 611 (2003) (since “th[e] audience would have known the facts ostensibly underlying the epithets ‘snitch,’ ‘squealer,’ and ‘liar’” these comments were nonactionable because the defendants “implic[ed] no undisclosed defamatory facts” rather the remarks overtly explained why “the resentful, unprofessional co-worker[s] regarded Robel as a ‘liar.’”)

In this case, the gist of the allegedly defamatory Public Notice was the assertion by the defendants of their belief that Duc Tan was a Communist or Communist sympathizer. This is a statement of opinion, not of a statement of fact. A statement by one person regarding what he believes to be the political opinions of another person can never be anything but an opinion, for the fundamental reason that one human being cannot read the mind of another. Because no one can “know” what is going on inside the mind of another person, witnesses are incompetent to testify to what another person is thinking. The most one person can do is to form an opinion as to what someone else is really thinking, by drawing inferences from the actions and statements of the other person.

In this case, all three of the criteria set forth in *Dunlap* demonstrate that the defendants' "Public Notice" was merely the statement of nonactionable political opinion. First, it was *admitted* that the statement was made in the course of political debate. Plaintiff Duc Tan acknowledged that the Committee Against the Viet Cong Flag was a political organization. RP V, 953.¹⁸ Second, it was made in the course of an ongoing public debate in the Vietnamese refugee community about who was truly committed to opposing communism,¹⁹ and thus audience expectations were to be prepared for some exaggeration. *Id.* Finally, the text of the Public Notice itself clearly satisfies the third and most crucial factor, because the defendants disclosed all of the facts upon which their opinion rested and invited the members of the Vietnamese community to judge for themselves whether their proffered opinion regarding Duc Tan and his organization was accurate.

In addition to setting forth a lengthy and detailed recitation of the evidence upon which the defendants based their opinion, the Public Notice expressly invited the public to attend a press conference to examine the evidence:

¹⁸ Above the words "PUBLIC NOTICE" in the title the document identifies the "COMMITTEE AGAINST VIET CONG FLAG" as being responsible for issuing the document. *Trial Exhibit* No. 8.

¹⁹ Defendant Norman Le testified that he helped draft the document because he "want[ed] the refugee community to be aware that there are incidents such as these, and they all raise their alertness. And the second purpose was to stop things like that from happening, because it remind them of the suffering they have suffered from the communist regime." RP VIII, 1410.

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

Ex. 8 at p. 1. The defendants expressly invited the plaintiffs to attend the press conference, to refute the allegations of the Public Notice:

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

Id. Finally, a postscript to the open letter to the Vietnamese refugee community which was posted on the internet apologized for being unable to post some of the supporting evidence online (“Sorry we cannot attach the picture (in English) of Old Ho (Ho Chi Minh) due to overload”) and again urged members of the community to “[p]lease come to the press conference *to see the evidence.*” *Id.* (emphasis added).

In *Dunlap* the allegedly defamatory statement said that “[i]t appears from the background information that [two sources] have supplied that” the plaintiff was making “a solicitation for a ‘kickback.’” *Dunlap*, at 532. The defendants in this case made similar statements inviting the public to form their own opinion based on a plethora of fully disclosed facts. Norman Le and the other defendants drew inferences from a host of facts that supported their opinion that Duc Tan and his organization, VCTC, were pro-Communist. Moreover, for the overwhelming majority of these underlying facts, there was no dispute between the parties. Indeed, the following facts were all *admitted*:

- The band at a VCTC sponsored event played the first few notes of the national anthem of Communist Vietnam;
- Duc Tan opposed including the word “Nationalist” in the name of his corporation;
- Duc Tan opposed Norman Le’s election as co-chair of the Committee Against the Viet Cong flag and tried to get that election invalidated;
- Near the VCTC booth at a fair an employee found an apron bearing the image of a bearded man wearing a crescent shaped red hat and adorned with several gold stars, and the employee immediately concluded that the apron was a piece of Communist propaganda designed to present an image of Ho Chi Minh, albeit disguised as a Santa Claus figure;
- For many years Duc Tan taught language classes inside a classroom where a flag of the Socialist Republic of Vietnam was on display;
- After six months of imprisonment at a Communist reeducation labor camp, Duc Tan was released after signing an oath that said he was loyal to the Communist regime;
- Upon his release Duc Tan was allowed to resume his job as a teacher at a Communist high school;
- The VCTC sponsored a cultural event on September 2nd, a date which is celebrated by the Communists as their independence day.
- The Politiburo of the Communist Party of Vietnam passed a resolution affirming their intent to win support for their regime in the population of Vietnamese refugees living in other countries such as the United States;
- The VCTC accepted a monetary donation from a grocery store owner who had distributed free calendars to his customers, and these calendars had been printed at the printing shop of the Vietnamese Communist Party located in Ho Chi Minh City, Vietnam, and bore a printed statement to that effect on the calendars.

To be sure, there were a few factual disputes, such as what were the exact words that Duc Hua spoke at the meeting to investigate the political

sentiments of the Caoson grocery store owner.²⁰ But the essential dispute was over what inferences could be drawn from these admitted facts.

The defendants were of the opinion that these facts showed that Duc Tan was pro-Communist. Duc Tan denied this, and other people who were members and supporters of the VCTC were of the opinion that these facts did not support this conclusion, particularly when considered together with other undisputed facts, such as the fact that Duc Tan escaped from Vietnam, immigrated to the United States, and for many years had attended many anti-Communist events. But this difference is undeniably a difference of *opinion*, and therefore not actionable as a matter of the First Amendment to the Constitution of the United States.

An analogy to contemporary American national politics serves to illustrate this point. It is undisputed that U.S. Senator Joseph Lieberman has done many things in recent years to support the positions taken by the Republican Party, including campaigning on behalf of Senator John McCain, the Republican party nominee for President in 2008. Notwithstanding such actions, he continues to caucus with members of the Democratic Party, and he identifies himself as an Independent and not a Republican. From these undisputed facts, many people have formed the

²⁰ Defendant Le testified that Duc Hua said it was acceptable for the VCTC to take monetary donations from the Viet Cong as long as VCTC did not listen to the donor. RP VII, 1398. Duc Hua testified that he said it was acceptable to take money from anybody so long as the money was not given on condition that the VCTC would do anything requested by the donor. RP IV, 663. But this means that so long as Viet Cong supporter did not seek to condition his donation on a promise that the VCTC would do anything, Duc Hua's position was that it was okay to accept such a donation. Thus the gist of this factual allegation was also true.

opinion that, notwithstanding his professed independence, it is more accurate to label Lieberman a Republican. Some people have gone so far as to publicly assert their belief that Lieberman really is a Republican. These assertions amount to statements of opinion – the opinion of the speaker as to the most accurate political label to affix to Lieberman.

Just as the statement “Joe Lieberman is really a Republican” is a statement of opinion, so is the assertion that “Duc Tan is really a Communist.” In both cases the speaker is of the opinion that the person is not what he professes to be. And in both cases, the law treats the speaker’s statement as incapable of supporting a claim for defamation. The Superior Court therefore erred when it denied the defendants’ motions for summary judgment, for directed verdict, and for judgment notwithstanding the verdict, on this ground. This Court should enforce the rule of *Dunlap*, vacate the judgments entered below, and remand with directions that the plaintiffs’ action be dismissed with prejudice.

2. INSUFFICIENT EVIDENCE OF ACTUAL MALICE

a. Proof of Actual Malice Requires Clear and Convincing Evidence That The Defendant Has Serious Doubts About the Truth of His Statements. It Requires Evidence of a Subjective State of Mind In Which the Defendant Has a High Degree of Awareness of the Probable Falsity of His Statements At the Time the Defendant Made Those Statements.

The First Amendment to the Constitution of the United States commands that, for a public figure plaintiff to recover in a defamation case he must prove with clear and convincing evidence that the defendant’s defamatory statement was made with “actual malice,” that is,

with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 729 (1968). Proof of “an extreme departure from professional standards” of responsible fact-checking is not a sufficient basis for finding actual malice. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989).²¹ “[O]nly those false statements made with the high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions.” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Proof of probable awareness of falsity is an essential prerequisite to recovery in public figure defamation cases. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967).

It is settled law “that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant*, 390 U.S. at 731. Instead,

[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731. *Accord Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991) (“[T]he plaintiff must demonstrate that the author ‘in

²¹ Justice Harlan’s suggestion “that a public figure [plaintiff, as opposed to a public official plaintiff] need only make ‘a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,’ . . . was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule. [Citations]. Moreover, just four years later, Justice Harlan acquiesced in application of the actual malice standard in public figure cases . . .” *Harte-Hanks*, 491 U.S. at 666.

fact entertained serious doubts as to the truth of his publication.”); *Harte-Hanks*, 491 U.S. at 667 (same), 688 (“The standard is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant actually had a ‘high degree of awareness of . . . probable falsity”); *Herbert v. Lando*, 441 U.S. 153, 156 (1979) (same); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) (“In *St. Amant v. Thompson*, [citation omitted], the Court equated reckless disregard of the truth with subjective awareness of probable falsity . . .”). It was precisely because the defamation plaintiff carries the burden of “proving awareness of falsehood” that the Court in *Lando* rejected the contention that a defamation defendant had a privilege that permitted him to refuse to answer the plaintiff’s discovery questions about the defendant’s state of mind: “[O]ur cases necessarily contemplate examination of the editorial process to prove the necessary *awareness* of probable falsehood[.]” *Lando*, 441 U.S. at 172 (italics added).

Washington courts have acknowledged these constitutional rules for decades. See *Herron v. King Broadcasting Co.*, 109 Wn.2d 514, 523, 746 P.2d 295 (1987) (“‘Reckless disregard’ means (1) a ‘high degree of awareness of . . . probable falsity’, [citation omitted]; or (2) that the defendant ‘in fact entertained serious doubts’ as to the statement’s truth,’ [citations omitted]”); *Tilton v. Cowles Pub’g Co.*, 76 Wn.2d 707, 722, 459 P.2d 8 (1969) (same). Washington courts have consistently recognized that “the standard for determining ‘actual malice’ is *subjective*, focusing on the defendant’s belief in or attitude toward the truth of the statement...”

Herron, 109 Wn.2d at 523 (italics added). *Accord Margoles v. Hubbard*, 111 Wn.2d 195, 200, 760 P.2d 324 (1988).

Acknowledging that “[i]t may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant’s testimony that he published the statement in good faith and unaware of its probable falsity,” *St. Amant*, 390 U.S. at 731, the United States Supreme Court has nevertheless adhered to this rule because the public interest in the conduct of public figures “is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies.” *Id.* at 732. Since “erroneous statement is inevitable in free debate . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’” *Sullivan*, 376 U.S. at 271-72 (citations omitted). *Cf. Gertz*, 418 U.S. at 341 (“The First Amendment requires that we protect some falsehood in order to protect speech that matters,” and thus even a private figure plaintiff is required to prove actual malice in order to recover punitive damages).

b. Appellate Courts Reviewing Judgments Which Impose Liability For Speech Are Constitutionally Required to Engage in De Novo Review of the Facts and Must Conduct An Entirely Independent Review of the Record. In Reviewing Defamation Judgments, Appellate Judges Must Decide for Themselves Whether They Are Persuaded That Actual Malice Has Been Proven by Clear and Convincing Evidence.

In public figure defamation cases, the rules for appellate review of judgments on jury verdicts in favor of the plaintiff are decidedly different from the usual rules. “[J]udges in such cases have a constitutional duty to ‘exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.’” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989). The United States Supreme Court has “repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). “[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether that factfinding function be performed in the particular case by a jury or by a trial judge.” *Id.* at 501. “The simple fact is that First Amendment questions of ‘constitutional fact’ compel this Court’s de novo review.” *Id.* at 508, n.27.

The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip

the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing evidence of “actual malice.”

Bose Corp., 466 U.S. at 510-511 (emphasis added).

Washington appellate courts have followed and applied the rule of independent *de novo* review in public figure defamation cases for decades. Citing to *Bose*, the Supreme Court in *Richmond v. Thompson*, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996), held:

In reviewing a defamation case on appeal, then, this court must make an independent examination of the record to determine whether there is sufficient evidence of actual malice.

Accord State v. Kilburn, 151 Wn.2d 36, 51, 84 P.3d 1215 (2004) (“This Court has read *Bose* (and *New York Times*) as imposing a mandatory rule of independent review in defamation cases . . . ”); *Margoles*, 111 Wn.2d at 199, n. 6; *Tilton*, 76 Wn.2d at 720; *Mellor v. Scott Publishing Co.*, 10 Wn. App. 645, 657, 519 P.2d 1010 (1974) (“sole issue” on appeal is whether defendant acted with actual malice: “To determine this issue we are obliged to review the record *de novo*”).

c. Appellate Courts Have Routinely Reversed Verdicts in Favor of Defamation Plaintiffs Because the Requisite Proof of Actual Malice is Lacking.

The principle of *de novo* review of a judgment or jury verdict in favor of a public figure defamation plaintiff is no mere hortatory sentiment, as the following cases illustrate:

In *St. Amant (supra)* the defendant made a televised speech in which he quoted statements made by previously by a Teamsters union official named J.D. Albin. Albin's remarks suggested that a deputy sheriff named Thompson was assisting a corrupt union official. St. Amant had no personal knowledge of Thompson's activities, relied solely on Albin's comments, and failed to verify Albin's statements by checking with other union members. *St. Amant*, 390 U.S. at 730. St. Amant "gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words." *Id.*

Despite the evidence of St. Amant's unreasonable behavior, the United States Supreme Court reversed the judgment against him because there was insufficient evidence that St. Amant himself was aware that his statement was probably false. Notwithstanding the callousness which St. Amant displayed towards the harm he might cause deputy sheriff Thompson, and the ease with which he might have done some investigation to determine whether Albin's statements were true, the Supreme Court concluded that such conduct "falls short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson." *Id.*

By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a public officer. Nothing referred to by the [lower court] indicates an awareness by St. Amant of the probable falsity of Albin's statement about Thompson. Failure to investigate does not in itself establish bad faith. [Citation omitted].

St. Amant's mistake about his probable legal liability does not evidence a doubtful mind on his part. That he failed to realize the import of what he broadcast -- and was thus "heedless" of the consequences for Thompson -- is similarly colorless.

St. Amant, 390 U.S. at 732-33.

Similarly, in *Beckley Newspapers v. Hanks*, 389 U.S. 81, 84 (1967), the Court threw out a libel judgment in favor of the plaintiff because nothing "in the record reveals 'the high degree of awareness of . . . probable falsity demanded by'" the *Sullivan* case and its progeny. Likewise In *Bose Corp., supra*, the Court held that in its independent judgment the record "does not contain clear and convincing evidence" that the defendant acted with actual malice. 466 U.S. at 513. And in *Time, Inc. v. Pape*, 401 U.S. 279, 291-92 (1971), the Court held the record did not contain evidence which satisfied the requirement of proving that the publication in question was made with a high degree of awareness of its probable falsity, and thus held that actual malice had not been established.

There are also many reported Washington cases where appellate courts have vacated judgments in favor of defamation plaintiffs, or required the dismissal of defamation suits on summary judgment motions, because the plaintiff did not establish actual malice with clear and convincing evidence which showed that the defendants acted with subjective knowledge of the falsity, or probable falsity of their statements. *See, e.g., Margoles*, 111 Wn.2d at 207-08 (reversing denial of defendant's summary judgment motion and remanding for dismissal due to lack of clear and convincing evidence of actual malice); *Eubanks v. North Cascades Broadcasting*, 115

Wn. App. 113,125, 61 P.3d 368 (2003) (affirming summary judgment for defendant due to failure to raise genuine issue of material fact as to existence of actual malice); *Exner v. American Medical Ass'n*, 12 Wn. App. 215, 224, 529 P.2d 863 (1975) (same); *Mellor*, 10 Wn. App. at 659-660 (same). *Cf. Moe v. Wise*, 97 Wn. App. 950, 965, 989 P.2d 1148 (1999) (affirming directed verdict for defendant because plaintiff failed to show with clear and convincing evidence that the defendant in fact entertained serious doubts as to the truth of the publication”).

d. The Plaintiffs Failed to Meet Their Constitutional Burden to Prove That the Defendants Had Serious Doubts About the Truth of Their Statements, Or That They Believed That the Statements Were Probably False.

Each of the defendants in this case testified that both at the time of publication and still at the time of trial, he or she believed that the statements made in the Public Notice were true and accurate. RP VI, 1088-89 (Than Tran); RP VI, 1161 & RP VII, 1208-09 (Dat Ho); RP VII, 1314-15 (Phiet Nguyen); RP VII, 1398 (Norman Le). Norman Le testified that the defendants “made a lot of adjustment, corrections into this public announcement many times, probably seven or eight times in – before we come to a final version. So we have put in all our efforts to make it perfect or a very careful version of it.” RP VIII, 1363.

The plaintiffs argued that the defendants’ conduct in accusing Duc Tan of being a Communist was “objectively unreasonable” and therefore the defendants acted with reckless disregard for the truth:

[The law] allows you to *objectively say, was this reasonable* [sic]. Could they have *reasonably believed* what they were saying in this document, or did they show reckless disregard for the truth?

RP IX, 1602 (bold italics added). Thus, during the trial plaintiffs' counsel asked defendant Norman Le "Did you ever look on the internet to see whether you'd find an apron like the one we have been talking about, in other words, to – to see whether anybody sold this in mass production?" RP VIII, 1392. Le admitted he had never done that. RP VIII, 1392. It is well settled, however, that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks*, 491 U.S. at 688; *St. Amant*, 390 U.S. at 731. Thus, in *Sullivan*, despite the fact that the New York Times failed to check its *own* pasty-clippings file, which would have revealed several of the inaccuracies in the publication which formed the basis for the plaintiffs' defamation action, the Court held there was insufficient proof of actual malice. The Court held that the evidence "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Sullivan*, 376 U.S. at 287-288. Similarly, in *Beckley Newspapers v. Hanks*, 389 U.S. 81, 84 (1967), the Court threw out a libel judgment in favor of a public official plaintiff on the ground that the defendant's "failure to make a prior investigation" failed to establish actual malice.

In this case, the plaintiffs consistently relied on proof of objectively negligent *conduct* (you should have looked further and dug deeper before

leveling the charge against Duc Tan of being pro-Communist), instead of on proof of the subjective *awareness* of a serious possibility that their statements were not true. The record in this case fails to demonstrate by clear and convincing evidence -- indeed by any evidence -- that the defendants acted with a subjective "reckless disregard" for the truth. Since this does not meet the *Sullivan* actual malice test, the judgments in favor of the defendants must be vacated and judgments in favor of the defendants must be entered.

3. THE JURY WAS ERRONEOUSLY INSTRUCTED THAT FALSITY NEED ONLY BE PROVEN BY A PREPONDERANCE OF THE EVIDENCE. THE FIRST AMENDMENT REQUIRES THAT THE PROOF OF FALSITY BE CLEAR AND CONVINCING.

In the first paragraph of Jury Instruction No. 15 the jury was informed: "To prove an allegation of defamation against any defendant, plaintiffs must prove that defendant acted with knowledge of the falsity or reckless disregard for the truth by clear and convincing evidence." CP 168. In the next sentence, however, the jurors were told: "All other allegations of plaintiffs must be proved by a preponderance of the evidence." CP 168. (Copy of instruction No. 15 attached as Appendix ____). This second

sentence was legally erroneous because the element of falsehood²² must also be proven by clear and convincing evidence.²³

In *Hart-Hanks Communications*, the Court recognized that there was “some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence.” 491 U.S. at 661, n.2. The Court specifically declined to express any view on this issue. *Id.*

While courts have split over this issue, “[m]ost courts that have addressed the issue subsequently, however, have required the higher standard of proof.” *Sack on Defamation: Libel, Slander & Related Problems*, § 3.4 at n.46 (April 2008). A clear majority of jurisdictions to address the issue have held that the higher burden of proof rule is constitutionally required by the First Amendment. Eight states and one federal circuit court of appeals have concluded that the clear and convincing evidence standard applies.²⁴ One federal circuit in a split

²² Instruction No. 10 informed the jury that there were five elements to a claim of defamation and falsehood was identified as the third element. CP 166. Actual malice was identified as the fourth element. CP 166. Under Instruction No. 15, elements (1), (2), (3) and (5) were all required to be proved by a simple preponderance of the evidence.

²³ None of the appellants took exception to this jury instruction. Nevertheless, because the issues raised here – whether the First Amendment or article 1, § 5 require a higher burden of proof on the element of falsity – is a manifest constitutional issue, it may be raised for the first time on appeal. *See, e.g., Haueter v. Cowles Publishing Co.*, 61 Wn. App. 572, 577 n.4, 811 P.2d 231 (1991) (Libel plaintiff allowed to raise First Amendment issue for first time on appeal because it was an issue affecting fundamental constitutional rights).

²⁴ *See, e.g., Deutsch v. Birmingham Post Company*, 603 So.2d 910, 912 (Ala. 1992) (“Deutsch was required to present clear and convincing evidence from which a jury could conclude that the Post-Herald made false and defamatory statements about him and that the statements were made with actual malice . . .”); *Smiley’s Too, Inc. v. The Denver Post*, 935 P.2d 39, 41 (Colo. App. 1997) (“if a public figure or a matter of public concern is involved, a heightened burden applies and the plaintiff is required to prove the article’s
(footnote continued on next page)

decision,²⁵ and one state, have concluded that the lesser preponderance of the evidence standard applies.²⁶ (And some state courts have flagged the issue but not resolved it either way. *Nevada Independent Broadcasting v.*

falsity by clear and convincing evidence rather than by a preponderance”); *Barnett v. Denver Publishing Co.*, 36 P.3d 145, 147 (Colo. App. 2001) (same); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 906 (Iowa 1996) (“We agree with the district court that a rational finder of fact could not find by clear and convincing evidence the requisite elements of falsity and malice”); *Batson v. Schiflett*, 325 Md. 684, 602 A.2d 1191, 1210 (Md. 1992) (“before a public figure may recover for defamation, clear and convincing evidence must establish that the statements in issue were . . .(2) false . . .”); *Whitmore v. Kansas City Star*, 499 S.W.2d 45, 49, (Mo. App. 1973) (trilogy of Supreme Court cases “imposes upon a party claiming to have been libeled the burden of proving by ‘clear and convincing’ proof the falsity of the purported defamatory article . . .”); *Deaver v. Hinel*, 223 Neb. 529, 391 N.W.2d 128, 132 (1986) (“[plaintiff] Deaver has not met the threshold burden of proving that the statements published in the Tribune were false. A public figure libel plaintiff bears the burden of proving the falsity of the published statements by clear and convincing evidence”); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626, 629 (1993) (“As with actual malice, a public-libel plaintiff must establish falsity with clear and convincing evidence”); *Hornberger v. American Broadcasting Companies, Inc.*, 351 N.J. Super 577, 799 A.2d 566, 578 (2002) (“Plaintiff’s burden of proof for each of the elements of defamation is by clear and convincing evidence”); *Newman v. Delahunty*, 293 N.J. Super. 491, 681 A.2d 671, 675 (1994) (same); *Armstrong v. Simon & Schuster*, 280 A.D.2d 430, 721 N.Y.S.2d 340, 341 (2001) (“[G]iven his limited public figure status, plaintiff was required to prove by clear and convincing evidence that the complained of passage, in addition to being substantially false and defamatory, was published with actual malice”); *Pritt v. Republican National Committee*, 210 W.Va. 446, 557 S.E.2d 853, 862 (2001) (plaintiff “must prove by clear and convincing evidence that . . . the stated or implied facts were false”); *Buckley v. Littell*, 539 F.2d 882, 889-890 (2nd Cir. 1976) (“a public figure must rather have demonstrated with convincing clarity not only that appellant’s statements were false, but that appellant knew they were false or made them with reckless disregard of their truth or falsity”); *See also Dibella v. Hopkins*, 403 F.3d 102, 111 (2nd Cir. 2005) (applying New York law in diversity case) (“[W]e are persuaded that state law requires clear and convincing proof of falsity”).

²⁵ *Ratray v. City of National City*, 36 F.3d 1480, 1487-1488 (9th Cir. 1994) (2-1) (public official plaintiff need only prove falsity by preponderance of the evidence). The majority relied on an earlier Second Circuit decision, *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2nd Cir. 1969), which was no longer good law since seven years later the Second Circuit adopted the rule requiring clear and convincing proof in *Buckley v. Littell*, *supra*. Appellants submit that Judge Hug’s dissent in *Ratray* is the better reasoned opinion. *See Ratray*, 36 F.3d at 1491 (Hug, J., dissenting) (“The majority misapplies [Justice Brennan’s statement in *New York Times*] to justify easing the burden on the plaintiff in proving the falsity of a statement. [Majority op. at 1487-88] Justice Brennan’s words do not justify making it easier to prove the falsity of a statement than to prove the defendant’s knowing it was false. It would have an equally chilling effect if the plaintiff were not required to prove the falsity of a statement with the same convincing clarity as the knowledge it was false.”)

²⁶ *Bentley v. Bunton*, 94 S.W.3d 561, 587 (Tex. 2002).

Allen, 99 Nev. 404, 664 P.2d 337, 412-413 (1983) (“the degree of proof is yet unclear”).)

With respect to the issue of which burden of proof rule applies to the element of falsity in a public figure case, Washington case law is unsettled, in part due to errors in treating private figure and public figure plaintiffs alike. Initially, in a *private* figure libel case, the Court of Appeals in *Haueter v. Cowles Pub'g Co.*, *supra*, held that since the *New York Times* rules were only applicable to public official and public figure cases, “the standard of fault is negligence and the preponderance of the evidence standard of proof applies to all the elements of the [plaintiff’s] prima facie case.” *Haueter*, 61 Wn. App. at 584.

Next, in *Richmond v. Thompson*, *supra*, the Court upheld a verdict in favor of a public figure plaintiff. There defendant Thompson attempted to raise the same issue which defendant/appellants raise here. First, the Washington Supreme Court noted that the defendant had “proposed the language in the jury instruction he now objects to and did not object to it at trial.” 130 Wn.2d at 385. It is well settled, of course, that “even where constitutional issues are involved, invited error precludes review.” *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009); *State v. Henderson*, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). Notwithstanding the clear bar of the invited error rule, the court went on to consider the merits of the issue. However, it then relied on *Haueter* and on the authorities cited in *Haueter* to justify the conclusion that the clear and convincing evidence standard only applied to the actual malice element, and did not apply to

the element of falsity. But *Haueter* was a *private figure* defamation case, and thus completely inapposite to *Richmond* where the plaintiff was a Washington State Trooper and therefore a *public figure*. Since *none* of the elements in a private figure defamation case have to be proved by clear and convincing evidence, *Haueter* provides no support for applying the preponderance of the evidence standard in a public figure case.

More recently, the Washington Supreme Court has seemed to backtrack significantly from its ruling in *Richmond*. In *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005), the court stated that “[c]ase law is unclear as to whether a private plaintiff [Footnote omitted] facing a defense motion for 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.” Ultimately the court held that “[t]his case does not require us to clarify the issue because the parties before the Court of Appeals agreed that the evidentiary standard is preponderance of the evidence.” *Id.*

In sum, after *Mohr* it appears that the Washington Supreme Court recognizes that the issue of what burden of proof rule applies to the element of falsity in a defamation case is an open question in Washington, at least in public figure cases, and perhaps in private figure cases as well. Nor does it appear that any Washington appellate court has been presented with briefing demonstrating that, although the United States Supreme Court has left this issue open, the overwhelming majority of courts in

other states have held that the clear and convincing evidence standard is constitutionally required by the First Amendment.

In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the Supreme Court explained why the First Amendment required clear and convincing proof of actual malice, rather than merely proof by a preponderance of the evidence:

In the normal civil suit, where [the preponderance] standard is employed “we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.” [Citation omitted]. In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement...but ***the possibility of such error...would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate.***

Rosenbloom, 403 U.S. at 50 (bold italics added). This same rationale is equally applicable to the element of falsity. It is often extremely difficult to know whether a statement is true or false. If a person can be held liable for defamation based on proof which only makes it barely more probable that his statement was false, rather than true, then people are quite likely to engage in self-censorship and simply to refrain from making any statement at all. The resulting self-censorship does not merely harm the plaintiff, it damages society as whole by depriving society of the plaintiff’s expression. In areas of public concern, this is particularly harmful, and thus the First Amendment does not tolerate it.

In his concurring opinion in *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972), Judge Bell reached this same conclusion, noting that it would

make no sense to hold that *knowledge* of falsity had to be proved by clear and convincing evidence, but that falsity itself need only be proved by the lower preponderance of the evidence standard.²⁷ And as the Second Circuit noted recently in *Dibella v. Hopkins, supra*, “[c]ourts have found good reason to favor the higher standard of proof”:

In *Robertson v. McCloskey*, 666 F. Supp. 241, 248 (D.D.C. 1987), for example, the district court held:

“[A] clear and convincing standard of proof for falsity would resolve doubt in favor of speech when the truth of a statement is difficult to ascertain conclusively. Indeed, as a practical matter, public-figure plaintiffs already bear such a burden, for in order to prove actual malice they must, of necessity, show by clear and convincing evidence that the defendant knew that the statement was false or acted in reckless disregard of its truth. Finally [the standard] has more than a merely logical symmetrical appeal. To instruct a jury that a plaintiff must prove falsity by a preponderance of evidence, but must also prove actual malice, which to a large extent subsumes the issue of falsity, by a different and more demanding standard is to invite confusion and error.”

Id. At 248; *see Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337, 343 n.5 (1983) (noting that “[p]ractically speaking, it may be impossible to apply a higher standard to ‘actual malice’ than to the issue of falsity”).

Dibella, 403 F.3d at 114.

In the present case, the jury was told it need only be convinced by a preponderance of the evidence that the statements portraying Duc Tan as a

²⁷ “The Supreme Court has not expressly added the requirement of clear and convincing proof of falsity to the plaintiff’s burden of proof. As stated, the burden of showing falsity has been imposed upon the plaintiff in First Amendment cases. [Citations omitted]. Such a standard of proof seems implicit, however, in the stated requirement in *New York Times* that plaintiff has the burden of showing by clear and convincing proof that publication was with knowledge of falsity or with reckless disregard as to falsity *vel non*. I conclude, for the same constitutional reasons giving rise to this stringent proof requirement that the clear and convincing proof standard would also apply to proving that the statement was false in the first instance.” 460 F.2d at 722-23 (Bell, J., concurring).

Communist were false. Yet it was also told that the plaintiff must prove by a much higher standard that the defendants *knew* these statements were false, or consciously felt there was a high degree of probability that they were false. There is an obvious danger posed by telling the jury to apply two such different standards of proof to these interrelated questions: it is quite likely that having found falsity by a preponderance of the evidence the jury will find it impossible to consider the element of actual malice by a different standard and will simply apply a preponderance standard to that element as well.

For these reasons, the defendants submit that this Court should join the majority of jurisdictions which hold that the First Amendment requires that falsity, as well as actual malice, be proved by clear and convincing evidence in any defamation case where the plaintiff is a public figure.

4. ARTICLE 1, SECTION 5 OF THE WASHINGTON CONSTITUTION INDEPENDENTLY REQUIRES THAT PROOF OF FALSITY BE CLEAR AND CONVINCING.

As the Second Circuit noted in *Dibella*, “[s]tates, of course, are free to offer greater protection to individual rights than federal law affords.” 403 F.3d at 111. *Accord World Wide Video v. Tukwila*, 117 Wn.2d 382, 387, 816 P.2d 18 (1988) (“federal law operates as a floor for speech protection”). “Freedom of speech is a preferred right under the Washington Constitution.” *State v. Reyes*, 104 Wn.2d 35, 43, 700 P.2d 1155 (1985); *State v. Coe*, 101 Wn.2d 364, 375, 679 P.2d 353 (1984). In several instances, the Washington Supreme Court has already held that

“article 1, section 5 [of the Washington Constitution] provides greater protection of speech than the first and fourteenth Amendments to the United States Constitution[.]” *O’Day v. King County*, 109 Wn.2d 796, 802, 749 P.2d 142 (1988); *see also*, *State v. Coe*, 101 Wn.2d at 374 (“unlike the First Amendment to the United States Constitution, the plain language of art. 1, § 5 seems to rule out prior restraints under *any* circumstances . . .”); *Collier v. Tacoma*, 121 Wn.2d 737, 747-748, 854 P.2d 1046 (1993) (“The broad language of Const. art. 1, § 5 as compared with the federal Constitution compels” the conclusion that time, place, and manner restrictions on speech can be imposed “only upon showing a compelling state interest”); *Bering v. SHARE*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986) (same); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 117, 937 P.2d 154 (1997) (“In regard to claims of overbreadth, the text of art. 1, § 5 is less tolerant than the First Amendment of overbroad restrictions on expression when such restrictions rise to the level of prior restraint”).

On this particular question of whether the burden of proof to show falsity in a public figure defamation case is clear and convincing evidence, the United States Supreme Court has specifically left the issue open: “We express no view on this issue.” *Harte-Hanks*, 491 U.S. at 661, n.2. Nevertheless, an analysis of the factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), should assist this Court in deciding this state constitutional law issue, and so such an analysis is offered here.

The first two factors are (1) the text of the state constitutional provision and (2) differences between the state and federal provisions. The text of article 1, section 5 reads:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

This is entirely different from the text of the First Amendment. In fact, the text of article 1, section 5 is a direct translation of article 11 of the French Declaration of the Rights of Man. The fact that the framers of our state constitution chose to copy the free speech guarantee of another country would seem to demonstrate quite clearly their unwillingness to rely on the scope of the federal free speech guarantee.

The words of the First Amendment give virtually no guidance to a court trying to assess what the limits of the free speech guarantee are. Instead, the First Amendment language seems to express the idea that regulation of speech is not a proper subject of federal legislation, and the inference is that only the States can regulate speech. This was the construction adopted by the Kentucky²⁸ and Virginia Resolves, and the

²⁸ For example, cl. 3 of the Kentucky Resolve stated: "That it is true, as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" and that, no power over the freedom of religion, freedom of speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, and were reserved to the states, or to the people;.... That therefore the act of the Congress of the United States, passed on the 14th of July, 1798, entitled "An Act in Addition to the Act entitled 'An Act for the Punishment of certain Crimes against the United States,'" which does abridge the freedom of the press, is not law, but is altogether void, and of no force.

view adopted by most scholars of the First Amendment. *See, e.g.,* Leonard Levy, *Emergence of a Free Press* 268 (1985 ed.) (“[T]he Framers meant the clause to reserve to the states an exclusive authority in the field of speech and press.”).

Article 1, Section 5, on the other hand, provides specific guidance to courts as to the contours of the right guaranteed. It guarantees the right “to freely speak,” and thus acknowledges that some laws will cause citizens to pause before speaking because of fears of subsequent punishment. Thus the text of article 1, section 5 acknowledges the existence of what later became known in free speech parlance as the “chilling effect” phenomenon which laws placing burdens of the exercise of the right can have. It also specifically states that the right extends to speech “on all subjects,” which the First Amendment clearly does not do.

The clear and convincing evidence rule of *New York Times v. Sullivan* was specifically adopted so as to give “breathing space” to the exercise of free speech, relieving citizens of the fear that they would face liability if the truth of their statements was not easily demonstrable. 376 U.S. at 271-272. Since the text of article 1, section 5 also uses the words “freely speak” which similarly acknowledge the need for “breathing space,” it is particularly appropriate for a Washington court to conclude that article 1, section 5 requires that falsity also be proved by clear and convincing evidence.

The third and fourth factors, constitutional history and pre-existing state law, also support this conclusion, since the Supreme Court has

recognized the need to strike down restrictions on speech whenever such restrictions can be expected to have a chilling effect on the exercise of the right to freely speak. *See, e.g., Soundgarden v. Eikenberry*, 123 Wn.2d 750, 871 P.2d 1050 (1994) (Erotic Sound Recording statute is an unconstitutional prior restraint on speech because of its chilling effect on shopkeepers who are afraid to offer for sale music which might later be deemed erotic and thus statutorily required to carry warning label, and on artists, who are afraid to use certain lyrics for fear they will be found to trigger warning label requirement); *Rickert v. Public Disclosure Comm'n*, 161 Wn.2d 843, 855, 168 P.3d 826 (2007) (where an enforcement scheme provided that political appointees would review the truthfulness of political speech and decide what sanctions to impose, “the mere threat of such a process will chill political speech,” and is therefore unconstitutional).

An analysis of the structural difference between state and federal constitutions *always* favors giving added protection to a right guaranteed by the state constitution. The federal constitution is a grant of enumerated powers, while the state constitution acts as a limitation on the otherwise plenary powers of state government. *Gunwall*, 106 Wn.2d at 62. “This distinction simply reinforces this court's responsibility to engage in independent state analysis *and afford broader protection when necessary.*” *Ino Ino*, 132 Wn.2d at 121 (emphasis added).

Finally, the scope of tort liability for defamatory speech is a subject of local state concern. Whether one Washington citizen has libeled another

is not a matter of federal concern, and there is no need for national uniformity in the area of the degree of protection against tort liability which is given to speech which may be false.

For all of these reasons, regardless of what the United States Supreme Court may someday say about the standard of proof of falsity which is required by the First Amendment, this Court should hold that clear and convincing proof is required by article 1, section 5's guarantee of the right to freely speak on all subjects. Since the jury was not so instructed, all of the judgments in favor of the plaintiffs should be set aside and (assuming, *arguendo*, that a dismissal as a matter of law is not to be ordered) the case remanded for new trial at which proper instructions on the burden of proof on this element will be given.

5. IT WAS ERROR TO ADMIT EVIDENCE OF DUC TAN'S RECEIPT OF A LETTER MAKING A DEATH THREAT WHERE IT WAS CONCEDED THAT NONE OF THE DEFENDANTS SENT THE LETTER. MOREOVER, NO DAMAGES COULD PROPERLY BE AWARDED BASED UPON THE EMOTIONAL AND MENTAL DISTRESS CAUSED BY THE RECEIPT OF THE LETTER BECAUSE RECEIPT OF THE LETTER WAS NOT PROXIMATELY CAUSED BY THE CONDUCT OF THE DEFENDANTS – A CONCLUSION COMPELLED BY THE FIRST AMENDMENT AS WELL AS COMMON LAW AND COMMON SENSE.

There is a “plethora of authorities holding or implying that proximate cause is an element of defamation.” *Schmalenberg v. Tacoma News, Inc.*,

87 Wn. App. 579, 598-99, 943 P.2d 350 (1997).²⁹ Since proximate cause is an element, cause in fact is also an element:

The goal of compensatory damages is to compensate the plaintiff for harm caused by the defendant's wrongful conduct. [Footnote omitted]. In Washington then, a defamation plaintiff can recover damages only if he or she proves harm factually caused by the defendant's wrongful conduct.

Schmalenberg, 87 Wn. App. At 602.

In this case the plaintiffs failed to present any evidence at all to show that the defendants' defamatory statements were the cause in fact of the sending of the death threat letter and Duc Tan's receipt of it. Plaintiff Duc Tan expressly disavowed the notion that *any* of the defendants sent the letter:

Q. Are you accusing any of the defendants in this courtroom of sending you a death threat or a death threat to your wife? Is that what you are claiming in this lawsuit right now?

A. No.

RP V, 962. Effectively, Duc Tan agreed that the death threat letter was a *hoax*. Some unknown person had sent it and had attempted to pass off the

²⁹ In support of this proposition in *Schmalenberg* this Court cited to many cases including *Caruso v. Local Union No. 690*, 107 Wn.2d 524, 533, 730 P.2d 1299 (1987) (“‘false statements of fact’ must be a proximate cause of said damages”); *Miller v. Argus Publishing Co.*, 79 Wn.2d 816, 820 n. 3, 490 P.2d 101 (1971), overruled on other grounds in *Taskett v. King Broadcasting*, 86 Wn.2d 439, 546 P.2d 81 (1976) (jury instructed plaintiff carries burden of proving “that damage was proximately caused to him by the alleged libel. The term ‘proximate cause’ means that cause which in a direct, unbroken sequence produced the damage complained of and without which such damage would not have happened.”); *Arnold v. National Union of Marine Cooks*, 44 Wn.2d 183, 188, 265 P.2d 1051 (1954) (plaintiff “is entitled to recover those damages which the law presumes must naturally, proximately and necessarily result from the publication of libelous matter.”).

letter as having been written and signed by defendant Norman Le, but the plaintiff agreed that Norman Le did not send it.

The plaintiffs did not present *any* evidence of who did send it. But whoever sent it, it is plain that their motive was to frame Norman Le, not to cause distress to Duc Tan. Since no defendant sent it, and since there was no evidence as to who did, there was no evidence that the defendants' conduct in publishing the allegedly defamatory statements was the cause in fact of any emotional distress suffered by plaintiff Duc Tan. In the absence of any such evidence of cause in fact, the letter had no probative value at all and should have been excluded under ER 401. Admission of such completely irrelevant evidence is an abuse of discretion.

Even if there had been some evidence presented which indicated that the person who sent the death threat letter was prompted to do so by anger at the defendants for having defamed Duc Tan, that still would be insufficient to establish the element of proximate cause. In tort cases, unless it is reasonably foreseeable (see, e.g., *Whitehead v. Stringer*, 106 Wash. 501, 180 P. 486 (1919), where it was reasonably foreseeable to deputy who arrested plaintiff and left his truck in a dangerous part of town that the truck would be stolen), a subsequent criminal act is viewed as a superseding cause which breaks the normal sequence of events. As a matter of law, it is not reasonably foreseeable that the publication of a false accusation of being a Communist will lead some unknown third party to commit the felony offense of malicious harassment (RCW 9A.46.020) by mailing a death threat to the person alleged to be a

Communist. Thus, even assuming there was some evidence of cause in fact, there was no evidence of proximate cause. For this reason as well, the evidence that Tan received a death threat letter had no probative value.

Moreover, even if the evidence had some minimal probative value (e.g., as to damages), it should have been excluded because of its highly inflammatory nature and its capacity to incite the jury to bring in a high damages award on emotional grounds. RP V, 914. Thus, the evidence should have been excluded under ER 403, as well.

Finally, in a case where liability is predicated upon *speech*, the First Amendment and article 1, § 5 both compel the adoption of a rule that a speaker, even a speaker of defamation, cannot be held liable for emotional distress damages caused by some unknown third party criminal, even if the common law might conclude otherwise. To safeguard the freedom of speech, speech must be given “breathing space.” *NAACP v. Button*, 371 U.S. 415, 433 (1963). A rule that imposes civil liability upon a speaker simply because his or her speech aroused a third party to commit a serious crime would chill protected speech. *Cf. Sullivan*, 376 U.S. at 279 (protecting false speech regarding public figures and officials is necessary because without such protection speakers will “steer far wider” of the subject and simply refrain from expressing their criticism).

The United States Supreme Court therefore has held that a speaker can only be held liable for acts of criminal violence that are “directly and proximately caused by wrongful conduct chargeable to the defendants”:

No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, ***“precision of regulation” is demanded.*** *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405. [FN omitted]. Specifically, the presence of activity protected by ***the First Amendment imposes restraints on the grounds that may give rise to *917 damages liability and on the persons who may be held accountable for those damages.***

NAACP v. Claiborne Hardware, 458 U.S. 886, 916-917 (1982) (bold italics added). Quoting its prior decision in *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Court held that “the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity.” *Claiborne Hardware*, 458 U.S. at 918, quoting *Gibbs*, 383 U.S. at 729.

In this case the defendants all belonged to the Committee Against the Viet Cong flag, and it might be suspected that some member of this Committee sent the threatening letter to Duc Tan. But this is insufficient to permit the imposition of civil liability on the defendants. “Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.” *Claiborne*, at 920. In sum, the admission of evidence of the death threat letter -- a criminal act committed by some unknown person -- not only violated ER 401 and 403, but also transgressed the limits placed on state damages awards by the First Amendment.

6. THE TRIAL COURT ABUSED ITS DISCRETION IN EXCLUDING TESTIMONY BY DEFENDANT DAT HO THAT PLAINTIFF DUC TAN CRITICIZED DAT HO'S SUCCESSFUL CAMPAIGN TO GET THE POST OFFICE TO RECALL A MANUAL WHICH CONTAINED PICTURES OF THE COMMUNIST FLAG OF VIETNAM. SUCH EVIDENCE WAS HIGHLY RELEVANT TO SHOW THE BASIS FOR THE DEFENDANTS' SUBJECTIVE STATE OF MIND.

Defendant Dat Ho, was born in Long Xuyen, Vietnam in 1945. RP VI, 1125. He worked as an interpreter for U.S. military forces from 1966 to 1968 translating seized Viet Cong documents. RP VI, 1128. His life was threatened due to his cooperation with the U.S. forces. RP VI, 1130. On one occasion he found a note stuck on a tree that had his name on it and stated that he had been sentenced to death in absentia. RP VI, 1129-1130. He also worked at American military bases at Bien Hoa and Long Binh. RP VI, 1130. He escaped from Vietnam and came to the U.S. in 1975. RP VI, 1131. He settled in Washington State, worked first as a mailman and general assistant for the Bremerton School District; in 1979 he became an employee of the United States Post Office. RP VI, 1132-33.

In 2001 Dat Ho noticed that the Vietnamese language version of a United States Post Office manual contained a representation of the Communist flag of Vietnam. RP VI, 1133-34. Dat Ho "wrote a letter addressed to the Postmaster General to oppose that." RP VI, 1134. Eventually he received a letter from the Postmaster General's office advising him that the Postmaster General had taken steps to address the objections voiced by Dat Ho on behalf of the Vietnamese community, and that "[i]nstructions have been issued to all of our Post Offices to remove

the decals you referred to in your letter.” Trial Exhibit 56; RP VI, 1134-1135.

When the defendants’ counsel attempted to question Dat Ho regarding efforts made by Duc Tan to oppose Dat Ho’s effort to get the Communist flag removed from the Post Office’s manual, the trial judge repeatedly sustained the “relevance” objections of the plaintiffs’ counsel:

Q. Did the plaintiff, Mr. Duc Tan, ever make any public comments about you and your efforts that culminated in that letter?

MR. RHODES: Objection. Relevance, Your Honor.

THE COURT: Sustained.

Q. (By Mr. Malden) Did Mr. Duc Tan express opinions on your efforts with regard to removing this material from the postal service?

MR. RHODES: The same objection, Your Honor.

THE COURT: Counsel, how is that relevant?

MR. MALDEN: Well, we’re discussing here what is reasonable political discussion in the Vietnamese community.

THE COURT: The objection is sustained.

Q. (By Mr. Malden) Let’s move then – well, let me ask you this: Getting the material removed from the postal service mailers, did you feel that was a victory for you[?]

A. I did feel that I have achieved something. But I do not consider that as my own efforts, you know? I consider it only as a small contribution to the community?

Q. Did Duc Tan criticize you for that?

MR. RHODES: Objection, Your Honor. Relevance.

THE COURT: The same ruling as when you asked the same question before, Mr. Malden. The objection is sustained.

RP VI, 1136-1137.

The defendants' counsel then moved to another subject and offered two more exhibits (Nos. 57 and 58)³⁰ to which the plaintiffs' counsel did not object. RP VI, 1139. The *failure* of plaintiffs' counsel to object prompted the trial judge to announce an immediate trial recess. RP VI, 1139. He excused the jury and then berated both the defendants' counsel, for offering evidence which he deemed to be not relevant, and the plaintiffs' counsel for not objecting to these exhibits:

THE COURT: Please be seated, ladies and gentlemen. Please shut the door.

Counsel, ***none of this is relevant.*** We are wasting time here. ***How can you possibly not have objection to that exhibit, Mr. Rhodes? How is it possibly relevant to any issue that is before the court?***

Here we are well into the second week. We're getting near the time when we told this jury that the trial would be concluded, and we're not even close. ***How is this relevant, Mr. Malden?***

RP VI, 1139-1140 (bold italics added).

Attorney Malden responded that the subjective state of mind of the defendants was the critical issue in the case, and that the defendants were entitled to put before the jury evidence which showed what their subjective state of mind was with respect to Duc Tan:

MR. MALDEN:...I think that my clients have a right to put on their case. ***The issue in this entire case is what is the background and the subjective thinking and impressions of my clients when they got into political discussions with the plaintiff.***

³⁰ These exhibits are photos which show Dat Ho and other local Vietnamese residents visiting an elementary school on December 19, 2001 to participate in a ceremonial hanging of the Nationalist flag of Vietnam. RP VI, 1139, 1144.

And their activities, their long standing activities promoting the Nationalist flag is directly relevant to the issues in this case. If we don't have this background, how can the jury understand why a group of people would make a public announcement like they did in 2003? It's critically important that we put in evidence not only about the culture but about the experiences, the efforts, the political ideologies of my clients.

Their efforts before they ever met Mr. Duc Tan or ever got involved in any other issue is critically important ***to help me explain to the jury their subjective state of mind.*** So I contend that it's all relevant. . . .

. . . And ***I submit all of this material is relevant.***

RP VI, 1140-41 (bold italics added).

The trial judge responded by scoffing at the assertion that the defendants' subjective state of mind was relevant, and defendants' counsel replied that it was a bedrock principle that in defamation cases involving public figures – like this case – the plaintiff had to prove the defendant acted with a particular subjective state of mind termed “actual malice”:

THE COURT: ***How? What is the law that supports your contention that a person's subjective state of mind determines whether that person has acted with reckless disregard for the truth or deliberately lied?***

MR. MALDEN: ***The fundamental cornerstone of defamation law, and the actual malice standard is, did they have a subjective belief in the truth of what they said. . . .***

* * *

The plaintiff cannot win a defamation case without proving the subjective state of mind of the plaintiffs – excuse me, of the defendants. That is bedrock defamation law. You can't just get up and say, well, they published material that's wrong.

In a public figure case, which this is, the plaintiffs have the burden of proving by clear and convincing evidence that the statements made by the defendants were false and they knew it to be false or acted in reckless disregard. ***I have an obligation, therefore, to put***

into evidence, well, what was their subjective state of mind when they made this announcement [in 2003]. And certainly their activities during two years leading up to that that are directly tied to the flag, and the symbols of the flag, are directly relevant to the defense.

RP VI, 1141-41 (bold italics added).

The court then brought the jurors back into the courtroom and admitted Exhibits 57 and 58. But the trial court did not reverse his prior ruling excluding testimony from defendant Dat Ho regarding Duc Tan's *opposition* to Dat Ho's efforts to get the Post Office to recall its manual which contained the Communist flag of Vietnam. The trial judge sustained "relevance" objections and made it clear that he did not believe that the defendant's subjective state of mind regarding Duc Tan was relevant.

The defendants' trial counsel was absolutely right: It *is* a bedrock principle that a defamation plaintiff in a public figure case has to prove that the defendant made his statement with a subjective state of mind known as actual malice. *Harte-Hanks*, 491 U.S. at 688 ("The standard is a subjective one – there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity'"); *Herbert v. Lando*, 441 U.S. 153, 156 (1979) (same); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) ("In *St. Amant v. Thompson*, [citation omitted], the Court equated reckless disregard of the truth with subjective awareness of probable falsity").

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.” ER 401. Evidence that Duc Tan criticized Dat Ho for persuading the U.S. Post Office to recall its manual containing the Communist flag of Vietnam obviously does have a tendency to make it more probable that Dat Ho and his fellow defendants did *not* act with a high degree of awareness of the probable falsity of their publication when they disseminated their opinion that Duc Tan was pro-Communist. (Assuming, arguendo, that such a statement can be viewed as a statement of fact, it also has a tendency to make it less probable that the assertion was false.) The exclusion of this evidence as irrelevant therefore was a manifest abuse of discretion. And since this evidence would have rebutted the plaintiffs’ contention of actual malice, an element constitutionally required by *New York Times v. Sullivan, supra*, its exclusion also violated the First Amendment.

7. THE TRIAL COURT ERRED WHEN IT ADMITTED A PURPORTED INTERNET ADVERTISEMENT FOR THE “SANTA CLAUS” APRON BECAUSE THE WEBSITE POSTING WAS NOT AUTHENTICATED, THE STATEMENTS IN THE AD WERE INADMISSIBLE HEARSAY, AND THE EXHIBIT ITSELF HAD NO RELEVANCE.

During the defense portion of the trial, defendant Dat Ho testified, “I do not believe that this apron was designed by an American or made at any regular plant. It looks more like a hand-made kind of design.” RP VI, 1158. Defendant Norman Le testified that it was the fabric from which the apron was made that convinced him that the apron was not made in the United States:

The first thing we observed was the fabric. It was not a fabric that was made here...This apron does not. [sic]. So this – the fact that it did not have a tag give us some suspicion that it came from somewhere with some certain purpose.

RP VII, 1379-1380. Given that the apron showed white stars against a blue background on “Santa’s” gloves, Le believed the apron showed the Viet Cong swallowing the American flag. RP VII, 1381. According to Le, “for people who are observative [sic] and are good at interpreting the deceiving tactics, they would know right away what it means by this kind of symbol.” RP VII, 1381. “The red hat, that’s a symbol of a sickle. So in our minds, this is a display of the sickle and the [yellow] star symbol of the international communist party. The only thing they lacked there was the hammer.” RP VII, 1381.

On cross-examination, plaintiffs’ counsel asked Norman Le if he had ever looked on the internet to see if the apron was available in “mass production” and Le answered he had not. RP VIII, 1392.

In “rebuttal” the plaintiffs presented the testimony of Dieu Van Nguyen who said that he looked to see if the apron was being advertised on the internet. RP VIII, 1510. Nguyen said that on November 21, 2003 he went on line and went to a website at www.starshows.com where he discovered an advertisement for several products including the “Santa Claus” apron. RP VIII, 1511-1512.³¹ When the plaintiffs sought to have a

³¹ This “rebuttal” testimony did not “rebut” anything Norman Le had said. Le did not testify that it was *not* being advertised on the internet. Le testified that he never investigated to see whether it was being advertised on the internet. Thus, the testimony of defense witness Nguyen did not “rebut” Le’s testimony that he never made such an investigation. That Nguyen did look does not contradict the testimony that Le did not (*footnote continued on next page*)

printout of the internet admitted in evidence, defendants' counsel objected on several grounds, including "hearsay, relevance, [and] lack of foundation." RP VIII, 1512.³²

Outside the presence of the jury, the plaintiffs' counsel argued that the evidence was being offered to rebut the assertion "that it was a homemade garment that clearly was not stock-made as stated by the defendants." RP VIII, 1514. Counsel stated:

*The defendants were asked whether they went on the internet to look and see what they could find. **This is relevant, because it shows what they would have found had they done some investigation. It's relevant as to the question of reckless disregard before making a statement that this was clearly an incendiary device of the communists.***

RP VIII, 1514 (bold italics added). Counsel contended that it was not only relevant to show a lack of investigation, but that it was also "rebuttal" evidence because it (allegedly) contradicted Norman Le's testimony (which plaintiffs' counsel elicited on cross-examination) that the apron was "a handmade item." RP VIII, 1516-17.

The trial judge overruled the hearsay objection with these comments:

I find that this document is not an assertion of an out-of-court declarant and is therefore not hearsay. It is offered for the purpose of rebutting testimony of the defendants' witnesses that the apron was not commercially available and was a homemade object of Viet Cong propaganda.

look. Accordingly, Nguyen's testimony was not "rebuttal" testimony at all and should never have been admitted under this erroneous label.

³² He also argued that the exhibit had not been disclosed in discovery and that plaintiffs had "sandbagged" the defendants by failing to disclose this exhibit for five years. RP VIII, 1515.

RP VIII, 1519. He also overruled the relevance objection stating that the materiality of the evidence was “evident.” RP VIII, 1520.³³

The internet advertisement was admitted as Trial Exhibit No. 70. RP VIII, 1537. The witness testified that he exhibit showed an apron identical to the one which the defendants displayed at their press conference as the one found by Mr. Dai Pham near the VCTC booth at the Lakefair festival. RP VIII, 1538.

A copy of Exhibit 70 is attached to this brief as Appendix F. In fact, the advertisement does *not* substantiate any of the plaintiffs’ claims about the apron. First, the advertisement does *not* show that the apron is “mass produced” or that it is generally commercially available. On the contrary: Although the advertisement has a drawing of a woman wearing a Santa Claus apron, underneath this drawing it states “Sorry. Sold out,” and suggests purchasing a different apron instead. Ex. 70. The advertisement says *nothing* about where the apron is made, or what it is made of, and thus does not rebut Norman Le’s testimony at all.

At the top of Exhibit No. 70 the advertisement states “You’ll Love Lucy’s Aprons and Bottle Wraps Exclusively at Starshows.com.” *Id.* It

³³ The trial judge stated that the defendants had “presented their evidence that this was not a commercially available apron, that it was not available on the internet.” RP VIII, 1520. The record shows the trial judge was mistaken. The defendants *never* testified that the apron was not commercially available. They did testify that it appeared not to have been designed in the United States, that it appeared to be a “hand-made” item rather than something manufactured “at any regular plant,” and that the fabric did not look like it was made in the United States. RP VI, 1158; RP VII, 1379-1380. Neither Dat Ho nor Norman Le ever testified that the apron was not commercially available and neither testified that it was not available on the internet.

does not state who Lucy is, or where she lives, or what kind of materials she uses. The trial exhibit does not state what kind of a company Starshows is, but it suggests that Starshows does *not* make or manufacture the aprons, it merely sells them. Moreover, the trial exhibit only consists of two pages and the page numbers are identified as pages 9 and 11 of an 11 page document. Pages 1-8 and 10 of the complete advertisement for www.starshows.com/aprons_and_bottle_wraps/ are missing. In sum, this highly prejudicial document was admitted in violation of the basic rules governing relevance, foundation *and* the prohibition against hearsay.

a. Exhibit No. 70 Was Admitted Without Any Authentication

Webpages printed off the internet are inadmissible absent authentication testimony by a witness with direct personal knowledge of who created and maintained the webpage and whether it is accurate and reliable. Proper authentication requires “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 for Relief*, 549 F.3d 685, 703 (7th Cir. 2008) (en banc). Courts have repeatedly held that absent such a foundation, copies of information posted on internet websites are *not* admissible and were properly excluded. In *State v. Davis*, 141 Wn.2d 798, 854, 10 P.3d 977 (2000), the Supreme Court held that the trial court properly excluded a print out of Washington State population statistics from the internet offered by defense counsel because it did not qualify as a self-authenticating document. Similarly, in *United States v.*

Jackson, 208 F.3d 633, 638 (7th Cir. 2000), the appellate court held that the trial court correctly excluded print outs of information posted on the internet which were offered by the criminal defendant because there was nothing to show that the postings were actually put there by the organization whose name appeared on internet site:

Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailings were posted by the groups, as opposed to being slipped onto the group's web sites by Jackson herself, who was a skilled computer user.³⁴

As one court colorfully put it, "evidence" which is merely something posted on the Internet, is of virtually no probative value whatsoever without the necessary foundation testimony to establish who put the information up on the website to begin with:

Plaintiff's electronic "evidence" is totally insufficient to withstand Defendant's Motion to Dismiss. While some look to the internet as an innovative vehicle for communication, the Court continues to warily and wearily view it as one large catalyst for rumor, innuendo, and misinformation. So as not to mince words, the Court reiterates that this so called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon . . . There is no way Plaintiff can overcome the presumption that the information he discovered on the internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy . . . Moreover, the

³⁴ *Accord In re Homestore.com Securities Litigation*, 347 F.Supp.2d 769, 783 (C.D.Cal. 2004) (printouts of earnings releases posted on internet held inadmissible notwithstanding URL address and date stamp; "[t]o be authenticated some statement or affidavit from someone with knowledge is required"); *Wady v. Provident Life*, 216 F.Supp.2d 1060, 1064-65 (C.D. Cal. 2002) (internet printout properly excluded because witness "has no personal knowledge of who maintains the website, who authored the documents, or the accuracy of their contents.") Similarly, courts have reversed judgments where trial courts improperly admitted unauthenticated internet postings. *See, e.g., Victaulic Company v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) ("it is premature to assume that a webpage is owned by a company merely because its trade name appears in the uniform resource locator").

Court holds no illusions that hackers can adulterate the content on *any* website from *any* location at *any* time.

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F.Supp.2d 773, 774-775 (S.D.Tex. 1999).

Plaintiffs' witness Nguyen gave no such foundation testimony. Without such a foundation, there is no way to know whether the website posting which Nguyen copied was done by (1) a bona fide internet trading group called Starshows; (2) the current Communist government of Vietnam; or (3) by the plaintiff himself, by (a) creating the useful fiction that there is someone named Lucy who makes such aprons and markets them on the Starshows internet platform, or (b) by hacking into the website created by Starshows.com and then altering it so as to make it appear that Starshows offers the Santa Clause apron for sale. Since plaintiffs offered absolutely no foundation testimony whatsoever to establish the authenticity of documents posted on the internet at this website, it was a error to admit it.

b. Exhibit No. 70 Was Inadmissible Hearsay. Just Because It Was Offered in "Rebuttal" Does Not Mean It Is Exempt from the Rule Excluding Hearsay.

The trial court overruled the defendants' hearsay objection on the ground that the internet ad was not a statement made by an out-of-court declarant. RP VIII, 1519. That is obviously incorrect. Whoever wrote the text of the Internet advertisement did not appear in court, and the advertisement was not disseminated in court, it was posted on the Internet.

Obviously the advertisement was offered for the truth of the matter stated in the advertisement. The trial judge himself stated that the ad was being offered to rebut the defendants' testimony that the apron was "not commercially available." RP VIII, 1519. The advertisement stated that the Santa Claus apron was being offered for sale over the internet (although it also stated that the unidentified seller of the apron was currently out of all such aprons.) The defendants offered the internet printout to show the truth of the statement that the apron was being offered commercially for sale, and was not simply a "homemade" item made by someone who intended to use it herself, rather than to sell it. Only if that statement were true, would the advertisement have any tendency to show that the defendants could have learned that the apron was "commercially available." If the internet advertisement for this particular apron was a phony creation, then the apron was not really being offered for sale over the internet.

In overruling the defendants' hearsay objection the trial judge also stated that Exhibit No. 70 was offered in rebuttal. RP VIII, 1519. But rebuttal testimony is not exempt from ER 802, the rule which states that "hearsay is not admissible except as provided by these rules, but other court rules, or by statute."

The case of *State v. Davis, supra*, is directly on point. In addition to holding that the internet print out offered by the defendant in that case was not properly authenticated, the Washington Supreme Court also held that

the print out was inadmissible hearsay and did not meet the criteria for any hearsay exemption:

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)...The trial court did not abuse its discretion in sustaining the State's hearsay objection to the document.

Davis, 141 Wn.2d at 854.

- c. **Defendants' Failure to Fully Investigate the Facts Regarding the Marketing of the Apron Had No Relevance at All Because Plaintiffs Were Required to Show That The Defendants Were Subjectively Aware of the High Degree of Probability That Their Statements About the Apron Were False. Even Assuming That the Internet Ad Showed That They Were Negligent in Failing to Discover Facts About That Apron, That Fact is Irrelevant Since Actual Malice Cannot Be Predicated Upon Negligence.**

The plaintiffs argued that the Internet advertisement was highly relevant because it showed that the defendants acted "with reckless disregard" for the truth. But it is well established that a failure to investigate the facts thoroughly, no matter how negligent such a failure may be, is completely irrelevant in a public figure/public official case where the plaintiff must establish a subjective *awareness* that the published statement is false or probably false. Facts which one does not learn because one never investigated have no probative value in such a case precisely because a defamation defendant is not aware of such facts.

In *Sullivan* the Supreme Court held that the fact that the New York Times employees did not look in their own newspaper clippings file, and thus did not discover that some of the factual statements made in the

advertisement that they published were actually false, was irrelevant because evidence of negligent investigation had no tendency to establishing the constitutionally required subjective state of mind – actual subjective awareness that the facts stated were false, or highly likely to be false. *Sullivan*, 376 U.S. at 287-88. *Accord Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 664 (1989) (even proof of “an extreme departure from professional standards” of responsible fact-checking is not a sufficient basis for finding actual malice.”); *Herron v. King Broadcasting*, 112 Wn.2d at 777 (“Failure to investigate is not sufficient to prove recklessness.”) The same is true in this case. The undisputed failure of defendant Norman Le to look to see if there was an Internet website where this particular Santa Claus apron was offered for sale was constitutionally irrelevant. The erroneous admission of this Internet website ad simply encouraged the jury to return a verdict based upon negligence, which is a constitutionally insufficient basis for a judgment establishing defamation liability in a public figure case.

8. IT WAS ERROR TO EXCLUDE THE EXPERT OPINION OF ROBERT CAVANAUGH. HE WAS OBVIOUSLY QUALIFIED TO GIVE SUCH AN OPINION AND THE FACT THAT HE IS NOT OF VIETNAMESE ANCESTRY IS NOT A SUFFICIENT REASON FOR BARRING HIS OPINION TESTIMONY WHILE ADMITTING THE SAME TYPE OF OPINION FROM OTHER WITNESSES WHO ARE OF VIETNAMESE DESCENT.

The defendants called retired U.S. military officer Robert Cavanaugh to testify as an expert witness. He received training at the Special Warfare School in Fort Bragg and at the Army’s West Coast Language School. RP

VII, 1237. He was trained there to conduct military operations and psychological warfare against communist insurgents, and he served in Vietnam in the 1960s. RP VII, 1236-37. Once in Vietnam he served as an advisor to the Vietnamese and received training on communist propaganda and how to recognize it. RP VII, 1246. He worked in the “four-corner” area of the Mekong River Delta with the Vietnamese 9th Armed Division. RP VII, 1245-46. The Viet Cong would come through the villages at night and distribute propaganda leaflets. RP VII, 1246. They were aimed at intimidating the people of the villages, and they bore the Communist gold flag. RP VII, 1246-1247.

The defendants’ counsel showed Cavanaugh the apron (Exhibit 54) which had been found by the VCTC booth at the 2003 Lakefair and asked him if he believed that it was related to any communist symbolism. RP VII, 1259. Plaintiffs’ counsel objected on relevance grounds and the trial judge sustained the objection. RP VII, 1259-1260. The trial judge ruled that counsel had not yet established that Cavanaugh had the requisite expertise:

MR. MALDEN: Your Honor, I think that the other side has – both sides have elicited from every witness that’s testified their impression of this apron. We now have a member of the community that is not a part of the refugee community but has specialized expertise in recognizing communist propaganda. And I think he should be permitted to express an opinion on whether or not this, in fact, has any quality or any factor or any sign of propaganda.

THE COURT: Counsel, the witness was permitted to testify about conditions in Vietnam in 1964 and 1966. He is not established as an expert in conditions here in the United States in this community.

You are invading the province of the jury to make those kinds of determinations. And the opinions that he would offer are not admissible under the evidence rule relating to expert testimony.

MR. MALDEN: *Is the court saying it requires an expert to know whether or not these are communist symbols?*

THE COURT: *Absolutely.* In the course of this trial, if you are bringing in someone who is not involved in the case to offer opinions, *he must be qualified as an expert* to give that opinion. Otherwise you're invading the province of the jury which is to decide these matters from the evidence that they hear in court.

RP VII, 1260-61 (bold italics added).

The defendants' counsel then elicited testimony, that while he was at the Special Warfare School at Fort Bragg, Cavanaugh "received training on how to identify symbols that the communists commonly used in South Vietnam." RP VII, 1261. counsel argued that whether Cavanaugh's training "was in 1960 or 1990...doesn't matter" and that he training "was given by the United States government," RP VII, 1262, but the trial judge disagreed and again ruled again that a sufficient showing of the expert's qualifications had not been made:

THE COURT: Counsel, it does matter. The training that this witness has described is military training appropriate for Vietnam in 1964 and 1966. You are asking him to come and in simply support the opinion already given by the members who are part of the Vietnamese community who have supported your position in the case. This is not a qualified expert witness to add something to the jury's consideration. Let's move on.

RP VII, 1262.

After the jury verdicts were received, defendants moved for new trial and that motion was based in part upon the trial court's refusal to permit

Cavanaugh to give his opinion as to whether the image on the apron was Communist propaganda. In their motion the defendants noted:

The trial court allowed every other witness in the trial to describe their interpretation of the apron, and whether it had any symbols that might reasonably be associated with communism. The only witness the court barred from discussing the subject was called by the defense, Robert [C]avanaugh. The court's arbitrary exclusion of Mr. [C]avanaugh's testimony was an abuse of discretion that warrants a new trial.

CP 62. In response, the plaintiffs' counsel argued that that the trial judge made an appropriate ruling, and that the distinction between Cavanaugh and all the other witnesses who were allowed to give their opinions was appropriate because all the other witnesses were Vietnamese *and Cavanaugh was not*:

Every other witness who testified at trial was a Vietnamese-American, either first or second generation. Mr. Cavanaugh's experience in Vietnam and apparent appreciation for Vietnamese culture does not put him into the shoes of someone from Vietnam who fled their homeland. As such Mr. Cavanaugh's reaction to the apron was not the same as someone who fled Vietnam as an immigrant. The Court accurately restricted Mr. Cavanaugh's testimony in this regard, upon a relevancy determination. This ruling was appropriate, and a new trial is not justified on these grounds.

CP 224-225 (bold italics added).

The trial judge's ruling is clearly arbitrary and capricious and constituted an abuse of discretion. On the one hand, the trial judge conceded that *only* an expert in communist propaganda was qualified to opine on the issue of whether the apron was Communist propaganda. RP VII, 1261. It was also conceded by the trial judge that he had allowed both party-witnesses and non-party witnesses to testify regarding their

opinion as to whether the apron was a piece of Communist propaganda. *See, e.g.*, RP II, 364-65(Dai Pham); RP IV, 616 (Len Hua); RP V, 927 (Duc Tan); RP VI, 1085 (Thanh Tran); RP VII, 1309 (Phiet Nguyen); RP VII, 1379-1380 (Norman Le).

Robert Cavanaugh did live in Vietnam during the Vietnam War, just as the other witnesses did. And he did have direct experience, just as many of the other witnesses did, in encountering Communist propaganda. It cannot be that Robert Cavanaugh was not qualified as an expert just because he was non-Vietnamese or non-Asian. Such a justification for excluding his opinion testimony would be a blatant violation of the Equal Protection Clause of the Fourteenth Amendment because race and national origin have nothing to do with a person's talents or knowledge and are generally constitutionally forbidden. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). *Accord State v. Barber*, 118 Wn.2d 335, 346, 823 P.2d 1068 (1992) ("racial incongruity" – person of one race in a neighborhood perceived to be populated largely by persons of another race is an unconstitutional justification for a seizure of that person).

What one is left with is simply this: because Robert Cavanaugh was not himself a refugee from Vietnam, he was more likely to be objective, scientific, and impartial when it came to evaluating the design on the apron, because he (arguably) had less of a personal stake in

opposition to the Communists of Vietnam than did the plaintiff or the defendants. For this reason it was quite important that defendants be permitted to elicit his expert testimony. His opinion was not so easily impeachable precisely because he did not have to flee his native country and resettle in a foreign land because of the conduct of the Communists of Vietnam.

No reasonable jurist could possibly conclude that Robert Cavanaugh was not qualified to testify as an expert on Vietnamese Communist propaganda. Moreover, since Cavanaugh not only had practical experience identifying Communist propaganda, but also had specialized military training in this field, no reasonable trial judge could possibly conclude that Cavanaugh was *less* qualified than any of the other witnesses whom the trial judge permitted to give their opinions on this same subject. Accordingly, it was an abuse of discretion to exclude Cavanaugh's expert opinion on this subject.

9. THE TRIAL JUDGE ERRONEOUSLY REFUSED TO PERMIT THE JURORS TO CONSIDER TRIAL EXHIBITS 66 AND 67, TWO NEWSPAPER ARTICLES PUBLISHED IN 1997, AS EVIDENCE BEARING ON THE DEFENDANTS STATE OF MIND WHEN THEY LATER PUBLISHED THEIR PUBLIC NOTICE.

Defendants Dat Ho testified that the defendants had read two newspaper articles published in Vietnamese newspapers in 1997. RP VII, 1211, 1215. These newspaper articles discussed plaintiff Duc Tan and asserted that he was actually pro-Communist and not anti-Communist as

he professed. When these newspaper articles were offered in evidence, plaintiffs' counsel objected on hearsay grounds. RP VII, 1211, 1215.

Defendants' counsel responded that he was not offering them for the truth of the matters asserted in the articles, but rather to show "what the defendants believed at the time. . . . So, we're not introducing this exhibit to prove the truth of the matter, simply to show what, in fact, their – the Defendants' state of mind was. . ." RP VII, 1211-1212, Defense counsel also argued that the articles were relevant to the issue of damages, because they tended to show that Duc Tan already had a reputation for being pro-Communist six years before the defendants published their "Public Notice" in 2003. RP VII, 1212. Plaintiffs' counsel renewed his objection to the substance of the articles on hearsay grounds, but maintained that it was permissible for the witness to testify "that he saw an article." RP VII, 1212.

The trial judge sustained plaintiffs' objection and ruled: "The exhibit [No. 66] is admitted, ladies and gentlemen, for a limited purpose, and that is to prove the existence of the article, not to prove its allegations, and not to prove the reputation of the Plaintiffs in the community. It is only for the purpose of establishing that apparently there was this article." RP VII, 1212.

When the second article (Exhibit 67) was offered in evidence, plaintiffs' counsel again objected on hearsay grounds, and the Court again ruled it was "admitted for the same limited purpose as 66 was admitted." RP VII, 1215.

The trial court's rulings limiting the admissibility of these exhibits was an abuse of discretion. When a statement is offered solely to show the statement's effect on the state of mind of a person who heard or read the statement, then the statement is not hearsay because it is not "offered to prove the truth of the matter asserted." ER 801(c). When an out of court statement is offered to show *why* a person made a statement to someone else, it is not offered for the truth of the matter asserted. *See, e.g., State v. Lass*, 55 Wn. App. 300, 303-304, 777 P.2d 539 (1989) (police properly allowed to testify that witness Tillet stated that he believed Lass stole his truck, where jury told evidence admitted not for truth of the matter asserted but merely to show why police concentrated their search for the truck in a particular area).

Here the evidence was offered not to show that what the newspaper articles said in 1997 was true, but to show that defendants' statements in 2003 were not made with actual malice (with high degree of awareness of their probable falsity), and that in fact they had a good faith subjective *belief* in the truth of what they were saying. Other courts have recognized that such evidence is properly admitted in defamation cases notwithstanding a hearsay objection. *See, e.g., Brewer v. Capital Cities/ABC, Inc.*, 986 S.W.2d 636, 644 (Tex. App. 1998) ("The records are also admissible to show ABC's state of mind, i.e., to show lack of malice, rather than for the truth of the matter asserted."). Thus, it was an abuse of discretion to prohibit the jury from considering these articles for this purpose.

It was also error for the Court to prohibit the jury from considering the articles as evidence of Duc Tan's reputation as a Communist in 1997. ER 803(a) (21) provides that the following out of court statements are not excluded by the hearsay rule (even if they are offered for the truth of the matter asserted): "Reputation of a person's character among his associates or in the community."

Here, an article from Issue No. 49 of the *Chinh-Luan Weekly*, stated in part: "The 'RED' tail of DUC MINH HUA – DUC THUC TAN group had no more place to hide. This is also the strategy [of] that the Vietnamese Communist Intelligence and the Chinese Communist spies are carrying out in foreign countries in a concerted manner, and they are also testing the reaction of the nationalist Vietnamese overseas." Ex. 66. Similarly, Issue No. 48 of the *GOP GIO* newspaper reported that "the Vietnamese communist anthem had been played openly in Olympia, WA" at a cultural event "organized by the Vietnamese Community of Thurston County Association [.]" Ex. 67. The article warned that the VCTC had fewer than 20 members and yet called itself the representative of the Vietnamese community. *Id.* Noting that "no other organizations had accept[ed] the VCTC," the article questioned whether the playing of the Communist national anthem was accidental or intentional:

Let's go back to the main purpose of this article. It was the Vietnamese of Thurston County Association that gave permission to the band to play the Vietnamese communist anthem during the flag salutation. Did it happen by accident or was it an act to test the water to measure the people's reaction? Those who are well experienced in spy-war are invited to contribute their inputs.

Id.

It was error to preclude the jury from considering these articles for any purpose other than to show that the articles' "existence." The articles bore directly on the issues of both "actual malice" and damages; consideration of their contents was not properly limited on hearsay grounds.

10. SINCE ONLY PARTIAL EXCERPTS OF ONE OF THE ALLEGEDLY DEFAMATORY NEWSPAPER ARTICLES WERE ADMITTED IN EVIDENCE, IT WAS LEGALLY IMPOSSIBLE FOR THE JURORS TO CONSIDER THIS ARTICLE "AS A WHOLE" AS IT WAS INSTRUCTED TO DO IN INSTRUCTION NO. 7. THUS, THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT ANY DEFAMATION AWARD BASED ON THIS ARTICLE. SINCE THE JURY'S SPECIAL VERDICTS DID NOT SEGREGATE HOW MUCH WAS BEING AWARDED FOR EACH OF THE THREE NEWSPAPER ARTICLES, THE JUDGMENTS BASED ON THE NEWSPAPER ARTICLES MUST BE VACATED.

"[I]n determining whether a publication is defamatory, it must be read as a whole and not in part or parts detached from the main body." *Camer v. Seattle P.I.*, 45 Wn. App. 29, 37, 723 P.2d 1195 (1986), *cert. denied*, 482 U.S. 916 (1987). This rule was established long ago and is settled law in Washington State. *See Sims v. Kiro*, 20 Wn. App. 229, 234, 580 P.2d 642 (1978). *Gaffney v. Scott Publishing Co.*, 35 Wn.2d 272, 277, 212 P.2d 817 (1949); *Blende v. Hearst Publications, Inc.*, 200 Wash. 426, 429, 93 P.2d 733 (1939) (article should be read in its entirety); *Graham v. Star Publications*, 133 Wash. 387, 389-390, 233 P. 625 (1925) (same).

In accordance with this rule, the trial court properly instructed the jury in Instruction No. 8 with language nearly identical to the quotation set

forth above from *Camer* (except that the word “statement” is used instead of the word “publication”). CP 165.

In addition to their defamation claims based on the Public Notice (Trial Exhibit No. 8) posted on the internet, the plaintiffs also brought claims based on three articles published in two Vietnamese community newspapers. In instruction No. 7 the trial judge summarized the claims of the parties for the jury, and explained where the jurors could find these articles:

Plaintiffs claim that three additional defamatory statements were published in articles written by defendant Norman Le, the first two in a publication entitled *Community Newsletter*, in separate articles on November 15, 2002, and a third in a newspaper entitled the *New Horizon*, in October 2003 (all in Exhibit 14a). Plaintiffs have brought this lawsuit against Norman Le and his marital community for these alleged defamatory statements.

CP 163 (Jury Instruction No. 7).

However, the plaintiffs did not translate the entire text of the third newspaper article. The complete *Vietnamese* text of these three articles was before the jury in three exhibits. Trial Exhibit Nos. 9, 10 & 11. The complete text of the first two articles was translated into English and admitted into evidence as Trial Exhibit No. 18. But the plaintiffs only placed in evidence, in Trial Exhibit No. 14a, only a *partial* English translation of some “excerpts” from the third article published in “New Horizon.” Trial Exhibit No. 14a says at the very top of the exhibit:

Excerpts from “Community Newsletter” and “NEW HORISON” monthly newspaper.

Exhibit No. 14a (bold italics added). This two page trial exhibit contains only a short excerpt from page 9 of the October 2003 issue of “New Horizon.” *Trial Exhibit No. 14a* (copy attached as Appendix D).

Thus, the plaintiffs gave the jury only “isolated segments” of the third allegedly defamatory newspaper article, in direct contravention of the rule of *Sims*, 20 Wn. App. At 234, *Camer*, and *Gaffney*. Since the plaintiffs failed to give the jurors English translations of the entire text of this article, it was impossible for the jurors to follow the law given to them in Instruction No. 8. The evidence they were provided was legally insufficient to support any judgment for defamation based on the third newspaper article. On this record, there is no way anyone could determine if this article was defamatory.

The jury’s special verdicts awarding damages for defamatory newspaper articles did not specify how much was awarded for the first two articles and how much for the third article. Accordingly, the judgments entered against Norman Le and in favor of plaintiffs Duc Tan and the VCTC must be set aside because there is no way to know what portion of these judgments rests on the third newspaper article.

E. CONCLUSION

For the reasons stated in Argument Sections 1 and 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 9, 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, 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 11th day of February, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By Michael B. King
Michael B. King, WSBA No. 14405
Of Attorneys for Appellants Le, Ho, Tran and Vo

By James E. Lobsenz
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellants Le, Ho, Tran and Vo

INDEX TO APPENDICES

<i>APPENDICES</i>	<i>DESCRIPTION</i>
Appendix A	Trial Exhibit No. 8 - <i>Public Notice</i>
Appendix B	Trial Exhibit No. 18 – English translation of Community Newsletter dated November 15, 2002, by Legal Language Services with original in Vietnamese
Appendix C	Trial Exhibit No. 14A – Summaries of Community Activity Reporting on New Horizon Articles – English translation by Vuong Nguyen
Appendix D	<i>Declaration of Nigel Malden in Support of Motion for New Trial</i> attaching Police Reports from Olympia Police Department and Washington State Patrol <i>Appendix A</i> (CP 202-216)
Appendix E	Jury Instruction No. 15 (CP 168)
Appendix F	Trial Exhibit No. 70

APPENDIX A



WASHINGTON COUNTY CLERK'S OFFICE

SMITH COUNTY
COUNTY CLERK

Plaintiff/Petitioner Exhibit

8

Cause #

04-2-404249

Date Admitted

3-31-09

By

Tom

Deputy

From: Tuan Vu [tvu2020@yahoo.com]

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

To: viet.nguyen@comcast.net; Shphaml@Attbi.Com; normanle@netzero.net; khavous@yahoo.com; thanhnguyenusa@hotmail.com; danghi@vncac.org; Tan Duc; sdn23066@premier1.net; Nam Lai; svu@co.kitsap.wa.us; dsteussy@highline.com; hdao@webtv.net; TIEN NGUYEN; nvtbkp86@aol.com; Julien Pham; liily.iftner@dbmengineers.com; Dan Nguyen; pr@tetinseattle.org; kietaly@u.washington.edu; nhanvodao@yahoo.com; nguoihien_98104@yahoo.com; dieuhien@u.washington.edu; mongmo@u.washington.edu; uyen.t.le@rssmb.com; vinhx@hotmail.com; thanh_tan@hotmail.com; tvinh@seattletimes.com; sngo@windermere.com; mbach@u.washington.edu; mariehb@u.washington.edu; xiulan@u.washington.edu; radi011568@aol.com; Mai Nguyen; f5ttang@hotmail.com; biet-hai@pacbell.net; t_nambinh@yahoo.com; baodacbui@yahoo.com; vamco13@hotmail.com; baokiemdam@aol.com; dat_ho@hotmail.com; huynhnpq@yahoo.com; rhuynh@spccc.ctc.edu; thuynhrmt@hotmail.com; dieu81@hotmail.com; Nguyen, Hieu; tcyevnus@hotmail.com; nguyenanquy@hotmail.com; I taokng@aol.com; nguyentj1@juno.com; npham@hcc.ctc.edu; tongmai@msn.com; stonthat@online.no; huongviet19@hotmail.com; duocmy@aol.com; rickn@rpne.net; huytuong@hotmail.com; vuthuy@u.washington.edu; tvu2020@yahoo.com

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

To the Communist Refugees Compatriots in the whole world,

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

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

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

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

Sincerely,

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

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

Please come to the press conference to see the evidence.

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

COMMITTEE AGAINST VIET CONG FLAG

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

PUBLIC NOTICE

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

I. FACTS

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

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

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

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

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

II. RECORDS OF THE TAN THUC DUC GANG.

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

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

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

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

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

III. ALERT AND SUMMON

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

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

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

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

Olympia, August 7, 2003

For The Committee Against Viet Cong Flag
On Duty Section

Tuan Anh Vu
Co-Chair

Dat Tan Ho
Commissioner

Phiet Xuan Nguyen
Commissioner

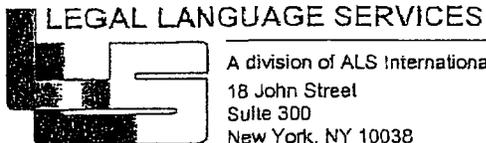
Ngo Thien Le
Co-Chair

Nhan Thanh Tran
Commissioner

Nga Thi Pham
Commissioner

APPENDIX B

1/8



Telephone (212) 766-4111
 Toll Free (800) 788-0450
 Telefax (212) 349-0964
 www.legallanguage.com

July 28, 2006

To whom it may concern:

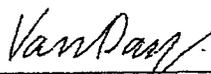
This is to certify that the attached translation from Vietnamese into English is an accurate representation of the document received by this office. This document is designated as:

**Activity News
 NVQG COMMUNITY (VIETNAMESE NATIONAL)**

Van Dang, who translated this document, is certified by this company as fluent in Vietnamese and standard North American English and is qualified to translate.

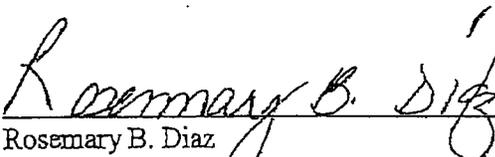
She attests to the following:

"To the best of my knowledge, the accompanying text is a true, full and accurate translation of the specified document."



 Signature of Van Dang

Subscribed and sworn to before me this 28th day of July 2006.



 Rosemary B. Diaz
 Notary Public, State of New York
 No. 01BR6077317
 Certificate filed in New York County
 Qualified in Kings County
 Commission Expires July 8, 2010

Sincerely,

Victor J. Hertz
 President & CEO

Activity News

NVQG COMMUNITY (VIETNAMESE NATIONAL)

Pull down VC flag and pull up VNCH (Vietnamese National) flag at Saint Michael School, Olympia.

A blood flag of VC displayed in a class in a big high school in Olympia that Mr. Tan Thuc Duc and Mr. Hua Minh Duc used to teach Vietnamese language in many years. Till recently, organizations of Vietnamese National people in Olympia discovered and requested Mr and Mrs. Nguyen Xuan Phiel, CDCG (Catholic Community) in Olympia asked Bishop Lee to intervene. The School's Director, Sally Merriwether took it down and replaced it by the Vietnamese National flag. But for unknown reason, only one week after that, the Vietnamese National flag was taken down.

Being too indignant because of the above action, on July 20th, 02, Dr. Le Thien Ngo, President of CDNVQGTBWA (Vietnamese National Community of Washington State) guided a delegation of 12 representatives of the National Vietnamese organizations (Catholic Community, Christian Community, Community of Vietnamese National of Washington State/CDNVQGTBWA), Organization of Senior People, H.O Association of Olympia, Women's Association, Voters' Alliance...) to come and see the school's director board. After over an hour of discussion, Madam Principal agreed allowing the permanent display of the Vietnamese National Flag again at the main corridor of the school. Dr. Le Thien Ngo requested Mr. TT Duc to help displaying it. After nearly two hours of discussion, Mr. Duc refused. After the first school day, in the afternoon of Friday, October 11th, representative delegations of Vietnamese National organizations in Olympia brought Vietnam Republic National Flag to put up at the position that had been agreed by madam principal Sally Merriwether. The local representatives of National Vietnamese were all presented.

Fight against the VC agents with the plot of hanging the Communist flag at SPCCC.

At the beginning of the last school year, students' representative board of the new school year including one who came from Vietnam decided to hang VC flag at the center area of Multi-Cultural Center of SPSCC in Olympia.

Vietnam Students Association (VSA) including H.O children and grand children sent a letter to strongly protest against it. But the Viet Cong agent was not defeated. They had 7 people, met together to question VSA, which had only 3 students. These children sent an alert to Vietnam

Community Organizations. Therefore, on October 22nd, 02 at 11:00 AM when they set up a forum to question 3 Vietnamese students, representatives of the organizations, and people from places like Seattle, Tacoma, Lacey, Olympia, loudly came over with pennants, banners in front of MCC. At the beginning, the chief student consultant David Rector, intended not to let people in. But after half an hour of discussion with Dr. Le Thien Ngo who was the representative of Vietnamese Community National Washington State, he had to make concession so that the delegation could come in, at the same time, agreed that: after the students' representative board and Vietnamese Students Association finished the "questions and answers" session, the remaining time would be used for the community representatives to raise opinions. Representatives of Vietnamese Students Association including Nguyen Thanh Tai (child of Mr. and Mrs. Tho), PCT, Le Viet Huong, CT, (child of Mr. and Mrs. But) and Cat Tuong (child of Mr. and Mrs. Thai) had excellent speeches, thanks to being instructed by the uncles and aunts many days in advance. They are all children of H.O's families, who have come to America just a few years ago.

Note: None of Vietnamese visiting students delivered speech like it was said in a newspaper. Maybe this newspaper aimed at raising the importance of VC, that they were good to go on discussion in public. That student only sat facing down quietly in a corner!

From the community, the excellent speeches were delivered by Vu Anh Tuan, Nguyen Xuan Phiet, Dr. Le Thien Ngo (Olympia), Bui Dac Bao (Tacoma), and Ho Tan Dat (Seattle).

The reasoning, pictures, evidences that the gentlemen displayed made BDSV/SPSCC bewildered. And American professors, students there have warmly applauded Vietnamese speakers. Just like the time to pull down the flag at St. Michael School, this success was thanks to contributions of Mr. and Mrs. Nguyen Xuan Phiet and Mr. and Mrs. Le Thien Ngo who worked until 10:00 pm the previous night to make Vietnam-American flags, hand's banners....

Hung Viet reports from Olympia

WARMLY INVITE VIETNAMESE FELLOWS TO VISIT HOME PAGE OF NATIONAL VIETNAMESE COMMUNITY OF WASHINGTON STATE AT WWW.VAC-WA.ORG

Van Dang

Van Dang

Subscribed and sworn to before me

This 28th day of July 2006

Rosemary B. Diaz

Rosemary B. Diaz

Notary Public, State of New York

No. 01BR6077317

Certificate filed in New York County

Qualified in Kings County

Commission Expires July 8, 2010

Ti. Sinh Hoat

CỘNG ĐỒNG NVQG

lá cờ VC và thương cờ VNCH tại Trường Saint Michael, Olympia.

Một lá cờ máu của VC được trưng bày trong một lớp học tại một trường trung học lớn tại Olympia mà các ông Tân Thục Đức Hứa Minh Đức dùng để dạy Việt ngữ trong nhiều năm. Đến gần đây các tổ chức Người Việt QG tại Olympia đã phát hiện và yêu cầu Ông Bà Nguyễn Xuân Phiệt, CĐCG tại Olympia nhờ Cha Lee can thiệp. Bà Giám đốc nhà trường Sally Merriwether đã lấy xuống và thay thế bằng lá cờ Quốc gia. Nhưng không biết vì lý do gì, chỉ độ một tuần sau là lá cờ QG bị tháo xuống.

Quá công phẫn vì hành động trên đây, ngày 20-6-02 Ts. Lê Thiện Ngọc Chủ tịch CĐNVQGTBWA hướng dẫn một phái đoàn gồm 12 đại diện các tổ chức đoàn thể người Việt QG (Cộng-đồng Công giáo, Cộng đồng Tin-Lành, CĐNVQGTBWA, Hội Cao niên, Hội H.O. Olympia, Hội Phụ Nữ, Liên minh Cử tri, v.v.) đến gặp Ban Giám đốc nhà trường. Sau hơn một giờ tranh luận, bà Hiệu trưởng đồng ý cho phép trưng bày thương xuyên lá cờ QG trở lại tại đầu hành lang chính của trường. Ts. Lê Thiện Ngọc yêu cầu Ô. TT Đức làm giùm công việc trưng bày đó. Sau gần 2 giờ tranh luận, ông ta từ chối. Sau ngày tựu trường, chiều Th. Sáu 11 tháng 10, phái đoàn đại diện các đoàn thể người Việt QG tại Olympia đã mang Quốc kỳ VNCH đến để thượng lên tại vị trí đã được bà Hiệu trưởng Sally Merriwether thỏa thuận. Các đại diện cộng đồng NVQG tại địa-phương đều có mặt.

Đấu tranh với tay sai VC âm mưu treo cờ CS tại Đại học Công đồng SPSCC.

Vào lúc bắt đầu niên học vừa qua, Ban Đại diện SV niên khóa mới trong đó có một tên từ VN qua, đã quyết định treo lá cờ VC lên tại khu trưng ương của Trung tâm Văn-hóa (multi-Cultural Center) của Đại học cộng đồng SPSCC ở Olympia.

Hội SVVN (VSA) gồm, các con cháu của H.O. đã gửi một văn thư phản ứng quyết liệt. Ban ĐDSV buộc lòng phải gỡ xuống. Nhưng bọn tay sai VC nằm vùng vẫn không chịu thua. Chúng gồm 7 tên họp lại để chất vấn VSA chỉ có 3 em. Các em liền báo động cho các tổ chức cộng đồng VN biết. Bởi vậy ngày 22-10-02 lúc 11:00AM khi chúng lập diễn đàn để chất vấn ba SV Việt Nam đại diện đoàn thể và đồng bào từ các nơi như Seattle, Tacoma, Lacey, Olympia, kéo đến với cờ xí biểu ngữ rầm rộ trước MCC. Lúc đầu Cố vấn trường cho SV, David Reclor, định không cho đồng bào vào. Nhưng sau nửa giờ tranh luận với TS. Lê Thiện Ngọc, đại diện CĐNVQGTBWA, anh ta phải nhượng bộ để cho phái đoàn vào, đồng thời thỏa thuận là: sau khi ĐDSV và VSA hỏi đáp xong, họ sẽ dành toàn bộ số thì giờ còn lại cho các đại diện của cộng đồng phát biểu. Các đại diện VSA gồm cháu Nguyễn Thành Tài (con Anh Chị Thọ), PCT, cháu Lê Việt Hùng, CT (con anh chị Bút) và cháu Cát Tường (con anh Chị Thái) phát biểu rất xuất sắc, nhờ các chú các bác đã chỉ vẽ giúp đỡ trong nhiều ngày trước. Các cháu đều là con H.O. mới đến Mỹ chỉ độ vài năm thôi.

Lưu ý: không có SV du học từ VN nào phát biểu như một tờ báo đã đăng bậy bạ. Có thể tờ báo đó nhảm đẽ cao VC cho rằng chúng cũng ngon lành dám ra mặt tranh luận công khai. Tên SV đó chỉ ngồi rúc vào một xó!

Từ phía cộng đồng thì những vị phát biểu xuất sắc gồm Ô. Vũ Anh Tuấn, Nguyễn Xuân Phiệt, Ts. Lê Thiện Ngọc (Olympia), Bùi dắc Bảo (Tacoma) và Hồ Tấn Đạt (Seattle). Các lập luận và hình ảnh, bằng chứng mà quý ông trưng ra khiến cho bọn BDSV /SPSCC ngồi ngơ ngáo. Còn các Giáo sư, SV Hoa kỳ có mặt đã vỗ tay tán thưởng nhiệt liệt các diễn giả VN. Cũng như lần hạ cờ tại Trường St Michael, sự phản cộng lần này một phần lớn là nhờ công lao của Ô. Bà Nguyễn Xuân Phiệt đã cùng với ông bà Lê Thiện Ngọc làm việc đến 10 giờ đêm hôm trước để thực hiện cờ Việt Mỹ, Biểu ngữ cầm tay, v.v.

Hưng Việt tường thuật từ Olympia

MỜI QUÝ ĐỒNG HƯƠNG HÃY VIẾNG TRANG NHÀ CỦA CĐNVQGTBWA Ở ĐỊA CHỈ:
(PLEASE VISIT VACWS WEBSITE AT)

WWW.VAC-WA.ORG

APPENDIX C

Excerpts from " Community Newsletter " and "NEW HORIZON monthly newspaper:

I. COMMUNITY NEWSLETTER:

By The Vietnamese Community of Washington State

ISSUE #20 NOVEMBER 15, 2002 SPECIAL RELEASE

The Article Title: "COMMUNITY ACTIVITY NEWS" - (Page 5)

Taking down the VC flag and raising the VNCN flag at St Michael School, Olympia.

A bloody VC flag has been displayed in a classroom of a big high school in Olympia where Mr. Duc Tan and Mr. Duc Hua use to teach Vietnamese for many years. Recently the Vietnamese Nationalist organizations of Olympia had discovered it and asked Mr. and Mrs. Phiet Nguyen, Catholic Community, to ask Father Lee to intervene. Sally Merriwether, School Principal, took it down and replaced it with the Nationalist flag. But for an unknown reason, about a week later, the Nationalist flag has been taken down. Too indignant by the above act, on 6/20/02, Ts Norman Le, president of the CDNVQGTBWA led a delegation of 12 representatives of the Nationalist Vietnamese people to meet with the school's administration. After over an hour of debate, the Principal agreed to let display the Nationalist flag again and permanently at the main entry hall. Dr. Norman Le asked Mr. Duc T.T. to do the displaying of the flag. After almost two hours of discussion, he refused to do it. After the reopening of school, the delegation of Vietnamese nationalists of Olympia brought a Republic of Vietnam flag to put up at the location Ms. Sally Merriwether, School Principal, had agreed. Representatives of the local Vietnamese Nationalist organizations were all present

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Title: "The Statement of the former president of the "Washington State Vietnamese Nationalists" regarding the Election into the Board of Directors for 2002-2006 term. "

(Page 20): ... Voters should take a good look into what the Evil Axis has done in the past:

The Axis's head is Mr. Sanh Pham, a former Colonel who has once done sabotage to the New Year Ceremony of saluting Vietnamese Yellow Flag performed by the Washington State Vietnamese Nationalists in Seattle. He is trying to organize and be allied with the politically dangerous people and the organizations publicly recognized in their services to the VC regime, among which they are:

- The organization of Seng sang DUC HUA and Seng sang DUC TAN who have once run a ceremony of flag salutation with the VC national anthem, and called for celebration of "The Sept, 2 anniversary

The organization of the former Colonel having the same last name as HUA who has disdained the Vietnamese Yellow Flag and teamed-up with DUC HUA in serving as tool to LCD in their plot to form the Evil Axis in Thurston-King-Tacoma aiming at a total control over the whole Vietnamese community in Washington State by the VC. Note that they never used the word "NATIONALIST" in any of their organizations' names, but only naming as "VIETNAMESE COMMUNITY" meaning a "VC-controlled Community".

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APPENDIX D

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FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

09 APR 27 PM 4:12

BETTY J. GOULD, CLERK

BY _____
DEPUTY

1	<input type="checkbox"/> EXPEDITE
2	<input checked="" type="checkbox"/> Hearing is set:
	Date: _____
3	Time: <u>9:00 a.m.</u>
	Judge/Calendar: <u>McPhee</u>
4	<input type="checkbox"/> No hearing currently set

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

DUC TAN, et al,

Plaintiffs,

NO. 04-2-00424-9

vs.

DECLARATION OF NIGEL S.
MALDEN IN SUPPORT OF
DEFENDANTS' MOTION FOR
NEW TRIAL

NORMAN LE, et ux., et al.,

Defendants.

NORMAN LE, et ux., et al.,

Counterclaim-Plaintiffs,

vs.

DUC TAN, et al.,

Counterclaim-Defendants.

I, NIGEL S. MALDEN, do hereby declare as follows:

I am an attorney licensed to practice law in the State of Washington, and I am
counsel for the defendants in this case.

DECLARATION OF NIGEL S. MALDEN IN SUPPORT
OF DEFENDANTS' MOTION FOR NEW TRIAL

Page 1 of 3

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DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT - P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

0-000000202

1 Prior to trial, I discovered that opposing counsel, Greg Rhodes, had filed a
2 telephone report with the Olympia Police Department regarding an alleged threatening
3 letter delivered to his client, Duc Tan, on or about March 23, 2004.

4 I have attached hereto as **Exhibit 1** a true and correct copy of the police report,
5 Washington State Patrol Investigation Report, and correspondence to Dr. Norman Le
6 addressed by the City of Olympia Records Custodian.

7 One of the most suspicious things about the letter is that it was purportedly signed
8 and mailed by Norman Le whose address was printed on the envelope. It seemed highly
9 unlikely that someone would sign and attach their address to a threatening letter likely to
10 be investigated by the police. Dr. Le assured me that he had nothing to do with the letter
11 which he believed was an obvious attempt to frame him most likely by Duc Tan himself.

12 At the start of trial, I discussed with plaintiffs' counsel whether he intended to
13 make any mention of the threatening letter. I was very concerned that the letter and the
14 alleged threat was hearsay evidence with zero probative value but which would likely
15 mislead or confuse the jury and raise many collateral issues including whether plaintiffs'
16 counsel should be called as a witness as the one who originally filed the police report.

17 Mr. Rhodes assured me that he had no intention of raising the letter or the threat.
18 Mr. Rhodes told me that he knew the letter was a hoax. Mr. Rhodes said that he knew
19 that Norman Le would not sign his name or put his address on a threatening letter. Mr.
20 Rhodes said he knew that the letter was likely intended by someone to frame Norman Le.

21 Based on this conversation with plaintiffs' counsel, I thought the matter would
22 never be raised at trial. I was shocked when plaintiff Duc Tan began testifying about an
23

24 **DECLARATION OF NIGEL S. MALDEN IN SUPPORT**
25 **OF DEFENDANTS' MOTION FOR NEW TRIAL**
26 Page 2 of 3

ru e:\xxxx\014\014674\01475\pleadings\dec-nsm-01.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

0-000000203

1 alleged death threat. As set forth in the accompanying Motion for New Trial, I objected
2 to the plaintiff's testimony as I knew it was hearsay and was a hoax that would likely
3 confuse and mislead the jury. The court overruled all of my objections and allowed Duc
4 Tan to testify that he received a death threat. Mr. Tan and his attorney then returned to
5 the issue of the threat over and over requesting the jury to include the threat in
6 determining what sum of money should fairly compensate the plaintiff for his fear,
7 anxiety, etc.

8 The admission of the phony death threat violated the Rules of Evidence and was
9 so unfairly prejudicial that it denied the defendants their right to a fair trial.

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

12 Executed at Tacoma, Washington this 27th day of April 2009.

13
14 

15 _____
NIGEL S. MALDEN

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24 DECLARATION OF NIGEL S. MALDEN IN SUPPORT
25 OF DEFENDANTS' MOTION FOR NEW TRIAL

Page 3 of 3

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DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT - P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

0-000000204



City of
OLYMPIA

900 Plum Street, P.O. Box 1967, Olympia, WA 98507-1967

June 23, 2004

**Mr. Norman Le
4110 14th Avenue SE
Lacey, WA 98503**

**RE: Public Disclosure Request
Olympia Police Case Number: 04-2274**

Enclosed is a copy of the public record(s) you requested. We have released the portions of the record which are not exempt from disclosure by RCW 42.17.310 and/or other statutes. Information redacted is exempt from public disclosure for the following reasons(s):

Disclosure of the information could endanger a person's life, physical safety or property RCW 42.17.310 (1)(e). (Victim was redacted).

If you believe that the information furnished has been incorrectly redacted or is incomplete, you may file a written appeal with the Chief of Police within seven business days from the date of this letter. The appeal must include your name and address, a copy of the redacted document and a copy of this letter, together with a brief statement identifying the basis of the appeal. Please mail or deliver your appeal to the Olympia Police Department. Our address is PO Box 1967 Olympia, WA 98507.

Sincerely,

**Leesa Judkins
Police Services Specialist
Olympia Police Department
Phone: (360)709-2770
Fax: (360)753-8143
Email: ljudkins@ci.olympia.wa.us**

City Council
City Manager
City Attorney
Administrative Services

(360) 753-8447
(360) 753-8447
(360) 753-8449
(360) 753-8325

Community Planning & Development
Fire
Human Resources
Parks, Arts & Recreation

(360) 753-8314
(360) 753-8348
(360) 753-8442
(360) 753-8380

Police
Public Works 0-000000205



**OLYMPIA
POLICE DEPARTMENT**

Case # 04-2274

CASE STATUS and DISTRIBUTION

Incident Classification: HARASSMENT

- | | | |
|---|--|----------------------|
| <input type="checkbox"/> Thurston County Prosecutor | <input type="checkbox"/> City Prosecutor | Related Case # _____ |
| <input type="checkbox"/> Juvenile Prosecutor | <input type="checkbox"/> DUI | |

- | | | |
|---|--|---|
| <input checked="" type="checkbox"/> Open Report (1) | <input type="checkbox"/> Unfounded (4) | <input type="checkbox"/> Leads Exhausted (8) |
| <input type="checkbox"/> Arrest/Citation (2) | <input type="checkbox"/> Resolved (5) | <input type="checkbox"/> Referred to Prosecutor (9) |
| <input type="checkbox"/> Gone on Arrival/Unable to Locate (3) | <input type="checkbox"/> Refused to Prosecute (6) | <input type="checkbox"/> Information Only (11) |
| | <input type="checkbox"/> Refer to Other Agency (7) | |

<input type="checkbox"/> Detectives <input checked="" type="checkbox"/> Patrol <input type="checkbox"/> Traffic	Assigned to: <u>OFFICER TUPPER</u>	Date: _____
	Reassigned to: _____	Date: _____
	Clear Date: _____	

- | | | |
|-------------------------------------|--|--|
| <input type="checkbox"/> Detectives | <input type="checkbox"/> Victim Assistance Coordinator | <input type="checkbox"/> Child Protective Services (CPS) |
| <input type="checkbox"/> Patrol | <input type="checkbox"/> Evidence Office | <input type="checkbox"/> Community Mental Health |
| <input type="checkbox"/> Traffic | <input type="checkbox"/> Crime Prevention Office | <input type="checkbox"/> Drug Unit |
| <input type="checkbox"/> SROs | <input type="checkbox"/> CIT Coordinator | <input type="checkbox"/> Olympia Fire Department |
| | | <input type="checkbox"/> Other _____ |

- | | | | | |
|----------------------------------|----------------------------------|--|-----------------------------------|---|
| <input type="checkbox"/> Auction | <input type="checkbox"/> Court | WASIC/NCIC
Entered <input type="checkbox"/> Yes <input type="checkbox"/> No
Removed <input type="checkbox"/> Yes <input type="checkbox"/> No | <input type="checkbox"/> Retained | <input type="checkbox"/> WACIC Officer Safety Entry |
| <input type="checkbox"/> Destroy | <input type="checkbox"/> Lab | | <input type="checkbox"/> Returned | |
| <input type="checkbox"/> Return | <input type="checkbox"/> Officer | | | |

THIS DOCUMENT WAS PREPARED BY THE OLYMPIA POLICE DEPARTMENT ON 06-23-04 DATED FOR THE OFFICIAL USE OF NIJMAN LE (AGENCY) FOR THE PURPOSE OF REPORTS AND MAY NOT BE REVEALED TO ANY OTHER INDIVIDUAL AND/OR AGENCY OR USED FOR ANY OTHER PURPOSE THAN STATED WITHOUT CONSENT OF THE OLYMPIA POLICE DEPARTMENT

Reporting Officer	Officer #	Supervisor Approved	Officer #	Entered by
-------------------	-----------	---------------------	-----------	------------

Olympia Police Department Incident Report

Page 1

Case Number
2004-02274

Type of Report				Responding To	Event	Officer Assigned	Date
Incident Classification 1 HARASSMENT CLEAR				Offense Code 1212	Offense Code	Offense Code	Offense Code
Address/Location of Incident [REDACTED] Olympia, WA 98502							
Premises Type/Name One Story House				Code 01	# of Units	# of Offenses 1	# of Offenders 1
Occurred on or From (Date/Time/DOW) 03/23/2004 23:00 Tue		Occurred To (Date/Time/DOW)		Reported On (Date/Time/DOW) 03/24/2004 15:38 Wed		Status 1	Date
Charge # 1	<input type="checkbox"/> Local <input type="checkbox"/> State	Statute 9A.20.030	Description Harassment				Counts 1
No. V-1	Non-Disc. <input type="checkbox"/>	Name (Last, First, Middle)	Race	Ethnicity	Sex	DOB/Age	Height 0'00"
Street Address			Residential Status	Home Phone	Work Phone		
No. S-1	Name (Last, First, Middle) LE, NORMAN NMN		Race A	Ethnicity N	Sex M	DOB/Age 03/21/1938 0	Height 5'05"
Street Address 4110 14TH AVE SE, OLYMPIA, WA 98501			Residential Status	Home Phone 487-3836	Work Phone		
Subject Arrested <input type="checkbox"/>	Charge # 9A.20.030	Citation Number	Counts 1	Charge #	Citation Number	Counts	Charge #
No. 1	Subject # V-1	Subject Name				Evidence Location SE	
Property Code 03	Property Type	Property Class K	Quantity 1	Description ENVELOPE AND LETTER			
Make	Model		Serial Number	QAM	Value		

Greg Rhodes, the attorney for [REDACTED] called to report that his client had received a threatening letter in the mail. Greg advised that he was representing [REDACTED] in a Defamation case, and the suspect in the threats had been served paper in the suit about two weeks ago. The basis of the suit is the suspect, Dr. Norman Le has repeatedly and publicly accused [REDACTED] of being a communist. Both Norman and [REDACTED] are first generation Vietnamese refugees. They both fled South Vietnam when it fell to communist North Vietnam. Calling some one a communist to this day in their culture is a horrible and damaging allegation. Greg agreed to have [REDACTED] come to his office, and I met the two of them there.

[REDACTED] showed me the letter. I recovered the original and later put into evidence to be printed, see attached copy of the letter. The envelope that the letter came in was addressed to [REDACTED] and had a pre-made return address sticker on it with Norman's name and address. The letter was printed on letterhead that had Norman's information on it as well. There is a picture that is on the letter that has a subject believed to be Norman holding two dogs by a leash in each hand. Each of the dogs has a Vietnamese name written on it, [REDACTED] believes these are Norman's closest allies. The letter has written on it, "[REDACTED] Would you like to become one of my two dogs. If against me, I will kill you like I kill a dog. You are behind him..."

Officer Name/Number (Tupper, John) #0878		Unit 878	Approved By Number (Hutchings, John) #0838		Date 03/25/2004
Clearance <input type="checkbox"/> ArrA <input type="checkbox"/> ArrJ	<input type="checkbox"/> Unfounded <input type="checkbox"/> ExcA <input type="checkbox"/> ExcJ	Distribution		Logged Date / Initials	
<input type="checkbox"/> Entered RMS Date / Initials	<input type="checkbox"/> Entered WACIN/CIC Date / Initials	<input type="checkbox"/> Cleared WACIN/CIC Date / Initials			

INCIDENT REPORT 0-000000207

Olympia Police Department Incident Report

Page 2

Incident Classification 1

HARASSMENT CLEAR

Case Number

2004-02274

█████ advised that he takes the threat seriously. █████ is unsure if Norman would resort to murder as his letter indicates, but clearly believes that Norman is capable of hurting him or his family.

Clearly, the elements of the crime of harassment has been committed with this letter. But because of the pending civil case between Norman and █████, and that █████ feels that the two names on the dogs are Norman's henchmen, the crime of conspiracy may be occurring, and intimidating a witness reference the civil case.

The letter will be processed for prints by the crime lab. After that is completed, the investigation will continue.

Return to this officer for follow-up.

jt

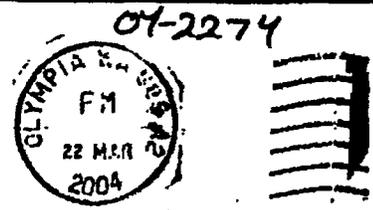
<input type="checkbox"/> Signature Form	<input type="checkbox"/> Statement Form	<input type="checkbox"/> Impound Notice	<input type="checkbox"/> Authorization to Impound
<input type="checkbox"/> Medical Release	<input type="checkbox"/> Consent Form	<input type="checkbox"/> Other	

Officer Name/Number (Tupper, John) #0878	Unit 878	Approved By Number (Hutchings, John) #0838	Date
--	--------------------	--	---------------

INCIDENT REPORT 0-000000208



Mr. Norman Le
4110 14th Ave. SE
Olympia, WA 98503



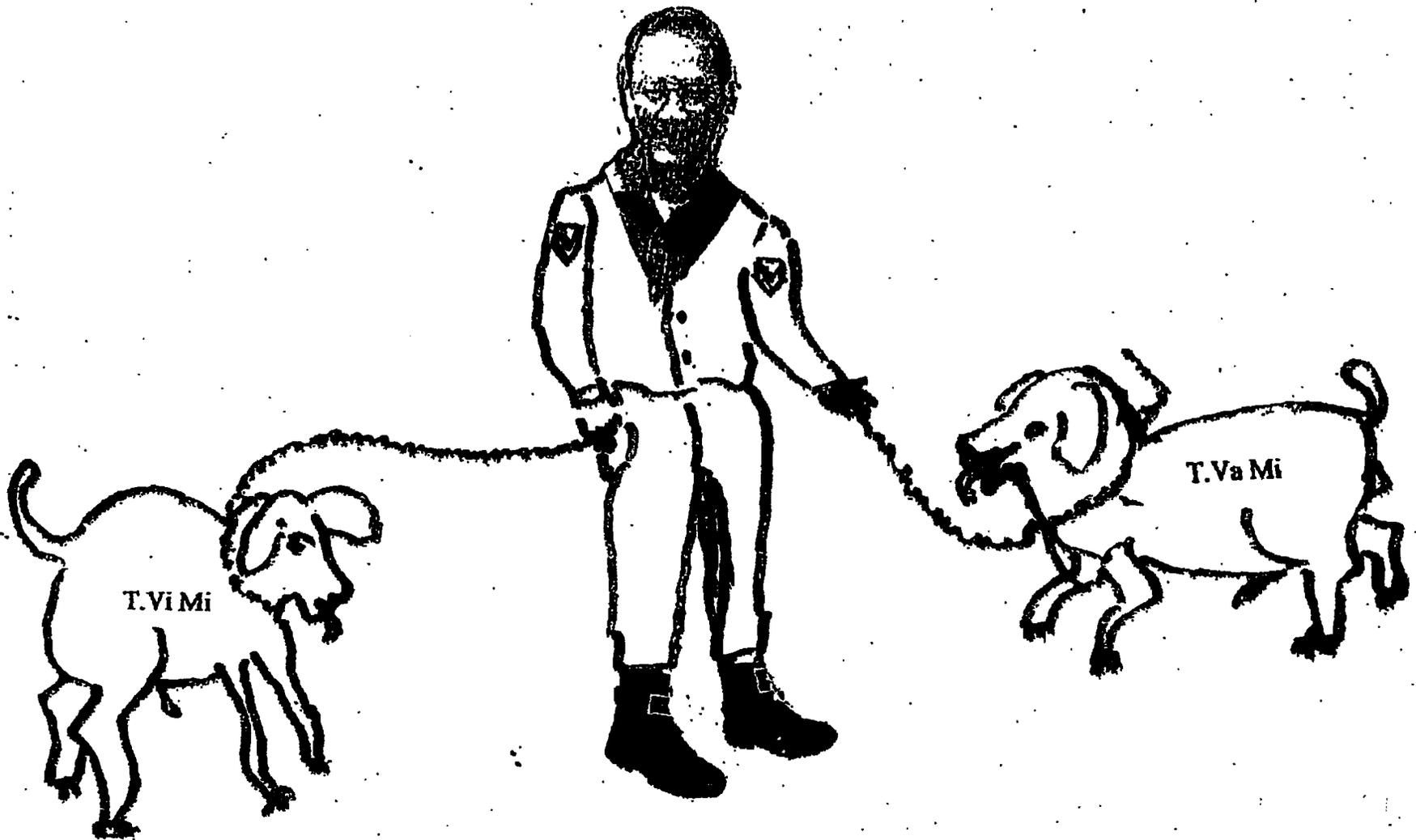
98502+4434 

Norman Le, Ph.D., MBA, BSME
Business Consultant

04-2274

4110 14th Avenue SE, Lacey, WA 98503 • Tel: (360) 491-3836 • Fax: (360) 491-6508 • Email: normanle@ncczero.com

0-000000210



0-000000211



!
Would you like to become one of my two dogs.
If against me, I will kill you like I kill a dog.
You are behind him ...

Dr. Norman Le
(aka Ts. Lê Thiệu Ngo)

01-2274

04-2277

STATEMENT OF [REDACTED]
3/24/2004

The threatening letter which was turned over to Olympia Police was received at my house on Tuesday, March 23, 2004. The letter was self-addressed from Mr. Norman Le, but I have no proof that it was actually Mr. Le who sent the document.

For many years now, Mr. Le has accused me of being a communist. He has done this in press conferences, newspaper articles, and other public functions. I recently filed a defamation lawsuit against Mr. Le.

If Mr. Le is the one who sent this threat, I would like to press charges.

Sincerely,

[REDACTED]

0-000000212



STATE OF WASHINGTON

WASHINGTON STATE PATROL

PO Box 42608 • Olympia, Washington 98504-2608 • (360) 705-5988

CRIME LABORATORY REPORT

Agency: Olympia Police Department
Agency Rep: Evidence Officer Chester Mackaben
Subject: Suspect - LE, NORMAN
Victim: [REDACTED]

Laboratory Number: 704-000984
Agency Case Number: 042274
Request Number: 0001

The following item(s) were examined:

Submission #LAT001: One sealed plastic bag, Item 1

Item #LAT001-01: 1) envelope; 1) letter

Results

The envelope and letter were processed with ninhydrin. No latent impressions of value for identification purposes were developed. The stamp was removed from the envelope and the adhesive side was processed with gentian violet. No latent impressions of value for identification purposes were developed.

Eileen Slavin

Eileen Slavin, Forensic Scientist

04/19/04

Date

If examination and comparison of this evidence will require a court appearance, at least one week's notice is necessary for the preparation of presentation materials.

Olympia Police Department Follow-Up Report

Page 1

Case Number
2004-02274

Incident Classification HARASSMENT CLEAR		Name of Original Victim(s) [REDACTED]	
Report Date 6/18/2004	Original Case Report Date 03/25/2004	Referred To	
Connecting Case Numbers		Incident Involved	

I received information from Evidence Tech Mackaben that no latent prints were found on the letter, envelope, or the postage stamp.

On 06-16-04, I interviewed Mr. Le. Mr. Le acknowledged that he knows [REDACTED] and even volunteered that [REDACTED] is suing him for defamation. I showed Mr. Le a copy of the letter and envelope. Mr. Le looked at the documents carefully. I asked him if he created the documents or if he had any part in the mailing of the letter. Mr. Le said that he had no part in the creation of the documents, nor did he mail them. Mr. Le said this was the first time he had seen the documents. I asked him if the signature on the letter was his. He said that it was his signature, but he didn't sign the letter. Mr. Le believe the creator of the letter performed a cut and paste action with his signature. Mr. Le thinks it is likely the signature came from another letter he may have mailed.

Mr. Le took some time to explain the history between him and [REDACTED]. Mr. Le is convinced [REDACTED] is a communist. Mr. Le believes it is likely that either [REDACTED] or someone from his community group produced the letter to frame him for harassment.

Based on the above and the lack of evidence in the case, I 'm closing the case leads exhausted.

Closed.

jt

Officer Name/Number Tupper, John #0878		Unit 878	Approved By Number Hutchings, John #0638	Date 06/18/2004			
Clearances <input type="checkbox"/> AsstA <input type="checkbox"/> AsstJ <input type="checkbox"/> Insp/Chief	<input type="checkbox"/> Unbanded <input type="checkbox"/> ExecA <input type="checkbox"/> ExecJ <input type="checkbox"/> Closed/Other	Distribution <input type="checkbox"/> PA <input type="checkbox"/> ADMIN	<input type="checkbox"/> DOC <input type="checkbox"/> CPB <input type="checkbox"/> DMS	<input type="checkbox"/> ND <input type="checkbox"/> JLV <input type="checkbox"/> MH	<input type="checkbox"/> TRAF <input type="checkbox"/> BRT <input type="checkbox"/> PAT	<input type="checkbox"/> PROACT <input type="checkbox"/> Const <input type="checkbox"/> Other	Logged Date / Initial
Entered RMT _____ Date / Initial		<input type="checkbox"/> Entered WAC/DNCK _____ Date / Initial		<input type="checkbox"/> Entered WAC/DNCK _____ Date / Initial			

0-000000215

APPENDIX E

Instruction No. 14

A cause of a 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.

There may be more than one proximate cause of a damage.

Instruction No. 15

To prove an allegation of defamation against any defendant, plaintiffs must prove that defendant acted with knowledge of falsity or reckless disregard for the truth by clear and convincing evidence. All other allegations of plaintiffs must be proved by a preponderance of the evidence.

When it is said that a proposition must be proved by a preponderance of the evidence, it means that you must be persuaded, considering all of the evidence in the case, that the proposition is more probably true than not true.

When it is said that a proposition must be proved by clear and convincing evidence, it means that the proposition must be proved by evidence that carries greater weight and is more convincing than a preponderance. However, it does not mean that the proposition must be proved by evidence that is convincing beyond a reasonable doubt.

APPENDIX F

<p>flocked with snow and topped with a gold star. This is so lifelike you will want to keep it away from the fireplace.</p> <p><u>Price: \$9.99</u> BUY NOW!</p>	<p><u>Price: \$3.25</u> BUY NOW!</p>	<p>fuzzy chicken suit, moves his legs and flaps his arms as he sings the 'Chicken dance' song. During the chorus and anytime you press his foot, Elmo will move his head in an adorable action that is sure to get you laughing and moving too!</p> <p><u>Price: \$34.99</u> BUY NOW!</p>
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BETTY J. GOULD
COUNTY CLERK
and Ex-Officio Clerk
of Superior Court

THURSTON COUNTY CLERK'S OFFICE



70

Plaintiff/Petitioner Exhibit #

042004249

Cause #

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<p>Contact Information: Starshows.com, Inc. Sewell, NJ 08080 Phone: 856-589-8639 Fax: 856-589-8639 (Auto Fax Recognition) E-mail: aprons@starshows.com <u>Request for information</u> [Back to top]</p>	<p>Other Gift Suggestions</p> <p><u>Lenox</u> <u>Collectibles</u> <u>Sports</u> <u>Memorabilia</u> <u>Disneyana</u> <u>Dolls</u> <u>Collectibles</u> <u>Coins and Currency</u> <u>Collector</u> <u>Watches</u> <u>Nascar Items</u> <u>Handbags</u> <u>Bobble Head</u> <u>Dolls</u></p> <p>Still unsure? <u>Try our Gift Guide</u></p>	<p>Flat Rate Shipping charges</p> <table border="1"> <tr> <td>\$0.01-\$9.99</td> <td>\$3.95</td> </tr> <tr> <td>\$10-\$49.99</td> <td>\$5.25</td> </tr> <tr> <td>\$50-\$99.99</td> <td>\$9.25</td> </tr> <tr> <td>\$100-\$199.99</td> <td>\$12.75</td> </tr> <tr> <td>\$200 and up</td> <td>\$15.85</td> </tr> </table>	\$0.01-\$9.99	\$3.95	\$10-\$49.99	\$5.25	\$50-\$99.99	\$9.25	\$100-\$199.99	\$12.75	\$200 and up	\$15.85
\$0.01-\$9.99	\$3.95											
\$10-\$49.99	\$5.25											
\$50-\$99.99	\$9.25											
\$100-\$199.99	\$12.75											
\$200 and up	\$15.85											

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available in both
tan and red
background (see
adult apron at
left for color.
~~Price: \$7.00~~
BUY NOW!

**Adult Snowman
Santa Apron**

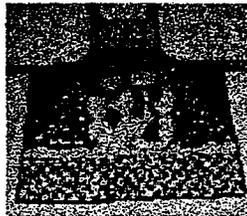


Very colorful Adult Snowman Santa Apron.
Just in time for the Holidays. Great gift
item.

~~Price: \$7.00~~
Buy Now!

[\[Back to top\]](#)

**Mr. and Mrs.
Snow Couple**



Frosty and Crystal are on display for the
holidays. Extremely colorful and lifelike,
but be careful you don't want them to
melt.

~~Price: \$7.00~~
Buy Now!

**Santa Baking
Apron**



Get ready for your Holiday baking by getting
a Santa Apron. This brightly colored apron will
be just the thing to put you in the holiday
spirit.

~~Price: \$7.00~~
**Sorry! Sold out We do have plenty of the
Snow Man Santa Aprons shown to the left.**

Bottle Wraps

**Wine Bottle Wrap
- Christmas Balls**



Bringing a bottle of wine or champagne as
a gift? Be creative this holiday season.
Here is just the thing. This fabric wrap has
a red background with multicolored
Christmas Tree Balls. A gold ribbon is
included to accent the neck of the bottle.
Price: \$4.99
BUY NOW!

**Wine Bottle
Wrap- Gold
Stars and
Hearts on Red**



Giving wine for Christmas? Going to a
house warming or Holiday Party? Then

**Santa look
Champagne/Wine
Bottle Cover**



Santa look Champagne/Wine Bottle Cover
Santa Cap Included

Price: \$4.50
BUY NOW!

2. On February 11, 2010, I served one copy of the foregoing documents on:

Gregory M. Rhodes
YOUNGLOVE LYMAN & COKER PLLC
PO Box 7846
Olympia, WA 98507-7846
(Via US First Class Mail)

Nigel Malden
NIGEL MALDEN LAW
711 Court A, Suite 114
Tacoma, WA 98402
(Via US First Class Mail & Email)

Rebecca Larson
DAVIES PEARSON PC
920 Fawcett Ave
PO Box 1657
Tacoma, WA 98401-1657
(Via US First Class Mail)

Howard M. Goodfriend
Edwards, Sieh, Smith & Goodfriend, P.S.
500 Watermark Tower
1109 First Avenue
Seattle, WA 98101-2988
(Via US First Class Mail & Email)

entitled exactly:

- 1) **APPELLANTS' OPENING BRIEF;**
- 2) **MOTION FOR ACCEPTANCE OF OVER-LENGTH
OPENING BRIEF**

DATED: February 11, 2010.



LILY T. LAEMMLE

CERTIFICATE OF SERVICE - 2