

TABLE OF CONTENTS

I. JOINDER IN OPENING BRIEF OF APPELLANTS LE, VU, NGUYEN, HO, TRAN AND VO..... 1

II. STATEMENT OF FACTS..... 1

III. ARGUMENT..... 6

 A. The Plaintiff Failed to Prove That Nga Pham Signed the Public Notice With Actual Malice, Given Her Undisputed Sincere Belief That Duc Tan’s Professed Anti-Communism Was A Front That Masked His True and “Hidden Agenda.”..... 6

IV. CONCLUSION 7

TABLE OF AUTHORITIES
RULES AND REGULATIONS

RAP 10.1..... 1

I. JOINDER IN OPENING BRIEF OF APPELLANTS LE, VU, NGUYEN, HO, TRAN AND VO

Pursuant to RAP 10.1(g), appellants Nga Pham and Tri V. Duong, defendants in the trial court, join the Brief of Appellants filed by co-appellants Norman Le and Phu Le, Tuan A. Vu and Hyunh T. Vu, Phiet X Nguyen and Vinh T. Nguyen, Dat T. Ho, Nhan T. Tran and Man M. Vo. Appellants Pham and Duong expressly adopt as their own the assignments of error, issues, statement of the case and legal arguments asserted by their co-appellants.

Ms. Pham and Mr. Duong submit this separate brief to highlight their unique circumstances and their individual experience with respondent Duc Tan that demonstrates the failure of proof of Ms. Pham's actual malice and that compels reversal of the judgment entered jointly and severally against them.

II. STATEMENT OF FACTS

Defendant Nga Pham worked at Highline Community College as a student advisor, where she became active in the Vietnamese Student Association. (RP VIII, 1440-41) She has been an active member of the Seattle Vietnamese community, serving as chair of the Vietnamese-American Seafair Committee, and on the board of directors of the Vietnamese Friendship

Association, and engages in a wide array of activities related to instilling in the younger Vietnamese-American generation the political and cultural importance of her generation's battle against communism. (RP VIII,1441-48)

Ms. Pham became aware of Duc Tan when she heard about the 1997 incident involving the national anthem, which was widely talked about in the Vietnamese community. (RP VIII, 1458; see App. Br. at 12) She kept an open mind about Tan's political leanings when she first met Duc Tan in 1999. (RP VIII, 1459) At that time, Duc Tan and his daughter sought Nga Pham's support in organizing a fundraising event for the Red Cross to show the community's gratitude for helping Vietnamese refugees who resettled in Washington State. (RP VIII, 1448-49) Pham worked very closely with Duc Tan for about a year. (RP VIII, 1448)

In the fall of 2000, Pham and her husband Tri Duong went to Duc Tan's home. (RP VIII, 1455, 1481, 1490) When they were seated in the living room, Tan asked them to wait a minute while he retrieved something he wanted to show them. (RP VIII, 1455) Tan left the room briefly and returned with a magazine with the picture of a man on the cover, (RP VIII, 1455) Tan said his daughter had

brought the magazine, which was written in Vietnamese, home from a conference. (RP VIII, 1457) It was a publication of the Vietnamese Red Cross. (RP VIII, 1481) Tan asked Ms. Pham and her husband if they knew who the man was, and they said they did not. (RP VIII, 1455) Tan then told them that “this is an image of Uncle Ho.” (RP VIII, 1456)

Ms. Pham and Mr. Duong were both surprised by the fact that Tan, a leader in the Vietnamese community and ostensibly opposed to the Communist regime, had a picture of Ho Chi Minh in his home, and particularly taken aback by Tan’s use of the affectionate epithet “Uncle Ho.” Tan’s action and words raised serious doubts in their minds as to the sincerity of his professed anti-communism, and convinced Pham that he had a “hidden agenda” that “alarm[ed] me.” (RP VIII, 1456-57, 1462) As Nga Pham said, “He have a Ho Chi Minh picture in his house and proudly show it to me.” (RP VIII, 1476) Pham explained that if she had a picture of Ho Chi Minh she would tear it up, or at the very least, “I don’t let the public or another soul to see it.” (RP VIII, 1476) When asked why she thought Tan would show her such a

picture, Ms. Pham explained that she thought Tan was “testing me to see how I react.” (RP VIII, 1482)

Ms. Pham explained that the issue of whether a member of the Vietnamese community sympathizes with the Communist government of Vietnam is a significant one in the Vietnamese community. (RP VIII, 1476) Following this incident, Ms. Pham and her husband distanced themselves from Duc Tan and stopped associating with him. (RP VIII, 1477)

In February 2003, Pham met Norman Le when she attended the second organizing meeting of the Committee Against the Viet Cong Flag. (RP VIII, 1450) At that meeting, Duc Tan argued that Norman Le should step down as co-chair of the committee. (RP VIII, 1450-51) Ms. Pham was nominated, joined the committee and became an active member. The Committee’s sole goal was to “bring down the communist flag [at] South Puget Sound Community College.” (VIII, RP 1452)

Ms. Pham’s name appears on the Committee Against the Viet Cong Flag’s August 7, 2003 “Public Notice” as a “commissioner.” (Ex. 8) She lent her name to the document, not because she harbored any ill will toward Tan, but because she

believed the statements to be accurate based upon “the media, from the newspaper and from the discussion in our community.” (VIII, RP 1453-54) Her goal was to “stop the propaganda from the communists.” (VIII, RP 1455)

In 2004, Pham’s husband Tri Duong received a call from Tan at their home. Tan told Mr. Duong that he and Pham had to stop associating with Norman Le and Le’s group. (RP VIII, 1499) Tan said if they continued their involvement in Le’s community, Tan would take action against Mr. Duong and his wife. (RP VIII, 1499) Two weeks after that, Ms. Pham and Mr. Duong “receive[d] a letter of the lawsuit” and found that they were among the defendants who had been sued by Duc Tan. (RP VIII, 1499. See CP 91-133)

The jury found that Nga Pham, along with the co-appellants defamed both Duc Tam and the Vietnamese Committee Of Thurston County in the Public Notice. In accordance with the verdict, the trial court entered two joint and several judgments against Ms. Pham and Mr. Duong, one in favor of Duc Tam for \$150,000 and another in favor of the VCTC for \$60,000.

III. ARGUMENT

A. The Plaintiff Failed to Prove That Nga Pham Signed the Public Notice With Actual Malice, Given Her Undisputed Sincere Belief That Duc Tan's Professed Anti-Communism Was A Front That Masked His True and "Hidden Agenda."

Nga Pham and Tri Duong join in their co-appellants' arguments, particularly those relating to the trial court's erroneous refusal to grant judgment as a matter of law because the Public Notice was a protected statement of opinion (App. Br. at 30-37), and because there is no clear and convincing evidence that any of the appellants acted with actual malice (App. Br. at 37-45). That lack of proof, and the prejudice caused by the trial court's erroneous use of an objective standard in its evidentiary decisions in a case involving a public figure, is particularly manifest upon review of the undisputed evidence concerning Ms. Pham's and Mr. Duong's personal experience in 2000, in which Tan proudly displayed a picture of Ho Chi Minh and affectionately called him "Uncle Ho." Ms. Pham's and Mr. Duong's undisputed testimony established as a matter of law Ms. Pham's honestly held subjective belief that Tan sympathized with the communist government of Vietnam.

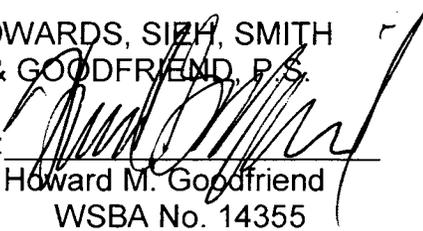
Ms. Pham's and Mr. Duong's testimony was unrebutted. This court should reverse the judgment against appellants Pham and Duong and dismiss the defamation action as a matter of law.

IV. CONCLUSION

For the reasons stated here, in addition to those set forth in the Opening Brief of the Co-Appellants, this court should reverse, direct entry of judgment as a matter of law in favor of Ms. Pham and Mr. Duong, or at a minimum, remand for a new trial.

DATED this 18th day of February, 2010.

EDWARDS, SIZH, SMITH
& GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355

Attorneys for Appellants Nga
T. Pham and Tri V. Duong

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 18, 2010, I arranged for service of the foregoing Brief of Appellants Nga Pham and Tri V. Duong, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Gregory M. Rhodes Younglove Lyman & Coker PLLC PO Box 7846 Olympia, WA 98507-7846	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Nigel S. Malden Rebecca Larson Davies Pearson PC 920 Fawcett Ave PO Box 1657 Tacoma, WA 98401-1657	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Michael King James W. Lobsenz Carney Badley Spellman, P.S. 701 Fifth Avenue, Suite 3600 Seattle WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 18th day of February, 2010.

Carrie O'Brien
Carrie O'Brien

BY *[Signature]*
DEPUTY
STATE OF WASHINGTON
10 FEB 19 AM 11:47

FILED
COURT OF APPEALS
DIVISION II