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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

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

Respondents.

ANSWER TO AMICUS CURIAE BRIEF

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ORIGINAL

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INTRODUCTION

This matter involves very serious and false assertions of fact – that Duc Tan and the Vietnamese Community of Thurston County took "tangible steps to support the Communist Party," organizing Communist celebrations, defending the VC flag, and "doing activities for the Vietnamese Communist." ***Tan v. Le***, 161 Wn. App. 340, 352, 254 P.3d 904, *rev. granted*, 172 Wn.2d 1010 (2011); Ex 8. There is no greater insult to a Vietnamese American. These false assertions are not ideas. This is not about rigorous debate. This is defamation.

Amici add nothing new to the analysis. No authority protects published false facts. The defendants cannot lie about the plaintiffs and hide behind the First Amendment by claiming their lies were only an "opinion."

And Amici's claim that the plaintiffs failed to prove damages betrays their ignorance of Vietnamese American culture, and of the seriousness of the defendants' false assertions of fact. In the relevant community, the plaintiffs' damages are obvious.

This Court should reverse the appellate court and re-affirm the jury's verdict.

RESPONSE TO ARGUMENT

A. This Court should not consider an issue raised only by Amici, particularly where this Court has already rejected the argument.

Amici ask this Court to determine whether a defamation plaintiff must prove falsity by clear and convincing evidence. Amici 2-10. This Court should decline to consider this argument raised only by Amici and previously rejected by this Court in a case Amici fail to even mention. ***Richmond v. Thompson***, 130 Wn.2d 368, 385-86, 922 P.2d 1343 (1996).

The defendants proposed an instruction stating that everything other than actual malice must be proved by a preponderance of the evidence:

> [Plaintiffs] have the burden of proving that Defendants 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.

CP 269. The defendants did not provide any briefing on jury instructions. RP 460-62. There is virtually no discussion on the record, but the defendants acknowledged the opportunity to review the instructions, made only one unrelated objection, and took no exceptions. CP 1558, 1560-61. The trial court instructed the jury consistent with the defendants' proposed instruction. CP 168.

The defendants then raised this issue for the first time on appeal, arguing in a footnote that it was a manifest constitutional issue. BA 48 n.23.[1] The appellate court did not address this plainly unpreserved argument. The defendants did not move for reconsideration.

The defendants also failed to raise this issue in their answer to Tan's Petition for Review. In fact, the defendants' answer states that "there is no substantial issue of constitutional law presented by this case." Answer at 19. The defendants' supplemental brief is equally silent on this issue.

This Court does not "consider issues raised first and only by amicus." ***Mains Farm Homeowners Ass'n v. Worthington***, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993); ***Mohr v. Grant***, 153 Wn.2d 812, 830 n.11, 108 P.3d 768 (2005) ("[W]e do not consider an issue raised only by amicus and not asserted by the parties"). Amici attempt to revive an issue that the defendants abandoned, after raising it for the first and only time on appeal. This Court should not address this issue.

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[1] The defendants filed three appellants' briefs. This brief refers only to the brief filed by Le, Ho, Tran, and Vo, in which the other defendants joined. Pham and Duong BA 1; Phiet and Nguyen BA 1, 8.

In any event, this Court already rejected Amici's argument in ***Richmond***, a case in which Amicus Allied Daily Newspapers briefed this same argument. 130 Wn.2d at 386. There, as here, the jury was instructed that the plaintiff had to prove actual malice by clear and convincing evidence and all other defamation elements by a preponderance. ***Richmond***, 130 Wn.2d at 384 n.8. The defendant relied on ***Herron***, in which this Court cited ***Anderson*** for the proposition that "[a]ll the elements of defamation must be shown with convincing clarity." ***Richmond***, 130 Wn.2d at 385 (citing ***Herron v. KING Broadcasting Co.***, 112 Wn.2d 762, 768, 776 P.2d 98 (1998) (citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 255-56, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))). In ***Richmond***, however, this Court correctly held that "***Anderson*** in fact applied the clear and convincing evidence standard only to the element of actual malice." ***Richmond***, 130 Wn.2d at 385 (citing ***Anderson***, 477 U.S. at 255-56). Thus, this Court held that only actual malice must be proven by clear and convincing evidence:

> [T]he United States Supreme Court has applied the convincing clarity standard "only to the issue of fault, and then only where the standard is actual malice," and "neither the common law nor the First Amendment, as interpreted by the United States Supreme Court, requires proof of any element of a defamation action, other than actual malice, by evidence of convincing clarity."

Id. at 385-86 (quoting ***Haueter v. Cowles Publ'g Co.***, 61 Wn. App. 572, 582, 811 P.2d 231 (1991)).[2]

This Court should decline to consider this argument raised only by Amici. ***Richmond*** is correct and no one has suggested that it should be overruled.

B. The defendants did not call the plaintiffs Communists – they asserted provably false facts: that the plaintiffs supported the VC and promoted the Communist agenda.

As discussed at length in the plaintiffs' supplemental brief, while calling someone a Communist may be a protected opinion, accusing them of affiliating with the Communist party is an actionable false assertion of fact. Pet. Supp. Br. 2-7. Amici ignore this distinction, persisting in the defendants' false assertion that they only called the plaintiffs "Communists or Communist sympathizers." Amici 10-16. This argument is as unhelpful as it is inappropriate – Amici add nothing new to the defendants' argument on this point, which the plaintiffs already addressed at length. *But see* RAP 10.3(e) (directing Amici to "review all briefs on file and

[2] Amici argue that this Court "acknowledged that Washington had not clearly determined the appropriate test for falsity" in ***Mohr***, 153 Wn.2d at 822). Amici 4. ***Mohr*** is inapposite – it involved a private plaintiff facing summary judgment. 153 Wn.2d at 822. And this Court merely refused to resolve that issue, where, as here, the parties had agreed on the standard of review. *Id.* This Court should similarly refuse to consider the unpreserved (if different) issue raised here.

avoid repetition of matters in other briefs"). Repeating the defendants' statements does not make them true.

The defendants' "Public Notice" never calls the plaintiffs Communists, pro-Communists, Communist sympathizers, or any other iteration of the word. Ex 8. Nor does the Public Notice express anything in the form of an opinion, such as "we think" or "we believe." Pet. Supp. Br. at 6-7 (citing ***Milkovich v. Lorain Journal Co.***, 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990)); Ex 8. The Public Notice plainly accuses the plaintiffs of overt acts supporting the VC, such as defending the VC flag, organizing communist celebrations, playing the VC anthem, and "doing activities for the Vietnamese Communist." Ex 8.

Amici ignore the crucial distinction between calling someone a Communist – an opinion – and accusing someone of working for the Communist Party – an "allegation[] of fact." Pet. Supp. Br. 3-4 (quoting ***Buckley v. Littell***, 539 F.2d 882, 894 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)). Yet Amici rely on cases recognizing this distinction. In ***Buckley***, for example, the Second Circuit explained that "allegations of membership or well-defined political affiliation are readily perceivable as allegations of fact susceptible to proof or disproof of falsity." 539 F.2d at 894. While

the Second Circuit held that calling someone a "fascist" was nonactionable opinion, it noted that accusing someone of associating with the Fascisti or some "mythical Fascist Party" was a different thing entirely. *Id.* at 893-94, n.11.

And in ***Lam***, upon which Amici heavily rely, the California appellate court recognized the crucial distinction articulated in ***Buckley***. Amici 14-15 (citing ***Lam v. Ngo***, 91 Cal. App. 4th 832, 837-851, 111 Cal. Rptr. 2d 582 (2001)). Rejecting Lam's defamation claim, the court noted that the defendants "were not accusing Lam . . . of being an actual member of a secret Communist cell." ***Lam***, 91 Cal. App. 4th at 850 (citing ***Nat'l Ass'n of Govt. Employees v. Cent. Broad. Corp.***, 379 Mass. 220, 229-30, 396 N.E.2d 996 (1979)). ***National Association*** also approved the ***Buckley*** distinction:

> [The Second Circuit] noted a possible difference between the vague expression there at bar and a specific charge of association with "the Fascisti, or the Nazis, or the Falangists, or a mythical Fascist Party of America" . . . also a possible difference between attacking a person for "communism," and charging him specifically with being "a member of the Communist Party, or a legislative representative of the Communist Party."

379 Mass. at 229-30 (quoting ***Buckley***, 539 F.2d at 893-94 n.11).

Amici's entire argument on this point is premised on the false assertion that the defendants did nothing more than call the plaintiffs Communists. Amici 10, 15. They do not even address the Public Notice or the plaintiffs' argument that the defendants really published provably false facts, such as that the plaintiffs were "doing activities for the Vietnamese Communist." Ex 8; Pet. Supp. Br. 2-7. These false facts are actionable defamation. The jury properly found that they caused serious damages. This Court should reverse and reinstate the jury's verdict.

C. False facts are actionable, even assuming that they may imply a protected opinion.

Here again, Amici add nothing new, arguing that the false facts the defendants published are not actionable because their sting is the same as the sting attached to the statement that the plaintiffs are Communists. Amici 16-18. Again too, Amici do not even address the plaintiffs' argument on this point. *Compare* Amici at 16-18 *with* Pet. Supp. Br. 12-14. The First Amendment does not protect false facts simply because they suggest an unstated opinion.

Mark and ***Herron***, Washington's lead cases on the sting analysis, protect defamation defendants who publish true and false

facts, where it is impossible to discern that the false facts caused damages that the true facts did not cause on their own. Supp. Br. 12-14 (discussing ***Herron***, 112 Wn.2d at 770-72; and ***Mark v. Seattle Times***, 96 Wn.2d 473, 496, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982)). The essential premise of these cases is that the false facts do not cause additional damages. *Id.* Rather, it is the true – so necessarily non-defamatory – facts that fully injure the plaintiff.

These inapposite cases have no bearing on this matter. ***Mark*** and ***Herron*** do not remotely suggest that an opinion, which by its nature is not true or false, shields false facts if the sting is the same. And Amici (and the defendants) do not provide any authority for the idea that a defendant can publish false facts injuring a plaintiff and escape liability because the publication implies protected speech.

Finally on this point, Amici claim that the plaintiffs did not prove damages, arguing that the defendants published mostly "innocuous events." Amici 17-18. This accusation betrays Amici's ignorance of the relevant community. It is not "innocuous" to accuse a Vietnamese refugee of working for the VC – it is the most insulting, demoralizing, and dangerous accusation one could make.

The jury heard testimony that being associated with Communism in the Vietnamese community is "devastating." RP 491-92. Tan explained that for 30 years he and the VCTC worked in the Vietnamese community to "bring some more democracy and freedom to the people of Vietnam." RP 921. These efforts have gone "down the drain." RP 922.

The VCTC cannot recruit new volunteers. RP 922. They used to have 15 board members, but now have only four. *Id.* Their anti-communist activities have been "paralyzed." RP 923.

"[T]he objective of [Tan's] life is to serve this community and somehow to fight for some rights back in Vietnam." RP 923. He testified to the pain, humiliation, and depression he suffered. RP 911, 921, 923. The defendants' false assertions ruined his "honor completely." RP 923. Within the relevant community, the plaintiffs' damages are obvious.

D. Accusing the plaintiffs of infiltrating and subverting the Vietnamese community is not protected speech.

Amici's final argument is essentially that political speech must be "unfettered" and "uninhibited" or "tyranny" will result. Amici 18-19. But political speech is the debate on matters of public concern – the exchange of ideas. *E.g.,* ***New York Times Co. v.***

Sullivan, 376 U.S. 254, 269, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The parties were not engaged in a debate and the Public Notice does not state ideas about the plaintiffs. Ex 8. Accusing the plaintiffs of organizing Communist celebrations, defending the VC flag, and "doing activities for the Vietnamese Communist" is accusing them of having taken affirmative action. These accusations are not ideas, but false and defamatory assertions.

Amici grossly underestimate the seriousness of these allegations in the relevant Community. The defendants published their defamatory statements in Vietnamese and disseminated them to Vietnamese people living in the Puget Sound area. Ex 7. This community is largely comprised of refugees – many of whom risked their lives to escape Communist Vietnam. RP 491-92. They witnessed and were subjected to atrocities carried about by the VC. To say that they fear and hate anything associated with Communism is an understatement. *E.g.*, RP 921-22. To accuse them of working for the VC is "unthinkable." RP 922.

This is not what our First Amendment protects. This is not debate. This is not the free flow of ideas. This is defamation.

CONCLUSION

For the reasons stated above, this Court should reverse the appellate court and re-affirm the jury verdict.

RESPECTFULLY SUBMITTED this 17th day of February, 2012.

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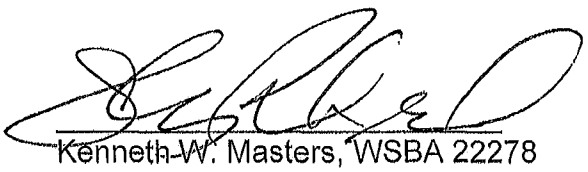

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CERTIFICATE OF SERVICE BY MAIL

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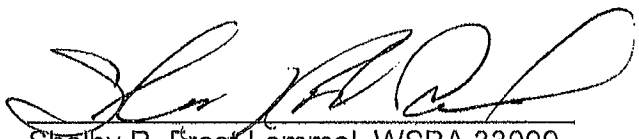

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