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No.86021-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners

v.

NORMAN LE and PHU LE, husband and wife; PHUET 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

ON PETITION FOR REVIEW FROM DIVISION TWO
OF THE COURT OF APPEALS

SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

This public figure defamation case arises from statements made during a political dispute between the members of the Committee Against the Viet Cong Flag (collectively, “defendants”) and Duc Tan and the Vietnamese Community of Thurston County (“VCTC”) (collectively, “plaintiffs”). The “sting” of the defendants’ statements was the accusation that plaintiff Duc Tan was a Communist or Communist sympathizer. A jury found the defendants liable for defamation. The Court of Appeals reversed on two First Amendment grounds.

- Protected Opinion. The Court of Appeals concluded that defendants’ statements about plaintiffs’ Communist affiliations were opinions based upon disclosed facts, and thus protected by the First Amendment. The Court of Appeals correctly applied the law in reaching this conclusion. The statements were published in a newsletter and on the internet, made in the context of a political dispute, and to an audience expecting uninhibited public debate. The statements did not imply the existence of undisclosed facts, and any untruth contained in the disclosed facts did not add any distinct or separate “sting” to the accusation of being a Communist or Communist sympathizer.

- Failure to Prove Actual Malice The Court of Appeals also held that plaintiffs failed to meet the constitutional burden to prove defendants published statements about plaintiffs’ Communist affiliations with actual malice. The First Amendment requires that, in public figure cases, a plaintiff must, by clear and convincing evidence, prove “actual

malice" -- that the defendant made the statement at issue either with actual knowledge of its falsity, or with a high degree of awareness of probable falsity or while entertaining serious doubts as to the statement's veracity. The Court of Appeals correctly subjected the plaintiffs' evidence to the independent review required of appellate courts in public figure cases, and correctly concluded from that review that plaintiffs had failed to meet their burden. In their petition for review plaintiffs identified only two statements by defendants that supposedly evidence actual malice with clear and convincing force. Those statements, made in support of defendants' opinion that Tan was a Communist or Communist sympathizer, are related to Tan's display of the Vietnamese flag and to a Fall 2002 cultural event; neither can sustain the jury's finding of actual malice when the evidence relating to them is subjected to the independent review required by the First Amendment.

II. STATEMENT OF THE CASE

Respondents adopt the statement of the case set forth in their Answer to Petition for Review.

III. SUPPLEMENTAL ARGUMENT

A. The Defendants' Opinion Is Not Actionable.

As the Court of Appeals correctly held, defendants' opinion that Duc Tan is a Communist or Communist sympathizer is not actionable under the First Amendment. Under *Dunlap v. Wayne*, a statement of opinion based on disclosed fact is not actionable "no matter how unjustified and unreasonable the opinion may be or how derogatory it is."

105 Wn.2d 529, 540, 716 P.2d 842 (1986) (quotation and citation omitted). Here, all three factors of *Dunlap*'s test counsel against making defendants' statement actionable.

First, these statements were published during a protracted debate among community leaders over how best to achieve the goals of the Vietnamese community. *See Dunlap*, 105 Wn.2d at 539 (a court should consider "the medium and context in which the statement was published"). This debate -- involving the political allegiances of a community leader -- is quintessentially political, meaning that statements made in the course of this debate would likely be received as opinions.

Second, in the context of an ongoing political debate, the audience -- here the Vietnamese community -- would expect mischaracterizations, exaggerations, rhetoric, hyperbole, and biased speakers. *See Dunlap*, 105 Wn.2d at 539 (courts should consider "the audience to whom [the statement] ... was published"); *see also New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (statements made in the course of political debates should be viewed "against the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks[.]").

Finally, none of defendants' statements implies the existence of undisclosed facts. *See Dunlap*, 105 Wn.2d at 539 (courts should consider "whether the statement implies undisclosed facts"). To the contrary -- defendants invited the members of the Vietnamese community to come to

a press conference and evaluate for themselves the bases for the opinion that Duc Tan was a Communist or Communist sympathizer. *See* Trial Ex. 8 (English trans.) at pps. 1 and 2. The members of the Vietnamese community thus were free to judge for themselves the validity of the defendants' conclusion about Tan's political views. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."). But instead of participating in a competition of ideas, plaintiffs brought a defamation lawsuit whose express purpose, as plaintiffs told the jury in opening statement, was to silence further public debate. RP 186 I 186 ("[M]y clients ... have chosen to take the high road by refusing to perpetuate the slinging of hurtful words, but rather, have taken their case to you" (emphasis added)).

Plaintiffs attack the Court of Appeals' conclusion that the statements were nonactionable political opinions by arguing that some of the facts supporting defendants' opinion were untrue. But the pertinent inquiry under *Dunlap* is whether facts were disclosed, not whether every disclosed fact is true. This Court in *Dunlap* recognized that, in the context of ongoing public debates, the audience is prepared for "mischaracterization and exaggeration[.]" and is likely to view such representations with an awareness of the subjective biases of the speaker. 105 Wn.2d at 541.

This is not to say that mischaracterizations are never actionable. The Court of Appeals correctly recognized this by applying the rule developed in *Mark v. Seattle Times*, 96 Wn.2d 473, 635 P.2d 1081 (1981), and *Herron v. King Broadcasting Co.*, 112 Wn.2d 762, 776 P.2d 98 (1989), to plaintiffs' allegations that they were defamed by alleged false statements found amidst the various facts supporting defendants' opinion. Under *Mark*, such statements are not actionable when they do not contribute "significantly greater opprobrium" to the overall "sting" of the publication -- here, the charge of being a Communist or Communist sympathizer. See *Mark*, 96 Wn.2d at 496. And under *Herron's* statement of this rule, the plaintiff must show that damage resulting from the falsehood is entirely the distinct result of the falsehood. 112 Wn.2d at 771-74.

That showing could not be made under plaintiffs' theory of their case. In their opening statement, plaintiffs argued that being called a Communist is the most "odious," "hateful" and "hurtful" insult imaginable in the Vietnamese refugee community. See RP I 195. And during closing argument, plaintiffs claimed "there is *no insult that could be greater* than being called a communist." RP IX 1614 (emphasis added). When there could be nothing worse than being called a Communist, there is no basis for doing an about-face and concluding that any allegedly specific false statement made in support of defendants' overall belief that Tan was a Communist could have caused significantly *greater* opprobrium or harm distinct from the sting of that overall charge.

This is especially so considering the nature of the sting, which is similar to the nature of the sting in *Mark*. There, the gist of the story was that the pharmacist was a thief. The news report said he stole more money than he had, but that did not alter the sting of the story as a whole. *Mark*, 96 Wn.2d at 476. This is because “a thief is a thief” -- the theft, not the amount of the theft, constituted the story’s sting. See *Herron v. King*, 112 Wn.2d at 773, citing *Mark*, 96 Wn.2d at 496. The same is true here. In the eyes of the Vietnamese refugee community, a Communist is a Communist, and the specific ways in which that odious political allegiance may have manifested itself will not cause significantly greater opprobrium or harm distinct from having being branded a Communist.¹

Plaintiffs nonetheless argue that certain allegedly false statements caused greater harm than would have resulted otherwise, due to a supposed incremental increase in persuasiveness. Thus, plaintiffs claim that members of the community would have been particularly outraged by the charge that plaintiffs not only are Communists, but that they are Communists who go so far as to “celebrat[e] Ho Chi Minh.” See Petition for Review at 14.² But even if that were so, plaintiffs still failed to

¹ Conversely, these facts are unlike those in *Herron v. King*, where a small amount of campaign contributions suggested nothing untoward, while a large amount from a group implied bribery. Thus, the false report of a large amount of campaign contributions from the bail bond interests resulted in a distinct harm that would not have resulted from accurate reporting of this one fact that made up a part of the overall story.

² Defendants never accused Tan or the VCTC of “celebrating Ho Chi Minh.” Instead, defendants said that plaintiffs “[o]rganized the Autumn 2002 Meeting to commemorate
(footnote continued on next page)

establish any distinct *harm* solely attributable to that (supposed) falsehood. The statements about the Communist flag in Tan's school and the Fall celebration (the details about which are addressed in the next section of this brief), along with all the other disclosed bases for defendants' opinion about Duc Tan's political allegiance, are only that -- bases for the belief that Duc Tan is a Communist or Communist sympathizer. Plaintiffs' claims therefore were correctly dismissed with prejudice under *Mark* and *Herron v. King*.

B. Plaintiffs Failed to Offer Sufficient Evidence of Actual Malice.

Since defendants' opinion is not actionable, the Court of Appeals can be affirmed on that basis alone. Defendants nonetheless will address the issue of actual malice because the Court of Appeals chose to do so.³

1. The Court of Appeals Correctly Described the Independent Review Standard.

The Court of Appeals' opinion demonstrates a sound understanding of its constitutional duty of independent review and does not reveal any abdication of that duty. In determining whether the

the Fall Revolution, exactly as the 1997 Autumn Flag Saluted with VC anthem incident." Ex. 8, Sec. II, 6 (emphasis in original). Plaintiffs' exaggerated (and punchier) description of defendants' allegedly false statement further weakens plaintiffs' argument that any distinct harm or significantly greater opprobrium resulted from defendants' statement that plaintiffs organized an event to commemorate the Fall revolution.

³ The Court of Appeals reached actual malice to foreclose the issue of whether Norman Le made any defamatory statements in his articles. Plaintiffs, however, have abandoned any attempt to distinguish the statements made by Norman Le from those contained in the Public Notice. See Petition for Review at 9; RAP 13.7(b).

constitutional standard has been met, “the reviewing court must ‘examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.” *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 105 L. Ed.2d 562 (1989), quoting *New York Times Co.*, 376 U.S. at 285. “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” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511, 104 S. Ct. 1949, 80 L. Ed.2d 502 (1984). *Accord Richmond v. Thompson*, 130 Wn.2d 368, 388, 922 P.2d 1343 (1996).

The Court of Appeals understood this standard: “In reviewing a defamation verdict, the First Amendment requires us to independently evaluate whether the record supports a finding of actual malice.” *Duc Tan v. Le*, 161 Wn. App. 340, 359, 254 P.3d 904 (2011), citing *Richmond*, 130 Wn.2d at 388 and *Bose*, 466 U.S. at 510. Because actual malice must be proven by clear and convincing evidence, the reviewing court’s independent evaluation is necessarily searching. *See Bose*, 466 U.S. 485 n.27 (In testing challenged judgments against the guarantees of the First Amendment, a reviewing court “cannot avoid making an independent constitutional judgment on the facts of the case.”) (quotations omitted).

“First Amendment questions of ‘constitutional fact’ compel [] de novo review.” *Id.* (quotations omitted).

The reviewing court must ask not whether there was *sufficient* evidence to convince the trier of fact, but whether the judges of the appellate court *themselves* are convinced that clear and convincing evidence support a finding of actual malice. See *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82, 88 S. Ct. 197, 19 L. Ed.2d 248 (1967); see also *Eastwood v. Nat’l Enquirer*, 123 F.3d 1249, 1252, 1254-55 (9th Cir. 1997) (The reviewing court must do more than determine whether a reasonable jury could have found for the plaintiff using a kind of sufficiency-of-the-evidence test -- believing that a preponderance of the evidence supports a jury’s verdict is not enough to uphold a finding of actual malice.).⁴

⁴ The stringency of review for actual malice explains why jury verdicts in favor of defamation plaintiffs are so often overturned for insufficiency of clear and convincing evidence of actual malice. See *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985); *Reuber v. Food Chemical News*, 925 F.2d 703, 718 (4th Cir. 1991); *Peter Scalամandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 563-564 (5th Cir. 1997); *Cobb v. Time, Inc.*, 278 F.3d 629, 640 (6th Cir. 2002); *Campbell v. Citizens for an Honest Government*, 255 F.3d 560, 575-576 (8th Cir. 2001); *Fuller v. Russell*, 311 Ark. 108, 112, 842 S.W.2d 12, 14 (1992); *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 465, 896 S.W.2d 897, 903 (1995); *McCoy v. Hearst Corp.*, 42 Cal.3d 835, 870-71, 727 P.2d 711, 735 (Cal. 1986); *Wanless v. Rothballer*, 115 Ill.2d 158, 175, 503 N.E.2d 316, 323-324 (1987); *Hirman v. Rogers*, 257 N.W.2d 563, 567 (Minn. 1977); *Sweeney v. Prisoners’ Legal Services of New York, Inc.*, 84 N.Y.2d 786, 793-94, 647 N.E.2d 101, 104-105 (1995); *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31, 40-41, 517 N.E.2d 1365, 1369-1370 (1987); *Journal Publishing Co. v. McCullough*, 743 So.2d 352, 366-367 (Miss. 1999); *Lyons v. Rhode Island Public Employees Council 94*, 559 A.2d 130, 136 (R.I. 1989); *Elder v. Gaffney Ledger*, 341 S.C. 108, 118-19, 533 S.E.2d 899, 904-905 (2000); *Peller v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 266-267, 478 S.E.2d 282, 284-285 (1996).

As the Court of Appeals put it, “we have considerable latitude in deciding whether the evidence supports a finding of actual malice.” *Tan*, 161 Wn. App. at 359-60. The Court of Appeals recognized this latitude -- indeed, the constitutional duty -- to conduct an independent review is cabined only by the deference due to a jury’s credibility determinations, if any. *Id.*, citing *Harte-Hanks*, 491 U.S. at 689 n.35. This deference, however, extends only so far as the credibility determinations the jury *must* have made. *See Richmond*, 130 Wn.2d at 388-89 (deferring to jury’s credibility determination where the jury “obviously” gave great weight to the plaintiff’s testimony). The United States Supreme Court in *Harte-Hanks* expressly rejected the speculative approach of deciding whether to affirm a jury’s verdict based on credibility determinations the jury *may* have made as to subsidiary facts. 491 U.S. at 690. The Supreme Court reviewed the jury instructions, answers to special interrogatories and the facts not in dispute to determine that the jury “*must* have” rejected the testimony of multiple defense witnesses. 491 U.S. at 690-91 (emphasis in original). Only then did the Supreme Court consider those findings, and only after concluding that actual malice “inexorably follow[ed]” from those findings and undisputed facts did the Supreme Court affirm the verdict for in favor of the public figure defamation plaintiff. *Id.*⁵

⁵ *Richmond*’s statement that a “reasonable juror could have believed” the defendant made the statement with actual malice does not show that Washington courts have disregarded the U.S. Supreme Court’s instructions on reviewing a defamation verdict for actual malice. 130 Wn.2d at 388-89. In *Richmond*, the court deferred to an obvious credibility
(footnote continued on next page)

And even then, deference to an adverse credibility determination cannot, *without more*, provide clear and convincing evidence of actual malice sufficient to sustain a judgment in favor of a public figure defamation claimant. See *Bose*, 466 U.S. at 511-12 (accepting trier of fact's express finding that defendant did not provide credible testimony regarding his description of what he had actually perceived while declining to infer actual malice from that finding); *Harte-Hanks*, 491 U.S. at 691 (relying on credibility determinations plus undisputed facts); *Richmond*, 130 Wn.2d at 388-89 (relying on credibility determination and uncontroverted facts). In *Bose*, the Supreme Court was unwilling to infer actual malice where the defamatory language chosen was "one of a number of possible rational interpretations' of an event 'that bristled with ambiguities'", even where the defendant had no credible explanation supporting the choice of inaccurate language. 466 U.S. at 512-513, quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971). The Court of Appeals demonstrated its sound understanding of the holdings in *Bose*, *Harte-Hanks*, and *Richmond* when it stated: "Where we can only speculate as to the jury's assessment of each witness, and where the events underlying the alleged defamation are wrapped in obscurity and capable of being interpreted or described in more than one

determination and other facts to conclude that the plaintiff had presented clear and convincing evidence of actual malice -- accordingly, a reasonable juror could have (but was not required to) return a verdict in favor of the defamation plaintiff. *Id.*

way, we require evidence independent of possible credibility determinations to support a jury's findings of actual malice." *Tan*, 161 Wn. App. at 362.

2. The Court of Appeals Correctly Held There Was Insufficient Evidence of Actual Malice.

In their petition for review plaintiffs give only two examples of supposedly false statements that were published with actual malice in support of defendants' opinion that Tan and the VCTC were Communist supporters. In actuality, neither statement demonstrates actual malice

• The Flag Display Incident. The first example is the statement that Tan "refused to display the National [South Vietnamese] flag" in the classroom of the language school where he was principal from 1999 to 2007. *See* Ex. 8, Se. II, 5. Plaintiffs claim this statement was made with actual malice because defendants testified during trial that they had seen the South Vietnam flag displayed on a cabinet in the classroom. Petition for Review at 8, citing RP VI 1165-67 (testimony of Dat Ho).⁶ Plaintiffs argue that defendants therefore must have known that Tan had not refused to display the South Vietnamese flag in the classroom. The problem with plaintiffs' reliance on this statement to prove actual malice are the absence of evidence of falsity and the absence of clear and

⁶ Plaintiffs' choice to highlight the testimony of Dat Ho to demonstrate that defendants had a high degree of awareness of probable falsity actually shows the weakness of plaintiffs' evidence, given that Dat Ho was a peripheral player in the school flag debate and did not have a high degree of awareness of any of the key facts regarding the issue. *See* RP VI 1166.

convincing evidence that defendants had the requisite "high degree of awareness of [the] probable falsity" of that statement, without which civil liability may not be imposed. *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964).

The statement made by defendants in the Public Notice used the verb "to refuse" in the past tense and discussed this past refusal as it related to one of the classrooms in which Vietnamese was taught at Tan's school. *See* Ex. 8, Sec. II, 5. This is not inconsistent with Tan's testimony that the South Vietnamese flag had been absent from the classroom until a controversy arose about the presence of the Communist flag in the classroom. RP V 839-45. At trial, Tan attempted to explain the absence of the South Vietnamese flag by testifying that he was not to touch or modify the borrowed classroom. RP V 838. That is not clear and convincing evidence that Tan had *never* refused to display the South Vietnamese flag in the classroom, especially considering that Tan's stated reason for being unable to display a South Vietnamese flag in the classroom did not ring true -- the flag was eventually displayed in the classroom following the controversy over its absence, notwithstanding Tan's testimony that this could not be done because the classroom could not be modified. Even if the jury found Tan credible, his excuse for having a Communist flag but not a South Vietnamese flag in the classroom does not prove the defendants' statement false but instead supports the notion that Tan was not vigorously opposing the display of the Communist flag.

Moreover, Tan testified he *did* resist defendants' efforts to have him display a the South Vietnamese flag in the classroom, telling Norman Le it was not necessary to have the flag displayed in the classroom. RP V 841. During closing argument, plaintiffs' counsel even argued that Tan's reaction to the controversy surrounding the absence of a South Vietnamese flag in his classroom was that "[w]e do not need to bring another Nationalist flag." RP IX 1600. This evidence, while tending to show that Tan thought it was sufficient to have a Nationalist flag displayed in the *hallway*, does not contradict the statement that Tan refused a display of the South Vietnamese flag in the *classroom* for many years.

Even if Tan had never actually refused to display the South Vietnamese flag in the classroom, plaintiffs failed to offer clear and convincing evidence that defendants knew that or had a high degree of awareness that their statement was probably false. After the controversy arose over its absence, a South Vietnamese flag ended up on display on a cabinet in the classroom. RP V 845. Plaintiffs claim that at least one defendant was aware of that. *See* Petition for Review at 8. This supposed "concession," however, is insufficient to show by clear and convincing evidence that defendants knew Tan had *never* refused to have a South Vietnam flag inside the classroom before the cabinet display. Nor is there any other clear and convincing evidence in the record to show that defendants had a high degree of awareness of the probable falsity of their statement.

Tan's testimony even cuts against plaintiffs' argument that defendants entertained serious doubts about Tan refusing to assist in having the South Vietnamese flag displayed in the classroom. For example, Tan testified that he did not notice that there was a Communist flag but no South Vietnamese flag flying in the language school classroom for many years, while he was principal. *See* RP V 838-39. Given the visceral reaction among Vietnamese anti-Communist refugees to the sight of the Communist flag, it is understandable that defendants would have expected Tan to notice and fix this problem if he in fact opposed Communism and would have concluded that his ignorance was intentional and demonstrated an unwillingness to display the South Vietnamese flag. Moreover, Norman Le had good reason to believe Tan was resisting defendants' efforts to display the South Vietnamese flag in the classroom, since Tan told Le that it was not necessary to have the flag displayed in the classroom. RP V 841. From that resistance, defendants could have concluded that Tan had refused to display the South Vietnamese flag in the classroom, even if he eventually acquiesced to the cabinet display. These reasons to believe, based on Tan's testimony, that Tan was not fully assisting in the fight against the Communist flag do not support, and in fact undermine, plaintiffs' argument that there was clear and convincing evidence that defendants entertained serious doubts about the truth of their accusations.

Even if defendants' perception that Tan had refused to display the South Vietnamese flag in the classroom could be found to be mistaken, it

cannot support an inference of actual malice. *See Bose*, 466 U.S. at 512-13 (actual malice cannot be inferred where the language chosen was “one of a number of rational interpretations of an event”) (quotations omitted); *see also Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 266-267, 478 S.E.2d 282, 285 (S.C. 1996) (“A subjective awareness of probable falsity cannot be demonstrated under the standard of ‘convincing clarity’ by evidence showing that the publisher and the plaintiff disagreed with respect to their perceptions of events which they both observed.”), quoting *McMurry v. Howard Publications, Inc.*, 612 P.2d 14 (Wyo. 1980); *Thomson Newspaper Publishing, Inc. v. Coody*, 320 Ark. 455, 464, 896 S.W.2d 897, 902 (Ark. 1995) (Defendant’s “perception, even though possibly mistaken, of a conversation which admittedly occurred must be protected.”); *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31, 40, 517 N.E.2d 1365, 1369-1370 (N.Y. 1987) (overturning jury verdict for plaintiff where there was no evidence to negate the possibility that the defendant simply misunderstood the plaintiff). Here, the statement that Tan refused to display the South Vietnamese flag in the classroom was not proven false, and in any event is a reasonable interpretation of Tan’s actions while he was principal of the language school. Plaintiffs’ failed to offer clear and convincing evidence that Tan never refused to display the South Vietnam flag, nor clear and convincing evidence that defendants in fact entertained serious doubts about their accusation.

- The Autumn 2002 Incident. Plaintiffs’ only other supposed example of clear and convincing evidence of actual malice involves

defendants' statement that plaintiffs organized an "Autumn 2002 Meeting to commemorate the Fall Revolution." Ex. 8, Sec. II, 6.⁷ Plaintiffs claim this statement was made with actual malice because one of the defendants said he did not know the true purpose of the Autumn 2002 meeting. Petition for Review at 8, citing RP VI 1170, 1173-74.⁸ Plaintiffs argued in opening and closing that defendants making that statement "without any proof evidences their reckless disregard for the truth." RP II 255-56; RP IX 1601-02.

Plaintiffs' reliance on that example to prove actual malice reveals their attempt to substitute a negligence standard for the First Amendment reckless disregard standard. This strategy worked for plaintiffs before the trial court, but it cannot withstand this Court's independent review. Proving actual malice requires more than evidence of a negligent failure to investigate. "[R]eckless conduct is not measured by whether a reasonably prudent man . . . would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Evidence that a defendant does not know the truth of an allegation does

⁷ The "Fall Revolution" refers to Ho Chi Minh's declaration of an independent (and Communist) Vietnam, on September 2, 1945 (the same day General Douglas MacArthur accepted the formal surrender of Japan, on board the battleship *Missouri* riding at anchor in Tokyo Bay).

⁸ Another defendant could not remember having seen the invitation letter to the Autumn 2002 event. RP VIII, 1392-93. And the only other defendant asked assumed the purpose of the Autumn 2002 meeting was to commemorate the Fall revolution, given Plaintiffs' previous choice to hold a celebration on September 2. RP VII 1337-38.

not amount to clear and convincing evidence that the statement was made with actual malice since a “public figure’s critics have no affirmative duty to search out the truth or to substantiate their statements[.]” *Margoles v. Hubbart*, 111 Wn.2d 195, 204, 760 P.2d 364 (1988) (citation omitted).

Plaintiffs failed to offer any evidence that defendants knew their allegation was false or that they entertained serious doubts as to the truth. Here, defendants’ suspicion that plaintiffs were calling an Autumn 2002 meeting for nefarious purposes is consistent with plaintiffs’ pre-2002 missteps involving sensitive dates, such as the decision to schedule an event on September 2 and the playing of the Communist anthem during an Autumn event in 1997. Though defendants could not have carried the burden before the jury of proving that the Autumn 2002 meeting was in fact called to commemorate the Fall revolution, they did not bear that burden. The Court of Appeals correctly recognized this flaw in plaintiffs’ trial strategy, stating:

The defendants may also have been overly quick to build a conspiracy theory from facts too scant and equivocal to persuade a jury that the conspiracy existed in fact. Nonetheless, the defendants’ mischaracterizations, exaggerations, and seemingly improbable inferences took place in an ongoing political discussion protected by the First Amendment.

Duc Tan, 161 Wn. App. at 366.

In addition to these two examples of statements for which plaintiffs supposedly satisfied their actual malice burden, plaintiffs presumably will renew the argument they made to the Court of Appeals in which they assert that public figure defamation plaintiffs can meet their actual malice

burden *cumulatively*, through evidence that, when taken its own right, is not competent to prove actual malice. In support of this proposition the plaintiffs have been able to offer only *dicta* arising out of the following statement from *Herron v. Tribune Publishing Co.*: “although negligence, a failure to investigate, anger or hostility towards the plaintiff, or reliance on sources known to be unreliable would, alone be insufficient proof, when viewed cumulatively and in appropriate circumstances they may establish clear and convincing evidence of actual malice.” 108 Wn.2d 162, 736 P.2d 249 (1987). This statement was not necessary to the holding or reasoning in *Herron v. Tribune* because undeniably sufficient evidence of actual malice, *i.e.*, knowing falsity, existed in the form of testimony that the reporter/defendant must have known the truth since he was present when the falsely described event occurred, and yet he went ahead and falsely reported the event he had witnessed. 108 Wn.2d at 173-74.⁹

⁹ Nor do the holdings of the cases cited in *Herron v. Tribune* actually support the *dicta*. In *Reader's Digest Ass'n, Inc. v. Superior Court of Marin County*, the California Supreme Court ultimately held that there were no triable issues of actual malice. 37 Cal.3d 244, 256-258, 690 P.2d 610, 618-19 (1984). In *Goldwater v. Ginzburg*, the Second Circuit upheld a defamation judgment in favor of Senator Barry Goldwater, where the record included evidence showing a systematic and deliberate distortion of documents by the publisher, as well as other evidence supporting a finding of a predetermined and preconceived plan to malign the Senator's character. 414 F.2d 324, 335-37 (2d Cir. 1969). Inferring the existence of actual malice from a body of evidence that establishes a predetermined and preconceived plan to defame is far different from allowing a jury to find actual malice by adding up factors that could not sustain a finding of actual malice on their own. To be sure, the Second Circuit's opinion contains language that comes very close to the *dicta* of *Herron*. It should be kept in mind, however, that the Second Circuit decided *Goldwater v. Ginzburg* in 1969, just five years after *New York Times v. Sullivan*, 15 years before *Bose* and 20 years before *Harte-Hanks*. The Second Circuit's language reflects a deferral to the jury's finding of actual malice that is no longer permissible after *Bose* and *Harte-Hanks*.

This Court should repudiate this *dicta* as inconsistent with the protective mandate of the First Amendment. Allowing a jury to add up evidence of a kind that has been rejected as insufficient to sustain a finding of actual malice can only dilute First Amendment protections. Zero plus zero plus zero should equal zero in matters of the First Amendment, as well as arithmetic.

IV. CONCLUSION

The Court of Appeals' decision should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of December, 2011.

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