Supreme Court Civil No. 2010-0046
Superior Court Civil No. 517/2007 Division of St. Thomas and St. John

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In the Supreme Court

of the

Virgin Islands

THE HONORABLE LEON A. KENDALL

Plaintiff-Appellant,

v.

THE DAILY NEWS PUBLISHING CO.
d/b/a THE VIRGIN ISLANDS DAILY NEWS
AND JOY BLACKBURN

Defendants-Appellees,

and

JOSEPH TSIDULKO

Defendant.

BRIEF OF *AMICUS CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT

I. After a thorough independent review of the entire record, this Court should find that the Superior Court did not err in entering judgment for Appellees as a matter of law. 2

A. Actual malice 2
1. Second-guessing the exercise of editorial judgments 3
2. The failure to investigate 6
3. Additional research beyond the reported event 7

B. Falsity and opinion 8
1. States, territories and the District of Columbia 9
2. U.S. Courts of Appeals 10
3. The rationale for extension of independent review 12

C. Defamatory meaning 13

D. Fair report privilege 14

II. This country has a storied tradition of protecting speech critical of its judiciary. 14

CONCLUSION 17

CERTIFICATES 20

TABLE OF AUTHORITIES

Cases

Abrams v. United States
250 U.S. 616 (1919) 16, 17

Abromats v. Wood
213 P.3d 966 (Wyo. 2009) 9

Afro-Am. Publ'g Co. v. Jaffe
366 F.2d 649 (D.C. Cir. 1966) 13

Agriss v. Roadway Express, Inc.
483 A.2d 456 (Pa. Super. Ct. 1984) 13

Associated Press v. United States
326 U.S. 1 (1945) 4

Beal v. Bangor Publ'g Co.
714 A.2d 805 (Me. 1998) 9

Bose Corp. v. Consumers Union of U.S., Inc.
466 U.S. 485 (1984) ..... passim

Bridges v. California
314 U.S. 252 (1941) 16

Brown v. Petrolite Corp.
965 F.2d 38 (5th Cir. 1992) 9

Bryant v. Associated Press
595 F. Supp. 814 (D.V.I. 1984) 3

Buckley v. Littell
539 F.2d 882 (2d Cir. 1976) 10-11

Butler v. Hearst-Argyle Television, Inc.
49 S.W.3d 116 (Ark. 2001) 9

Chapin v. Knight-Ridder, Inc.
993 F.2d 1087 (4th Cir. 1993) 11

Chesapeake Publ'g Corp. v. Williams
661 A.2d 1169 (Md. 1995) 4, 9

Craig v. Harney
331 U.S. 367 (1947) 5

Dombey v. Phoenix Newspapers, Inc.
708 P.2d 742 (Ariz. Ct. App. 1985) 9

Ertel v. Patriot-News Co.
674 A.2d 1038 (Pa. 1996) 9

Fargo v. Brennan
543 N.W.2d 240 (N.D. 1996) 9

Finebaum v. Coulter
854 So. 2d 1120 (Ala. 2003) 9

Garib Bazain v. Clavell
135 D.P.R. 475 (P.R. 1994) 9

Garrison v. Louisiana
379 U.S. 64 (1964) 5-6

The Gazette, Inc. v. Harris
325 S.E.2d 713 (Va. 1985) 9

Gertz v. Robert Welch, Inc.
418 U.S. 323 (1974) 4, 12

Goldwater v. Ginzburg
414 F.2d 324 (2d Cir. 1969) 2

Harte-Hanks Commc'ns, Inc. v. Connaughton
491 U.S. 657 (1989) 3, 6, 12

Havalunch, Inc. v. Mazza
294 S.E.2d 70 (W. Va 1981) 9

Howard v. Antilla
294 F.3d 244 (1st Cir. 2002) 9

In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts
913 F.2d 89 (3d Cir. 1990) 11

In re King
568 N.E.2d 588 (Mass. 1991) 15

In re Troy
306 N.E.2d 203 (Mass. 1974) 1

Journal-Gazette Co., Inc. v. Bandido's, Inc.
712 N.E.2d 446 (Ind. 1999) 9

Kaelin v. Globe Commc'ns Corp.
162 F.3d 1036 (9th Cir. 1998) 14

Ky. Kingdom Amusement Co. v. Belo Ky., Inc.
179 S.W.3d 785 (Ky. 2005) 9

Locricchio v. Evening News Ass'n
476 N.W.2d 112 (Mich. 1991) 9, 13

Marcone v. Penthouse Int'l Magazine for Men
754 F.2d 1072 (3d Cir. 1985) 3, 13

Maryland v. Balt. Radio Show, Inc.
338 U.S. 912 (1950) 17-18

Mashburn v. Collin
355 So. 2d 879 (La. 1977) 9

Masson v. New Yorker Magazine, Inc.
501 U.S. 496 (1991) 3

McCann v. Shell Oil Co.
551 A.2d 696 (R.I. 1988) 9

McCoy v. Hearst Corp.
727 P.2d 711 (Cal. 1986) 9

Melton v. Okla. City
928 F.2d 920 (10th Cir. 1991) 11

Miami Herald Publ'g Co. v. Tornillo
418 U.S. 241 (1974) 4

Miskovsky v. Okla. Publ'g Co.
654 P.2d 587 (Okla. 1982) 9

Morris v. Warner
770 P.2d 359 (Ariz. Ct. App. 1988) 9

N.Y. Times Co. v. Sullivan
376 U.S. 254 (1964) ..... passim

O'Connor v. Burningham
165 P.3d 1214 (Utah 2007) 9

Perk v. Reader's Digest Ass'n, Inc.
931 F.2d 408 (6th Cir. 1991) 6

Pierce v. Capital Cities Commc'ns, Inc.
576 F.2d 495 (3d Cir. 1978) 1

Reilly v. N. Hills News Record
1998 WL 1113472 (W.D. Pa. Oct. 26, 1998) 14

Rinaldi v. Holt, Rinehart & Winston, Inc.
366 N.E.2d 1299 (N.Y. 1977) 4-5, 9

Schiavone Constr. Co. v. Time, Inc.
847 F.2d 1069 (3d Cir.1988) 2

Sparagon v. Native Am. Publishers, Inc.
542 N.W.2d 125 (S.D. 1996) 9

Speiser v. Randall
357 U.S. 513 (1958) 12

St. Amant v. Thompson
390 U.S. 727 (1968) 2

St. Surin v. V.I. Daily News, Inc.
21 F.3d 1309 (3d Cir. 1994) 2, 3, 13, 14

Tavoulareas v. Piro
817 F.2d 762 (D.C. Cir. 1987) 2

Terminiello v. Chicago
337 U.S. 1 (1949) 7

United States v. Associated Press
52 F. Supp. 362 (S.D.N.Y. 1943) 5

Veilleux v. NBC
206 F.3d 92 (1st Cir. 2000) 10

Walker v. Colo. Springs Sun, Inc.
538 P.2d 450 (Colo. 1975) 9

Ward v. Zelikovsky
643 A.2d 972 (N.J. 1994) 9

Wellman v. Fox
825 P.2d 208 (Nev. 1992) 9

Wiegel v. Capital Times Co.
426 N.W.2d 43 (Wis. Ct. App. 1988) 9

Other Authorities

John Adams, A Dissertation on the Canon and Feudal Law, Sept. 30, 1765
available at http://teachingamericanhistory.org/library/index.asp?document=43 15

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available at http://www.constitution.org/fed/federa78.htm 15

David McCullough, John Adams (2001) 14

Restatement (Second) of Torts §§ 611, 614 (1977) 14

Rodney A. Smolla, Law of Defamation (1986) 8

INTRODUCTION

Along with mayors, legislators, police chiefs and other public officials, the manner in which judges conduct their public duties is vital to the functions of a civil society. The duty to monitor this judicial behavior historically vested in the community at large, and with good reason: Public criticism of judicial performance actually facilitates the administration of justice. "Persons and groups of persons in the community have a right, and in some instances a duty, to direct public attention to judicial conduct. Continued public scrutiny assists in insuring that justice will consistently be done." *In re Troy*, 306 N.E.2d 203, 218 (Mass. 1974). Because the press plays an essential role in informing the public about the character and conduct of judges, its constitutionally protected watchdog function "must be zealously guarded." *Pierce v. Capital Cities Commc'ns, Inc.*, 576 F.2d 495, 505 (3d Cir. 1978).

Accordingly, the U.S. Supreme Court has made clear that whenever the gravamen of a claim is an attempt to impose liability for allegedly defamatory speech, courts must "examine for [themselves] 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." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). The Superior Court undertook such a review in this case and correctly found that this threshold determination barred judgment in favor of Appellant, a retired judge; *amicus* asks this Court to affirm the Superior Court's finding that Judge Kendall failed to present sufficient evidence by which a reasonable jury would have a legally sufficient evidentiary basis to find for him. Such a holding is consistent with established law in the United States and its territories and necessary to protect the public's undeniable interest in informing itself as to whether the conduct of its judges satisfies their constitutionally imposed public duties.

ARGUMENT

I. After a thorough independent review of the entire record, this Court should find that the Superior Court did not err in entering judgment for Appellees as a matter of law.

Because this litigation implicates the First Amendment to the U.S. Constitution, the jury's verdict must be evaluated, on the basis of this Court's own *de novo* examination, against the heavy burden of proof imposed on a plaintiff who is a public official. *Tavoulareas v. Piro*, 817 F.2d 762, 776 (D.C. Cir. 1987). Without dispute, this mandated duty of independent review applies to the issue of actual malice. And despite Judge Kendall's claim to the contrary, it also applies to the other issues on appeal, namely falsity and opinion.

A. Actual malice

Under clearly established defamation law, a public official cannot recover damages for defamatory falsehood absent proof by clear and convincing evidence that the publisher of the material acted with actual malice defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *St. Surin v. V.I. Daily News, Inc.*, 21 F.3d 1309, 1317 (3d Cir. 1994) (quoting *Sullivan*, 376 U.S. at 279–80). The *Sullivan* exacting standard for malice "is a subjective one, based on the defendant's actual state of mind," *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1089 (3d Cir.1988), and is met when the author or publisher "in fact entertained serious doubts as to the truth of his publication." *St. Surin*, 21 F.3d at 1317 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). "[N]either negligence nor failure to investigate, on the one hand … standing alone, [are] sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used." *Id.* (quoting *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969)). Indeed, an article or statement concerning a public official that is negligently defamatory but published

with a good faith belief that it is true is not actionable under the actual malice standard. *Bryant v. Associated Press,* 595 F. Supp. 814, 818 (D.V.I. 1984). Moreover, the U.S. Supreme Court has made clear that actual malice in a defamation case and malice as "an evil intent or a motive arising from spite or ill will" are separate and unrelated concepts. *St. Surin*, 21 F.3d at 1318 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991)). The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 685 (1989) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510–11 (1984)).

In *Bose,* the U.S. Supreme Court mandated independent judicial review of evidence of actual malice. Accordingly, this Court has the power and affirmative duty to make *de novo* review of such:

> 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 proof of "actual malice."

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1088 (3d Cir. 1985) (quoting *Bose*, 466 U.S. at 510–11). Rather than reiterate the Superior Court's decision and Appellees' argument, *amicus* brings to the Court's attention the undesirable and consequential effects of adopting Judge Kendall's assertions of evidence of actual malice.

1. Second-guessing the exercise of editorial judgments

Judge Kendall argues that the reporter's omission of certain information — the fact that a former Attorney General previously agreed with a few of his bail decisions long before the Daniel Castillo hearing, for example — evinces an intent to "resolve[] all conflicts in the evidence in a manner calculated to portray Judge Kendall in the worst possible light."

(Appellant's Br. 27.) However, such editorial second-guessing cannot be the basis of a finding of actual malice, for it is squarely at odds with the long-standing doctrine, rooted in the First Amendment, that the press enjoys discretion to publish only that "which their 'reason' tells them should … be published," *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945), and to delete that "which, in its journalistic discretion, it chooses to leave on the newsroom floor." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 261 (1974) (White, J., concurring). Specifically in the context of newspaper reporting, the *Tornillo* Court cautioned:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Id. at 258. To permit a jury's (or court's) opinion of the "fairness" of editorial judgments concerning the manner of treating facts, or the inferences the reporter draws from such facts, to constitute evidence probative of actual malice represents a clear evisceration of this controlling principle. Moreover, as noted, the actual malice test does not turn on a third party's evaluation of the reasonableness or balance of controversial speech. The inquiry is limited to whether the speaker has a "subjective awareness of probable falsity." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974).

Further, while plaintiffs often would like reporters to include every fact that favors them, doing so is "not the reporter's obligation." *Chesapeake Publ'g Corp. v. Williams*, 661 A.2d 1169, 1177 (Md. 1995). Even if Appellees' articles "vilif[ied] Judge Kendall and subject[ed] him to the severest public embarrassment," (Appellant's Br. 3), their omission of information that Judge Kendall may have preferred to have been included simply cannot give rise to an actionable defamation claim. Indeed, " '[j]udges are supposed to be men of fortitude, able to thrive in a

hardy climate.' " *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1306 (N.Y. 1977) (quoting *Craig v. Harney*, 331 U.S. 367, 376 (1947)). Judicial office is not a place for those who are oversensitive to comments in the public press. *Id.*

The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). Inevitably, though, a rule permitting judges and jurors into the editing room to substitute their personal notions of fairness, balance and accuracy for those of publishers will inhibit free expression. The undesirability of such intrusion has been widely recognized, to the point of scrupulously protecting editorial discretion even where assertedly important facts may have been wholly omitted from a published work. *See, e.g., Rinaldi*, 366 N.E.2d at 1308 ("Although he could not make up facts out of whole cloth, omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function.") (citations omitted).

The conclusion must be the same here, where Appellees' omission from their reports of information that Judge Kendall claimed was crucial — namely the fact that Judge Kendall claims he was not presented with information about Castillo's criminal history during his bail hearing — did not render the statements materially false. Should such editorial judgments be subject to the kind of second-guessing endorsed by Judge Kendall, publishers, journalists, authors and broadcasters would be dissuaded from informing the open debate on important and controversial issues of public concern — a chilling effect that is particularly severe in public official cases like this one since reporting on "anything which might touch on an official's fitness for office …

protects the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964).

2. The failure to investigate

Judge Kendall also argues that the reporter's failure to investigate further — namely her failure to contact the prosecuting or defense attorney for comments about Castillo's bail hearing or to consult the transcript of the proceeding — is proof of a purposeful avoidance of the truth. (Appellant's Br. 27.) However, defamation law imposes no liability for a failure to research issues more thoroughly. *Perk v. Reader's Digest Ass'n, Inc.*, 931 F.2d 408, 412 (6th Cir. 1991).[1] This principle makes even more sense in cases such as this, where the allegedly defamatory statement is based wholly on information contained in a public document. When the journalist consulted the memorandum record of proceedings and other court records and fairly and accurately reported their contents, including the fact that Judge Kendall released Castillo on his own recognizance following his arrest on domestic violence charges, her report of that event and those records was privileged from liability for defamation. Nothing in the First Amendment or case law requires her, or any other reporter privileged by his or her fair and accurate report of an event, to conduct any further investigation.

Indeed, a rule requiring journalists to conduct an additional investigation to avoid a claim of actual malice by a public official places more restrictions on journalistic practice than First Amendment jurisprudence allows. Perhaps more significantly, it does not accurately reflect modern newsgathering techniques. That is, while more-in-depth, investigative journalism

[1] This is true in cases, like this one, that do not involve a factual scenario like that in *Harte-Hanks,* in which the newspaper's own sources indicated that there was a question as to the truth of what they were reporting, and a readily available additional source would have provided proof of whether their story was accurate. *Harte-Hanks*, 491 U.S. at 673.

undoubtedly serves the "high purpose" of the First Amendment, *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949), and has produced activities for which our nation is the better, one of the enduring hallmarks of journalism is its unrelenting deadline pressure that often prohibits further reporting on matters. Simply put, to assure that the public is informed of items of significant community interest as soon as possible, reporters must submit their completed accounts of them by 5 or 6 p.m., a strict deadline that necessarily terminates further investigation. Thus, a finding that failure to do so is probative of actual malice chills daily news reporting in a manner the First Amendment cannot tolerate.

3. Additional research beyond the reported event

In refusing to acknowledge that the journalist engaged in further reporting, Judge Kendall argues that her inclusion of information beyond the four corners of the reported event necessarily amounted to a fabrication of facts. (Appellant's Br. 25–26.) While it may be true that the memorandum record of proceedings the reporter consulted to ascertain what occurred at the bail hearing did not state that Castillo had a history of violence, nothing prohibits a journalist from reporting beyond the parameters of the original event — an activity that may include comment on truthful facts. Indeed, consulting additional sources of information helps journalists provide a fair and comprehensive account of events and issues and contributes to a diversity of voices in the "marketplace of ideas."

Moreover, one of the hallmarks of journalism is its synthesis of raw data, sometimes hundreds or even thousands of pages of it, into several hundred words from which an average member of the public can discern the meaning of the information, as well as its public significance. In fact, journalism exists because an otherwise preoccupied public demands an agent who will compile information that affects the public interest but that the public, because of

a lack of ability, time, energy or inclination, cannot gather for itself. In doing so, reporters present the information in an appropriate context and a manner designed to facilitate readers' understanding of the issues. To that end, they often provide comments on disclosed facts to reveal why a particular matter is of public concern. The First Amendment recognizes that valuable discourse is fostered by the free flow of evaluative ideas, Rodney A. Smolla, Law of Defamation § 6.02[1] (1986), and, thus, protects a journalist's insightful comments based on accurate facts. To hold otherwise would strip journalism of one of its greatest public benefits — the ability to meaningfully inform the public about issues of public significance.

In sum, after this Court's constitutionally mandated *de novo* independent examination of the evidence of actual malice, it should affirm the Superior Court's finding that Judge Kendall failed to satisfy his burden. This country's profound commitment to the free exchange of ideas through an uninhibited discourse on public issues, and the First Amendment's intolerance of a chill on the activities of the press — the conduit of the ideas, discussions and debates that comprise the marketplace of ideas — require such a ruling. Further, if this Court affirms the Superior Court ruling that Judge Kendall failed to prove actual malice by clear and convincing evidence, it may end its analysis of the claims at issue, for a public official is prohibited from recovering damages relating to his official conduct unless he proves that the statement was made with actual malice. *Sullivan*, 376 U.S. at 279. This constitutional rule applies even to statements that are false and defamatory. *Id.*

B. Falsity and opinion

While the First Amendment's requirement of independent appellate review of actual malice is unequivocal under *Bose*, the Supreme Court has not expressly addressed whether the

same exacting standard applies to other constitutional issues. However, a survey[2] of the existing law on the subject reveals that the majority of courts extend the mandate of *de novo* review of evidence of actual malice to these other elements.

1. States, territories and the District of Columbia

The law in 27 of the states, territories and the District of Columbia has addressed, either directly or indirectly, the issue of whether courts considering defamation appeals must review for themselves evidence of constitutional issues other than actual malice.[3] Of these 27 jurisdictions, only four — Kentucky, Maine, Texas and Virginia — have held that appellate courts' independent review is *limited* to the issue of actual malice, the standard for which Judge Kendall

[2] This survey is based on the law of all 50 U.S. states, the District of Columbia, the U.S. territories of Guam, Puerto Rico and the Virgin Islands and the 12 federal appellate regional circuits. (Because of the specialized nature of the cases it hears, the Court of Appeals for the Federal Circuit's jurisprudence is not included in the survey.)

[3] *Finebaum v. Coulter*, 854 So. 2d 1120 (Ala. 2003); *Dombey v. Phoenix Newspapers, Inc.*, 708 P.2d 742 (Ariz. Ct. App. 1985), *approved in part, vacated in part*, 724 P.2d 562 (Ariz. 1986). *But see Morris v. Warner*, 770 P.2d 359 (Ariz. Ct. App. 1988). *Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116 (Ark. 2001); *McCoy v. Hearst Corp.*, 727 P.2d 711 (Cal. 1986); *Walker v. Colo. Springs Sun, Inc.*, 538 P.2d 450 (Colo. 1975), *overruled on other grounds, Diversified Mgmt., Inc. v. Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982); *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind. 1999); *Ky. Kingdom Amusement Co. v. Belo Ky., Inc.*, 179 S.W.3d 785 (Ky. 2005); *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977); *Beal v. Bangor Publ'g Co.*, 714 A.2d 805 (Me. 1998); *Chesapeake Publ'g Corp. v. Williams*, 661 A.2d 1169 (Md. 1995); *Locricchio v. Evening News Ass'n*, 476 N.W.2d 112 (Mich. 1991); *Wellman v. Fox*, 825 P.2d 208 (Nev. 1992); *Howard v. Antilla*, 294 F.3d 244 (1st Cir. 2002) (applying New Hampshire law); *Ward v. Zelikovsky*, 643 A.2d 972 (N.J. 1994); *Rinaldi*, 366 N.E.2d 1299; *Fargo v. Brennan*, 543 N.W.2d 240 (N.D. 1996); *Miskovsky v. Okla. Publ'g Co.*, 654 P.2d 587 (Okla. 1982); *Ertel v. Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996); *Garib Bazain v. Clavell*, 135 D.P.R. 475 (P.R. 1994); *McCann v. Shell Oil Co.*, 551 A.2d 696 (R.I. 1988); *Sparagon v. Native Am. Publishers, Inc.*, 542 N.W.2d 125 (S.D. 1996); *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992) (applying Texas Law); *O'Connor v. Burningham*, 165 P.3d 1214 (Utah 2007); *The Gazette, Inc. v. Harris*, 325 S.E.2d 713 (Va. 1985); *Havalunch, Inc. v. Mazza*, 294 S.E.2d 70 (W. Va 1981); *Wiegel v. Capital Times Co.*, 426 N.W.2d 43 (Wis. Ct. App. 1988); *Abromats v. Wood*, 213 P.3d 966 (Wyo. 2009). These cases do not necessarily represent each jurisdiction's sole discussion of the issue; for brevity's sake, just one illustrative case from each jurisdiction was included.

argues. Rather, the majority of these courts either expressly extend the requirement of independent appellate review to the constitutional issues of falsity (Maryland, Michigan, Pennsylvania) or opinion (Louisiana, Nevada, New Jersey, West Virginia) or both (Colorado, New York, Puerto Rico), or do so implicitly by adoption of *Bose*'s broad standard requiring appellate courts to conduct an independent review "in cases raising First Amendment issues," *Bose*, 466 U.S. at 499, (Alabama, Arizona, Arkansas, California, Indiana, New Hampshire, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Wisconsin, Wyoming).

2. U.S. Courts of Appeals

Federal jurisprudence provides strong support for an extension of the independent appellate review requirement beyond the issue of actual malice to other constitutional elements in a defamation case. Of the eight federal circuits to address the issue,[4] most have expressly approved such extension, while the others have done so implicitly. Those courts in the former category include the U.S. Courts of Appeals for the First, Second, Fourth, Fifth and Eighth Circuits, while the Third, Seventh and Tenth Circuits comprise the latter category. The First Circuit, the court that generated *Bose*, has noted that appellate courts must independently review the evidence on dispositive constitutional issues regardless of whether a court or jury performed the fact-finding function. *Veilleux v. NBC*, 206 F.3d 92, 106 (1st Cir. 2000) ("Deference to the jury is muted, however, when free speech is implicated."). Moreover, the Second Circuit has explained that, "[a]s to our role in reviewing a libel case, the First Amendment requires careful appellate review of the facts found at trial which have constitutional significance." *Buckley v. Littell*, 539 F.2d 882, 888 (2d Cir. 1976). Thus, while

[4] It appears the U.S. Courts of Appeals for the Sixth, Ninth, Eleventh and District of Columbia Circuits have never squarely discussed the matter.

> [i]t may be true that, as a general rule, we are permitted only to review findings of fact under the "clearly erroneous" standard … when interpretation of a communication in the light of the constitutional requirements is involved, our scope of review is to examine in depth the "statements in issue" and the "circumstances in which they are made."

Id. (quoting *Sullivan*, 376 U.S. at 285). The Fourth Circuit has expanded the scope of its detailed independent appellate review to non-constitutional issues. *See, e.g.*, *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093–94 (4th Cir. 1993) (reviewing a dismissal for failure to state a claim and carrying out a statement-by-statement independent review of the allegedly defamatory material for defamatory meaning and truth, although the court did not specifically characterize the exercise as an independent review of the defamation elements).

While the Third Circuit has not weighed in on the impact of *Bose* in the context of any libel case, it has cited *Bose* in noting the plenary nature of its review, seemingly extending *de novo* review beyond the issue of actual malice. For example, in *In re Capital Cities/ABC, Inc.'s Application for Access to Sealed Transcripts*, 913 F.2d 89, 92 (3d Cir. 1990), the court considered an appeal from an order denying access to sealed documents in a criminal trial. The court reviewed the request for access under the common law under an abuse of discretion standard but reviewed the request for access under the First Amendment under a "substantially broader" standard that included the *Bose* requirement of an independent examination of the trial court's order and factual findings inferred from the evidence before it. *Id.* Likewise, the Tenth Circuit seemingly extends *de novo* review to constitutional issues beyond actual malice. In a 42 U.S.C. § 1983 case involving the deprivation of liberty interests and including defamation claims, the court stated, "[w]e … follow the mandate of *Bose* and make an independent review of the record on the dispositive constitutional issue." *Melton v. Okla. City*, 928 F.2d 920, 928 (10th Cir. 1991).

This Court's adoption of a standard of review mandating an independent examination of all constitutional issues involved in a defamation case would place the territory among all the federal appellate circuits that have addressed the issue. Such a rule also is supported by the law of about 85 percent of the U.S. states, the District of Columbia and U.S. territories that have considered the matter. (Specifically, 27 of these jurisdictions have addressed the matter, and 23 have ruled on it favorably.)

3. The rationale for extension of independent review

Requiring this searching review of the entire record on all constitutional issues raised in a defamation claim makes sense in light of the important policy reason for the mandate of *de novo* review of evidence of actual malice. Essential to maintaining the freedom of speech and the press is the creation of "breathing space," or protection strategically extended to defamatory falsehood to assure that protected speech is not discouraged. *Gertz*, 418 U.S. at 342. Requiring public officials and figures to prove by clear and convincing evidence that a publisher acted with actual malice is one means by which this breathing space is carved out. Yet, terms such as actual malice and reckless disregard are not easily defined, and only through case-by-case adjudication can courts "give content to these otherwise elusive constitutional standards." *Harte-Hanks*, 491 U.S. at 686 (citing *Bose*, 466 U.S. at 503). Such elucidation by courts is particularly important in cases that implicate speech rights, for "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech — the more elusive the standard, the less protection it affords." *Id.* Thus, judges must discharge their constitutional duty to ensure that — in cases presenting a question "of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated,' " *Sullivan*, 376 U.S. at 285 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)) — constitutional principles

have been applied properly. Such a requirement provides certainty to the scope of protection, thereby helping ensure that protected speech is not discouraged.

This unique interest protected by the actual malice standard is no less implicated by findings about other constitutional issues, namely falsity and opinion. That is, a jury verdict against the great weight of the evidence as to the falsity requirement or opinion defense, unreviewed by a court, comprises a forbidden intrusion on protected speech in the same way as a failure to review the whole record for clear and convincing evidence of actual malice. *Locricchio*, 476 N.W.2d at 125. Indeed, the overwhelming majority of courts to address the issue have somehow recognized that the disparate standard for actual malice, as opposed to falsity and opinion, appears to be a distinction without a constitutional difference. As such, *amicus* urges this Court to adopt the majority rule and find that determinations of falsity and opinion also are subject to independent appellate review.

Many of the above cases, in addition to requiring *de novo* review of the constitutional issues in a defamation appeal, also mandate the searching inquiry into non-constitutional matters. Although the common law element of defamatory meaning and the defense of fair report privilege are at issue in this case, this Court need not decide whether independent appellate review must extend to them, for both are matters of law already subject to *de novo* review.

C. Defamatory meaning

The threshold determination of whether a statement is capable of a defamatory meaning depends on the general tendency of the words to have such an effect. *Marcone,* 754 F.2d at 1078 (quoting *Agriss v. Roadway Express, Inc.*, 483 A.2d 456, 461 (Pa. Super. Ct. 1984)). As such, words should be construed as they would be understood by the average reader. *St. Surin*, 21 F.3d at 1317 (citing *Afro-Am. Publ'g Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966)). Moreover,

courts are required to take the full context of a publication into account when determining whether it is defamatory. *Kaelin v. Globe Commc'ns Corp.*, 162 F.3d 1036, 1040 (9th Cir. 1998). A defamatory meaning must be found, if at all, in a reading of the publication as a whole, including, for a newspaper, its headlines, caption and article as a whole. *Id.* Whether a statement is capable of the defamatory meaning alleged by the plaintiff is ultimately a question of law for the court to decide. *St. Surin,* F.3d at 1317 n.7. If it so finds, the jury's role is to determine whether such statement was so understood by its recipient, Restatement (Second) of Torts § 614 (1977), a distinction Judge Kendall overlooks.

D. Fair report privilege

The common law fair report privilege provides that, "[t]he publication of defamatory matter concerning another in a report of an official action or proceeding … is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." *Id.* § 611. A fair and accurate report is one that "conveys to the persons who read it a substantially correct account of the proceedings" and need not "be exact in every immaterial detail." *Id.* § 611 cmt f. The court determines as a matter of law the existence of the fair report privilege by comparing the proceedings or records in question with "the article as a whole." *Reilly v. N. Hills News Record,* 1998 WL 1113472, at *2 (W.D. Pa. Oct. 26, 1998).

II. This country has a storied tradition of protecting speech critical of its judiciary.

Forceful criticism of the judiciary has a long history that undoubtedly is due in part to the demanding standards to which this country's founders held its judges. In the words of John Adams, the second U.S. president, judges such as Appellant in this case are to be people "of experience on the laws, of exemplary morals, invincible patience, unruffled calmness and indefatigable application." David McCullough, John Adams 102 (2001). The requirement of

such daunting attributes was based in part on concerns about the potential for abuses of judicial power: "Individual oppression may now and then proceed from the courts of justice," and "there is no liberty, if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78 (Alexander Hamilton) (citation and internal quotation marks omitted), *available at* http://www.constitution.org/fed/federa78.htm. The potential for excesses of judicial power, as well as the role of executive and legislative representatives in safeguarding against such excesses, were founding principles of the federal Constitution.

There also can be little doubt that the constitutional framers envisioned the press playing an essential role in informing the public about the character and conduct of those who, like judges, wield the power of the state over its citizens. According to Adams, the people have an "indisputable, unalienable, indefeasible, divine" right to the "most dreaded and envied kind of knowledge, I mean, of the characters and conduct of their rulers. … And the preservation of the means of knowledge among the lowest ranks, is of more importance to the public than all the property of all the rich men in the country." John Adams, A Dissertation on the Canon and Feudal Law, Sept. 30, 1765, *available at* http://teachingamericanhistory.org/library/index.asp?document=43. It was Adams then who urged that despite the risk of "insinuations of slander and sedition," the press must "dare to read, think, speak, and write" of its criticism of the "great m[e]n" of government. *Id.*

In light of this heritage, it is essential that a free press report on criticism of members of the judiciary; doing so actually facilitates the administration of justice, assisting in the self-policing of the judiciary. *See, e.g.*, *In re King*, 568 N.E.2d 588, 591 (Mass. 1991) (considering a judicial reassignment and misconduct complaint triggered by a *Boston Globe* article).Yet, *amicus* recognizes that some may posit a competing concern to justify tempering the freedom afforded to

the press and public when criticizing judges: the fear that the independence of the judiciary is threatened by false charges leveled against judges concerning the performance of their official duties. Under this view, allowing this type of speech — particularly speech perceived as unfairly disparaging of members of the judiciary — is detrimental to the functioning of a healthy democracy. This argument has a potentially powerful, but fundamentally misguided, appeal. As Justice Holmes once cautioned:

> If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Moreover, "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion." *Bridges v. California*, 314 U.S. 252, 270 (1941). "And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." *Id.* at 270–71.

Yielding to the fear that the exigencies of the day require special dispensation from traditional constitutional safeguards gravely underestimates the perilous times in which those protections were born, as well as the judgment of history. That is, patriots in the late 18th century sincerely feared that pernicious attacks on public officials posed a serious threat to democratic institutions such that a new measure, the Sedition Act, was needed to counter the effect of such alleged threats. Despite that genuine fear, however, the attack on the validity of the Sedition Act has "carried the day in the court of history … reflect[ing] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent

with the First Amendment." *Sullivan*, 376 U.S. at 276. Generations later, passions of the day were used to defend the provisions of the Espionage Act of 1917 criminalizing criticism of the government. It fell to Justice Holmes to explain — in an opinion that came to form the basis of one of the most fundamental theories underlying the First Amendment — why perceived threats to democracy cannot justify a retreat from basic free speech principles:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

In sum, like the rationales offered in defense of the Sedition and Espionage Acts, the fear that false accusations against sitting judges threaten the independence of the judiciary is no reason to shrink from robust commentary and criticism of judicial performance. History, and the theory of the Constitution, teach us that far more would be lost in that bargain than would be gained.

CONCLUSION

Judge Kendall notes that "[m]uch more is at stake in this appeal than simply one man's reputation . . . ." (Appellant's Br. 3.) *Amicus* could not agree more. The outcome of this case will undoubtedly affect future news coverage involving criticism of public officials in general and the judiciary in particular — speech that lies at the heart of the First Amendment. *Amicus*, who takes very seriously the news media's constitutionally protected role as government watchdog, is disturbed by the possibility that a judge may recover damages for statements, either wholly true, fully privileged or both, about his judicial performance. This case, however, presents this Court with an important opportunity to ensure that the historic tradition of protecting speech about the

judiciary, "to the end that the public may judge whether our system of criminal justice is fair and right," endures. *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari). Accordingly, *amicus* respectfully urges this Court to mandate independent appellate *de novo* review of all constitutional issues in a defamation claim, thereby extending to this territory the standard in the majority of other jurisdictions. Moreover, *amicus* requests that the Court affirm the Superior Court's finding that Judge Kendall did not meet his burden of proving actual malice by clear and convincing evidence. Adoption of his assertions of evidence of actual malice threatens the free flow of information in a manner this country, consistent with its recognition of the public's paramount and vital interest in the performance and integrity of its judiciary, simply cannot tolerate.

Dated: January 18, 2011

Respectfully submitted,

By:_____
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CERTIFICATES OF SERVICE AND BAR MEMBERSHIP

I hereby certify that on this 18th day of January, 2011, two copies of Brief of *Amicus Curiae* The Reporters Committee for Freedom of the Press in Support of Appellees were served via first-class mail, postage pre-paid, on:

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I further certify that I am a member in good standing of the Bar of the Supreme Court of the Virgin Islands.

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