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# The Case of David v. Goliath: *Jewell v. NBC* and the Basics of Defamacast in Georgia

L. Lin Wood\*

*Television in its young life has had many hours of greatness . . . and it has had its endless hours of mediocrity and its moments of public disgrace. There are estimates that today the average viewer spends about two hundred minutes daily with television, while the average reader spends thirty-eight minutes with magazines and forty minutes with newspapers. Television has grown faster than a teenager, and now it is time to grow up. What you gentlemen broadcast through the people's air affects the people's taste, their knowledge, their opinions, their understanding of themselves and their world. And their future.*

—Newton Minow, Chairman of Federal Communications Commission (1961-63)<sup>1</sup>

*I want to discuss the importance of the television news medium to the American people. No nation depends more on the intelligent judgment of its citizens. No medium has a more profound influence over public opinion. Nowhere*

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1. Newton Minow, Chairman, Federal Communications Commission, Address Before the National Association of Broadcasters, Washington, D.C. (May 9, 1961), in WILLIAM SAFIRE, LEND ME YOUR EARS: GREAT SPEECHES IN HISTORY 664-65 (1992).

*in our system are there fewer checks on vast power. So nowhere should there be more conscientious responsibility exercised than by the news media. The question is, Are we demanding enough of our television news presentations? And, are the men of this medium demanding enough of themselves? . . . In Will Rogers' observation, what you knew was what you read in the newspaper. Today, for growing millions of Americans, it is what they see and hear on their television sets.*

— Vice President Spiro T. Agnew (1969-73)<sup>2</sup>

*Then David put his hand in his bag and took out a stone; and he slung it and struck the Philistine in his forehead, so that the stone sank into his forehead, and he fell on his face to the earth.*

—1 Samuel 17:48

## INTRODUCTION

At some point in your career, you may find an individual sitting across from you in your conference room complaining of being “defamed” by false statements made during a television or radio broadcast. Unless you are the rare plaintiffs’ lawyer able to build a successful practice specializing in the area of defamation law, you will next need to take a trip from your conference room to your law library to educate yourself on the intricacies of the law of defamation. Your research will undoubtedly leave you frustrated in your attempt to understand the confusing laws of libel, slander, and “defamacast.”<sup>3</sup>

This Essay attempts to clarify these confusing areas of

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2. Vice President Spiro T. Agnew, Address Before a Republican Gathering in Des Moines, Iowa (1969), in *SAFIRE*, *supra* note 1, at 654.

3. See *infra* notes 8-12 and accompanying text (defining the term “defamacast” and discussing its origin).

law by first setting forth the basic starting points for a case of defamacast in Georgia. This Essay then examines the factual setting of *Jewell v. NBC*<sup>4</sup> and applies the defamacast law to those facts, in order to provide a contextual framework for understanding defamacast law.

## I. THE LAW OF DEFAMACAST

When a defamation action is brought by an individual against a member of the press, the court is faced with competing legal interests. On the one hand, the individual has a common law right to the protection of his own good name. On the other hand, the First Amendment of the United States Constitution guarantees freedom of speech and the press.<sup>5</sup>

### A. Definition

A “defamacast” is a defamation<sup>6</sup> broadcast over either the television or radio airwaves.<sup>7</sup> The term originated, coincidentally, in Georgia, where it was coined by Judge Homer C. Eberhardt in the landmark decision of *American Broadcasting-*

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4. The case was settled out of court for an undisclosed amount of money. See *NBC, Lawyers for Jewell Settle Libel Allegations*, WASH. POST, Dec. 10, 1996, at A3 (discussing monetary settlement between Jewell and NBC for an undisclosed amount); see generally Symposium, *Accountability of the Media in Investigations*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 401 (1997) (colloquium between William Small and Richard Jewell’s attorney, L. Lin Wood, discussing the controversy surrounding Richard Jewell).

5. U.S. CONST. amend. I; see *Diamond v. American Family Corp.*, 368 S.E.2d 350, 351 (Ga. Ct. App. 1988), *cert. denied*, 186 Ga. App. 917 (1988).

6. Defamation is defined as a communication that tends “to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1971). Defamation law protects a party’s “interest in reputation and good name” by compensating for harm to reputation and by giving defamed persons an opportunity to vindicate their reputation in a public forum. *Id.*

7. BLACK’S LAW DICTIONARY 417 (6th ed. 1990) (defining defamacast as defamation by broadcast); L. ELDREDGE, THE LAW OF DEFAMATION § 13 (1978) (defining defamacast as an oral defamation communicated through the broadcast media); see, e.g., *Williamson v. Lucas*, 304 S.E.2d 412 (Ga. Ct. App. 1983) (finding radio broadcast defamed public figure).

*Paramount Theatres, Inc. v. Simpson*,<sup>8</sup> a case that arose out of a television broadcast of *The Untouchables*. In *American Broadcasting*, Judge Eberhardt traced the development of the common law actions of libel and slander<sup>9</sup> and recognized the

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8. 126 S.E.2d 873 (Ga. Ct. App. 1962); see *Pierce v. Pacific & Southern Co.*, 303 S.E.2d 316, 318 (Ga. Ct. App. 1983) (“In the case of *American Broadcasting v. Simpson*, Judge Homer C. Eberhardt . . . coined a new word, now in general use, which is quite descriptive of being defamed by television, to wit ‘defamacast.’”) (quoting *Montgomery v. Pacific & S. Co.*, 206 S.E.2d 631, 634 (Ga. Ct. App.), *aff’d*, 210 S.E.2d 714 (Ga. Sup. Ct. 1974). In formulating this new area of law, the court stated “[d]efamation by broadcast or defamacast presents a factual situation unknown to the common law and is in a new category.” *Id.* at 879. The court added, “this case involve[s] a new type of publication of defamatory matter (a defamacast).” *Id.* at 881; see also ELDREDGE, *supra* note 7 (discussing the emergence of a new type of defamation, defamacast).

In addition to Georgia courts, at least one district court has adopted the term defamacast. See *Spelson v. CBS*, 581 F. Supp. 1195, 1203 (N.D. Ill. 1984).

9. At common law, the constitutional law of defamation consisted of the “twin torts of libel and slander.” PROSSER, *supra* note 6, § 111, at 737. While similar in all respects, except that libel is written defamation and slander is verbal, the two types of defamation developed different rules. Jeffrey F. Ghent, Annotation, *Defamation by Radio or Television*, 50 A.L.R.3d 1311, §§ 4-5 (1974). Courts have recognized defamation by radio and television as a new species of tort, calling it defamacast, in which distinctions between libel and slander are not applicable. *Id.*

The court recognized how the emergence of new media had been the impetus for new law. *American Broadcasting*, 126 S.E.2d at 877. The common law first recognized a right of action only for slander. *Id.* It was not until the development of the printing press did an action for printed defamation, called libel, arise. *Id.* (citing RESTATEMENT OF TORTS § 568 Hist. n. b (1938)). Recognizing the lack of precedent for an action in defamation, the court noted that in the absence of binding precedent, the court “will reach a decision based upon sound principles and fair deductions from the common law.” *Tucker v. Howard L. Carmichael & Sons*, 65 S.E.2d 909, 910 (Ga. Sup. Ct. 1951) (Per Duckworth, C.J.). The court went on to state: “The genius of the common law has been its ability to meet the challenges posed by changing circumstances.” *American Broadcasting*, 126 S.E.2d at 878. As Judge Feld noted:

If the base of liability for defamation is to be broadened in the case of radio broadcasting, justification should be sought not in the fiction that reading from a paper ipso facto constitutes a publication by writing, but in a frank recognition that sound policy requires such a result. . . . That defamation by radio, in the absence of a script or transcription, lacks the measure of durability possessed by written libel, in nowise lessens its capacity for harm. Since the element of damage is, historically, the basis of the common-law action for defamation . . . , and since it is as reasonable to presume damage from the nature of the medium employed

emergence of defamation by broadcast, terming it defamacast.<sup>10</sup>

### B. Statutory Basis of Claim

Georgia has codified its common law of libel and slander.<sup>11</sup> The code addresses liability for defamatory statements in visual or sound broadcast and recoverable damages:

(a) The owner, licensee, or operator of a visual or sound broadcasting station or network of stations and

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when a slander is broadcast by radio as when published by writing, both logic and policy point the conclusion that defamation by radio should be action per se.

Hartmann v. Winchell, 73 N.E.2d 30 (N.Y. Ct. App. 1947).

Although defamacast includes elements of both libel and slander, such that certain traditional principles of both libel and slander apply, such categorization does not control in an action for defamacast. *American Broadcasting*, 126 S.E.2d at 876, 880 n.8. Many courts have had difficulty reconciling defamacast with the traditional libel-slander dichotomy. *Id.* at 877. Some courts have said that distinctions between libel and slander are inapplicable in cases of defamation by radio or television. *See, e.g., Niehoff v. Congress Square Hotel Co.*, 103 A.2d 219 (Sup. Jud. Ct. Me. 1954); *Kelly v. Hoffman*, 61 A.2d 143 (Ct. Err. & App. 1948); *Greer v. Skyway Broadcasting Co.*, 124 S.E.2d 98 (N.C. Sup. Ct. 1962); *Summit Hotel Co. v. National Broadcasting Co.*, 8 A.2d 302 (Pa. Sup. Ct. 1939). Courts disagree as to whether defamation by radio and television is a new tort or whether it is properly classified as libel or slander. *See Jeffrey F. Ghent, Annotation, Defamation by Radio or Television*, 50 A.L.R.3d 1311, 1319 (1990). Where a written script is used, most courts treat defamation by radio and television as libel, *see, e.g., Martins v. Coelho*, 478 N.Y.2d 58 (App. Div. 1984); *First Independent Baptist Church v. Southerland*, 373 So. 2d 647 (Ala. Sup. Ct. 1979); *Gray v. WALA-TV*, 384 So. 2d 1062 (Ala. Sup. Ct. 1980), whereas California courts treat it as slander, *see, e.g., White v. Valenta*, 234 Cal. App. 2d 243 (1965); *Arno v. Stewart*, 245 Cal. App. 2d 955 (1966). One commentator states that the modern trend is to treat broadcast statements as libel. R. Hayes Johnson, *Defamation in Cyberspace: A Court Takes a Wrong Turn on the Information Superhighway in Stratton Oakmont, Inc. v. Prodigy Servs.*, 49 ARK. L. REV. 589, 624 (1996).

10. Two of the most well-renowned commentators in the area of tort law were not fond of Judge Eberhardt's chosen term, referring to the term defamacast as "a barbarous new word." PROSSER, *supra* note 6, § 112, at 787. Even Judge Eberhardt himself noted, while coining the term defamacast, that "[w]hile this may be 'a glossological illegitimate,' 'a neological love-child' we can think of nothing better." *American Broadcasting*, 126 S.E.2d at 879 n.7 (citation omitted).

11. O.C.G.A. § 51-5 (1994); *see Blackstone v. Fisher*, 97 S.E.2d 322, 324 (Ga. Ct. App. 1957).

the agents or employees of any owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast by one other than the owner, licensee, or operator or an agent or employee thereof, unless it is alleged and proved by the complaining party that the owner, licensee, operator or the agent or employee has failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

(b) In no event shall any owner, licensee, or operator or the agents or employees of any owner, licensee, or operator of such a station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of the station or network by or on behalf of any candidate for public office.

(c) In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast, the complaining party shall be allowed only such actual, consequential, or punitive damages as have been alleged and proved.<sup>12</sup>

### C. *Basic Elements of Claim*

A plaintiff bringing a defamacast action must prove that the alleged defamatory statement was in fact defamatory.<sup>13</sup> The burden of proof the plaintiff must meet in this regard is dependent upon whether the plaintiff is a public or private individual.<sup>14</sup>

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12. O.C.G.A. § 51-5-10.

13. *Id.*

14. The actual malice standard, as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), requires a plaintiff in a defamation action who is deemed to be a public figure or public official to prove that the defendant made the defamatory statement with "actual malice," defined as "knowledge of the falsity or reckless disregard of the truth." *Id.* at 279-80. The public plaintiff is required to

## 1. Utterance of a False Statement

In an action for defamacy, the plaintiff must first prove that the statements complained of were false at the time they were made.<sup>15</sup> While this initial step appears elementary, the question of whether the statements were false is often both the most difficult and the most important question to prove in the case. Consequently, early in a defamacy case, perhaps before filing the complaint or even agreeing to pursue the case, an attorney bringing a defamacy action should consider conducting a focus group to help determine whether the issue of falsity presents a difficult issue in the case. Even if falsity appears to be a major problem, pursuit of a close case might be justified if the case has other, more positive aspects, such as extraordinary damage.

### a. Truth as an Absolute Defense

The truth of a statement is an absolute defense to a defamation action because falsity must be proven as part of the plaintiff's case in chief.<sup>16</sup> Accordingly, if the defendant can

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prove actual malice not merely by a preponderance of the evidence, but with "clear and convincing clarity." *Id.* at 285-86. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Court summarized who will be considered a "public figure," and thus subject to the *Sullivan* standards:

[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

*Gertz*, 418 U.S. at 345.

15. O.C.G.A. § 15-5-1; *Pierce*, 303 S.E.2d at 319; *Jones v. Neighborhood Newspapers*, 236 S.E.2d 23, 25 (Ga. Ct. App. 1977).

16. O.C.G.A. § 51-5-6 ("The truth of the charge made may always be proved in justification of an alleged libel or slander."); *see Masson v. New York*, 501 U.S. 496, 516-17 (1991); *Bird v. Weis Broadcasting Corp.*, 388 S.E.2d 710, 711 (Ga. Ct. App. 1989), *cert. denied*, 193 Ga. App. 657 (1990); *Montgomery*, 210 S.E.2d at 720 ("[T]here is no dispute that truth is a complete defense except in a few jurisdictions which make some exception."); *Savannah News Press v. Hartridge*, 138 S.E.2d 173, 175 (Ga. Ct. App. 1964); *Pierce*, 303 S.E.2d at 319.



prove that the allegedly defamatory statement is in fact true, the law requires a directed verdict in favor of the defendant. Many a defense lawyer will be quick to quote Blackstone as support for this proposition, as Justice Hiram K. Undercofler did in his dissenting opinion in *Pacific & Southern Co. v. Montgomery*:

We suppose there has never been a time since recognition of the action when truth was not an absolute defense. Blackstone asserted: ‘Also if the defendant be able to justify, and prove the words to be true, no action will lie, even though special damage hath ensued; for then it is no slander or false tale. As if I can prove a tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true it is *damnum absque injuria*; and where there is no injury, the law gives no remedy. . . . The truth is an answer to the action, not because it negatives the charge of malice . . . but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect to an injury to a character which he does not, or ought not, to possess.’<sup>17</sup>

## 2. The False Statement Must Be Defamatory

Defamacy is actionable whether the underlying defamation action is based on libel or on slander.<sup>18</sup> Because de-

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17. 210 S.E.2d 714, 720 (citations omitted).

18. The Georgia Court of Appeals recognizes a separate cause of action for defamation by broadcast, “defamacast,” which includes both libel and slander. *See, e.g., Pierce*, 303 S.E.2d at 318 (“Defamation by telecast is now actionable by law regardless of whether it is in libel or slander.”); *S & W Seafoods Co. v. Jacor Broadcasting of Atlanta*, 390 S.E.2d 228 (Ga. Ct. App. 1989), *cert. denied*, 194 Ga. App. 912 (1990); *Brewer v. Rogers*, 439 S.E.2d 77 (Ga. Ct. App. 1993), *cert. denied*, 114 S. Ct. 2712 (1994); *Montgomery v. Pacific & S. Co.*, 202 S.E.2d 631, 634, *aff’d*, *Pacific & S. Co. v. Montgomery*, 233 Ga. 175 (1974); *American Broadcasting*, 126

famacast contains elements of the laws of both libel and slander, an attorney bringing a defamacast action must consider whether the false statement meets Georgia's statutory definition of libel,<sup>19</sup> or whether it falls within Georgia's statutory definition of slander.<sup>20</sup>

a. The Statement Must Be Viewed in Context

In a defamacast action, a defamatory statement may be made in indirect terms or by insinuation; accordingly, "the publication thereof must be construed as a whole."<sup>21</sup> Likewise, it is true that defamation can be found not only in the actual words used, but also in the innuendo that may arise from the words.<sup>22</sup>

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S.E.2d at 879; *WSAV-TV v. Baxter*, 166 S.E.2d 416 (Ga. Ct. App. 1969).

19. O.C.G.A. § 51-5-1(a). A libel is a "false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and expose him to public hatred, contempt, or ridicule." *Id.*

20. O.C.G.A. § 51-5-4(a). Slander or oral defamation is defined as:

(a)(1) Imputing to another a crime punishable by law;

(2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society;

(3) Making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or

(4) Uttering any disparaging words productive of special damage which flows naturally therefrom.

*Id.*

21. *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 553 (Ga. Ct. App.), *cert. denied*, 190 Ga. App. 899 (1989) (citing *Garland v. State*, 84 S.E.2d 9, 11 (Ga. Sup. Ct. 1954)). The language must first be ambiguous before context will be considered, *Southeastern Newspapers Inc. v. Walker*, 44 S.E.2d 697, 700 (Ga. Ct. App. 1947) (stating that where "words are ambiguous . . . the plaintiff may . . . aver the meaning with which he claims that it was published"), because "if the words are clearly not defamatory, they cannot have their meaning enlarged by innuendo," *id.*; see also *Aiken v. Constitution Publishing Co.*, 33 S.E.2d 555 (Ga. Ct. App. 1945).

22. *Montgomery*, 202 S.E.2d at 634 (stating that "[w]ords apparently innocent may convey a libelous charge when considered in connection with innuendo and circumstances surrounding the publication"); see also *Davis v. Macon Tel. Publishing Co.*, 92 S.E.2d 619, 633, 635 (Ga. Ct. App. 1956)).

A related concept is the "extrinsic fact" approach, which allows a plaintiff to use extrinsic evidence to show that a defamatory statement refers to her, although she is not named in the statement. *American Broadcasting*, 126 S.E.2d at 880 ("[O]ne not named in the publication may show by extrinsic facts that the

Defense lawyers will invariably accuse the plaintiff of relying on “isolated statements” and taking the alleged defamatory statements “out of context.” While defamatory statements must be viewed in context with other pertinent comments or an entire conversation or report, correct, non-defamatory statements in one part of a conversation or report should not excuse or justify false, defamatory statements in another part of the conversation or report.

#### b. Statements of Opinion

It is also espoused by many First Amendment defense lawyers that “opinion” cannot be the basis for a defamation action. In fact, “[t]here is no ‘wholesale defamation exemption for anything that might be labeled opinion,’”<sup>23</sup> because any such exemption would ignore the fact that expressions of opinion often imply an assertion of objective fact.

#### c. The Average Listener Test

The issue of defamation is, as a general rule, a matter of fact to be determined by a jury, except in the clearest of cases.<sup>24</sup> The jury evaluates whether the allegedly defamatory statement is in fact defamatory by looking at what the average listener would construe the words to mean.<sup>25</sup>

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defamation applies to him.”). Whether the plaintiff is within the group defamed is a question for the jury. *Id.* at 880-81.

23. *Eidson v. Berry*, 415 S.E.2d 16 (Ga. Ct. App.), *cert. denied*, 202 Ga. App. 905 (1992) (citing *Milkovich v. Lorrain Journal Co.*, 497 U.S. 1 (1990)).

24. *Brewer v. Rogers*, 439 S.E.2d 77 (1993), *cert. denied*, 114 S. Ct. 2712 (1994).

25. *Macon Tel. Publishing Co. v. Elliott*, 302 S.E.2d 692, 694 (Ct.), (*cert. vacated*, 309 S.E.2d 142 (per curiam)), *cert. denied* 466 U.S. 971 (1983) (“[I]n considering whether a writing is defamatory as a matter of law, we look not at the evidence of what the extrinsic circumstances were at the time indicated in the writing, but at what construction would be placed upon it by average reader.”) (citing *Southeastern Newspapers v. Walker*, 44 S.E.2d 697, 700 (1947)); *Atlanta Journal Co. v. Doyal*, 60 S.E.2d 802 (Ga. Ct. App. 1950); *Garland v. State*, 84 S.E.2d 9 (Ga. Sup. Ct. 1954). The Georgia Supreme Court recognized this concept as early as in *Little v. Barlow*, 26 Ga. 423 (1858).

### 3. Private Individual or Public Official/Figure?

Whether a plaintiff is a “public official” is generally not the source of a great deal of legal research or factual development in discovery.<sup>26</sup> However, whether an apparently private citizen will be deemed a “public figure” for purposes of a lawsuit is fertile ground for a legal battle that may not be resolved until appeal.<sup>27</sup>

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26. The Supreme Court defined the terms “public official” and “public officer” in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), explaining that public officials are government employees who hold “a position in government that [has] such apparent importance that the public has an independent interest in the quality if the person who holds it, beyond the general public interest in the quality and performance of all government employees.” *Rosenblatt*, 383 U.S. at 86. Public officers are persons “in the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs.” *Id.* at 85. Although the Supreme Court has stated that public officers do not include all public employees, see *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979), the Court’s definition does not clearly distinguish between public officials and mere government employees. See *id.*

27. The Supreme Court has defined a public figure as a person who has assumed the risk of adverse publicity and criticism by affirmatively entering the public eye. *Gertz*, 418 U.S. at 344-45. This inexact standard has been deemed “much like trying to nail a jellyfish to the wall.” *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). The rationale is that a public figure has an effective self-help remedy to use the mass media to rebut defamatory falsehoods: they are both less vulnerable to injury because of their opportunity to remedy the injury, and less deserving of recovery because they affirmatively put themselves in the public eye. *Gertz*, 418 U.S. at 344-45.

The scope of the privilege afforded a particular public figure depends upon the type of public figure the individual is. *Id.* The Supreme Court has recognized three types of public figures: the all-purpose public figure, the limited-purpose public figure, and the involuntary-public figure. *Id.* General purpose public figures are individuals who have national and “pervasive fame or notoriety,” *id.* at 351; *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976) (requiring “public figure” to have national, not merely local, notoriety), or “occupy positions of such pervasive power and influence that they are deemed public figures for all purposes,” *Gertz*, 418 U.S. at 345, and are protected by the *Sullivan* standard in all aspects of their lives. *Gertz*, 418 U.S. at 345; see also J. BARRON & C. DENIES, HANDBOOK OF FREE SPEECH AND FREE PRESS § 6:12 (1979).

Limited purpose public figures are persons who “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issue involved.” *Gertz*, 418 U.S. at 345. Therefore, the *Sullivan* privilege attaches only to the individual’s discussion of the public controversy involved. *Firestone*, 424 U.S. at 454-55. Involuntary public figures, individuals who are thrust into the public limelight by no affirmative action on their own part, are

In a defamacist action, unless the contention does not pass the straight face-test, the defense will invariably claim that the plaintiff is a “public figure.” The defense logic is simple: most individuals who merit comment on television must have some personal appeal to the public or must be involved in some public controversy. The media defendant will often assert a defense which, in practical effect, was created by its own act of placing a private individual in the public eye. The plaintiff cannot over-prepare its legal research and factual development in discovery on this issue because the law to be applied and the plaintiff’s burden of proof at trial will depend on its resolution.

a. Categorization of Person in General

Whether an individual is a public figure is a mixed question of law and fact to be determined on a case-by-case basis by the court, rather than by the jury.<sup>28</sup>

b. Private Individuals

A private individual may recover if it is demonstrated, by a preponderance of the evidence, that the broadcaster failed to use “ordinary care” to determine the truth or falsity of the statement.<sup>29</sup> A broadcaster may be held liable even for

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truly rare and receive *Sullivan* protection for the limited reason for which they were put in the public eye. *Id.*

28. *Brewer v. Rogers*, 439 S.E.2d at 81 (citing *Sewell v. Eubanks*, 352 S.E.2d 802, 803-04 (Ga. Ct. App. 1987); *Williams v. Trust Co. of Ga.*, 230 S.E.2d 45, 49 (Ga. Ct. App. 1976)); *see also* *Ellerbee v. Mills*, 422 S.E.2d 539, 542 (Ga. Sup. Ct. 1992) (Fletcher, J., concurring).

29. *Diamond*, 368 S.E.2d at 353, *overruling* *Montgomery v. Pacific & S. Co.*, 206 S.E.2d 631 (Ga. Ct. App. 1974); *WSAV-TV v. Baxter*, 166 S.E.2d 416 (Ga. Ct. App. 1969). The Georgia Supreme Court applied to broadcasters the relaxed standard of ordinary care established in *Gertz* for publishers, and which had been adopted by the majority of states. *Triangle Publications v. Chumley*, 317 S.E.2d 534, 536 (Ga. Sup. Ct. 1984). The standard of ordinary care requires a broadcaster to employ “that degree of care required of a reasonable broadcaster under the circumstances” to determine the truth or falsity of the statement. *Diamond*, 368 S.E.2d at 353. Whether a defendant has practiced the requisite care is a question for the jury to decide. *Triangle Publications*, 317 S.E.2d at 537-38.

a newsworthy report if it contains a defamatory statement and if the broadcaster failed to employ the procedures a reasonable broadcaster under the circumstances would have employed to assure the accuracy of the statement before broadcasting the report.<sup>30</sup>

In *Triangle Publications, Inc. v. Chumley*,<sup>31</sup> the Supreme Court of Georgia adopted the ordinary care standard for defamation of a “private figure plaintiff” and enunciated some guidelines for defining this standard of conduct:

At trial of the negligence issue, the standard of conduct required [of defendant] will be defined by reference to the procedures a reasonable publisher in [defendant’s] position would have employed prior to publishing an advertisement such as this one. [Defendants] will be held to the skill and experience normally exercised by members of their profession. Custom in the trade is relevant but not controlling. When applying the ordinary care standard . . . , the jury is authorized to consider, among other factors: (1) whether the material was topical and required prompt publication, or whether sufficient time was available for a thorough investigation of its contents; (2) the newsworthiness of the material and public interest in promoting its publication; (3) the extent of damage to the plaintiff’s reputation should the publication prove to be false; . . . and (4) the reliability and truthworthiness [sic] of the source. The thoroughness of the accuracy check a reasonable person would make before publishing a defamatory statement will vary, depending on the relative weight of these factors and the circumstances of the case.<sup>32</sup>

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30. *Diamond*, 368 S.E.2d at 353.

31. 317 S.E.2d 534 (Ga. Sup. Ct. 1984).

32. *Id.* at 537 (citing RESTATEMENT (SECOND) OF TORTS, § 580(b), cmt. g (1972)).

### c. Public Officials and Public Figures

If the public plaintiff<sup>33</sup> is a public official or public figure, however, the plaintiff must show actual malice, not simply a failure of ordinary care. Furthermore, actual malice must be shown by clear and convincing proof, rather than by a preponderance of the evidence.<sup>34</sup> These showings are constitutionally required under *New York Times v. Sullivan*,<sup>35</sup> which held that a public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with actual malice, and defined actual malice as making a defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>36</sup> Under *Gertz v. Robert Welch, Inc.*,<sup>37</sup> “an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts[, or,] [m]ore commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”<sup>38</sup> In either case, such persons as-

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33. For purposes of this Essay, the term “public plaintiffs” refers to public officials and public figures collectively.

34. *Sullivan*, 376 U.S. at 285-86 (requiring a public plaintiff to prove with “convincing clarity” that defendant made statement with actual malice). The *Sullivan* progeny revised the clear and convincing standard. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In order to establish liability for defamation under the rule of *Sullivan* and its progeny, public officials and public figures must not only prove “actual malice”—defined as “knowledge of the falsity or reckless disregard of the truth,” *Sullivan*, 376 U.S. at 279-80, but also must do so with clear and convincing clarity. *Id.* at 285-86. To prove actual malice, a public plaintiff must show that defendant at least “entertained serious doubts as to the truth” of the supposedly defamatory statement. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

35. 376 U.S. 254 (1964).

36. See *supra* note 14 and accompanying text (defining “actual malice”); see also *supra* note 34 and accompanying text (discussing convincing clarity standard of proof).

37. 418 U.S. 323 (1974).

38. *Gertz*, 418 U.S. at 345, 351; see, e.g., *Byers v. Southeastern Newspaper Corp.*, 288 S.E.2d 698 (Ga. Ct. App.), *cert. denied*, 161 Ga. App. 717 (1982) (holding the dean of a state college a public figure for the limited purpose of his participa-

sume special prominence in the resolution of public questions.

#### 4. Respondeat Superior

In a slander action, a corporation or employer cannot be held liable for the defamatory statement of an agent or employee unless it affirmatively appears that the agent or employee was expressly directed or authorized to slander the plaintiff.<sup>39</sup> Because a defamacast is not considered to be slander, it has been held that the libel rule recognizing respondeat superior liability is applicable to an action for defamacast.<sup>40</sup>

#### 5. Damages

Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls:  
Who steals my purse steals trash; 'tis  
something, nothing;  
'Twas mine, 'tis his, and has been slave  
to thousands;  
But he that filches from me my good name  
Robs me of that which not enriches him,  
And makes me poor indeed.<sup>41</sup>

Private plaintiffs may recover compensatory damages on proof of mere fault, but may not recover punitive damages absent proof the defendant acted with actual malice.<sup>42</sup>

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tion in controversy relating to his tenure as dean of college). In *Gertz*, the Supreme Court addressed the issues raised in *Rosenbloom v. Metromedia*, which had held that the *Sullivan* privilege extend not only to public plaintiffs, but also to all "matters of public or general concern." *Rosenbloom v. Metromedia*, 403 U.S. 29, 44 (1971), *overruled by* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* overruled *Metromedia* by limiting the expansion of *Sullivan* to only the discussion of public officials and public figures. *Gertz*, 418 U.S. at 323.

39. *Garren v. Southland Corp.*, 228 S.E.2d 870 (Ga. Sup. Ct. 1976).

40. *Williamson v. Lucas*, 304 S.E.2d 412 (Ga. Ct. App. 1983).

41. WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3.

42. *Gertz*, 418 U.S. at 350. Proof of actual malice is required to impose liability for statements defaming a public figure. See *Byers v. Southeastern News-  
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### a. Actual or Consequential Damages

Actual damages is not necessarily restricted to monetary loss.<sup>43</sup> Indeed, “[w]ounding a man’s feelings is as much actual damage as breaking his limbs.”<sup>44</sup>

### b. Punitive Damages

In a defamacast action recovery for punitive damages for a private individual or a public plaintiff is not permissible without a showing that the broadcaster possessed knowledge of the falsity of the defamatory statement or exercised reckless disregard for the truth, that is, that he acted with actual malice as required by *Sullivan*.<sup>45</sup>

## 6. Retraction Demand

While not expressly mandatory, the retraction demand procedure established by Georgia statutory law should be deemed as mandatory as a practical matter.<sup>46</sup> The retraction

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per Corp., 288 S.E.2d 698, (Ga. Ct. App.), *cert. denied*, 161 Ga. App. 717 (1982); *Sewell v. Eubanks*, 352 S.E.2d 802, 803 (Ct. App. Ga. 1987).

The United States Supreme Court in *Gertz* permitted the states to define for themselves the appropriate standard of liability for defamation, restricting them only from imposing liability without fault. *Gertz*, 418 U.S. at 360. The guidelines set forth in *Gertz* permit recovery of punitive damages for defamation only on a showing of actual malice. *Gertz*, 418 U.S. at 396. Although *Gertz* relaxed the standard of proof necessary for a plaintiff to recover actual damages for defamation, the evidence must still meet the more demanding standard of “actual malice” for recovery of punitive damages. *Diamond*, 368 S.E.2d at 354. Defamacast statutes, on the other hand, permit the recovery of those actual consequential and punitive damages as are alleged and proved. *Fuqua Television, Inc. v. Fleming*, 215 S.E.2d 694, 696 (Ga. Ct. App. 1975).

43. O.C.G.A. § 51-5-10(c).

44. *Fuqua*, 215 S.E.2d at 696 (quoting *Head v. Georgia Pac. Ry. Co.*, 7 S.E. 217 (Ga. Sup. Ct. 1887); *Mabry v. City Electric Ry Co.*, 42 S.E. 1025 (Ga. Sup. Ct. 1902)).

45. *Gertz*, 418 U.S. at 349; *Diamond v. American Family Corp.*, 368 S.E.2d 350 (Ga. Ct. App. 1988), *cert. denied*, 186 Ga. App. 917 (1988). Because actual malice is part of the public plaintiff’s case in chief, the issue does not affect the public plaintiff’s case. *Fuqua*, 215 S.E.2d at 696 (stating that recovery is available for both actual and punitive damages).

46. O.C.G.A. § 51-5-12 (Supp. 1996).

demand provision will inevitably impact the damage issues at trial and may control the admissibility of evidence concerning the demand or lack of demand for retraction:

(a) In any civil action for a defamatory statement which charges the visual or sound broadcast of an erroneous statement alleged to be defamatory, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction or omitted to request retraction.

(b) In any such action, the defendant may allege and give proof of the following matters, as applicable:

(1) (A) That the matter alleged to have been broadcast and to be defamatory was published without malice;

(B) That the defendant, in a regular broadcast of the station over which the broadcast in question was made, within three days after receiving written demand, corrected and retracted the allegedly defamatory statement in as conspicuous and public a manner as that in which the alleged defamatory statement was broadcast; and

(C) That, if the plaintiff so requested, the retraction and correction were accompanied, on the same day, by an editorial in which the allegedly defamatory statement was specifically repudiated; or

(2) That no request for correction and retraction was made by the plaintiff.

(c) Upon proof of the facts specified in paragraph (1) or (2) of subsection (b) of this Code section, the plaintiff shall not be entitled to any punitive damages and the defendant shall be liable only to pay actual damages. The defendant may plead the broadcast of the correction, retraction, or explanation, including the

editorial, if demanded, in mitigation of damages.<sup>47</sup>

In the event the issuance of a retraction is made as contemplated by the statute, the retraction only addresses damage issues and does not bar the lawsuit for defamacist. Sometimes defamacist actions address, what is a jury issue, the question of whether or not the correction and retraction was broadcast “in as conspicuous and public a manner as that in which the alleged defamatory statement was broadcast.”<sup>48</sup>

## II. *JEWELL V. NBC* ANALOGIZED TO DAVID AND GOLIATH

### A. *Richard Jewell as David*

Richard Jewell was working as a private security guard in the early morning hours of Saturday, July 27, 1996, when he discovered the infamous unattended package now known to contain the bomb that would explode at Centennial Olympic Park, killing one person and injuring over one hundred others.<sup>49</sup> Although initially credited with saving many lives for his role in spotting the package and in evacuating park patrons,<sup>50</sup> Richard Jewell was later identified in an Olympic extra edition (check if need caps on Extra Edition) of *Atlanta Journal*, on the afternoon of July 30, as a suspect in the FBI’s bombing investigation.<sup>51</sup> On October 26,

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47. *Id.*

48. *Id.*

49. Max Frankel, *An Olympian Injustice*, N.Y. TIMES, Sept. 22, 1996, at 60; Mike Lopresti, *Guard’s Alertness in Park Makes Him an Unexpected Hero*, USA TODAY, July 29, 1996, at 4A.

50. See Kent E. Walker, *Atlanta Games Day 12. Olympic City Heroes at the Park: Guard’s Quick Thinking Saved Lives*, ATL. J. & CONST., July 30, 1996, at S29 (proclaiming Richard Jewell a “hero” and describing how he saved hundreds of lives by his quick thinking). On May 15, 1997, the American Police Hall of Fame honored Richard Jewell for saving the lives of countless people by helping to evacuate Centennial Park after spotting the suspicious package which contained the bomb. See *Hero-Turned-Villain-Turned Hero Honored By Cops*, STAR LEDGER, May 17, 1997, at 3; *Jewell Honored for Saving People*, ST. LOUIS POST-DISPATCH, May 18, 1997, at 5A.

51. Kathy Scruggs & Ron Martz, *FBI Suspects “Hero” Guard May Have*

1996, the United States Department of Justice declared in writing that, based on the evidence developed in the investigation, Richard Jewell was not considered a target of the bombing investigation.<sup>52</sup> Richard Jewell was never arrested; he was never charged with any crime. In fact, Richard Jewell was an innocent man.

#### B. *NBC and Tom Brokaw as Goliath*

Tom Brokaw<sup>53</sup> is the anchor of *NBC Nightly News*. On Tuesday, July 30, 1996, Mr. Brokaw appeared on *NBC PrimeTime Evening News*, hosted by Bob Costas, which was covering Day 12 of the 1996 Centennial Olympic Games in Atlanta, Georgia.<sup>54</sup> NBC was reported to have averaged a “twenty rating”<sup>55</sup> for the broadcast, meaning it was viewed

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*Planted Bomb*, ATLANTA J. & CONST., July 30, 1996, Extra J. Ed., at X1; see *The Atlanta Olympic Bombing Case and Possible FBI Leaks to the Media: Hearings Before the Terrorism, Technology & Government Information Subcomm. of the Senate Judiciary Comm.*, 104th Cong., 2d Sess. (1996) (testimony of Louis Freeh, Director, FBI).

52. Pierre Thomas & Bill McAllister, *Guard No Longer a Suspect in Olympic Park Bombing: Justice Department Serves Formal Notice*, WASH. POST., Oct. 27, 1996, at A1.

53. One might analogize Richard Jewell and NBC and Tom Brokaw to the Biblical characters David and Goliath. Analogizing NBC and Tom Brokaw to Goliath in fact exceeds the implications of the Biblical story, as NBC (as well as its parent company, General Electric) and Mr. Brokaw clearly fit the non-biblical definition of Goliath: a person or thing of colossal power or achievement. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 976 (3d ed. 1986) (defining Goliath, in the non-biblical sense, as giant). In the Biblical sense, Goliath is the Philistine giant whom David killed with a stone shot from a sling. 1 Samuel 17:4 (“And a champion went out from the camp of the Philistines, named Goliath, from Gath, whose height was six cubits and a span.”); *id.* at 17:49 (“Then David put his hand in his bag and took out a stone; and he slung it and struck the Philistine in his forehead, so that the stone sank into his forehead, and he fell on his face to the earth.”); see *infra* note 57 (quoting the biblical scene in which David slays Goliath).

54. *NBC Nightly News with Tom Brokaw* (NBC television broadcast, July 30, 1996).

55. A “rating” is the percentage of television viewers tuned in to a particular program out of all potential viewers. See *How Nielsen Measures Ratings*, PEORIA J. STAR, Jan. 5, 1997, at C11. Competing companies provide rating services, one of which is Nielsen Media Research. *Id.* Nielsen Media Research gathers ratings for programs on nationwide broadcast and cable stations. *Id.* Five thousand households, selected at random, are fitted with a device that records programs being

by more than twenty million households. During the broadcast, the following exchange occurred between Tom Brokaw and Bob Costas:

MR. BROKAW: FBI agents do have [Jewell's] apartment under surveillance tonight, and even though there is no search warrant that we know of, none of the high level sources that NBC has been talking to is waving us off Mr. Jewell as the focus of this investigation. So, Bob, that is what we know at this hour.

MR. COSTAS: If, for the sake of argument, Mr. Jewell's lawyer is correct and people are barking up the wrong tree and he ultimately is not arrested, they have done him a grave disservice.

MR. BROKAW: I think it is going to be acutely embarrassing for the FBI as well. I don't know whether they are going to arrest him tonight. The speculation is that the FBI is close to making the case, in their language. They probably have enough to arrest him right now, probably enough to prosecute him, but you always want to have enough to convict him as well. There are still some holes in this case.

MR. COSTAS: So let's assume that that's true and they do arrest him and they have enough evidence. Again, for the sake of argument, they arrest him tomorrow or the next day. You might ask, why not wait until then before saying anything publicly? Why toss this guy out there now?

MR. BROKAW: I think one of the reasons that they

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viewed at any given time. *Id.* Through information compiled from these "Nielsen" homes, television programs are given "ratings." *Id.*

The popularity of a television program is also measured by "shares;" a television program's "share" is the percentage of televisions tuned in to a particular program, out of all televisions in use at that time. *Id.* For example, if 20% of the Nielsen households who are watching television at a given time tune in to the NBC television program "Seinfeld," the show gets a "20 share." *See id.* Consequently, a 20 share is usually substantially fewer viewers than a 20 rating. *See id.*

may be doing this is that there is, in the language of the FBI or in the law enforcement, they sweat a guy. And one of the ways that you do that is put the kind of public pressure that he has on him tonight. Now, we have to be absolutely clear that everyone understands, he is not yet officially a suspect. He is the focus of this investigation. But this is coming to us from everywhere, Washington, Atlanta, Pete Williams who covers the Justice Department, Fred Francis covers everybody down here. They are only using one name tonight, and that is Richard Jewell.

MR. COSTAS: Tom, thanks. I am sure we will be talking to you again soon.

The ultimate question is whether Richard Jewell was the victim of a defamacast as the result of the previous statements by Tom Brokaw.<sup>56</sup>

### III. THE ANSWER: A JURY QUESTION

*They probably have enough to arrest him right now, probably enough to prosecute him . . . They are only using one name tonight, and that is Richard Jewell.*

—Tom Brokaw

The viewing public believes that the major network news anchors report news in a truthful manner. The viewing public believes Dan Rather and Peter Jennings. The viewing public believes Tom Brokaw.

On July 30, 1996, at a time when the FBI was not even willing to publicly acknowledge that Richard Jewell was an official “suspect,” the gist of Tom Brokaw’s statements to millions of television viewers was that the FBI had its man

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56. In addition to suing the broadcast network NBC, Richard Jewell’s attorneys brought, and continue to bring, actions against the print media. *See Jewell Sues Papers, College Over Olympic Blast Stories*, L.A. TIMES, Jan. 29, 1997, at A5.

and its man was Richard Jewell. Tom Brokaw turned investigative suspicions into legal probabilities. The average viewer could not ignore the clear implication of the Brokaw comments that there was, in all probability, damning evidence against Richard Jewell warranting his arrest and prosecution for bombing Centennial Olympic Park.

The problem is that Tom Brokaw's statements were false. No evidence had been developed as of July 30 (nor at any time thereafter) that was legally sufficient to justify the arrest or prosecution of Richard Jewell. Richard Jewell was an innocent man.

The statements by Tom Brokaw were defamatory. The bomber of Centennial Olympic Park faces the federal punishment of death for an act of terrorism. To state falsely to the viewing public that evidence existed sufficient to justify the arrest and prosecution of Richard Jewell unquestionably injured his reputation, exposed him to public hatred, contempt, and ridicule, and imputed to him a crime punishable by death.

The statements by Tom Brokaw were uttered with a reckless disregard for their truth or falsity. Mr. Brokaw's characterization of the evidence against Richard Jewell was nothing more than his personal conclusions stated as objective fact to the viewers; there was no prior substantiation whatsoever from credible law enforcement sources. Tom Brokaw made the statements at the same time he acknowledged that there had been no search warrant issued, that Mr. Jewell was not an official suspect, and that there were holes in the case against Mr. Jewell. These acknowledged facts required Mr. Brokaw to refrain from stating that there was sufficient evidence to arrest and prosecute Mr. Jewell. These undisputed facts, acknowledged by Mr. Brokaw, demanded further investigation by NBC into the credibility of the government leak of Mr. Jewell's name, not an on-the-air evaluation by Mr. Brokaw of the evidence against Mr. Jewell.

Early in any criminal investigation, there will usually be a number of individuals investigated by law enforcement authorities. Most of these early “suspects” are innocent and are never charged with, or arrested for, any crime. The American people cannot, and should not, tolerate their national news anchors first revealing the identity of these early suspects of an investigation and then falsely informing the viewing public that there is evidence justifying that individual’s arrest and prosecution. When conduct occurs, as it did in the case of Richard Jewell, there must be accountability. But for the out-of-court settlement by NBC with Richard Jewell, I am confident a jury would have found Mr. Brokaw accountable for his false statements by answering the ultimate question with a resounding, “yes.”

#### CONCLUSION

Ultimately, the same trial considerations apply to a defamast action as apply to any other personal injury action. The success of the case will most likely turn, in large part, on how well the jury likes the plaintiff and the degree of preparation by the involved attorneys. Cases involving “honest mistake” types of false statements are best avoided, while concentrating on aggressively handling cases involving serious, false attacks on an individual’s character and reputation. Even cases involving a private individual as plaintiff should develop and present “reckless disregard” evidence, not only for the possible recovery of punitive damages, but also to persuade the jury to the plaintiff’s side on the liability issue in the first instance. The reality is that few plaintiffs’ attorneys can afford to “specialize” in the area of defamation, but defense lawyers can command big reputations and even bigger incomes serving as “defenders of the First Amendment” for their media clients. The plaintiff needs as large a stone as possible in his or her sling.



Finally, remember at all times: David won.<sup>57</sup>

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57. 1 *Samuel* 17:50 (“So David prevailed over the Philistine with a sling and a stone, and struck the Philistine and killed him.”).