

**IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA**

CHARLOTTE PRITT,

Appellant,

Appeal No. 29326

**THE REPUBLICAN NATIONAL
COMMITTEE, ET AL.,**

Appellees.

APPELLANT'S REPLY BRIEF

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Appellee's Mischaracterizations and Misstatements

Appellant submits this brief in response to the Brief of Appellees in the above-styled appeal. The Appellees' brief is so replete with misstatements of fact and mischaracterizations of the Appellant's contentions that it is necessary, at the outset, to correct a number of their assertions.

For ease of reference, this portion of Appellant's brief will respond to the Appellees' misstatements and mischaracterizations by reference to the page number of Appellees' brief in which they occur.

Pages 1, 8, 9, 10, 11, 15, 19, 20, 21, 25 :

Throughout the Appellees' Brief is the repeated contention that the law of the case requires Appellant to show by "clear and convincing evidence that the statements at issue were false." Clearly, that is not the law of West Virginia, and a fuller discussion of this issue will ensue in Appellant's substantive arguments in response to Appellees' Brief.

Page 2:

Appellant contends that the statement that Appellant “was not a school teacher” when the advertisements at issue aired, “having left that profession in 1992” is inaccurate. There is and will be no proof that Appellant, subject to the periodic certification requirement for her profession, ever was disqualified to be a school teacher. Furthermore, the profession of being a school teacher, much like that of a lawyer, is one to which you remain a member without regard to whether you are actively practicing that profession.

Pages 2, 3, 24 & 25 f.n. 10:

Appellees react strongly to Appellant’s questioning of why the National Republican Senatorial Committee would be participating in a West Virginia state election for Governor, and attempt to reject the validity of Appellant even raising this issue. In their brief, at page 2 the Appellees state:

“The NRSC engages in nationwide activities to support Republican candidates for the United States Senate and state level offices.”

The legality or illegality of the scheme that Appellees used in publishing the “Ads opposing Pritt” is not a primary issue in this case. However, both the legality, or lack thereof, as well as all other circumstances surrounding the airing of these ads is relevant to the issue of malice. Furthermore, the two decisions which the Appellees cite in footnote 10 at page 25 are appeals based on the same fact scenario and involve Tim Wirth of Colorado. Wirth was a Democratic candidate for United States Senate, not a state office. Thus, these decisions are factually inapposite to the issue of why the National Republican Senatorial Committee was participating in a West Virginia state election.

Page 3:

The Appellees’ observation that:

“As Ms. Pritt acknowledges, the Victory Committee filed a Notice of Dissolution on April 6, 1998, and has dissolved. *See App. Br. At 4-5.* Accordingly, it is not a real party in interest here.”

The record will reflect that the Victory Committee was nothing more than a temporary alter-ego of the Republican National Senatorial Committee, which remains a party to this action.

Page 3, n. 3:

The representation that the Florida case of Dicks v. NRSC “settled for nuisance value” is either disingenuous on the part of the Republican Committee or reflects their perspective on the cost of dirty politics, as the Dicks case settled for \$99,000.00.

Pages 3, 4:

At pages 3 and 4 of Appellees’ brief, they attempt to justify the “Ads opposing Pritt” on the basis that Appellant was subject to “essentially these same criticisms, about the same votes” in the 1992 and 1996 primary elections. This is not only a non-issue, as conduct which occurred in 1992 and 1996 is not at issue in this case, but is also an obvious attempt to obfuscate the real issues before this Court. The Appellees’ contention that prior false ads **justified** the Appellees in publishing the false and defamatory ads which are at issue in this case, however, **strengthens** the right of one in the Appellant’s position to seek redress for this conduct.¹ Furthermore, reference to the transcript testimony will reflect that the statement in footnote 4, page 4 that Appellant “does not dispute that they use virtually the same language to describe the same votes on the same legislation” is as false as the “Ads opposing Pritt.” Reiterating the most important point,

¹The 1992 and 1996 ads to which Appellees allude were misleading, but did not step over the line of falsehood and malice to the extent that they were actionable.

however, the 1992 and 1996 primary ads are irrelevant as they are not the subject of this lawsuit.

Page 6:

Appellees' statement at page 6 that, "Ms. Pritt failed to list the advertisements at issue here in the long litany of reasons for her loss" is false. It is as false and the ads themselves, because what the Appellant actually said in the record of this case was:

"What I am challenging here is the word usage of 'blaming'. I have said that I felt they were a factor...I didn't attribute it to any one thing. I said there were several factors that were involved...And then the ads, the false, misleading ads that the Republican National Committee put out simply was the icing on the cake. It was the rain barrel effect, that tipped everything over."Trs. III-58/66

Pages 7 and 11:

Appellant-Plaintiff below objected to the Appellees' unsolicited filing of a proposed order granting Summary Judgment some 60 days after the August 26th hearing and approximately 6 ½ months before the Circuit Court made its decision and entered an order. As noted elsewhere, the Circuit Court simply took this proposed October 1999 order, scratched out 1999 and entered it on May 15, 2000. Appellant's objection was grounded on the proposition that it was inappropriate and presumptive on the part of Appellees to submit this unsolicited order manifesting a decision that had not been made without the court's request. In reaction to this at pages 7 & 11 of its brief, Appellees tell the Court at page 7:

"Ms. Pritt withdrew the objection" to this proposed order."

And again at page 11:

"Moreover, as discussed above, at the May 11, 2000, pretrial conference, Ms. Pritt's counsel withdrew her objection to the trial court's use of the Committees' proposed order, and even submitted her own proposed order."

This is also untrue. What counsel for the Appellant really said is found at page 5 of the transcript of the May 11, 2000, hearing in response to the Court's inquiry as to whether "counsel wants to air with me anything they have in mind..." was:

"MR. ROBERTS: Yes. Your Honor, on the order, the order -- the proposed they filed with you, I felt that was inappropriate because the Court hadn't asked for the order. However, I do have --and we gave them a copy of that. I do have a decision which would be what I think recites both sides and tells you where you are."

This can hardly be interpreted as a "withdrawal" by Petitioner of her objection to the unsolicited submission of this proposed order. Although not a major point in the issues before this Court, it reflects the continuing "fudging" of the facts by the Appellees.

Page 16:

The section of Respondent's brief entitled "'B. Ms. Pritt's Effort to Avoid the New York Times Standard is unavailing" once again grossly misstates the Appellant's position with regard to New York Times v. Sullivan, 376 U.S. 254 (1964). Appellant recognizes the New York Times decision as the "law of the land." **Nothing** in Appellant's brief suggests otherwise. However, Appellant submits that Sprouse v. Clay Communications, our own West Virginia case which acknowledges the New York Times case is **the** controlling decision in the present case. Sprouse is neither contrary to nor inconsistent with the New York Times decision. In fact, Sprouse discusses and relies upon the New York Times case. The Appellant's contentions in this appeal are all based on existing law, both New York Times, Sprouse, and their progeny. It is not necessary for this Court to depart from any existing law to uphold the Appellant's position.

Page 16:

Appellees' brief questions the accuracy of Appellant's assertion that "research did not reveal any reported decisions in this category," the word "category" referring to a case by a political candidate against a political organization. Appellees' brief correctly reports that there were three cases in Florida in where a candidate sued a political organization. At least two of these, however, were decided on a local circuit level and went no further. Appellant used the term "reported decisions" in the conventional definition of the phrase, that is to refer to "precedential decisions". Judge Vickers, at page 10 of the Transcript of hearing on May 11, 2000, recognized that a decision by a circuit court in Florida had no precedential value in our case.

Page 22 & 23:

Appellees makes the point that David Welch "is not a defendant in this case." In foot note 9 they state, "Even if (contrary to fact) Mr. Welch could be credibly accused of actual malice, such proof would be insufficient to prove that the Committees acted with actual malice..." This argument not only flies in the face of the principle that a principal is responsible for the acts of its agent and ignores the role of Craig Engle, general counsel of the Committee, in reviewing and approving the "Ads opposing Pritt." But it also is very disingenuous in that Appellees throughout have adamantly resisted Appellant's effort to join David Welch as a defendant at least in part based on their contention that his joinder was not necessary for the Appellant to receive full and complete relief. At an October 15, 1998, hearing before Judge Vickers, Appellees argued vociferously that it was not necessary to join David Welch as a Defendant in this case since "the pre-existing defendants, have certified in the federal court, they are financially capable, have the resources, have the necessary insurance coverage to pay for

whatever relief the plaintiff may in this case ultimately obtain.” (See pages 9, 10 and 11 of Transcript of October 15, 1998 hearing, copy attached as Exhibit II.

Page 32:

Appellees assert that “it is reasonable to assume that a large proportion of X-rated videos are ‘pornographic’.” If permitted a full exposition of evidence, Appellant will show that this assumption is not warranted and that the term “X-rated” as used in 1992 did not necessarily indicate that such material could be classified as “pornography.” Furthermore, the evidence when presented will reflect that the Appellant’s vote on this bill preserved stronger existing statutory protection of children from pornographic material.

Page 32:

Appellees on numerous occasions below, and again in their brief, assert that the Appellant “was only one of two state senators who voted against the (Gulf War) Resolution” [Parenthesis provided for clarity]. The Senate Journal shows Appellant was one of six. (Copy of Senate Journal January 15, 1991, attached as Exhibit I.) They were apprised on many occasions below that this was an inaccurate statement. While this is not a significant point in this case, it reflects on the continued lack of credibility on the part of Appellees in the record below and in their brief before this Court.

Page 37:

The Appellees’ summary of what they characterize as “disclosed facts” in the ads upon which they claim they could rightfully state an opinion are again deceptive. Rather than setting forth the actual statement which they made in the ads which they now assert to be factual in nature (i.e. that Appellant “proposed teaching first graders about condoms”), they sanitize it to be a statement of the Appellant’s vote on “sexual education in the public schools.” In so sanitizing their

conduct, the Republican Committee itself seems to recognize the absurdity and the maliciousness of the statement that they claimed to be a "fact."

Page 41:

In reply to Appellees' assertion that "Ms. Pritt cannot prove that the advertisements at issue caused her to lose the 1996 gubernatorial election," the Court's attention is directed to page 78 of the deposition of David Welch (copy attached as Exhibit II.). On November 17, 1996, Gazette Reporter Fanny Seiler reported an interview with David Welch as follows:

"David Welch, the Republican political media consultant, who produced the 'contrast TV ad' on Pritt's voting record in the State Senate, says the Underwood camp deserves the prize for a strategically correct and well-executed campaign. 'The lion's share of the credit goes to campaign manager Bill Phillips and consultant Charles Ryan,' Welch said.

Welch said the national Republican community and the state business community decided to do the independent advertising campaign against Pritt to counter the 'big labor money coming in to Charlotte's campaign.' They turned to Welch since he lived in West Virginia, and 'they needed someone detached from the Underwood campaign,' he said."

'When a poll was done before the advertising campaign was undertaken, Underwood and Pritt were dead even,' Welch said. 'But at the end of the two-and-a-half week advertising blitz, a poll showed Underwood ahead by nine points,' he said. Welch said the ads on Pritt's voting record turned undecided and independent voters to Underwood and accounted for a significant part of his victory because they broke 3-1 for him.'"

When asked upon deposition "Do you remember that interview with Fanny Seiler?", Welch responded "Yes."

When asked, "Is this a fairly accurate report of your interview with Fanny Seiler?", Welch answered "Yes."

Page 42:

Appellees state “As this Court noted in a similar setting, ‘at the very least, this type of severe emotional distress will exhibit mental emotional damages readily recognizable by qualified experts.” Courtney v. Courtney, 190 W.VA. 126, 131 n. 11, 132 (1993) (emphasis added). Appellees then state that Appellant would have to have a expert (presumably a psychiatrist or psychologist) to show emotional or mental damage. **This is a totally inaccurate statement of the law.**

Courtney v. Courtney, a copy of which is attached as Exhibit V, is a tort of outrage case wherein this Court held that a mother who had to witness her ex-husband beat her son had a cause of action. In a tort of outrage case is arguable that to prove emotional distress, absent physical damage, it is necessary to have a professional witness as to prove the emotional distress suffered. Courtney enunciated a new basis for this type of cause of action, and consequently drew the parameters of such cause rather tightly. This is not so in a libel, defamation or slander case. The courts recognize that one of the probable consequential damages in libel, defamation or slander is emotional distress. In Gertz v. Welch, 94 S.Ct. 2997, 3012, 418 U.S. 323, 350 (1974), the Supreme Court stated in considering damages in a libel action:

“We need not define ‘actual injury,’ as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”

Appellant reiterates that argument on whether adequate evidence has thus far been presented on the issue of damages is getting the cart before the horse, as the only issue before the court is the propriety of summary judgment.

It is telling that the Appellant has had to spend nine pages of this response brief correcting the numerous mischaracterizations and misstatements by the Appellees. Many of these exceptions taken by Appellant to Appellees' Brief do not directly relate to the primary issue of the appropriateness of summary Judgment in this case. They are necessary, however, because the Appellees brief attempts to obfuscate and divert the Court's attention from the real issues at hand.

Appellant's Substantive Legal Arguments

Summary judgment was inappropriate and unwarranted

The circuit court erred in granting summary judgment for several reasons. In 1994 and 1995, respectively, Justice Cleckley writing for this Court, authored Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994), and Williams v. Precision Coil,² 194 W.Va. 52, 459 S.E.2d 329, the seminal West Virginia cases² on the issue of summary judgment.

First and foremost, these cases clarified that summary judgment is appropriate **only** when the record taken as a whole could not leave a rational trier of fact to find for the non-moving party (the Appellant). Thus, if there is **any** possibility that a rational trier of fact, i.e. a jury, could find that the ads were false, then summary judgment is not appropriate and evidence must be heard by a jury. Precision Coil also held that a court must therefore draw any permissible inference from underlying facts in the light most favorable to the party opposing the motion, in this case, the Appellant. Further, this Court held that summary judgment "should be denied even where there is no dispute as to the evidentiary facts in the

²In Precision Coil, Justice Cleckley made clear, as he had in his earlier exposition on summary judgment in Painter v. Peavy, that the Court's pronouncements regarding the standard for granting summary judgments were not an innovation in our jurisprudence but were an application of settled principles long recognized in this State.

case but only as to the conclusions to be drawn therefrom.” citing Pierce v. Ford Motor Co, 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887, 72, S.Ct. 178 (1951). That is precisely the situation in the instant case. There is no dispute with respect to the content of the ads at issue. There is no dispute as to the actual legislation upon which the Appellant voted. There obviously is, however, a major dispute with respect to the **conclusions** to be drawn therefrom. Therefore, the issue of whether the ads contained **false** statements is a jury issue. The lower court invaded the jury’s province in making that determination. Syllabus Point 3 of Painter v. Peavy provided: “The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” In the instant case, the judge hinged his grant of summary judgment to the Republican National Committee upon his, not a jury’s, finding that the ads were not false. The circuit court thus violated the Painter v. Peavy prohibition against weighing the evidence and determining the truth of the allegations. The weighing of evidence, and the drawing of legitimate inferences from facts are jury functions, not those of the judge.³ Under the record in the instant case, it is an utter absurdity that there would be no possibility that a rational trier of fact could read the ads on their face and the subject legislation on its face and find the ads to be untrue.

Standard of Review

³While the Appellees cite Long v. Egnor, 176 W.Va. 628, 346 S.E. 2d 778 (1986), which held that **prohibition** will lie to stop a trial from going forward when First Amendment rights are involved and where the remedy of appeal is manifestly inadequate to protect against the chilling effect of allowing a suit to proceed because the complaint, as a matter of constitutional law, contains insufficient allegations to warrant interference with a citizen’s right to free speech under the First Amendment to the United States Constitution and under the West Virginia Constitution. Neither the allegations nor the facts already in the record in the instant case fall within this manifestly inadequate standard.

Precision Coil makes clear that the standard of review for this Court's review of the propriety of the lower court's grant of summary judgment is *de novo*. That case also makes clear that in cases where there is any significant doubt as to whether a genuine issue of material fact exists, safer course of action is to deny motion for summary judgment and to proceed to trial.

Burden of Proof on Falsity

The law of West Virginia requires that the falsity of the ads be proven only by a preponderance of the evidence, not by clear and convincing evidence as the Appellees argue and as the lower court erroneously concluded. The Appellees repeatedly misstate the law on this point. In Sprouse v. Clay Communications, 158 W.Va. 427, 211 S.E. 2d 674 (1975), at pages 464 and 465, in pertinent part attached hereto as Exhibit III, (hereinafter Sprouse), this Court cited with approval the jury instructions given in the lower court with respect to the burden of proof in an action by a public official. Those instructions make very clear that the burden of proof with respect to falsity is **preponderance of the evidence**. Similarly, this Court in Estep v. Brewer, 192 W.Va. 511, 453 S.E.2d 345, made clear that in an action of this type, the burden of proof on the element of falsity is preponderance of the evidence. The law is so clear on this point that one must again question whether the Appellees' astute and highly educated Washington, D.C. lawyers are acting in a forthright manner in presenting their arguments. The record as a whole, especially the content of the actual ads and the content of the Appellant's actual legislative voting record make clear that there was sufficient evidence to take the issue of falsity to the jury.

New York Times v. Sullivan, Sprouse v. Clay Communications, & their Progeny

The Appellant recognizes that, as a public figure, she carries a heavy burden in this action against the Republican National Committee. That burden includes, inter alia, proof by a preponderance of the evidence of the falsity of the statements

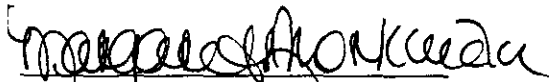
made and clear and convincing proof of malice. The term "malice" in this context has been interpreted by this Court in the Sprouse case to mean that a defendant published false and defamatory statements with knowledge that they were false or with a reckless disregard of whether they were true or false. Appellant submits to this Court that the record in its current state contains sufficient evidence of both of these elements, as well as the other required elements for this cause of action, to submit this case to a jury. Although the only issue before this Court by virtue of the lower court's order is whether summary judgment was proper based on the trial court's finding of fact that the ads were not false, the Appellant urges this Court also to make clear that the evidence of record is more than adequate for presentation of the issue of the existence of malice to the jury as well. Evidence of malice includes, inter alia, the cloak and dagger manner in which the committee was surreptitiously created just before the election, the dishonesty of the committee's self-portrayal as being sponsored and paid for by the contributions of West Virginians, the time frame just before the election when the ads were aired, providing the Appellant no legitimate opportunity to respond, the vituperative nature of the content of the ads and their obvious intent to shock the consciences of West Virginia voters with statements that were patently false; and the pattern of conduct of the Republican National Committee.

Conclusion

Clearly, the lower court erred when it injected itself into the role of fact-finder in conjunction with its consideration of the motion for summary judgment of the Appellees. Painter v. Peavy and Precision Coil make clear that the court's finding of fact as to the lack of falsity of the ads was not the proper subject of a summary judgment ruling; and this court must reverse unless it can find as a matter of law that no rational trier of fact could possibly have found that the ads were false. This would be an utter absurdity.

In consequence of all of which, the Appellant respectfully urges this Court to reverse the trial court and return this matter to the circuit court for trial.

Appellant
By Counsel



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The Senate of West Virginia

DARRELL E. HOLMES
CLERK
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May 28, 1998

TO WHOM IT MAY CONCERN:

Attached is a true and actual copy as they appear in the West Virginia Senate Journal relating to House Concurrent Resolution No. 4, 1991.



Darrell E. Holmes, Senate Clerk

EXHIBIT "1"

Unanimous consent that the
be for consideration.

Senator Chafin objecting.

Resolution (S. C. R. No. 5)
adoption.

Adoption of Senator Boley's
question Senator Boley

Yeas: Boley and Heck—2.

Boley, Blatnik, Brackenrich,
Craigo, Dalton, Dittmar,
Hay, Humphreys, Jones,
Mann, M. Manchin, Minard,
Wehrle, Whitlow, Withers,
(Ayes)—30.

Nays—2.

Senator Boley and voting not having
residence declared Senator

The resolution lies over one

to the eleventh order of
business.

Senator Boley, a leave of absence
declared by Senator Viedebusch.

Senator Boley, a leave of absence for the

The Senate adjourned until

JANUARY 14, 1991

President, in the Chair.)
Honorable Yolanda Wright, St.

Paul African Methodist Episcopal Church, Charleston, West
Virginia.

Pending the reading of the Journal of Friday, January 11,
1991.

On motion of Senator Claypole, the Journal was
approved and the further reading thereof dispensed with.

The Senate proceeded to the second order of business and
the introduction of guests.

At the request of Senator M. Manchin, and by unanimous
consent, the provisions of rule number fifty-four of the
Rules of the Senate, relating to persons entitled to the
privileges of the floor, were suspended in order to grant
Mrs. Della Hackney and her family and Jim Lavender
privileges of the floor for the day.

Senator Burdette (Mr. President) presented a communi-
cation from the Joint Commission for Vocational-
Technical-Occupational Education, submitting its report, as
required by chapter eighteen-b, article three-a, section four
of the code of West Virginia.

Which communication and report were received and filed
with the Clerk.

The Clerk then presented a communication from the
Solid Waste Management Board, submitting its annual
report, as required by chapter sixteen, article twenty-six,
section seventeen of the code of West Virginia.

Which communication and report were received and filed
with the Clerk.

The Senate next proceeded to the third order of business.

A message from The Clerk of the House of Delegates
announced the adoption by that body and requested the
concurrence of the Senate in the adoption of

House Concurrent Resolution No. 4—Urging the Presi-
dent and the Congress of the United States to develop a
policy to stop aggression by negotiation, or by force only if
necessary, in order to restore self-government to Kuwait
and stabilize relations of all countries in the Middle East.

Whereas, Saddam Hussein's naked aggression against Kuwait and the atrocities committed against the people of Kuwait by the Iraqi Army has required the deployment of over 350,000 men and women of the United States Armed Forces in Saudi Arabia in Operation Desert Shield; and

Whereas, The ruthless tyrant Saddam Hussein who used poisonous gases against his own people has been caught up short by the steadfast resolve of the President and the men and women of Desert Shield; and

Whereas, We will never have "peace in our time" unless and until Saddam Hussein and his brutal army are expelled from Kuwait and the legitimate government of Kuwait is restored; and

Whereas, The voices of those helpless men, women and children of Kuwait who were murdered, raped and tortured by Saddam's army demand that the strongest nation in the world restore order in the Middle East; and

Whereas, The nations of the world are united in the resolve that Iraq must leave Kuwait or face military destruction; therefore, be it

Resolved by the Legislature of West Virginia:

That the President is urged to consult with the United States Congress to develop the policy of the United States to stop aggression, by negotiation or by force, if necessary, and to support self-government by Kuwait and stabilize the Middle East by the adoption of a resolution to support the efforts; and, be it

Further Resolved, That Congress is hereby urged to support the President and to give to the President the appropriate authority to respond to the crisis; and, be it

Further Resolved, That the President and Congress implement a national energy policy to achieve national energy independence so that our brave women and men of West Virginia will never again have to be put in harm's way because our nation is dependent on foreign oil; and, be it

acked aggression against
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 quired the deployment of
 the United States Armed
 on Desert Shield; and

Saddam Hussein who used
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West Virginia:

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Further Resolved, That the Clerk of the House of Delegates is hereby ordered to forward a copy of this resolution to the President of the United States and to each member of the State's delegation in Congress.

At the request of Senator Chafin, and by unanimous consent, the message was taken up for immediate consideration and reference of the resolution to a committee dispensed with.

The question being on the adoption of the resolution,

Pending extended discussion,

Senator J. Manchin requested unanimous consent that the resolution (H. C. R. No. 4) lie over one day, retaining its place on the calendar.

Which consent was not granted, Senator M. Manchin objecting.

Senator J. Manchin moved that the resolution lie over one day, retaining its place on the calendar.

Pending discussion,

Thereafter, at the request of Senator J. Manchin, and by unanimous consent, his foregoing motion was withdrawn.

On motion of Senator Chafin, the resolution (H. C. R. No. 4) was referred to the Committee on Military.

Thereafter, at the request of Senator Pritt, and by unanimous consent, the remarks by Senators Holliday and Blatnik were ordered printed in the Appendix to the Journal.

At the request of Senator Boley, and by unanimous consent, the remarks by Senators M. Manchin and Heck were ordered printed in the Appendix to the Journal.

Executive Communications

Senator Burdette (Mr. President) laid before the Senate the following communication from His Excellency, the Governor, consisting of executive nominations for appointees:

- a. Women's Commission
- b. Department of Human Services
- c. Oil and Gas Conservation Commission
- d. Family Law Masters System
- e. State Lottery Commission
- f. West Virginia Health Care Cost Review Authority
- g. Soil Conservation Committee
- h. Rural Resource Division
- i. Meat Inspection Program
- j. Child Advocate Office
- k. Division of Corrections
- l. West Virginia Labor Management Council
- m. Tree Fruit Industry Self-Improvement Assessment Program
- n. Division of Tourism and Parks
- o. State Advisory Council of the Department of Employment Security.

Very truly yours,

Jae Spears,
Senate,

Joe Martin,
*House of Delegates,
Cochairpersons.*

Which communication and attachment were received and filed with the Clerk.

The Senate then proceeded to the fourth order of business.

Senator Felton, from the Committee on Military, submitted the following report, which was received:

Your Committee on Military has had under consideration

House Concurrent Resolution No. 4, Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East.

And has amended same.

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l to the fourth order of

mittee on Military, submit-
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. 4. Urging the President
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n, or by force only if
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tries in the Middle East.

And reports the same back with the recommendation
that it be adopted, as amended.

Respectfully submitted,

Charles B. Felton, Jr.,
Chairperson.

At the request of Senator Felton, unanimous consent
being granted, the resolution (H. C. R. No. 4) contained in
the preceding report from the Committee on Military was
taken up for immediate consideration.

The following amendments to the resolution, from the
Committee on Military, were reported by the Clerk:

On page one, by striking out everything after the title
and inserting in lieu thereof the following:

Whereas, The Government of Iraq without provocation
invaded and occupied the territory of Kuwait on August 2,
1990; and

Whereas, Iraq's conventional, chemical, biological, and
nuclear weapons and ballistic missile programs and its
demonstrated willingness to use weapons of mass destruc-
tion pose a grave threat to world peace; and

Whereas, The international community has demanded
that Iraq withdraw unconditionally and immediately from
Kuwait and that Kuwait's independence and legitimate
government be restored; and

Whereas, The United Nations Security Council repeatedly
affirmed the inherent right of individual or collective self-
defense in response to the armed attack by Iraq against
Kuwait in accordance with Article 51 of the United Nations
Charter; and

Whereas, In the absence of full compliance by Iraq with
its resolutions, the U. N. Security Council in Resolution 678
has authorized member states of the United Nations to use
all necessary means, after January 15, 1991, to uphold and
implement all relevant Security Council resolutions and to
restore international peace and security in the area; and

Whereas, Iraq has persisted in its illegal occupation of, and brutal aggression against Kuwait; and

Whereas, On January 12, 1991, the United States Congress passed House Joint Resolution No. 77, authorizing the President to use military force against Iraq; therefore, be it

Resolved by the Legislature of West Virginia:

That the West Virginia Legislature supports United States Congressional action authorizing the President to stop Iraqi aggression by negotiation, or by force if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East; and, be it

Further Resolved, That the West Virginia Legislature supports and so honors all West Virginians serving America in Operation Desert Shield, including those West Virginia National Guard and Reserve Units activated for Operation Desert Shield. West Virginia's sons and daughters have a long and distinguished tradition of serving their country in times of military need, with traditionally one of the highest per capita rates of military service in the nation; and, be it

Further Resolved, That the President and Congress implement a national energy policy to achieve national energy independence so that our brave women and men of West Virginia will never again have to be put in harm's way because our nation is dependent on foreign oil; and, be it

Further Resolved, That the Clerk of the House of Delegates is hereby ordered to forward a copy of this resolution to the President of the United States and to each member of the state's delegation in Congress.;

And,

On page one, by striking out the title and substituting therefor a new title, to read as follows:

House Concurrent Resolution No. 4—Supporting United States Congressional action authorizing the President of the United States to stop Iraqi aggression by negotiation, or by force if necessary, in order to restore self-government to

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Kuwait and stabilize relations of all countries in the Middle
East.

Senator J. Manchin requested unanimous consent that
further consideration of the resolution and the pending
amendments be deferred following the tenth order of
business.

Which consent was not granted, Senator Felton objecting.

Following discussion,

At the request of Senator Felton, and by unanimous
consent, his foregoing objection was withdrawn.

Following discussion and a point of inquiry to the
President, with resultant response thereto,

At the request of Senator J. Manchin, unanimous consent
being granted, further consideration of the resolution and
the pending amendments was deferred following the tenth
order of business.

The Senate then proceeded to the sixth order of business.

On motions for leave, severally made, the following bills
were introduced, read by their titles, and referred to the
appropriate committees:

By Senator Burdette (Mr. President) (By Request):

Senate Bill No. 37—A Bill to amend and reenact section
twelve, article eight; chapter eleven of the code of West
Virginia, one thousand nine hundred thirty-one, as
amended; to amend and reenact section four, article five,
chapter eighteen; to amend and reenact section six, article
nine-b of said chapter eighteen; and to amend and reenact
sections two, six and seven, article two, chapter eighteen-
a, all relating to county boards of education and establish-
ing specific timelines for budget preparation and approval.

Referred to the Committee on Education.

By Senator Pritt:

Senate Bill No. 38—A Bill to amend article twelve,
chapter forty-seven of the code of West Virginia, one
thousand nine hundred thirty-one, as amended, by adding

Three Custodians	992.00 - 1,406.00
Two Mail/Supply Clerks	1,125.00 - 1,291.68

The Clerk of the Senate, with the written approval of the President of the Senate, or the President of the Senate, is hereby authorized to employ persons to fill the above positions, at the compensation hereinabove set forth for each and to make adjustments in said compensation during the year. The President of the Senate may employ personnel at such rates of compensation as may be needed to fill any other positions.

At the request of Senator Tomblin, unanimous consent being granted, the resolution was taken up for immediate consideration, reference to a committee dispensed with, and adopted.

There being no business under the tenth order, the Senate returned to the consideration of

House Concurrent Resolution No. 4, Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East.

Having been reported from the Committee on Military in prior proceedings today, and now coming up in deferred order, with committee amendments pending, was again reported by the Clerk.

The question being on the adoption of the Military committee amendments to the resolution bill (as shown in the Senate Journal of this day, pages 75 to 77, inclusive).

On motions of Senators J. Manchin and Jones, the following amendment to the committee amendments was reported by the Clerk and adopted:

On page two, after the second *Further Resolved* clause, by adding the following:

Further Resolved, That the West Virginia Legislature urges the President and Congress to require all allied nations to support, in the form of military aid, personnel

1991]

and monetary reimbursement, or to in essence carry their fair share; and, be it".

The main question now being on the adoption of the Military committee amendments, as amended, the same was put and prevailed.

The question being on the adoption of the resolution, as amended, and on this question Senator Holliday demanded the yeas and nays.

The roll being taken, the yeas were: Anderson, Bailey, Boley, Brackenrich, Chafin, Claypole, Craig, Dalton, Dittmar, Felton, Hawse, Heck, Helmick, Jones, Lucht, Macnaughtan, J. Manchin, M. Manchin, Minard, Sharpe, Spears, Tomblin, Wagner, Whitlow, Wiedebusch, Wooton and Burdette (Mr. President)—27.

The nays were: Blatnik, Chernenko, Holliday, Humphreys, Pritt and Withers—6.

Absent: Wehrle—1.

So, a majority of all the members present and voting having voted in the affirmative, the President declared the resolution (H. C. R. No. 4) adopted.

Ordered, That The Clerk communicate to the House of Delegates the action of the Senate and request concurrence therein.

On motion of Senator Chafin, a leave of absence for the day was granted Senator Wehrle.

Pending announcement of meetings of standing committees of the Senate,

On motion of Senator Chafin, the Senate adjourned until tomorrow, Wednesday, January 16, 1991, at 11 a.m.

WEDNESDAY, JANUARY 16, 1991

The Senate met at 11 a.m.

(Senator Burdette, Mr. President, in the Chair.)

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No. 4, Urging the President States to develop a policy tion, or by force only if, self-government to Kuwait, ries in the Middle East.

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Appendix—Remarks

Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East

(Adoption of House Concurrent Resolution No. 4)

REMARKS OF
HONORABLE
ROBERT K. HOLLIDAY

Monday, January 14, 1991

SENATOR HOLLIDAY: Mr. President, sabers are rattling. Drums are beating. Piccolos are shrilling. Even though Isaiah cried out to turn swords into plowshares, the governments of both the United States and Iraq through their legislatures have approved a war.

War appears imminent. At this point, perhaps a majority of U.S. citizens wants fighting with Iraq. Why? Because of Saddam Hussein's naked invasion of a little totalitarian country named Kuwait, which has an absolute monarchy.

Does it matter that the Soviet troops just a day or so ago stormed and killed more than a dozen persons and seized newly-declared independent Lithuania's main broadcasting station in order to forcibly keep the state within the U.S.S.R.? Is it all right for dictatorship in Russia to smother freedom at

every turn for so many years as it has done in the Baltics? If freedom is so dear, then why do we support China's government that murdered unknown thousands of young college students and others whose only crime was wanting to be free?

From this very floor, back in the sixties, I spoke out against the Vietnam War, and I have that opportunity that I do not want to pass by this day. It was the same thing, the Vietnam War. Lovers of strife told us that the domino theory, if not checked, will allow the spreading of communism. We lost the war, got out and such did not happen. And within the last year elsewhere in the world, in eastern Europe, the very evolutionary processes of freedom and democracy are prevailing against the communism that existed there for so long.

How many in El Salvador, South American countries ruled by the military or countries run by tyrants will Uncle Sam step in and solve all these problems? If we must kill in Grenada, why not Northern Ireland, Haiti, South Africa, Ethiopia? Why not? Perhaps because our national interest of oil is not at stake as it is in the Middle East and that's what the resolution talks about in its finality today.

What is the price we pay for democracy? Is democracy fair to minorities? Is democratic law a tool against tyranny, or does it suppress the individual? Is the military a contributor to democracy or a menace? Can democracy endure into the next century?

In the Middle East we have not exerted enough in talks and sanctions to prevent war so only Almighty God, President Bush and some others know whether blood is soon to be spilled. It appears a President is taking a divided country into battle. No guarantee exists that war will be brief. Will American casualties be light? Will it last one day, two weeks or even ten years?

No. There are no guarantees that sanctions and talks will bring peace nor that war will bring lasting peace. We have enough warmongers, let us have more peacemakers.

Wherever we travel, people battle for freedom other than through war. In Africa tribal chiefs are trying to find fraternity a source of democratic citizenship. In Argentina and Brazil civilians dared again to subdue ambitious colonels. In the U.S., despite inequalities of wealth and racial prejudice, immigrants are still drawn by the ideal of equal opportunity. In New Zealand a whole nation has defied the superpowers to defend a nuclear-free South Pacific. In Australia the white man and the Indians are finding a new political language. In Canada the women are struggling to make an old democracy as real for them as it has been for their families and sons.

I'm almost 58 years of age, and I am not naive to the fact that it is very evident as to the mentality of many persons—they desire and crave to be warlike. I would hope to be as patriotic toward our country, my country, your country, as any here, for I want a free, democratic country—strong in spiritual and material elements that

promote peace and human rights everywhere.

My prayers go out for all our brave U.S. military personnel in Saudi Arabia and elsewhere and for peace in the Persian Gulf area and for all peoples of the world.

It is not a showdown of the Islamic believers against the Christian infidels as Iraq would have the world to believe. It will be a war for blood, oil—plain and simple. The deal-making is down to the final hours. The situation looks tragic to those who will be the punishers and the sufferers.

So help us, God.

Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East

(Adoption of House Concurrent Resolution No. 4)

**REMARKS OF
HONORABLE
MARK ANTHONY MANCHIN**

Monday, January 14, 1991

SENATOR M. MANCHIN: Mr. President, I stand in support of the resolution.

The Congress of the United States of America has said that we will support the President. Countless legislatures

throughout the stood and said President. The F the State of We and said that v President of the U

I think that it this time of cris the State of Wes and rise, and say President of the crisis.

You know, T many years ago soldiers and su retreat in the de try". During this not—let not this defense of their c clear message t men in Saudi Ar our men in Kuw comes to. The Pr do what we must here today sayin men and wome children who wil to fight. But we make those decisi the United State decision. He has of the United St done it.

Now, I submit ate of the State o be doing a grea men and wome who, if it comes the sands of Ku Saudi Arabia. M ble thing to say, I hope and pray pen. But, please,

promote peace and human rights everywhere.

My prayers go out for all our brave military personnel in Saudi Arabia and elsewhere and for peace in the Persian Gulf area and for all peoples of the world.

It is not a showdown of the Islamic fanatics against the Christian infidels. Iraq would have the world to believe. It will be a war for blood, oil—plain and simple. The deal-making is down to the final hours. The situation looks tragic to those who will be the winners and the sufferers.

So help us, God.

Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East

(Adoption of House Concurrent Resolution No. 4)

**REMARKS OF
HONORABLE
MARK ANTHONY MANCHIN**

Monday, January 14, 1991

SENATOR M. MANCHIN: Mr. President, I stand in support of the resolution.

The Congress of the United States of America has said that we will support the President. Countless legislatures

throughout the United States have stood and said we will support the President. The House of Delegates of the State of West Virginia has stood and said that we will support the President of the United States.

I think that it is only right during this time of crisis that the Senate of the State of West Virginia also stand, and rise, and say that we support the President of the United States in this crisis.

You know, Thomas Paine wrote many years ago that "Summertime soldiers and sunshine patriots will retreat in the defense of their country". During this time of crisis, let us not—let not this Senate retreat in the defense of their country. Let us send a clear message that we support our men in Saudi Arabia, that we support our men in Kuwait—if that is what it comes to. The President says we must do what we must do. None of us stand here today saying that we want our men and women to die. I have no children who will fight—I do not have to fight. But we, as leaders, have to make those decisions. The President of the United States has to make that decision. He has done it. The Congress of the United States of America has done it.

Now, I submit to you that the Senate of the State of West Virginia would be doing a great disservice to those men and women who have children who, if it comes to that, must die in the sands of Kuwait and the sands of Saudi Arabia. My God, that's a terrible thing to say, but that may happen. I hope and pray that it does not happen. But, please, I ask you, I submit to

you, let us resolve as a Senate, as a body, that we will support our country in this hour of need. Let us do that here today.

I ask that we support this resolution.

Urging the President and the Congress of the United States to develop a policy to stop aggression by negotiation, or by force only if necessary, in order to restore self-government to Kuwait and stabilize relations of all countries in the Middle East

(Adoption of House Concurrent Resolution No. 4)

**REMARKS OF
HONORABLE
HOMER HECK**

Monday, January 14, 1991

SENATOR HECK: Mr. President, I rise in support of the resolution.

I think to do less than support the resolution is a detriment to the peace effort that the President of the country and the Congress by passing the resolution states. And, I think to do less in this Senate would not be in the best interests of keeping the peace and striving for the peace. I think that we, above all, we need to pass this resolution here today in support of our soldiers and our people that are now in the Gulf area ready for any commitment that the resolution that was passed Saturday by the Congress of the United States—ready to do that service to the people of the State of

West Virginia and the people of this country.

And I would urge adoption of the resolution.

**Urging the President and the Congress
of the United States to develop a policy
to stop aggression by negotiation, or by
force only if necessary, in order to
restore self-government to Kuwait
and stabilize relations of all countries
in the Middle East**

*(Adoption of House Concurrent
Resolution No. 4)*

**REMARKS OF
HONORABLE
THAIS BLATNIK**

Monday, January 14, 1991

SENATOR BLATNIK: Mr. President, I stand before you, all of you, as the original grandmother in tennis shoes in 1958 against the Vietnam War.

Let there be no mistake, I support our children that are in the Persian Gulf. I support those young men and women, those mothers, those fathers. I grieve with their parents as they send their young men and women across the seas.

I want this Senate to read something that is in the current Reader's Digest. How Saddam Hussein's military might was amassed in a large measure by, guess whom, by us. By us—for our own greed and our own gullibility. And I stand before you cautioning you—look at the morning's paper to

see the litany of arms that the Pentagon has already ordered—including 8,000 body bags. I tell you, as a mother who has gone through the throes of birth, some of them very difficult, I have not one son nor daughter to give to bring back in a body bag.

And I'll caution you—I'll be on your conscience. I'll be on your conscience if that first body bag arrives. Yes, I support the energy policy, but then I supported President Carter when he first proposed the energy policy. I say to you again—8,000 body bags on order. Not one man or woman is to be sacrificed for a \$31 barrel of oil.

I support the men and women, yes, but I think that at this present time that we should bring them back. And I caution you, also, that President Bush knows the war will be short, it will be bloody. Not one of us had asked the cost—the cost will be horrendous and not worth one of our men and women. Eight thousand body bags are on order.

**REMARKS OF
HONORABLE
HOMER HECK**

Monday, January 14, 1991

SENATOR HECK: Mr. President, there are a few more things that I want to talk about today, but I'll speak very briefly on each one.

First of all, I want to thank you for moving my baby sitter back here next to me, because this gentlemen, over the last year, has been helping me

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2 opportunity to have an argument."

3 Thank you, Your Honor.

4 THE COURT: All right.

5 MR. LEVINE: Your Honor, Jason Levine for the
6 defendants. I'm going to address the three matters that
7 Mr. Thompson has referred to in really reverse order, if
8 you will, the first of them being a motion for a ruling
9 with regard to the district court proceedings.

10 As Mr. Thompson has acknowledged, there was
11 discussion about the use of the previously filed motions to
12 dismiss in this court in deciding defendant's motion to
13 dismiss. And it was at that hearing that Your Honor
14 specifically stated that you would take the motions that
15 were previously filed under advisement, that you would
16 consider those motions, and that they would be the basis
17 for a possible hearing on the motion to dismiss.

18 Now, furthermore, at that hearing, of course,
19 Mr. Roberts actually urged the Court to consider precisely
20 those motions.

21 And it's our feeling, Your Honor, as we stated in
22 our brief, that the Court should stick with the plan that
23 it announced three months ago, at the July hearing, and
24 continue to consider the motions to dismiss that were
25 previously submitted and make those the basis for a future

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2 possible hearing on the motions to dismiss.

3 Of course, Your Honor, if you decide to the
4 contrary, defendants are prepared to submit a new motion to
5 dismiss if that's necessary.

6 Second, Your Honor, on the motion to amend the
7 allegations that are contained in the plaintiff's
8 complaint, as our opposition brief states, defendants don't
9 have any substantive objection to that motion.

10 Defendants, rather, simply wish to preserve the
11 right, which of course they have, to present any
12 affirmative defenses or motion to dismiss or a summary
13 judgment motion at a later time. However, we will not
14 stand in defendant's (sic) way of making substantive
15 amendments to the complaint.

16 Third, however, with regard to the question of
17 whether the plaintiff should be permitted to add new
18 defendants, the motion of plaintiff proceeds on Rule 21 and
19 also on Rule 15C, which is necessary, governing the
20 question of relation back on amendments.

21 Now, I'm going to address two types of arguments
22 here, Your Honor. The first are equitable arguments about
23 why the plaintiff should not, at this late date, be
24 permitted to add these three totally new defendants. And
25 the second is a more substantive argument.

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2 Equitably speaking, Your Honor, first, -- there
3 are really four arguments. First, the addition of the new
4 three defendants is not necessary to preserve the
5 plaintiff's ability to obtain full and adequate relief if
6 ultimately she's found to be entitled to relief.

7 As the defendants, the pre-existing defendants,
8 have already certified in the federal court, they are
9 financially capable, have the resources, have the necessary
10 insurance coverage to pay for whatever relief the plaintiff
11 may in this case ultimately obtain.

12 And accordingly, the addition of these three new
13 defendants is not necessary for her to obtain relief. And
14 parenthetically, Your Honor, as to the new contention that
15 the new defendants are indispensable parties, that, of
16 course, suggests that they are not, because the plaintiff
17 -- the plaintiff is capable of getting full relief from the
18 existing defendants, the new defendants clearly are not
19 indispensable because they're not necessary for that relief
20 to be obtainable.

21 Second, and relatedly, Your Honor, the addition
22 of the new defendants is not necessary, though plaintiff
23 adverts to this in their motion for the purpose of
24 plaintiff obtaining full and complete discovery because, as
25 Your Honor knows, third-party discovery, of course, is

determined as of the time the various publications were published.”

Obviously a newspaper under the First Amendment cannot be held to a standard of omniscience and can be judged with regard only to information which is available to the newspaper at the time of publication. Therefore, the Court holds that it was error for the trial court to fail to give instruction No. 14 but that the error was harmless in light of all of the other instructions which were given in the case.

It is clear from a reading of plaintiff's instructions Nos. 1, 2a, 3, 7, and defendant's instructions Nos. 3 and 5 that the case was tried on the proper theory that a newspaper is to be judged concerning actual malice with regard only to information known by it at the time of publication.¹⁰ In general, where it appears to this Court

¹⁰ PLAINTIFF'S INSTRUCTION NO. 1

The Court instructs the jury that if you find by a preponderance of the evidence that one or more of the publications identified as Plaintiff's Exhibits Nos. 1 & 2 complained of constituted "libel", as that term is defined for you in these instructions, and if you further find by a preponderance of the evidence that the libelous publication or publications were false in some material particular; and if you further find by clear and convincing evidence that the libelous and false statements were published with actual malice, as defined in these instructions, then your verdict may be for the plaintiff, James M. Sprouse, and against the Charleston Mail Association.

PLAINTIFF'S INSTRUCTION NO. 2a

The Court instructs the jury that libel in a case brought by a nominee for public office may be defined as a false writing published by the publisher with knowledge of its falsity, or false publication published with a reckless disregard of its falsity, and which tends to injure the reputation of the nominee, to throw contumely or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt.

PLAINTIFF'S INSTRUCTION NO. 3

The Court instructs the jury that the term "actual malice" means that the defendant published false and defamatory statements with knowledge that they were false or with a reckless disregard of whether they were true or false.

PLAINTIFF'S INSTRUCTION NO. 7

The Court instructs the jury that even though failure to investigate, on the one hand, and mere ill will, bias spite or

that the effect of an improperly refused instruction is merely cumulative, and that the theory of the case enunciated in the refused instruction has been adequately covered by other instructions, and where it further conclusively appears that the outcome of the case would not have been affected by the giving of the re-

prejudice on the other, standing alone, are insufficient to establish either a knowledge of the falsity of, or a reckless disregard of the truth or falsity of the materials used; however, such evidence, if any, of motive, intent, may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. *Goldwater v. Ginzburg*, 414 F.2d 324, 342.

DEFENDANT'S INSTRUCTION NO. 3

The Court further instructs the jury that all of the news stories and editorials published by the defendant, and complained of by the plaintiff, were constitutionally protected and require a verdict for defendant, unless:

First, one or more of the publications complained of constituted "libel" as that term is defined for you in these instructions;

Second, the libelous publication or publications were false in some material particular; and

Third, the libelous and false statements were published with "actual malice" as defined in these instructions;

The burden is upon the plaintiff to prove the first two of these essential elements by a "preponderance of the evidence" as that phrase is defined in these instructions;

The burden of proof to be borne by plaintiff with respect to the third essential element—actual malice—is more strict. The plaintiff has the burden of proving actual malice by "clear and convincing evidence".

The Court instructs the jury that by clear and convincing evidence is meant more than a mere preponderance of evidence. Clear and convincing evidence is that evidence which is so clear, explicit, and unequivocal [sic] as to leave no substantial doubt and which is sufficiently strong to command the unhesitating assent of every reasonable mind.

If you find that plaintiff has failed to establish any of these three essential elements by the standard explained, it is your duty to return a verdict for defendant.

DEFENDANT'S INSTRUCTION NO. 5

The Court instructs the jury that the term "actual malice," which must be established by clear and convincing evidence to warrant a verdict for plaintiff, means that defendant published false and defamatory statements with knowledge that they were false or with a reckless disregard of whether they were