5-22-2018

Verity v. USA Today Respondent's Brief Dckt. 45530

In the Supreme Court of the State of Idaho

JAMES VERITY and SARAHNA VERITY, husband and wife, Plaintiffs/Respondents, v. USA TODAY, a division of Gannett Satellite Information Network, LLC, a Delaware limited liability company; KTVB, a division of King Broadcasting Company, a Washington corporation; KGW, a division of Sander Operating Co. III, LLC, a Delaware limited liability company; TAMI TREMBLAY, an individual; STEPHEN REILLY, an individual; and JOHN/JANE DOES, Defendant/Respondent	Supreme Court Docket No. 45530-2017 Ada County Case No. CV-OC-2016-6185

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

HONORABLE MELISSA MOODY
District Judge

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I. STATEMENT OF THE CASE

1. Nature of the Case

Respondents, James Verity ("Verity") and Sarahna "Sari" Verity ("Sari"), are the prototypical all-American family. They have been married since 1991, have six children, went through college together at the University of Idaho and obtained bachelor's degrees in education, raised a family, obtained teaching jobs together and have coached their children and other youth sports together for over two decades. Their contribution to education, high school athletics, youth sports and the community at large came to a screeching halt when the Appellants decided to publish multiple but related stories about Verity that contained both expressed and implied falsehoods about him. The Verity family generally and Verity individually have not recovered from the devastating effects the Appellants' falsehoods have had on them.

This case demonstrates that, at a time when publications spread faster than wildfire across the internet, the media can harm someone with a stroke of the figurative pen just as a violent offender can harm someone with the pull of a trigger. The First Amendment of the United States Constitution does not protect harmful conduct by way of communication any more than the Second Amendment protects harmful conduct by way of firearm. James Verity, Sari Verity and their six children were devastated by the stroke of the Appellants' figurative pen because Stephen Reilly of USA Today and the other Appellants valued their professional aspiration to win a Pulitzer prize more than the truth.

The powerful multi-billion dollar media industry whom Appellants and the *Amici* represent want this Court to disregard what seems so fundamental and simple – it is not acceptable to publish something that expressly or implicitly conveys a falsehood about another person. The recently coined phrase "fake news" is not merely a political slogan - it is a present-day epidemic of epic proportions. The media's reputation is at an all-time low because the media publishes information to serve the media's own interest, not the public's interest as was intended by the First Amendment. One need only juxtapose the coverage of the same exact event by CNN and Fox News to see just how polarized and politicized the media has become. The pendulum has swung way too far toward protecting the media from defamation to the detriment of the voiceless, powerless individual people just like Verity.

The law is designed to protect the weak and powerless from the powerful and privileged. The purpose of the First Amendment freedom of speech and press was to ensure that the media had the ability to maintain transparency in governance in aid of protecting the individual from government oppression and corruption. That purpose is largely defeated if the media is not held accountable for clearly inaccurate reporting aimed at achieving the goals of the author rather than accurately conveying information and allowing the public to decide.

This case presents this Court with the opportunity to affirm the right of the individual to redress for damages caused to his or her reputation by falsehoods perpetrated by the powerful media.

2. Statement of Facts

Verity and Sari were married in 1991. They have six children together ranging in age from 25 years to 7 years. R. 750 at ¶ 1. Verity and Sari began teaching school and coaching youth and high school sports in 1998. R. 750-51 at ¶¶ 3-6.

Verity and Sari have coached AAU youth basketball and club basketball, both boys and girls, for over 19 years, building successful basketball programs in both Oregon and Idaho. R. 750 at ¶ 6; R. 857 at ¶¶ 12-14. Verity and Sari have also been teachers in the public school system in Oregon or Idaho since 1998. R. 750 at ¶¶ 3-4; R. 856 at ¶¶ 10-11; R. 861 at ¶ 40; 862 at ¶¶ 43-44.

In 2005, Verity had an inappropriate relationship with an 18-year-old female student athlete whom he had previously coached. The inappropriate relationship lasted for approximately four months during a period when Verity was no longer coaching the student athlete. The inappropriate relationship involved inappropriate text messages and telephone calls, as well as two separate instances of physical contact of a sexual nature. R. 753 at ¶ 12.

After the inappropriate relationship ended, Verity sought marriage counseling, personal counseling and obtained a psycho-sexual evaluation at the request of the Oregon Teachers Standard Practices Commission ("TSPC"). R. 858-59 at ¶¶ 25-27. One of the evaluations Verity obtained was done by Dr. Whitehead, a psychologist. R. 759 at ¶ 31. Dr. Whitehead also referred Verity to Dr. James R. Hamer to obtain a psycho-sexual evaluation, which Verity obtained. R. 758 at ¶ 30. Verity also sought and received counseling by Dr. Miller, a psychotherapist, per the approval of Dr. Whitehead. R. 762-63 at ¶ 44; R. 382-391. In

Dr. Miller's opinion, there was "no significant reason to believe that Verity is a risk to 'cross the line' with a student of any age." R. 387 at ¶ 14.

After Verity's one-year suspension was up in Oregon, he applied for reinstatement in July 2007. R. 757 at ¶ 27. While Verity was going through the process of trying to get his Oregon license reinstated, Verity and Sari decided to also apply for teaching credentials in the state of Idaho where Sari grew up, where Sari's family was still living and where Verity and Sari lived prior to moving to Oregon. R. 859-861 at ¶¶ 29-30, 38.

Verity was simultaneously seeking teaching credentials in Oregon and Idaho based upon the same information. The Oregon TSPC was provided in Dr. Whitehead's report and Dr. Hamer's report, among other information in support of Verity's license being reinstated, and the Idaho Department of Education Professional Standards Commission ("PSC") was provided the same information. R. 759-780 at ¶ 34; R. 369; R. 827-28 at ¶¶ 5, 6.c., 7-8, R. 835-840.

Ultimately, Idaho initially denied Verity's application for a teaching certificate, and Oregon denied Verity's application to reinstate his Oregon teaching credentials. R. 760-61 at ¶¶ 38-39. Verity requested a hearing to appeal the denial of his Oregon license reinstatement and also appealed the denial of an Idaho teaching license. *See id.*

Verity elected to abandon his appeal in Oregon and focus on his appeal in Idaho. As such, Verity did not appear at the hearing before the TSPC in Oregon causing a default order to be entered denying reinstatement in Oregon. R. 762 at ¶¶ 42-43.

Verity did pursue his appeal in Idaho, and attended a hearing before the PSC hearing panel on September 30, 2008. R. 761-62 at ¶ 40. Based upon sworn testimony at the hearing and the record before the PSC, which was effectively the same record provided to the Oregon TSPC, plus more, the PSC entered an Interlocutory Order that did not grant Verity a license and did not deny him a license. Rather, the PSC provided Verity an opportunity to supplement the record with additional information to address "loose ends of Verity's additional need for psychotherapy." *See id.*

Verity supplemented the PSC's record with affidavits from Dr. Whitehead, Verity himself and Dr. Scott Miller. R. 762-63 at ¶¶ 41, 44. Based upon the entire record before the Idaho PSC, and after almost a full day of deliberations, the hearing panel of the PSC entered an order requiring the Idaho chief certification officer to grant Verity Idaho teaching credentials. R. 763 at ¶ 45; R. 828-29 at ¶¶ 8, 12; R. 842-47.

After obtaining teaching credentials in Idaho, Verity applied for a teaching job at the Caldwell School District ("CSD") in Caldwell, Idaho. R. 862 at ¶ 41; R. 829 at ¶ 13. Just as he had done with his application for teaching credentials in the state of Idaho, Verity fully disclosed his Oregon revocation and the circumstances that led to such revocation to the CSD. R. 830-31 at ¶¶ 24-25, 27; R. 862 at ¶¶ 42.

As part of the hiring process of Verity, Randy Schrader, the assistant superintendent of the CSD at the time, contacted Melanie Hensman, who sat on the Idaho PSC hearing panel which had decided to grant Verity Idaho teaching credentials, to inquire regarding the circumstances of the Oregon revocation. Ms. Hensman assured Mr. Schrader that she did not believe there was

any concern with hiring Verity and specifically told Mr. Schrader that she would be comfortable with her own daughter being in Verity's classroom. R. 829 at ¶ 16.

Additionally, Verity talked with Mike Farris, the then principal of Caldwell High School, who was involved in hiring Verity. Verity discussed the Oregon incident with Mr. Farris and answered any questions Mr. Farris had about the incident. R. 862 at ¶ 41-42.

Verity was hired by the CSD as a physical science teacher in 2010 and was employed there continuously until 2014 when he resigned to take another teaching position in the Vallivue School District. R. 767 at ¶ 60. Initially, Caldwell High School would not accept Verity's resignation because they wanted to keep him as a teacher at Caldwell High School. R. 767 at ¶ 59; R. 862 at ¶ 45.

Ultimately, Caldwell High School accepted Verity's resignation which paved the way for Verity to take his new job at Sage Valley Middle School in the Vallivue School District. R. 767 at ¶60. Verity was also hired to coach the football team at Sage Valley Middle School and to coach freshman and sophomore basketball at Eagle High School. R. 863 at ¶ 47. Verity was ultimately promoted to junior varsity high school basketball coach before he lost his job as a result of the USA Today and KTVB publications made about him in 2016. R. 865 at ¶ 57.

Verity was a very popular teacher and coach at Caldwell High School, Sage Valley Middle School and Eagle High School. R. 830 at ¶¶ 19-22; R. 943-49; R. 851 at ¶¶ 20-21.

Sometime in late 2014, Defendant Stephen Reilly ("Reilly") of USA Today began what appears to be Reilly's first investigative report with USA Today, which apparently spanned over

one year. R. 768 at ¶¶ 63-64; R. 1136 at 9:20-10:3; R. 1137 at 13:11-14. The purpose of the investigation was, among other things, because Reilly believed "many people are concerned with making sure that schools in which their children learn are safe, that their teachers are not people who act inappropriately or put students in danger or who touch students inappropriately." R. 768 at ¶ 64; R. 1139 at 21:24-22:3.

Early on in his investigation, Reilly identified Verity as one of the teachers included in the data he collected. R. 769 ¶ 68; R. 1141 at 29:21-22. Initially, Reilly found that Verity had been disciplined in Oregon and was now teaching in Idaho. *See id.*; R. 1141 at 30:11-24. Reilly also initially and mistakenly believed that Verity had not been included in the NASDTEC, a national database that apparently tracks disciplined teachers. R. 1145 at 48:11-22.

Because Reilly initially believed Verity had not disclosed his Oregon revocation when he obtained his Idaho teaching credentials and was not included in the NASDTEC database, Reilly believed Verity was a good fit for his story regarding teachers who are disciplined in one state and then go undetected and move to another state to obtain teaching credentials. R. 1144 at 42:15-43:12; R. 1153 at 77:10-12; R. 1161 at 110:10-23, R. 1111.

After putting in substantial work to investigate Verity and others, Reilly learned that Verity was no longer a good fit for his story. Specifically, Reilly obtained Idaho's records regarding Verity's appeal and Reilly learned that Verity was, in fact, included in the NASDTEC database which caused Reilly's managing editor, John Kelly, concern regarding Reilly's

information obtained from Jodi Mills of the CSD and whether such information was reliable. R. 228 at 35:4-9, 36:10-15; R. 1112; R. 1115-1122; R. 1145 at 48:11-12; R. 1150 at 68:2-8; R. 1152 at 75:23-76:1.

As such, Reilly's managing editor decided not to allow Reilly to publish Verity's story in the article published in the USA Today. R. 1167 at 133:2-3; 135:3-6, R. 1124. Nevertheless, because Reilly had put so much work in investigating Verity, he was unwilling to give up on the fruits of that work. As such, Reilly published an article on KGW's website, under the authority of USA Today. R. 779 at ¶ 96; R. 525-33.

The article indicates Verity lost his Oregon teaching license and then obtained a license in Idaho "simply by crossing state lines." The article further states that, in obtaining his license in Idaho, Verity "slipped through the cracks." R. 779-80 at ¶¶ 97-98.

The article also states that the CSD did not know about Verity's Oregon license revocation when it hired Verity. In conjunction with Steve Reilly's article, KGW of Oregon also broadcast a story about Verity, KTVB in Idaho broadcast a story about Verity, and KTVB also printed an article about Verity on its website. R. 777-80 at ¶¶ 94-98; R. 1167 at 135:20-24; R. 228 at 33:24-34:-4; R. 1080 at 56:14-25.

All of the Defendants were working collaboratively and jointly on the story about Verity. Although each publication has slightly different use of language, all of the stories have substantially the same narrative, which was that Verity was disciplined in Oregon, secretly came to Idaho and flew under the radar screen and then obtained a license to teach in Idaho and teaching jobs in Idaho without Idaho or the school districts in Idaho knowing that Verity was disciplined in Oregon. R. 777-80 at ¶¶ 94-98; R. 538-47.

Almost immediately after Steve Reilly made his first publication on KGW's website and KGW published the broadcast on its news station, the public began inundating the Vallivue School District with communication via email and otherwise with concerns about Verity teaching at Vallivue School District and coaching at Eagle High School. R. 938-41.

Immediately after the publications, Verity was forced to resign his teaching position at Sage Valley Middle School, was not permitted to continue coaching the Eagle High School basketball team and was prohibited from coaching youth baseball and youth football for his son as he was scheduled to do, and had done for his older children (including girls' softball and basketball) for almost 20 years. R. 865-66 at ¶¶ 57-59.

After publishing the articles at issue, KTVB and USA Today continued publishing articles wherein they took credit for causing Verity to resign his teaching position. Following the publications, Verity lost all sources of income from teaching and coaching, went into a deep depression and was suicidal. R. 865-66 at ¶¶ 58-59; R. 852 at ¶ 26; R. 853 at ¶ 30.

Verity is a model husband, father, teacher and citizen and always has been. He made a mistake in 2005, owned it and did what he needed to do to make up for it. The publications falsely portray Verity as a dangerous teacher, a problem teacher, an untruthful person and a sneaky person. The publications also imply that Verity had sexual intercourse with one of his students who was not of an adult age. R. 830 at ¶ 24; R. 831 at ¶¶ 27-28; R. 851 at ¶ 20.

II. ADDITIONAL ISSUES ON APPEAL

Respondents identify the following additional issues on appeal:

(1) Whether there is sufficient evidence in the record to establish malice even if this Court determines that Verity is a public official or public figure;

(2) Whether Respondents are entitled to attorney fees on appeal under Idaho Code § 12-121.

III. STANDARD OF REVIEW

Appellants correctly articulate the standard of review on a permissive appeal and on this Court's review of a denial of summary judgment. This Court should not go beyond the issues expressly stated in Appellants' motion for permissive appeal. Specifically, the Court should not address the tort invasion of privacy – false light as the *Amici* invite the court to do. *Amici* Brief p. 11, n. 5.

Additionally, at the summary judgment stage:

> [A] trial court's power to find, at the summary judgment stage, that a statement is not defamatory as a matter of law is limited:
>
> It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous.

White v. Fraternal Order of Police, 285 U.S. App. D.C. 273, 909 F.2d 512, 518 (1990) (quoting *Levy v. American Mut. Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964).

IV. ARGUMENT

Preliminarily, it should be noted that Appellants' and *Amici's* contention repeated throughout their respective briefs that Verity concedes all stated facts in the publications at issue are true is disingenuous at best and intentionally misleading of this Court at worst. The article contained expressed false statements of fact as well as implied falsehoods. For example, as demonstrated below, the CSD was aware of the circumstances leading to Verity's Oregon license revocation prior to him being hired, yet the articles contend CSD was not aware. This false statement of fact was contained in each of the publications at issue. Additionally, the KTVB

story states that Verity was not included in the NASDTEC database when, in fact, he was in the database. Additionally, KTVB's story states, "Verity was denied a new teaching license." Nowhere in the article was it expressly stated he received an Idaho license, something all Appellants undisputedly knew before running any of the stories.[1] Although the primary concern and most damaging aspect of this case is the implied messages the publications at issue convey of and concerning Verity when read as a whole, the various news stories also contain expressed statements of fact that are not true. These expressed misstatements of fact advance the overall false narrative, more thoroughly discussed below, about Verity in the various publications at issue.

1. The United States Supreme Court Has Neither Modified Nor Abrogated The Common Law Of Defamation.

At common law, "reputation was a dignitary interest of such importance that, it was not only legally protected, the onus of publishing even truthful defamatory statements was placed on the publisher." Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 245 (1993). As Lord Mansfield explained, "Whatever a man publishes, he publishes at his peril." *Id.* (quoting *King v. Woodfall*, 98 Eng. Rep. 914, 976 (K.B. 1774). Protection of one's reputation was the primary goal of the common law tort of defamation. *See id.* at 248.

In order to recover for defamation at common law, a plaintiff was required to prove that the defendant: (1) communicated information concerning the plaintiff to others; (2) that the

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[1] Verity concedes that the article implies that he was licensed in Idaho. Nevertheless, if we are going to pretend, as Appellants and *Amici* ask this Court to do, that readers read only the literal words without regard to the context in which those words are used, or that the author only intends to convey what is literally written without regard to context, then that must go both ways. By Appellants' and *Amici's* logic, the statement "Verity was denied a new teaching license" should be an actionable false statement of fact because it is literally not true.

information was defamatory; and (3) that the plaintiff was damaged because of the communication. *See Clark v. Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007) (citing *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 177, 249 P.2d 192, 194 (1952)). Truth of a defamatory statement was an affirmative defense that need be proven by the defendant.

The U.S Supreme Court has modified the common law in an effort to balance the freedom of speech and press guaranteed under the First Amendment to the U.S. Constitution, and the People's and several States' right, arising under the Ninth and Tenth Amendments, to provide redress to those who have suffered damage to their reputation as a result of defamatory publications. *Rosenblatt v. Baer* 383 U.S. 75, 92, 86 S. Ct. 669, 676 (1966) (J. Stewart concurring) ("[t]he protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.")

In 1964, the U.S. Supreme Court rendered the Seminole decision of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, (1964), wherein the burdens of proof and standards of proof regarding defamation were substantially altered in defamation cases involving public officials. The *New York Times* decision sought to balance the interest of the First Amendment in having a free and open press and the individual's interest in protecting one's reputation. *See id.* at 264, 84 S. Ct. at 717 ("We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.")

Spawned from *New York Times* was the now clearly established law that a public official cannot recover "for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-280, 84 S. Ct. at 726.

The rationale behind the *New York Times* rule is that, pursuant to the First Amendment's protections of freedom of speech and freedom of press that public debate on public issue must not be unduly inhibited. *See id.* at 270, 84 S. Ct. at 721 ("we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.")

The U.S. Supreme Court later articulated this policy as follows:

> The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply.

Rosenblatt, 383 U.S. at 86, 86 S. Ct. at 676 (1966).

The common law of defamation is still alive and well, although restricted as it applies to public officials or public figures. Additionally, at common law, the burden of proof was on the publisher to prove the publication was true. The U.S. Supreme Court has shifted that burden to the Plaintiff in a defamation action to prove the publication was false where the publication is about a private individual but is about matters of public concern. *See Philadelphia Newspapers*

v. Hepps, 475 U.S. 767, 776, 106 S. Ct. 1558, 1564 (1986) ("[w]e believe that the common law's rule on falsity - that the defendant must bear the burden of proving truth – must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.")

In short, the individual States retain the right to provide civil redress for defamatory speech under the common law so long as the contextual standards of *New York Times* and its progeny applicable to public officials, public figures and matters of public concern are kept. *See Gertz v. Robert Welch*, 418 U.S. 323, 347, 94 S. Ct. 2997, 3010 (1974) ("[w]e hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.") (cited with approval in *Wiemer v. Rankin*, 117 Idaho 566, 574, 790 P.2d 347, 355 (1990)); *Hepps*, 475 U.S. at 775, 106 S. Ct. at 1563 ("[w]hen the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.")

For the reasons set forth below, this Court should hold that Verity is not a public official or public figure. Additionally, this Court should reject Appellant's and *Amici's* invitation to further strip an individual whose reputation is harmed by negligent publication of falsehood of his or her right to seek redress. The present state of the law of defamation adequately balances societies' interest in the freedom of the press and freedom of speech found in the First Amendment with individual interests and in protecting his or her reputation and the states' interest in providing redress for defamation.

2. Public School Teachers And Coaches Are Not Public Officials/Figures And Should Not Be Treated As Public Officials/Figures.

The *New York Times*' "public official" standard was designed to ensure robust and free debate over both public issues and "those persons who are in a position significantly to influence the resolution of those issues." *Rosenblatt*, 383 U.S. at 85, 86 S. Ct. at 675 (1966). In *Gertz,* the U.S. Supreme Court provided the framework from which this Court should analyze whether Verity is a public official.

The *Gertz* court expressly agreed with the *New York Times*' actual malice standard applicable to public figures and public officials, but also expressly declined to extend that standard to private individuals even where the publisher was a media defendant. 418 U.S. at 343, 94 S. Ct. at 3008. First, the *Gertz* court recognized that public figures and officials are in a better position to combat defamatory publications by virtue of their status in the public's eye. The Court reasoned "[p]rivate individuals are therefore more vulnerable [than public officials] to injury, and the state interest in protecting them is correspondingly greater. *Id.* at 344, 94 S. Ct. at 3009.

Secondly, the *Gertz* court recognized that public officials/figures undertake a sort of assumption of risk by voluntarily placing themselves in the public domain (public official) or accepting the benefit of being in the forefront of the public (public figure). *See id.* As such, private individuals are more deserving of redress for defamatory speech than are public figures and public officials. *See id.*

A. Verity was not a public official.

Appellants contend Verity is a public official merely because he was a school teacher and coach. This contention has been rejected by several other states and should be rejected by this Court. *See, e.g., Poe v. San Antonio Express-News Corp.*, 590 S.W.2d 537, 540 (Tex. Civ. App. 1979) (reversing the trial court's characterization of a public school teacher as a public figure); *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 286-87, 362 S.E.2d 32, 37 (1987) (holding that a teacher, who was not an elected official, did not influence or appear to influence or control any public affairs or school policy and therefore was not a public official under *New York Times*); *Franklin v. Benevolent & Protective Order of Elks*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136-37 (1979) ("[w]e conclude that an appropriate balancing of freedom of expression against sanctity of reputation does not require, and that appropriate regard for the role of the classroom teacher in our society should not permit, extension of the public official concept to a school teacher 'entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.'") (quoting *Rosenblatt, supra*). *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 297, 473 N.E.2d 1191, 1195 (1984) (cert. den. *Lorain Journal Co. v. Milkovich*, 474, U.S. 953, 106 Sup. Ct. 326 (1985) (holding that a prominent wrestling coach, although, "recognized and admired in his community for his coaching achievements, he does not occupy a

position of persuasive power and influence by virtue of those achievements . . ." and "[b]y the same token, [the wrestling coach's] position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies."); *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984) (refusing to characterize a public high school English teacher as a public figure). The *Nodar* court wisely recognized the problem with characterizing school teachers as public figures and rejected the idea that "one who accepts a position as a teacher in a public high school thereby effects the same kind of surrender of the right to vindicate defamation as does one who seeks or accepts an elected or policymaking position with a public body or government institution." *Nodar* 462 So. 2d at 808.

Applying the *Gertz* principals to the present case leads to only one reasonable conclusion - Verity is not a public official.

First, Verity did not hold a position of persuasive power and influence by virtue of his position as a high school teacher or coach. A school teacher and coach has limited, albeit important, influence over a very small group of people – his or her students and athletes. It is not the kind of broad influence that generates general public interest in the position held. Stated differently, the general public does not have any interest in how a particular teacher performs his or her duty. The interest in the performance of a teacher or coach comes from his students and athletes and their families. The decisions a school teacher and his conduct makes does not directly affect the general public and does not influence public policy.

Second, a school teacher or coach generally, and Verity specifically, are not better situated than a private citizen to combat falsehoods because of holding the position of school teacher or coach. Verity's teaching and coaching position did not give him a unique platform *vis-à-vis* a private individual to defend himself and refute defamatory speech like a politician or famous person.

Third, Verity has not accepted public office or assumed an "influential role in ordering society." *Gertz,* 418 U.S. at 345, 94 S. Ct. at 3010. To hold otherwise would discourage individuals from becoming public teachers at a time when Idaho is already having a difficult time recruiting educators and coaches.

The injustice of stripping public school teachers and coaches of redress for non-malicious defamation is underscored when one considers the fact that the same standard would not be applied to private school teachers. Private school teachers are in no sense of the word "public" officials or "public figures." And yet Appellants are asking this Court to expose public school teachers to defamation without the same level of redress that their private school teacher counterparts enjoy. This is wholly unjust and would undoubtedly exacerbate the difficulty of public school teacher and coach recruitment. Verity is not a public official.

B. Verity was not a public figure.

Similarly, Verity is not a public figure. This Court in *Wiemer*, 117 Idaho 566, 790 P.2d 347 (1990) set forth two independent tests articulated by the U.S. Supreme Court to determine whether an individual is a public figure. First, one is a public figure if he occupies "a position of such 'persuasive power and influence' that he could be deemed one of that small group of individuals who are public figures for all purposes." *Wiemer*, 117 Idaho at 570, 790 P.2d at 351

(citing *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 165, 99 S. Ct. 2701, 2706, 61 L.Ed.2d 450, 458 (1979).

Second, a person could be a public figure if he thrusts himself "to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* (quoting *Gertz*, 418 U.S. 323, 345, 94 S. Ct. 2997, 3009, 41 L.Ed.2d 789, 808 (1974)). In that case, that person is a public figure "for the limited purpose of comment on his or her connection with, or involvement in, the particular controversy." *Id.* Verity fits into neither of the two public figure categories described in *Wiemer*. Verity is not a public figure.

C. The modified standard of *Hepps* governs school teacher where the publication is about conduct of the teacher related to his or her employment.

The well-reasoned decision of the trial court that Verity is not a public official or public figure should be affirmed. Although there might be circumstances where a public school teacher could be a public figure - e.g. if he or she is also an elected school board member, is actively involved in administrative decisions of the school or has taken an overt and active public position on a particular public dispute – those circumstances do not exist here. There is no valid public policy reason to treat Verity as a public official or public figure.

The cases Appellants and the *Amici* cite that hold public school teachers as public officials ignore the fundamental reasoning of the *New York Times* Court and it progeny. These cases conflate the public figure/public official rubric and the public concern rubric. Verity conceded at the summary judgment stage in the lower court that the topic about which the Appellants wrote was a matter of public concern. Indeed, any topic regarding a school teacher's conduct related to his employment is a matter of public concern regardless of whether the teacher

is in a public or private school. As such, the modified standard articulated in *Hepps*, 475 U.S. 767 at 776, 106 S. Ct. 1558, 1564 (1986), applies.

The *Hepps* public concern standard, which places the burden of proving falsity on the Plaintiff on matters of public concern, provides the proper balance between the First Amendment rights of speech and press on the one hand and the states' compelling interest in providing redress for damages to reputation by defamation to school teachers on the other hand. The heightened burden to prove actual malice should not be applied to school teachers and coaches.

3. Defamation By Implication Is Already A Tort Recognized In Idaho And Should Remain As Such.

Imagine an article that highlighted an epic battle between two wrestlers, Joe and John. After describing the match the article concludes "Joe killed John." In context, it is clear that the statement "Joe killed John" was a metaphor, not a statement of fact that Joe committed homicide. Yet if the statement "Joe killed John" is taken out of context and taken literally, then it could form the basis for a defamation claim because it is clearly false and is clearly defamatory. Presumably Appellants and *Amici* would agree that a defamation claim under these facts would be absurd.

Conversely, consider an article written about an epidemic of marital infidelity in the community of Boise and discussing an alarming high rate of married couples committing adultery. In such article it is stated vaguely that Mary was seen in Boise entering into a residence with a man who was not Mary's husband, and it happens to be literally true that Mary entered a residence with a man other than her husband (it was her father). Given the context and premise of the article, the inescapable implication is that Mary was being unfaithful to her husband. There would be no other logical explanation for including Mary in the story. The

harm to Mary's reputation that would flow from naming her in the article is as real as the harm that would flow by expressly stating Mary was not being faithful to her husband.

It is just as unjust to deprive Mary of her ability to seek redress for the harm to her reputation in the latter hypothetical as it would be to allow Joe to recover for defamation in the former hypothetical. The hypotheticals above demonstrate the reality of how people communicate. Communication does not occur in a vacuum – context matters. Appellants and *Amici* are asking this Court to ignore the reality of how people communicate and pretend that a falsehood cannot be communicated and cannot harm a person unless it is expressly stated. Defamation by implication has been recognized as a tort since the infancy of the common law and should continue to be the law in Idaho.

Idaho Code § 73-116 provides "[t]he common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."

Under this statute, the common law is expressly the law of the land in Idaho unless contrary to the law or the Constitution of the United States, or unless the Idaho Legislature expressly abrogates the common law. *See Evans v. Twin Falls Cty.*, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990) ("Idaho Code § 73-116 provides that the rules of the common law are in effect in Idaho unless modified by other legislative enactments) (citing *State v. Iverson*, 79 Idaho 25, 310 P.2d 803 (1957)).

The Idaho Legislature is presumed to know the common law. *Twin Lakes Canal Co. v. Choules*, 151 Idaho 214, 218, 254 P.3d 1210, 1214 (2011). In 1953, the Idaho Legislature passed legislation that slightly altered the common law of defamation in a way that does not apply to the issues before this Court. Idaho Code §§ 6-701, *et seq.* The Idaho Legislature has added to or amended Idaho Code §§ 6-701, *et seq.*, at least a couple of times since 1953, yet the Legislature chose not to alter or abrogate the common law tort of defamation by implication discussed below.

At common law, one could recover for defamation based upon implications of an otherwise literally true publication. As one oft-cited scholarly article provides:

> At common law, the focus in establishing defamatory meaning was on what a reader could reasonably understand the publication to mean. Even if all readers would not derive a defamatory meaning from the publication, it was sufficient if some would reasonably construe the publication in a defamatory sense. It did not matter whether the publisher intended or was even aware of the defamatory meaning pressed by the plaintiff and found by the court to be fairly derived from the publication. The defendant's subjective state of mind regarding the meaning of his publication was simply not relevant. At common law, the plaintiff could establish the asserted defamatory meaning by pleading and proving extrinsic facts – "inducement" - which would provide the basis for the defamatory "innuendo." It did not matter whether the defendant knew the extrinsic facts, nor whether he could reasonably be expected to discover them.

Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 247 (1993).

Thus, in accordance with Idaho Code § 73-116 and the common law, the right to recover for defamation by implication already exists in Idaho.

The U.S. Supreme Court and several state courts have recognized the tort of defamation by implication, primarily because they recognize that defamation is harmful in whatever form it comes. *See Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 13, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (recognizing that defamation can arise where a statement of opinion reasonably implies false and defamatory facts); *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008) ("defamation already recognizes the concept that literally true statements can be defamatory where they create a false impression. This variation is known as defamation by implication and has a longstanding history in defamation law."); *West v. Thomson Newspapers*, 872 P.2d 999, 1009 (Utah Sup. Ct. 1994); *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 828 (Iowa 2007) ("We now expressly adopt the principle of defamation by implication. Otherwise, by a careful choice of words in juxtaposition of statements in a publication, a potential defendant may make statements that are true yet just as damaging as if they were actually false."); *Turner v. KTRK TV, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000) (holding "the First Amendment allows a public figure to sue for defamation when a publication as a whole conveys a false and defamatory meaning either by omission or juxtaposition.")

Defamation by implication arises, not from what is stated, but from what is implied when a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them; or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct. *See Stevens* at 728 N.W.2d 823, 827 (Iowa 2007) (quoting Dan B. Dobbs, *Prosser & Keeton on the Law of Torts* § 116, at 117 (Supp. 1988)).

In expressly recognizing the that defamation by implication has a longstanding history at common law, our neighboring Utah Supreme Court stated "[a] court simply cannot determine whether a statement is capable of sustaining a defamatory meaning by viewing individual words in isolation; rather, it must carefully examine the context in which the statement was made, giving the words their most common and accepted meaning." *See West,* 872 P.2d 999, 1009 (Utah Sup.Ct. 1994).

This Court should expressly confirm that defamation by implication is a tort at common law just as the Utah Supreme Court and several other state supreme courts and federal circuit courts have done.

4. The Court Need Not Engage In An Analysis Of Whether The Present State Of Defamation Law Is Constitutional.

Appellants and the *Amici* ask this Court to provide what amounts to an advisory opinion that would create "elements" of a cause of action for defamation by implication that are allegedly required under the First Amendment to the U.S. Constitution. This the Court need not do in order to resolve the issues before the Court on this permissive appeal.

It is also well established that "[w]hen a case can be decided upon a ground other than a constitutional basis, the Court will not address the constitutional issue unless it is necessary for a determination of the case." *State ex rel. Kempthorne v. Blaine Cty.*, 139 Idaho 348, 350, 79 P.3d 707, 709 (2003) (citing *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 710, 791 P.2d 1285, 1289 (1990)); *Thomson Newspapers*, 872 P.2d at 1004 ("we begin our analysis by focusing on state common law principles, in adherence to the general rule that courts should avoid reaching constitutional issues if the case can be decided on other grounds.") (internal citations omitted).

In *Thomson Newspapers*, the Utah Supreme Court recognized that "courts should decide cases on non-constitutional grounds where possible, including common law or statutory grounds." *Thomson Newspapers*, 872 P.2d at 1004. The Utah Supreme Court, after thoroughly analyzing the tort of defamation by implication claim under the common law, Utah State law and the Utah State Constitution, vacated the lower Appellate Court's decision as it related to the First Amendment of the United States Constitution. Specifically, the Utah Supreme Court stated the following:

> Having determined that in defamation cases all questions of state law -- common law, statutory, and constitutional -- should be resolved before assessing whether any claimed federal constitutional violations remain, we expressly vacate the opinion of the court of appeals without ruling on the merits of its First Amendment analysis.

Id. at 1020-21.

As discussed above, the common law answers the question in the affirmative that defamation by implication is a tort in Idaho just as it does in the state of Utah and several other states. Furthermore, the elements of the tort of defamation are well defined under Idaho law and at common law.

Appellant's and *Amici* urge this Court to alter the common law of defamation and the law of Idaho by requiring a plaintiff to prove additional elements of defamation where the defamation is by implication. The thrust of their arguments is that the First Amendment to the U.S. Constitution requires these additional burdens on a defamed Plaintiff. Neither Appellants nor *Amici* provide binding authority for imposing such a burden. To be sure, the United States Supreme Court has been presented with at least one defamation by implication case and did not impose additional burdens on the Plaintiff. *See Milkovich*, 497 U.S. at 19, 110 S. Ct. at 2706 ("It

is worthy of note that at common law, even the privilege of fair comment did not extend to 'a false statement of fact, whether it was expressly stated ***or implied*** from an expression of opinion.'") (quoting Restatement (Second) of Torts, § 566, Comment a (1977)) (emphasis added).

This Court in *Wiemer, supra,* had an opportunity to address whether defamation by implication cases warrant imposing an additional burden on a Plaintiff and it did not do so. *Wiemer* involved a published article critical of the prosecuting attorney of Kootenai County regarding the death of the plaintiff's wife. The article never mentioned the plaintiff, Wiemer, by name and was clearly focused on the alleged botched investigation of the death of Mr. Wiemer's wife which was deemed a suicide. The focus of the article was not Wiemer. Nevertheless, Wiemer brought a defamation claim against the author of the article in which Wiemer contended that the article as a whole implied "that Irvin lied during the police investigation and that Irvin murdered [his wife]." *Id.* at 571, 790 P.2d at 352. This Court stated in *Wiemer* "for purposes of reviewing the award of summary judgment, we interpret the article as ***implying*** these statements." *Id.* (emphasis added). The *Wiemer* court necessarily recognized defamation by implication as a tort in Idaho or the trial court's decision would have been affirmed as the entire case hinged on false implications about *Wiemer,* not expressions of fact about him. *See id.* ("Using this approach to evaluate the ***implications*** of Rankin's article gives us a framework within which to determine whether the article expressed ***or implied*** defamatory statements of 'fact' or protected statements of 'opinion.'") (emphasis added).

Weimer clearly involved a defamation by implication case, although not articulated as such; yet this Court did not find it necessary to vary from the well-established law of defamation. This Court should likewise exercise judicial restraint and refrain from going beyond the dispute at hand to fashion law regarding an already well-established tort.

It is the function of the Idaho Legislature to pass laws that abrogate or modify the common law. It is the function of the U.S. Supreme Court to interpret the U.S. Constitution unless doing so is necessary to resolve a particular dispute. On the other hand, this Court is the final arbiter and interpreter of the Idaho State Constitution, which states, "Every person may freely speak, write and publish on all subjects, *being responsible for the abuse of that liberty.*" Idaho Const. Art. I, § 9 (emphasis added). This Court has expressed the importance of protecting an individual's reputation from an unscrupulous media as follows:

> The public press is not licensed to do evil even under the misapprehension that good may result therefrom. The public press has no more license to publish falsehood and defamation than has a private individual.

McDougall v. Sheridan, 23 Idaho 191, 218, 128 P. 954, 963 (1913).

Appellants and the *Amici* focus their argument solely on the First Amendment of the U.S. Constitution without paying homage to any other provisions of the U.S. Constitution, the Idaho State Constitution or the states' interest in providing its people with the right to redress for harm caused by false publications. For example, the Ninth and Tenth Amendments to the U.S. Constitution leave to the people and the States the right and powers not restricted or delegated under the U.S. Constitution. *See Rosenblatt*, 383 U.S. at 92, 86 S. Ct. at 679 (J. Stewart concurring). One such right is the right to provide redress to individual's damages to

his or her reputation. It is the State's right to define defamation as it deems appropriate, subject to the *New York Times*' standards regarding public officials, as further clarified in *Gertz*.

Appellants and *Amici* similarly ignore the constitutional right to a jury trial. Article I, Sec. 7 of the Idaho Constitution states, "[t]he right of trial by jury shall remain inviolate . . . ." The Appellants and *Amici* are asking this Court to impose such a burden on a plaintiff in a defamation by implication case that the judges, not juries, would effectively be deciding whether a statement is true or false, or whether the communication is defamatory when read as a whole.

The Appellants and *Amici's* goal seems more about ensuring the media can publish anything, no matter how damaging and false, with impunity so long as they carefully craft the publication so that every expression of fact is literally true. It should be left to a jury to decide if a publication is false based upon the entire context of a publication.

If, in fact, a particular article is made up of all truthful statements as Appellants and *Amici* contend in this case (although disputed by Verity), and the matter is of public concern as in the present case, then defamation defendants similarly situated are adequately protected because of the inherent difficulty plaintiffs like Verity will have in proving by a preponderance of the evidence that the publication is false where all expressed statements are true.

In short, it is the proper role of the jury to determine if a publication is defamatory and false. Defamation plaintiffs have a right to present their case, and defendants are adequately protected by the requirement that a super majority of the jury must agree that the elements of defamation have been proven by a preponderance of the evidence. This Court need not undertake a First Amendment analysis to resolve the issues presented in this case.

5. Even If Verity Is Determined To Be A Public Official And/Or This Court Determines That The Tort Of Defamation By Implication Required Additional Proof Beyond The Traditional Defamation Case, Verity's Defamation Action Should Be Remanded For Trial.

The Court should find that Verity is not a public official or public figure and therefore is not subject to the *New York Times*' actual malice standard. If, however, this Court finds Verity is a public official or public figure, the Court should remand this case to the District Court for trial because there is sufficient evidence in the record from which a jury could find that Appellants acted with actual malice.

In a defamation action, actual malice is established by proving that the publisher acted with knowledge of falsity or reckless disregard of truth. *See Clark,* 144 Idaho 427, 431, 163 P.3d 216, 220 (2007) (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991)) (internal citation omitted). In order to establish malice, the plaintiff must demonstrate that "the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of . . . probable falsity." *Id.* (internal quotation omitted). The question of whether malice exists requires the court to focus on whether there is sufficient evidence of purposeful avoidance of the truth. *See id.* (internal citation omitted).

The standard of actual malice is a subjective one. *See id.* (internal citation omitted). A defendant's subjective state of mind can and almost always is proven through cumulative circumstantial evidence. *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 875 (W.D. Va. 2016) (internal citation omitted).

Oftentimes a single factor standing alone will not establish malice but the existence of more than one of such single factors taken together will establish malice. Evidence of malice includes (1) failure to further investigate where one has a reason to question the reliability of a source; (2) failure to adhere to journalistic standards; (3) publishing despite obvious reasons to doubt the veracity of an informant; (4) motive to harm the subject of the publication; and (5) that the defendants conceived a storyline in advance of an investigation and then consciously set out to make the evidence conform to the preconceived story. *See Eramo*, 209 F. Supp. 3d at 871-72 (W.D. Va. 2016).

The last category of evidence – that a defendant sets out to make the evidence conform to a preconceived story – "may often prove to be quite powerful evidence [of malice]." *See id.* (quoting *Harris v. City of Seattle*, 152 F. App'x 565, 568 (9th Cir. 2005)).

In the present case, there is substantial evidence that the Appellants published the defamatory statements and implications about Verity with reckless disregard for the truth at best and with actual knowledge of the truth at worst. The following evidence in the record is circumstantial evidence from which a jury could find malice.

1. Early on in Reilly's year-long investigation, he targeted Verity as a potential problem teacher that was disciplined in one state and obtained a teaching job in another state by simply crossing state lines and not telling anyone about his discipline in the first state. Reilly was determined to fit Verity into the mold of a problem teacher to the point of inaccurately describing Verity's conduct. For example, Reilly sent an email to Mr. Tierney of KGW wherein Reilly states, "She [Jodie Mills] seemed appropriately disturbed that the district did all the

correct background checks and still ended up hiring a teacher ***who had sex with a student***, and she seems willing to talk about it." R. 485; R. 517; R. 555; R. 582; R. 1131 (emphasis added).

Reilly's investigation ultimately revealed unquestionably that Verity had fully disclosed his Oregon revocation in obtaining an Idaho license and that he was on the NASDTEC database; yet Reilly and USA Today ran the story anyway on KGW's website even after the USA Today managing editor decided not to include Verity in the story published in the USA Today itself. R. 1147 at 53:20-56:5.

2. The Defendants published articles after Verity resigned from the Vallivue School District wherein they perpetuated the false narrative and false information in their stories and they took credit for causing Verity to resign. R. 465-66; R. 468-69; R. 471-72; R. 535-36; R. 538-540; R. 542-47' R. 565-66; R. 590-91.

3. The Appellants knew Verity went through an extensive vetting process in Idaho before being granted Idaho teaching credentials and did so virtually simultaneously with going through the less complete process in Oregon; yet Appellants chose to focus solely on the Oregon process and did not mention the Idaho process at all. R. 1083 at 66:20-68:3.

4. The Appellants focused on a few isolated negative quotes in the Oregon record and ignored and buried the overwhelmingly positive information about Verity in the Oregon record and in the Idaho record.

5. The Appellants relied on statements from Jodi Mills of the CSD and quoted her in the story despite knowing that she was not involved in any way in hiring Verity at Caldwell High School and after questioning the reliability of her information. R. 228 at 34:15-36:21. This is evidence of failure to properly investigate and relying on a source that has questionable veracity.

6. Comments made in emails between and among the Appellants prior to publishing suggest they had a motive to oust Verity from teaching in Idaho. R. 489; R. 1113; R. 1109. In short, Reilly established in his mind early on that Verity was a dangerous teacher that skipped the state of Oregon and secretly obtained a license in Idaho. This preconceived story that ultimately fell apart when Reilly learned Verity was completely transparent with Idaho and that Verity was in the NASDTEC database caused Reilly to publish for USA Today the story on KGW's website even though his managing editor at USA Today nixed Verity in the USA Today publication. Similarly, Ms. Tremblay knew Verity should not be featured in her story but featured him anyway at the behest of her news director at KTVB. R. 1087 at 82:14-83:10; R. 1098-99 at 126:22-130:7.

The present case has some striking similarities to the facts in *Wiemer* and are more egregious than what occurred in *Wiemer.* As is demonstrated below, the Appellants in the publications at issue in this case not only did not provide sufficient information to allow readers to make an independent decision regarding statements made or facts implied in the publications at issue, they intentionally left out information they knew and that directly contradicted the publications' various defamatory implications.

A. Steve Reilly's article published on KGW website

On or about February 15, 2016, USA Today and Steve Reilly published an online article on the website KGW.com entitled "Broken Tracking Systems **let teachers flee troubled pasts**." R. 525-33; R. 1148 at 58:5–60:13; R. 494-502 (emphasis added). The subheading of the article is "An investigation found fundamental defects in the teacher screening systems used to ensure the safety of children in the nation's more than 13,000 school districts." *Id.* In the body of the

article, it purports to provide a link to a related story that says, in bold and underlined font, "**KGW investigates: Sex offenders on campus**." *Id.* (emphasis in the original). The article first generally describes four teachers' circumstances, the first of which is Verity's situation in Oregon. The article then states "all four of those teachers found their way back into the front of public classrooms ***simply by crossing state lines.***" *Id.* (emphasis added). Another bullet point included in the article discusses states who fail to report the names of disciplined teachers to a privately run database and because of that "***troubled and dangerous teachers*** can move to new states – and get back in the classrooms – ***undetected***. *Id.* (emphasis added). The articles lead-in bullet points also refer to "problematic teachers" and the alleged failure of states to share information about "severe abuse cases."

The article then gets into the specifics of Verity's case with the heading "Former Oregon Teacher ***Slips Through the Cracks.***" *Id.* (emphasis added). The article then discusses Verity's history of teaching in Oregon as of 2005. The first two paragraphs, although incomplete, are accurate. The third paragraph after the subheading regarding Verity begins running off track. It states Verity applied for reinstatement in Oregon in 2009, when in fact he applied for reinstatement in 2007. The article then implies that Verity obtained a teaching license and subsequently a teaching job at the CSD without Idaho or the CSD knowing that he had his Oregon license revoked or the circumstances under which Oregon revoked his license.

One cannot read this article without coming to the conclusion that Verity secretly came to Idaho, covered up the circumstances that led to his Oregon license revocation, and that he was teaching in Idaho while posing a threat to the students of Idaho whom he taught. It is inescapably implied in the article that Verity was a dangerous teacher with a troubled past, that

his teaching in Idaho jeopardized the "safety of children" in Idaho, and that he went "undetected" in obtaining Idaho teaching credentials and an Idaho teaching job and that his Oregon revocation "absolutely" would have been a concern had it come to the CSD's attention. These implied facts are false as briefly explained below.

1. Verity was never a dangerous teacher or one that threatened the safety of students.

As of the date of the article in 2016, Verity had been a teacher and a coach for eighteen years. The sole significant discipline action against Verity during that time was the approximate four months during which he was having inappropriate communication with an eighteen-year-old female by phone and text and during which he had two instances of inappropriate physical contact with the female student. The article does not provide any information about Verity from which the readers could form their own opinion about whether Verity posed a danger to students. Reilly and USA Today knew before publishing the article that Verity had been through extensive counseling after the 2005 incident, that he had been fully vetted by the Idaho PSC who ultimately decided to issue him an Idaho license, and that Verity had provided the hearing panel that heard his appeal all the details that led to his Oregon license suspension plus updated information that addressed the panel's concerns about whether Verity posed a threat to students.

The information Reilly and USA Today intentionally withheld from the public would have most certainly enabled to public to form their own opinion regarding Verity and whether he was a danger to his students, and would have led them to the conclusion that Verity was not a danger to his students, just as everyone who has all the information has concluded (e.g. the hearing panel that heard his case, friends, family, colleagues and professionals who know Verity

personally or have had direct involvement with him and are aware of the circumstances that led to Verity's Oregon license suspension).

For example, Dr. Miller, who counseled Verity in 2008, opined that "there is no significant reason to believe that Verity is a risk to 'cross the line' with a student of any age." R. 387 at ¶ 14; R. 762-63 at ¶ 44; R. 844 at ¶ 14. Ms. Hensman, who was on the hearing panel that approved Verity's Idaho license and who worked side by side with him as a science teacher at Caldwell High School felt comfortable with her own daughter being in Verity's classroom. R. 828-29 at ¶ 11; R. 829 at 16; R. 830 at ¶ 18.

2. Verity fully disclosed his Oregon license revocation and the circumstances that led to such revocation to the Idaho Board of Education and to the Caldwell and Vallivue School Districts.

Rather than admitting their mistake and taking responsibility for the inaccuracies in their reporting, the Appellants are doubling down on the idea that Verity did not fully disclose his Oregon revocation and the circumstances that led to his Oregon revocation to the State of Idaho or to the CSD. The Idaho PSC hearing panel stated in its October 10, 2008 Interlocutory Order the following: "The Chief Certification Officer's case was entirely documentary. The State's Exhibit 1 was Verity's Application for an Idaho Professional Education Credential and materials that he submitted with the Application. In connection with his Application, ***Verity disclosed that he had been disciplined by the Oregon Teacher Standards and Practices Commission (OTSPC).*** Verity signed and agreed to a Stipulation of Facts, Order of Revocation and Probation before the OTSPC (the OTSPC Stipulation that contained the following . . . ." R. 369; R. 835; (emphasis added). The fact that Verity disclosed his Oregon license suspension and the circumstances that led to the suspension is also confirmed in a letter from Krista Howard,

attorney for the State of Idaho to the Oregon TSPC, dated May 21, 2008, where Ms. Howard states "[a]ttached to Verity's [Idaho teaching certificate] application was a Stipulation of Facts, Order of Revocation and Probation between Verity and the Teacher Standards and Practices Commission." R. 339.

The Appellants knew Verity had disclosed this information to Idaho and the Appellants had this information when they published the article at issue, yet they intentionally withheld this information from the public and led the public to believe that Verity did not disclose this information to Idaho when applying for an Idaho teaching certificate. R. 489; R. 1113.

Similarly, Verity fully disclosed his Oregon revocation and the circumstances that led to such revocation to the CSD before being hired. R. 862 at ¶¶ 41-42; R. 831 at ¶¶ 25, 27, 29; R. 832 at ¶ 30. Yet the article clearly implies that Verity did not disclose such information to the CSD. Such implication was false.

Appellants try to explain that Jodi Mills, the superintendent whom one or more of the Appellants talked to, told them the CSD did not know. The Appellants did not take any further action to investigate Ms. Mills' statements despite (1) questioning the reliability of her statements; and (2) knowing that she was not an administrator at the CSD when Verity was hired or in any way involved with the hiring of Verity at the CSD. R. 1150 at 68:2-69:8; 75:23-76:1; R. 1120.

Reilly does not disclose in the article that Ms. Mills was not involved in hiring Verity or that he had concerns for the accuracy of the information he received from Ms. Mills about Verity.

3. Verity had a short period of trouble in his past, but did not have a "troubled past."

The article implies that Verity had a troubled past. Such implication suggests he has an ongoing history of trouble or problems. Verity has no criminal history, has been married for 27 years, has six children, is actively involved in his children's lives, has volunteered countless hours coaching youth sports and high school sports, has taught school and coached school ball of various types for over 20 years. Given this background, one could certainly conclude Verity is a model husband, father, teacher, coach and community volunteer.

Given this undisputed background, it is for the jury to decide whether the implication that Verity had a "troubled past" is a protected opinion or whether it is an actionable false statement just as the use of the statement "the evidence is overwhelming" used in the *Wiemer* case was submitted to the jury for consideration.

Reilly goes out of his way in this article to lead the readers of the article to believe he did a thorough investigation regarding Verity before publishing this article. To be sure, he did have knowledge of the extensive process Verity went through to get his Idaho teaching license and the record of such proceeding. That record included the extensive counseling Verity went through, Dr. Miller's opinion that Verity is not likely to cross the line with any girl, strong and detailed letters of support from over 40 individual friends, family and colleagues, and a petition of support signed by over 90 individuals who were friends, family and colleagues of Verity. R. 878-936.

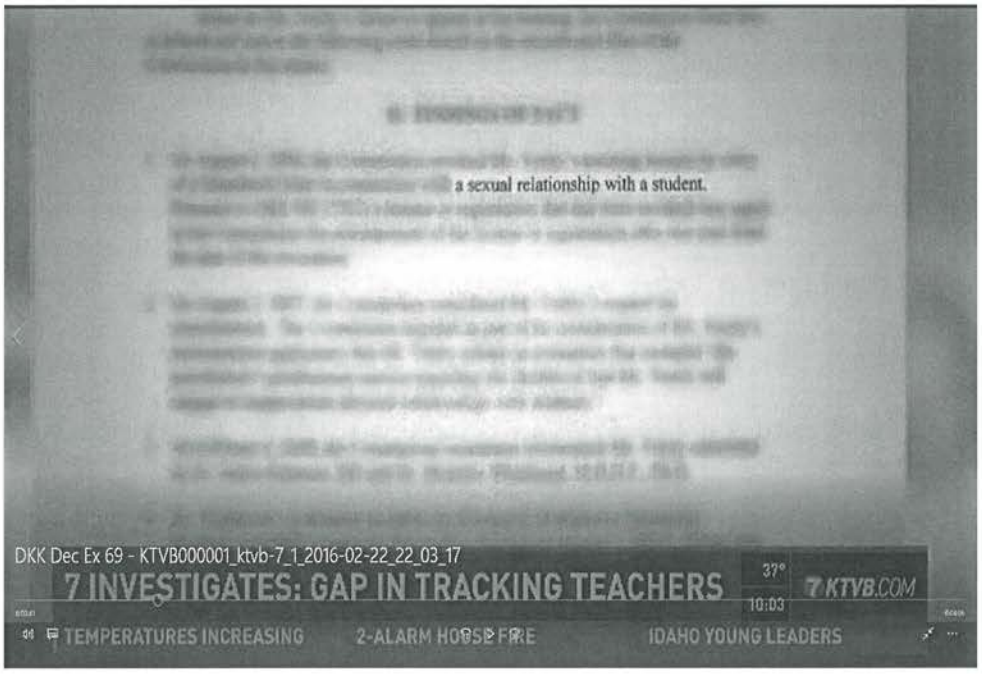
Because Reilly had information about Verity that refutes Reilly's implied statement that Verity had a troubled past and did not include that information to the public despite letting on

that he had information because of his "investigation", a jury could conclude that the article's implication that Verity had a "troubled past" was false.

B. KTVB's broadcast and online article

On February 22, 2016, KTVB aired a broadcast in conjunction with Steve Reilly's USA Today story discussed above. The story's lead-in states, "too often disciplined teachers are ***simply crossing state lines*** and landing brand new jobs." The article refers to Verity having a "sexual relationship" with an 18-year-old female student. The broadcast nowhere clarifies what the term "sexual relationship" means.

The visual used in conjunction with the reference to a "sexual relationship" is the following:



Supp. R. at DKK Dec. Ex. 69.

The document in the visual is the Oregon TSPC's February 23, 2009 default order denying Verity's application for reinstatement, which was entered ***after*** Verity had his hearing

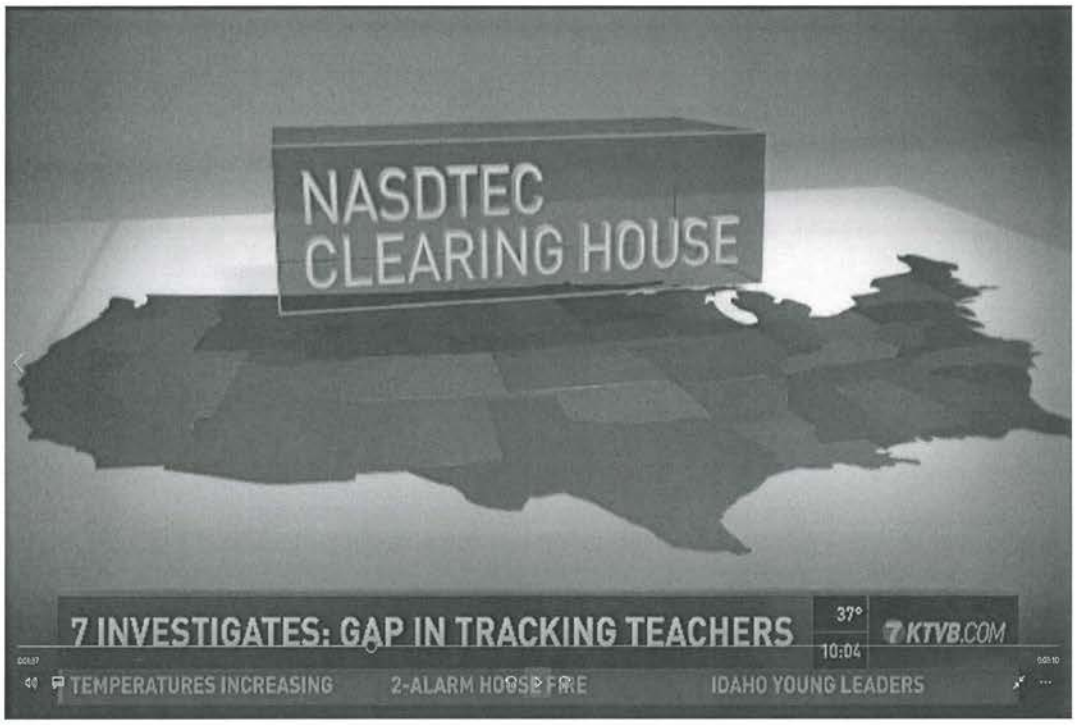
before Idaho's PSC (September 30, 2008), ***after*** the hearing panel had issued an Interlocutory Order giving Verity more time to supplement the record (October 10, 2008), and only three months before Idaho's PSC ordered that Verity be issued an Idaho license May 22, 2009). R. 376-379.

Ms. Tremblay intentionally relied on a default order that characterizes Verity's conduct as a "sexual relationship" and did not disclose the document or the language the TSPC used to describe the relationship in the Stipulated Order that made clear it was **not** a sexual relationship as that term is commonly understood to mean sexual intercourse. R. 296 at ¶ 6.

Furthermore, Ms. Tremblay intentionally failed to disclose that Verity was, in fact, granted an Idaho license at or very near the same time he was denied an Oregon license based upon a complete record that went to hearing. Rather, Ms. Tremblay reports that Verity was "denied a new teaching license, but the very next year, Verity was back in the classroom." Supp. R. at DKK Dec. Ex. 69.

The broadcast also states Verity was not in the NASDTEC database and provides an extensive visual to make that point; yet, it was clearly false that he was not in the NASDTEC. *Id.*

The following visual was used to reinforce the false statement that Verity was not in the database.



Supp. R. at DKK Dec. Ex. 69.

Ms. Tremblay, the lead reporter on the KTVB story, states, in conjunction with this visual, "[w]e found states can take months or even forget to add names to the database, allowing ***problem teachers to skip town and get back into schools***." (emphasis added). *Id.* Ms. Tremblay goes on to say:

> We found 9,000 disciplined teachers nationwide missing from the database, including Verity who worked for the Caldwell School District from 2010 to 2011 and from 2013 to 2014. The superintendent there, Jodie Mills, tells us they had no idea about his past record. Verity started working in the Vallivue School District in 2014. He still teaches sixth grade science at Sage Valley.

Id.

Virtually all of the information in this passage is false or materially misleading. First, Verity was in the database. But by falsely stating he was not, and using him as an example of one that was not, the broadcast implies that Verity is a teacher that is a "problem teacher" that

was "allowed" to "skip town and get back into schools" as described previously in the broadcast. *Id.*

Second, Verity worked continuously at CSD from 2010 to 2014, not from 2010-2011 and from 2013-14. *Id.*; R. 436; R. 486. Although this false statement might be innocuous standing alone, it suggests some type of instability or inconsistency in Verity's teaching employment history that further promotes the false narrative that Verity is a "problem teacher."

Third, the broadcast claims the CSD did not have knowledge of Verity's Oregon revocation. Supp. R. at DKK Dec. Ex. 69. The record is clear that this is false. CSD had full knowledge of Verity's Oregon teaching revocation, yet the broadcast states or implies it did not. Ms. Tremblay knew that Ms. Mills was not involved in the hiring of Verity and had reason to question the reliability of the information Ms. Mills provided about that. *Id.*

In short, the KTVB broadcast undeniably presents false statements of fact and implication of false facts such that a jury must decide whether and to what extent these false statements and implications are actionable. *Id.* Possibly the best evidence that the KTVB story contained false information about Verity is Ms. Tremblay's own admission that she did not believe Verity should be featured in the story but her managing editor at KTVB overruled her and included Verity anyway. R. 1087 at 82:14-83:10; R. 1098-99 at 126:22-130:7.

In short, the record strongly supports a finding that Appellants acted with malice in publishing their stories about Verity.

V. CONCLUSION

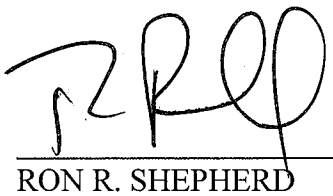
The Appellants left a path of destruction and devastation that spans across Verity's family, friends, community and the public school system itself. Although Verity is the only

person who may recover under the law for the harm Appellants exacted, Verity's children, students, student-athletes and the youth sports programs for which Verity volunteered tens of thousands of hours over the past two plus decades are now suffering because Appellants put their professional aspirations above the truth. Tami Tremblay knew not to include Verity because he was not an accurate portrayal of the message the story was conveying. Yet Tremblay's superiors and Appellant colleagues disregarded that clear truth and included Verity in the various stories anyway. The law of defamation protects Verity and others similarly situated. The District Court was spot on with its well-reasoned analysis. The District Court's decision should be affirmed in its entirety.

In the event the Court reverses the District Court in whole or in part, this case should be remanded to the District Court for further proceeding consistent with this Court's decision.

DATED this 22ND day of May 2018

SHEP LAW GROUP



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