

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(Asheville Division)

3 -----x
4 SHIRLEY TETER, :
5 Plaintiff, :
6 vs : Civil Action: 1:17-CV-256
7 PROJECT VERITAS ACTION : **EXCERPT OF PROCEEDINGS**
8 FUND, ET AL, :
9 Defendants. :
-----x

10 Tuesday, May 21, 2019
Asheville, North Carolina

11 The above-entitled action came on for a Jury Trial
12 Proceeding before the HONORABLE MARTIN K. REIDINGER,
13 United States District Judge, in Courtroom 1, commencing
at 9:00 a.m.

14 **APPEARANCES:**

15 **On behalf of the Plaintiff:**

16 **JONATHAN DREW SASSER, Esquire**
17 **PREETHA SURESH RINI, Esquire**
18 **DIXIE WELLS, Esquire**
Ellis & Winters, LLP
Post Office Box 33550
Raleigh, North Carolina 27636

19 **RALPH STREZA, Esquire**

Critchfield, Critchfield & Johnston, Ltd
4996 Foote Road
Medina, Ohio 44256

20 **On behalf of the Defendants:**

21 **JAMES A. DEAN, Esquire**
22 **MICHAEL MONTECALVO, Esquire**
23 Womble Bond Dickinson, LLP
One West Fourth Street
Winston-Salem, North Carolina 27101

24 Tracy Rae Dunlap, RMR, CRR 828.771.7217
25 Official Court Reporter

I N D E X

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	<u>Page</u>
Reporter's Certificate.....	63

1 P R O C E E D I N G S

2 (On the record at 5:56 p.m.)

3 THE COURT: Is there anything that we need to
4 address before we move on to the Rule 50 motions? Let me
5 go ahead and get the scorecard for tomorrow.

6 Mr. Montecalvo, Mr. Dean, what's the plan for in
7 the morning?

8 MR. MONTECALVO: Your Honor, we have one witness
9 who may be about as brief as what we just viewed here --
10 what we just saw here today.

11 We have Mr. Campbell by video deposition. I
12 believe the run time on that is about 20 minutes. We
13 then have another video deposition, Ms. JoAnne
14 Comerford. The run time on that is 55 minutes. We will
15 have Ms. Boyd testify by reading a deposition transcript;
16 that should take approximately three minutes. We expect
17 two other live witnesses who will be fairly brief, 20
18 minutes, perhaps, each.

19 We will have video deposition of Scott Foval.
20 That was not on our witness list, Your Honor, but we
21 found out last night that the plaintiffs were not going
22 to call Mr. Foval. The designations have been in and
23 submitted and, so, we thought it was important for the
24 jury to have that designation made and that transcript
25 come in.

1 THE COURT: Do you know what that run time is?

2 MR. MONTECALVO: I think the run time is about an
3 hour and ten. The last time I checked I think it was an
4 hour and ten. There may be some videos in there but not
5 as extensive as what we saw today. And, Your Honor, we
6 also had on our exhibit list a video designation for
7 Carol Martinson, and the video deposition of Maxine
8 Campbell. We informed the plaintiff's counsel yesterday
9 that we were not going to call those two witnesses by
10 video deposition, in order to give them an opportunity to
11 use those designations in their case in chief. We do not
12 plan to call those two witnesses. And there, perhaps, is
13 one more live witness or possibly two.

14 THE COURT: Okay.

15 MR. MONTECALVO: Maybe a couple hours.

16 THE COURT: What you've given me so far sounds
17 like it would take us to about the lunch break. Are you
18 going to finish your evidence tomorrow?

19 MR. MONTECALVO: I thought the run time would be
20 a little bit longer than that, Your Honor. But if that's
21 what Your Honor was calculating then it does -- we do
22 anticipate, then, there is a good chance we will be
23 finished with our evidence tomorrow.

24 THE COURT: Okay. I went through that whole
25 exercise so we can plan to know whether there's a

1 possibility for a charge conference tomorrow before the
2 end of the day. It sounds like there at least is a
3 reasonable possibility that there will be. So we will be
4 prepared for that, and I urge all of you to be prepared
5 for that as well.

6 MR. MONTECALVO: Thank you, Your Honor.

7 THE COURT: Okay. Any other issues before we move
8 on to the Rule 50 motions?

9 MR. MONTECALVO: Not from the defendants, Your
10 Honor.

11 MR. SASSER: No, Your Honor.

12 THE COURT: Okay. It was mentioned during the
13 bench conference that there would be Rule 50 motions by
14 the defendants. Mr. Dean, let me hear from you.

15 MR. DEAN: Your Honor, we've prepared a short
16 memorandum. May we approach and hand it up?

17 THE COURT: You may.

18 Mr. Dean, you may proceed. I will read your
19 memorandum later. I won't read while you're talking.
20 You may go ahead.

21 MR. DEAN: Sure, Your Honor. Your Honor, we move
22 under Rule 50 for a directed verdict. There are three
23 different bases I would like to discuss with the Court.
24 I will take them out of order from the brief and start,
25 first, with publication. Simply, Your Honor, the only

1 evidence that was elicited by the plaintiff was that
2 Videos I and II were published by Project Veritas Action
3 Fund. They haven't established any basis to make James
4 O'Keefe, as an officer, vicariously libel to pierce the
5 corporate veil. They haven't shown any basis to pierce
6 -- to the second corporation, or nonprofit entity, as
7 Project Veritas. They've only show shown that Project
8 Veritas and Mr. O'Keefe knew the videos would be
9 published. That's not publication. So, for that basis,
10 we ask that a directed verdict be entered in favor of
11 Mr. O'Keefe and the entity Project Veritas because there
12 simply is no evidence of publication.

13 The second basis, Your Honor, is on the issue of
14 "actual malice." Now, Your Honor, I know that you have
15 provisionally ruled that Ms. Teter is a limited purpose
16 public figure. But what I would point out to the Court
17 is even if in the Court's mind additional evidence could
18 -- that will come in in the defendant's case could still
19 bear on that issue here, Ms. Teter is going to be
20 required to prove actual malice in this case even if
21 she's not a public figure.

22 As the Fourth Circuit and Supreme Court have made
23 very clear, if a party seeks presumed and punitive
24 damages and a publication relates to an issue of public
25 concern, whether or not the plaintiff is a public figure

1 they must prove actual malice. And in the verdict sheet
2 that was submitted to Your Honor the only types of
3 damages that Ms. Teter seeks are presumed damages and
4 punitive damages. So she will have to prove actual
5 malice regardless of how the Court rules on the limited
6 purpose public figure issue.

7 Your Honor, Ms. Teter hasn't come forward in her
8 case in chief with evidence of actual malice. And as the
9 Supreme Court gave guidance in the *Liberty Lobby* case, on
10 a directed verdict motion the court takes into account
11 the burden of proof. Here the burden of proof for actual
12 malice is clear and convincing evidence. Ms. Teter has
13 to forecast or, at this point, has to have presented
14 clear and convincing evidence of actual malice, and she
15 has not done it.

16 Your Honor, "actual malice" is a subjective
17 standard. It measures the defendant's subjective mental
18 state. That has been repeated over and over by the
19 Fourth Circuit and the Supreme Court. It is a standard
20 that says that plaintiff cannot be held to -- defendant
21 can't be found to have acted with actual malice unless
22 they knew what they published was false or acted with
23 reckless disregard. Now "reckless disregard" is
24 confusing nomenclature because, usually, we hear that
25 language in the parlance of negligence. But, again, the

1 Fourth Circuit has reiterated over and over that
2 "reckless disregard" in an actual malice sense means the
3 defendant harbored serious, subjective doubts about the
4 truth of what they published.

5 Without actually knowing or having serious
6 subjective doubts about the publication, a defendant
7 cannot be held to have actual malice. Even if a
8 defendant is confused -- in this case, if Foval was
9 speaking of someone else and the defendants interpreted
10 him as speaking about Teter. Taking a reasonable,
11 alternative -- choosing one of the varying alternative
12 interpretations is not sufficient to get to the jury on
13 actual malice, so says the Fourth Circuit.

14 What they have put on in terms of evidence, Your
15 Honor, is evidence of negligence. They have put on
16 evidence that says that Project Veritas Action Fund did
17 not have anyone investigate or check the truth of what
18 was being stated. They've put on evidence that says,
19 well, perhaps Mr. Foval exaggerated. That's it. That's
20 the sum total of --

21 THE COURT: Let me stop you for a second, because
22 there's some case law -- and I don't have the case right
23 here in front of me. But it says that this actual malice
24 standard can be met if the defendant could have learned
25 that the thing being published was false from readily

1 available information. How does that fit into your
2 argument?

3 MR. DEAN: Two points, Your Honor. In New York
4 versus -- *New York Times versus Sullivan*, which is the
5 seminal actual malice case, the New York Times had in its
6 own files reporting it had done that disproved
7 representations that were made in an advertisement. And
8 the Supreme Court said that having that information in
9 its own files was not actual malice.

10 So what the Fourth Circuit has also said over and
11 over, Your Honor, is that the mere failure to
12 investigate, or to inquire into the truth of a matter, is
13 not actual malice. There used to be a standard of
14 journalistic norms, there used to be a standard of
15 investigation, and that was rejected by the Supreme Court
16 in *Harte-Hanks*.

17 THE COURT: Well that's not quite answering my
18 question though. Because, like, in *New York Times v*
19 *Sullivan* you have a situation where there was information
20 that they had in the file that would call into question
21 what think were publishing but didn't necessarily refute
22 what they were publishing. The standard that I remember
23 -- and I wish I had the case right here in front of me,
24 and I don't. But I believe that it is a case under North
25 Carolina law that says that the actual malice standard is

1 met if there is readily available information that would
2 in fact refute the thing that is about to be published
3 and, therefore, could prevent the publication.

4 How does that standard fit into the evidence
5 that's been presented here?

6 MR. DEAN: I would say that it can only impact
7 Video II. Because if you say that the readily available
8 evidence is the ability to call the party then you
9 eviscerate the failure -- the Fourth Circuit and Supreme
10 Court's guidance that failure to investigate is not
11 actual malice. So if you're going to apply that standard
12 it can only apply to Video II where, if the Court says
13 Ms. Teter's denial was in and of itself a basis not to
14 publish then that would affect Video II.

15 But, of course, we would argue that the story here
16 -- even if Ms. Teter had denied that she was one of
17 Mr. Foval's activists, that doesn't undermine the value
18 of the reporting. The story is that Mr. Foval took
19 credit -- that a highly placed democratic operative took
20 credit for Ms. Teter. And that has relevance in the
21 news even if Ms. Teter denies it.

22 And Mr. Hartsock testified -- this is the only
23 evidence on this point in the record. He testified that
24 as an undercover journalist what he would -- he would not
25 have found a denial credible because he did not have a

1 relationship with Ms. Teter that, for this type of
2 information, would have led her to give a credible,
3 truthful answer. Because it takes fostering a
4 relationship over a period of time in order to get this
5 type of information from the individuals that they
6 investigate.

7 But I would say, Your Honor, again, if the readily
8 available information -- they haven't put any forward.
9 They haven't put forward any readily available
10 information in this case that would have disproved what
11 Mr. Foval said. The closest they've come is said that
12 Ms. Teter made a public denial to the New York Times
13 and, of course, that was after Video I was published. So
14 the video that has the operative statements in it, the
15 statements that Your Honor has said you are considering
16 sending to the jury, that was already published before
17 that denial.

18 Again, I would just reiterate that the Fourth
19 Circuit has said over and over in the *Hatfield* case, and
20 they have said it in the *Horn* case that we cite in our
21 brief, and they've said it in *Carr*, that the mere failure
22 to investigate is not actual malice. All that they have
23 presented is evidence of failure to investigate.

24 The other thing that I would say, Your Honor, is
25 that if the failure to call someone, or the failure to

1 investigate is actual malice, then there's no more
2 distinction between actual malice and the negligence
3 standard. They're one and the same. So there is a --
4 there is obviously an important distinction that the
5 First Amendment provides in these situations. If the
6 mere failure to make a call and to investigate is somehow
7 held to be actual malice then that distinction is
8 eviscerated.

9 Your Honor, the burden of proof can't be ignored
10 in these cases. The First Amendment requires a
11 heightened burden for plaintiffs in Ms. Teter's
12 situation. And, again, the Supreme Court has guided that
13 that burden must be considered on a directed verdict. So
14 a scintilla of evidence isn't sufficient. There has to
15 be enough evidence that a reasonable juror could find
16 clear and convincing proof from what has been induced so
17 far.

18 The other evidence that is in the record, Your
19 Honor, that is the most relevant and the most on point is
20 the testimony of the investigator. He was asked
21 directly, did you believe that Mr. Foval was talking
22 about Ms. Teter? And he said, unequivocally, yes, I
23 did. It was based on the statements that Mr. Foval made.
24 It was also based on the timing and context of when those
25 statements were made. That meeting occurred only three

1 days after Ms. Teter was at the rally and, as the
2 investigator testified, within hours of it being a hot
3 headline. So for a juror to find that there is evidence
4 of actual malice they would have throw that testimony out
5 the window and they would have to be instructed that the
6 failure to investigate amounts to actual malice, and
7 that's not the law.

8 So, for that reason, Your Honor, as to any of the
9 defendants who remain in the case, aside from the
10 publication, Ms. Teter has not met her burden of proof.
11 She's presented -- she's had her day. She's presented
12 all the evidence she wanted to present. She could have
13 presented Scott Foval. She could have presented Joe
14 Halderman. She could have presented Russ Verney. All of
15 this testimony was ready to go and Your Honor read it.
16 She didn't put it forward. All she has is the failure to
17 make a phone call to Ms. Teter. And if that is actual
18 malice, Your Honor, then there is no such thing as actual
19 malice. Because the Fourth Circuit and the Supreme Court
20 have said over and over that the failure to investigate,
21 or the failure to look into the truth of the matter is
22 not actual malice.

23 Your Honor, I think the constitutional role that a
24 court holds in a case like this is extraordinarily
25 important. Another thing that you read in all of the

1 jurisprudence on First Amendment and actual malice cases
2 is the independent role that the judiciary holds in
3 evaluating the entire record to see if the constitutional
4 actual malice has been shown. And it's because it is an
5 issue that is so easy to slip up on as a juror.

6 In this case we've seen hours of testimony about
7 Ms. Teter that have nothing to do with our publications
8 but that could engender sympathy. We've seen hours of
9 testimony about the defendant's journalism methods which
10 don't bear on actual malice but that could, for some
11 people, engender feelings -- prejudicial feelings.

12 The court's role in these cases is extremely
13 important. I know that Rule 50 relief is not the norm,
14 Your Honor, but this is not the normal case. This is a
15 case where it is undisputed that the journalists believed
16 they were reporting truthfully what was said. That's the
17 only evidence. That's the only evidence that the Court
18 has before it. It is undisputed that they fervently
19 believed that what they were reporting was true. And if
20 that in that scenario, with actual malice, I don't know
21 of any case -- I don't know of any case like that in all
22 of the jurisprudence.

23 THE COURT: What's your third ground?

24 MR. DEAN: Your Honor, the third issue is the
25 issue of whether each of the videos amounts to defamation

1 per se. As you know, Your Honor, the statements the
2 plaintiff argues that are the defamation are, one, the
3 implication that she's mentally ill or homeless; and,
4 two, the implication that she was paid to instigate
5 violence at the rally.

6 Your Honor, I agree with Your Honor's analysis
7 that this case only really lends itself to a defamation
8 per se analysis in that there has been no evidence of
9 innuendo, colloquium, or explanatory circumstances that
10 give meaning these videos. But where we disagree -- we
11 don't disagree. But where we think the analysis goes
12 with this, Your Honor, is that neither of these videos
13 actually fits within that category.

14 So the North Carolina Supreme Court, in a case
15 that we discussed at summary judgment, in *Renwick versus*
16 *News And Observer Company*, explained that before a
17 defamation per se claim can go to the jury the court has
18 to make two threshold determinations. The first
19 determination is the video must be subject to only one
20 interpretation. The second threshold issue is that if
21 the video, or if the publication, is subject to only one
22 interpretation, the court must say whether that
23 interpretation is defamatory.

24 As *Renwick* says, it is only after the court has
25 decided the answer to both these questions is affirmative

1 that the case should be submitted to the jury of libel
2 per se. So, as to the first question, whether a
3 publication is susceptible to only one interpretation.
4 *Renwick* says that when a publication is susceptible to
5 two interpretations, one defamatory and the other not, it
6 would not support a case of libel per se.

7 Here, if we go to the first statement that
8 Ms. Teter says is a statement in Video I, mentally ill
9 and homeless. The assertion that the video stated that
10 Ms. Teter is mentally ill and homeless may be a
11 reasonable interpretation of the video, Your Honor, but
12 it certainly is not the only one. We have now watched
13 that testimony, or that video, several times today. And
14 what we see is Mr. O'Keefe introducing Ms. Teter, and
15 we see a scene with Mr. Foval where he says she was one
16 of our activists trained to bird-dog, and then he
17 describes bird-dogging.

18 Mr. Foval then moves. The scene changes to an
19 obviously different scene. We know it was a scene from
20 April, not from the September meeting. They're wearing
21 something different and it's a different scene. And
22 Mr. Foval talks about paying mentally ill people and
23 working with homeless people over the past 20 years, and
24 using union members. A very reasonable -- and I think
25 the best interpretation of that scene is that it is

1 describing other instances of Foval's claimed conduct
2 just like the rest of the video is.

3 Foval claims responsibility for incidents
4 throughout this video. He does it right before the scene
5 about Ms. Teter where they're talking about the Scott
6 Walker incident. He does it right after the scene
7 involving Ms. Teter. And one plausible way to interpret
8 this video is simply that Foval is claiming Ms. Teter is
9 a bird-dog, which he describes as being trained to attend
10 the rally early and ask questions. They've conceded at
11 summary judgment, Your Honor, that that -- if that's the
12 only meaning of the video, it's not defamatory.

13 So that is one reasonable way to interpret this
14 video. Whether or not it is also reasonable to interpret
15 the video as suggesting she's mentally ill and homeless?
16 It's irrelevant which is a better interpretation. The
17 only thing that matters on defamation per se is that the
18 video is subject to multiple interpretations. And that
19 takes it out of the world of defamation per se as to
20 those allegations of mental illness and homelessness.

21 The second statement is that she was paid to
22 incite violence at the rally. Now, Your Honor, the word
23 that I would focus on in that implied statement which is,
24 I think, the critical word, is -- well the first is "paid
25 and the second is violent -- "violence." The only place

1 in Video I where the notion of payment comes up is when
2 Foval talks about paying mentally ill people to "do
3 shit," which is in the section where he talks about
4 paying mentally ill people, working with homeless people
5 over the past 20 years, and calling on union members at
6 his need. That is not part of the prior scene where he
7 was talking about "she was one of our activists."

8 So if one interprets that scene of mental illness
9 and homelessness as not applying to the prior scene about
10 Ms. Teter which, I think, is a reasonable
11 interpretation, then payment goes by the wayside as well.
12 Because that only comes in in the scene about Mr. Foval's
13 general exploits, not the scene about Ms. Teter being a
14 bird-dog.

15 The other is violence, paid to incite violence.
16 Because again, Your Honor, that is interpreting the video
17 to suggest that Ms. Teter was paid to incite violence.
18 Even if that is a reasonable interpretation of the video,
19 it certainly is not the only potential interpretation of
20 the video. In fact, to take that interpretation of the
21 video, one has to ignore Foval's own statements. Foval
22 says she was an activist who was trained up to bird-dog.
23 Bird-dogging means to train someone to arrive early at a
24 rally and ask questions. That's all he says about bird-
25 dogging.

1 So to make a leap from there to that is inciting
2 violence, one -- if one could make that leap it would
3 have to ignore Foval's own language. And, again, the
4 point under *Renwick's* teaching is not that the court is
5 tasked with determining which is the best interpretation.
6 It's almost like summary judgment where the court isn't
7 determining the evidence, it's jut determining whether
8 there are disputes between the evidence. For defamation
9 per se, the court isn't determining which interpretation
10 is best. It's just determining if there are multiple
11 interpretations. And if there is a non-defamatory
12 interpretation then it cannot be defamation per se.

13 As to Video II, Your Honor, defamation per se has
14 to be considered within the four corners of the
15 publication. That's also explained in detail in *Renwick*.
16 Video II does not talk about mental illness and does not
17 talk about homelessness, and it does not talk about
18 payment. The only way that someone could interpret Video
19 II is asserting any of those things would be to import
20 concepts from outside of Video II. And, so, even without
21 interpreting Video II at all, it clearly does not support
22 Ms. Teter's claims for defamation per se because both of
23 the implied statements that she is relying on are based
24 on subject matter that simply isn't present in Video II.

25 So, Your Honor, for these reasons, for the lack of

1 publication, we believe that Project Veritas and
2 Mr. O'Keefe are entitled to a directed verdict. On the
3 issue of actual malice we believe that any of the
4 defendants would be entitled to it. And on the issue of
5 whether the statements as a matter of law are defamation
6 per se we believe that any of the defendants are also
7 entitled to directed verdict in their favor.

8 THE COURT: Okay. Thank you.

9 Who's going to answer on behalf of the plaintiff?

10 MS. WELLS: I am, Your Honor.

11 THE COURT: Ms. Wells.

12 MS. WELLS: Your Honor, I have not had a chance
13 to review thoroughly the defendant's brief, so I'm going
14 to put that aside and just respond to the -- to the
15 arguments that Mr. Dean made here today.

16 THE COURT: Well Mr. Dean's given you an awful
17 lot of a target there. So let's hear from you as to what
18 you have to say about what Mr. Dean has argued.

19 MS. WELLS: Yes, Your Honor. I'm happy to take
20 the arguments in any order Your Honor would like. I
21 thought I would start with actual malice since it's
22 something that affects all of the defendants, but I'm --

23 THE COURT: That's fine.

24 MS. WELLS: Okay. Your Honor, we would take
25 issue with the fact that the only evidence of actual

1 malice is the failure to make a phone call.

2 THE COURT: What is the other evidence then?

3 MS. WELLS: We believe that there is evidence
4 that -- first of all, and very simple, Mr. Hartsock, in
5 the interview with Mr. Foval, or in the conversations
6 with Mr. Foval, could have easily said "now you mean
7 Shirley Teter."

8 THE COURT: Well you say "could have said." In
9 other words, you're now saying that an element of actual
10 malice, or proof of actual malice, can be from the
11 interviewer not having done a good enough job.

12 MS. WELLS: Your Honor, I don't think that's
13 sufficient, and that's something that I wanted to take up
14 as well. Actual malice -- the cases -- a lot of the
15 cases say "mere failure to investigate," or "only this
16 particular element is not enough." As Your Honor
17 pointed out, you know, there is case law that says where
18 the defendant finds apparently reliable information that
19 contradicts its assertion, you know, it would have a
20 duty. There are many things that make up actual malice.

21 So here we have an investigation -- we have an
22 interview where the interviewer did not take what would
23 appear to be a very elementary step.

24 THE COURT: I need to stop you there because
25 that's one of the things that I've heard recurrently

1 through this case that -- the argument troubles me.

2 MS. WELLS: Okay.

3 THE COURT: Because the way that I try to analyze
4 this -- and maybe this is a simplistic way to do it. I
5 realize Mike Wallace is dead. But I think about it in
6 terms of, well, if Mike Wallace did that, could somebody
7 have sued him? And if Mike Wallace conducted an
8 interview of some person and then that person sued Mike
9 Wallace and CBS alleging, well, there was actual malice
10 there because Mike Wallace just didn't ask enough
11 questions.

12 How quickly do you think that that case would be
13 thrown out of court? It just -- it seems to me that that
14 sort of standard for any type of journalist is one that
15 eviscerates the First Amendment, doesn't it?

16 MS. WELLS: Your Honor, I do think it would be
17 very hard to say to a journalist the fact that you didn't
18 ask a question is actual malice.

19 THE COURT: How is it any evidence at all of
20 actual malice?

21 MS. WELLS: Your Honor, when we talk about
22 reckless disregard for the truth, or subjective -- and
23 maybe I should just switch and then come back to this to
24 show how I think it fits together. When we talk about
25 that we look at the overall picture. And one of the

1 things I thought was most striking was the testimony that
2 we heard from Mr. O'Keefe.

3 The question was put to Mr. O'Keefe -- and I
4 don't have it written down word for word. But the
5 question was put to Mr. O'Keefe along the lines of, you
6 know, was Ms. Teter paid to go to the rally to incite
7 violence? Mr. O'Keefe, who is one of the defendants,
8 who is the president of Project Veritas, who was
9 fundamental in the script that was developed for this
10 video and in what was said and narrated in the video.
11 Mr. O'Keefe never said no to that question.

12 You know, he never said -- I'm sorry, Your Honor.
13 He never said yes. He never said she was sent in to
14 incite violence. He said, instead, I can only repeat
15 what Scott Foval said. Your Honor, again the cases say
16 if you have reason to doubt the veracity of your source,
17 of the person that you're speaking of --

18 THE COURT: How is that evidence of doubting the
19 veracity of his source?

20 MS. WELLS: Well Mr. O'Keefe is one of the
21 defendants. He's one of the instrumental forces behind
22 the video. If he can't answer whether Ms. Teter was
23 paid to go in to incite violence -- if he can't answer
24 that, Your Honor, then doesn't that show his subjective
25 state of mind?

1 THE COURT: In other words, if a journalist is not
2 110 percent convinced of the absolute veracity of what
3 his source has told him, then printing it anyway is
4 actual malice. Again, it seems to me that you are
5 setting a standard forth that completely eviscerates the
6 First Amendment. Explain to me how you're not.

7 MS. WELLS: Well, again, Your Honor, it's -- 110
8 percent, that's far short of that. He didn't say "I
9 think so" or "I believe so."

10 THE COURT: He wasn't asked that. In the example
11 that you're using, that's not what Mr. O'Keefe was
12 asked. I mean you're changing your story now.

13 MS. WELLS: I didn't mean to, Your Honor. I
14 think he was asked, were you paid to go -- you know, do
15 you believe that Shirley Teter was paid to go to the
16 rally to incite violence.

17 THE COURT: So you think he was asked about his
18 belief, not did -- was Shirley Teter sent to the -- paid
19 to go to the rally to incite violence. I guess we can
20 look at the transcript.

21 MS. WELLS: I don't know.

22 THE COURT: Because earlier I didn't hear the word
23 "belief" come from you as to that question. But we can
24 look at the transcript.

25 MS. WELLS: I'm sorry, Your Honor. I don't know

1 as I stand here. But the point was that he did not feel
2 comfortable answering that question under oath.

3 THE COURT: Well you've got to define what the
4 question is before it makes any sense in the text of your
5 argument.

6 MS. WELLS: Sure. And I'll get that for you,
7 Your Honor.

8 So if we look at this as a -- as a puzzle that we
9 put together lots of pieces -- and that's what the cases
10 have done. One is *Eramo versus Rolling Stone*, where the
11 court in Virginia took different pieces of actual malice
12 and said when we assemble all of the cases, all of the
13 evidence together, we have that. Here we have O'Keefe
14 saying it's not necessarily my obligation to find out if
15 people are telling the truth. The extent of my
16 obligation is to report accurately what people say to us.
17 There was no -- he didn't say, and make sure I think that
18 person is credible or evaluate what they're saying.
19 Instead, he says --

20 THE COURT: How is that different though from this
21 idea that there's no actual malice for a failure to
22 investigate completely or failure to investigate? In
23 other words -- he said it in very different words, but
24 didn't Mr. O'Keefe essentially state what the standard
25 is? He says we go out there, we interview people, we

1 find what the facts are, and we report the facts that we
2 learn. We don't have an obligation to then go beyond
3 what we learned in our investigation.

4 Isn't the legal standard just articulated in
5 different words by what Mr. O'Keefe said in the
6 deposition?

7 MS. WELLS: No, Your Honor, and I think there's
8 several different reasons why. One is I think the
9 failure to investigate, the cases have said, can be
10 considered as part of the actual malice. It may not be
11 sufficient standing alone. The second part of that, Your
12 Honor, is that -- I lost my train of thought. The second
13 part of that is that when Mr. O'Keefe -- well okay. I'm
14 sorry, Your Honor, I lost my train of thought on that.

15 THE COURT: That's okay. Go ahead and regroup.

16 MS. WELLS: But he says, you know, that he
17 offered -- well let me get to that one in a minute. But
18 he says, you know, I have no obligation to give the
19 person I'm writing about a chance to respond or
20 investigate what they say to a third party because this
21 story is about Scott Foval. And I think that's Your
22 Honor's point that you mentioned of Christian Hartsock,
23 or Mr. Dean saying it would not help to go contact
24 Ms. Teter because I wouldn't believe her. I would not
25 have that kind of relationship with her. But, Your

1 Honor, just saying that really begs the point. Because
2 it then says the person who is making a statement has no
3 obligation to do any confirmation even when they're
4 inconsistent statements.

5 So let's look at what Scott Foval said about -- if
6 we assume that he's talking about Shirley Teter, which I
7 don't think we should. But he says no, no, no, no. It
8 was not pre-planned. Whoever he's talking about, he says
9 no, no, no, it was not pre-planned. He then says she was
10 one of our activists. She was a bird-dogger.
11 Bird-doggers we spend training. We take two weeks before
12 to train them and to teach them how to go in.

13 Well, you know, Your Honor, in that statement
14 itself there's a lot to unpack there. No, no, no it was
15 not pre-planned. Bird-dogging takes two weeks to plan.
16 So doesn't that statement in and of itself say to the
17 person who is recording this conversation -- and, Your
18 Honor, you've called it an interview, and I may have
19 slipped and called it that as well. This was taped at a
20 bar, and different places, where the person did not know
21 that they were being, "interviewed."

22 THE COURT: He knew he was being asked questions.

23 MS. WELLS: He knew he was being asked questions
24 but, certainly, I dare say that a lot of the questions
25 that are asked in bars do not elicit truthful answers.

1 And that's certainly not a forum where you would expect
2 to get truthful, objective -- you know, truth from
3 people. It's a place that people are known to
4 exaggerate; that people are known to pretend they're
5 other people. That people, you know, are known to not be
6 who they say they are. So when you're going into a bar
7 you're not saying, you know, I'm really trying to get to
8 the bottom of the truth here.

9 THE COURT: I want to make sure I'm following your
10 line of thought. Are you saying it's an element of
11 actual malice that Mr. Hartsock got his information in a
12 bar as opposed to somewhere else?

13 MS. WELLS: I'm saying that's a factor the Court
14 should consider, Your Honor, when it goes toward whether
15 there's a subjective knowledge that this might not be
16 true. A reckless disregard for the truth. I think it
17 factors into it. It factors into it that there was no
18 confirmation of what Mr. Foval told them. It factors in
19 that Mr. Hartsock didn't question the -- you know, they
20 just took out this language that didn't fit with the
21 narrative but didn't go back and -- Mr. Hartsock didn't
22 question him about that and say, wait, you said it wasn't
23 pre-planned but now you've told me it takes two weeks.

24 THE COURT: I need to back up a second because you
25 said the standard is subjective knowledge that it might

1 not be true. Again, I think every journalist who has
2 ever conducted an interview or talked to somebody in a
3 bar, or wherever that journalist talks to someone, has
4 some subjective knowledge that what they're being told
5 might not be true, regardless of who they're talking to.
6 It might be untrue because of failure of memory. It
7 might be untrue because somebody wants to color the
8 truth. It might be untrue because the person is an
9 outright liar. It might be untrue because they're trying
10 to cover for somebody else or there's some past mistake.
11 Whatever. There's a hundred different reasons. But if
12 it's actual malice or evidence of actual malice that
13 there is subjective knowledge that it might not be true.
14 Once again, aren't you articulating a standard that just
15 takes a Sharpie marker and marks out that part of the
16 First Amendment?

17 MS. WELLS: Well, Your Honor, I should stick with
18 the actual standard, the words of the standard, which is
19 "acting with reckless disregard whether the statement was
20 false."

21 THE COURT: Right. But reckless disregard in this
22 context, in a constitutional context, doesn't really mean
23 what it means in a negligence context. It's been given a
24 totally different, or a substantially different, meaning
25 here. And that's what I'm trying to get you to

1 articulate. That standard, and then take what this
2 evidence is and plug it into that standard and explain to
3 me how that gets to the jury.

4 MS. WELLS: Sure. Your Honor, when you look at
5 serious doubts about whether the statement was false and
6 you look at -- you know, again we've talked about a
7 failure to investigate and that's not enough standing
8 alone. The cases say that. Here we have a failure to
9 investigate. We have a reliance on an unreliable source.
10 Mr. Hartsock said I had qualms about everything that
11 Scott Foval was telling me.

12 THE COURT: He said he had qualms about the
13 morality of what he was doing.

14 MS. WELLS: And on cross-examination he said
15 qualms about the morality. Well, Your Honor, if you have
16 qualms about the morality of everything that a person is
17 telling you they're doing, doesn't that put in an idea
18 that perhaps they're not being completely truthful or
19 completely candid, or maybe you should take a further
20 step to investigate? The idea that you would have qualms
21 about what somebody tells you --

22 THE COURT: The reason that that intrigues me is,
23 under the Rules of Evidence a statement against interest
24 is considered more -- of greater veracity. And you're
25 saying, well, if it's somebody who is admitting to

1 something that's morally reprehensible, it should be less
2 believable. I mean it's the exact counterpoint of what
3 we find in our own Rules of Evidence. So I'm having
4 trouble following your logic.

5 MS. WELLS: Well, Your Honor, the idea that
6 you're in a bar, it's undercover; he's saying things that
7 are causing moral qualms. And, you know, if you want to
8 publish about him, fine. But when you then bring a third
9 party into it, and you've gotten qualms about the
10 morality of this person. And then you're taking a third
11 party and you're throwing her name into the mix. Because
12 remember in this video, Your Honor, they talk about
13 sending people in to rallies. They talk about paying
14 people to go into rallies. They talk about -- that the
15 DNC is sending people in to incite violence.

16 The only person that's in that video that is not
17 connected with one of the defendants, or the DNC, or
18 something like that, is Shirley Teter. This is not a
19 case where they highlight 16 different people. It's only
20 Shirley Teter. She is their poster child for the best
21 example that they had to prove the point of their video.
22 Your Honor, when you add that to the things that we said
23 about that, you know, they never even thought about
24 asking Ms. Teter about the veracity; they never even
25 thought about calling her. If you call her and she

1 denies it, you know, you may publish it anyway because
2 you might say I didn't have a relationship; I didn't put
3 much credibility into it. But there was no even chance
4 for her to do that.

5 They said, you know, we didn't trick Teter at all.
6 We weren't investigating her. We had no interaction.
7 Hartsock said he had never seen Teter. There was no
8 ability there, yet they bring her in to that video. They
9 then -- you know, they -- this typically goes to
10 negligence, Your Honor, but I think it is relevant for
11 actual malice.

12 After a retraction letter is sent to them, before
13 this lawsuit's filed, they don't do anything. So even
14 then --

15 THE COURT: What does that have to do with actual
16 malice here? I mean that's in a totally different
17 context. That's what's done or not done after the
18 publication or after the accused document is set forth.
19 What does that have to do with whether or not there was
20 actual malice in the publication of the document?

21 MS. WELLS: Your Honor, I have not seen cases on
22 this. But if it is relevant in the negligence context,
23 the cases have said it's relevant in negligence if it's
24 retracted. And so --

25 THE COURT: That's because there is a special

1 statutory exemption that if they do retract it then
2 there's no liability. I mean that's a statutory barrier
3 to the suit. That's something that's totally different
4 from what we have here, isn't it?

5 MS. WELLS: Isn't that some indication of their
6 intent? That if they didn't look at it and say, is this
7 -- is this true? Was she sent? Isn't that some
8 indication that their subjective intent all along was to
9 publish it without any regard for the truth of it, with
10 reckless disregard, and had serious doubts about the
11 truth? Otherwise, that's a case of time that they could
12 have taken action. And that's -- you know, again, on the
13 idea that there are bits of the puzzle.

14 Your Honor, I have found the testimony that I
15 referenced earlier. There were actually several
16 different lines of questions. One -- and this is on page
17 20 of Mr. O'Keefe's deposition, line 15.

18 Question: "Was Shirley Teter a bird-dogger?"

19 Answer: "I can only speak to what Scott Foval said
20 about Ms. Teter."

21 Question: "Well, was she?"

22 Answer: "I can only report what Scott Foval said
23 about her, about these incidents."

24 And then it goes on. "What's your opinion?" And
25 he, again, just says, "My duty as a journalist is to

1 report accurately what people tell me." He doesn't stand
2 behind what he said in the video.

3 THE COURT: Well, again -- and I don't need you to
4 read through all those. I can go back and look at it.
5 But this is exactly the conversation that you and I just
6 had a few minutes ago. The first two rounds of questions
7 are, essentially, Mr. O'Keefe will you in fact vouch for
8 the 100 percent veracity of your source? No journalist
9 would do that. No lawyer would do that. I mean we
10 lawyers pay lip service to it when we argue to the jury,
11 but that's our job. Or should I say that's your job.
12 It's not my job anymore. But, then, when it goes to,
13 well, what's your opinion? Well a journalist's opinion
14 about his source is utterly irrelevant. I would question
15 the ethics of a journalist who opines about the opinions
16 -- about the veracity of the people he reports on.
17 That's not what journalists do. I mean that's what
18 pundits do.

19 So, again, the -- here's the problem I'm having
20 with what you're saying, Ms. Wells. You're saying, oh,
21 it's the big picture. It's all the pieces together. And
22 it seems like every piece that you point to is a piece
23 that hurts your argument rather than helping it. And you
24 can't have a bunch of minus ones and add it up to 20. It
25 just doesn't -- it's just not math. So I'll hear what

1 else you want me to hear about this particular issue, but
2 right now your scorecard is sort of building up on the
3 negative side and not on the positive side. So if you
4 want to give me what are the things -- what are the
5 points in your favor that I ought to be looking at to get
6 this case to the jury on actual malice I'll hear from
7 you.

8 MS. WELLS: Sure. Thank you. Thank you, Your
9 Honor, for letting me know where I stand.

10 If you want to go back and look, the question
11 about, was Shirley Teter paid to disrupt Trump rallies is
12 on page 21 of his deposition testimony.

13 THE COURT: Okay. Thank you.

14 MS. WELLS: Your Honor, let me review my notes
15 just a minute.

16 THE COURT: That's fine. Take your time.

17 MS. WELLS: Your Honor, I skipped over this
18 earlier intentionally because I didn't want to get
19 prematurely into the question of Video I versus Video II.

20 THE COURT: Okay.

21 MS. WELLS: We then have -- after Video I comes
22 out we have the New York Times story that raises
23 questions about Ms. Teter and, again, there's nothing
24 done to investigate. There's nothing done to check that
25 except a second video is put out that focuses only on

1 Ms. Teter and refers back to Video I. It does say, you
2 know, she's one of our bird-doggers; she's one of our
3 activists. And we'll address later, if we get to it, the
4 question of whether that is defamatory.

5 Your Honor, at that point they were on notice of,
6 perhaps, some flaws even if they weren't before. And I
7 argue that they were before, both from the way that --
8 from what Scott Foval had said, from what they had cut
9 from what he said, and that they -- even after that, they
10 just put it out. They just put that same video out with
11 the clips about "she's one of our activists; she's a
12 bird-dogger." Nothing was done there, Your Honor.

13 Mr. O'Keefe testified repeatedly that, you know,
14 he didn't do anything after that came out. When we look
15 at the case law again. There are obvious reasons to
16 doubt the veracity of the person quoted. We've talked
17 about the fact that the -- oh, no, no, no, you know, this
18 was not pre-planned. That's something Scott Foval said,
19 yet it got taken out completely. When we look at that,
20 it can't be --

21 THE COURT: I want to make sure I understand that
22 point. Are you saying that it was somehow implied in
23 Video I that Ms. Teter's act was pre-planned, and the
24 pre-planning element of it is part of what is defamatory?
25 Pre-planned as opposed to spontaneous makes it

1 defamatory. Is that your point?

2 MS. WELLS: No, Your Honor.

3 THE COURT: Okay. Then I'm misunderstanding.

4 MS. WELLS: No, no, no. The comment was no, no,
5 no, it was not pre-planned. So my point is it can't be
6 both.

7 THE COURT: Can't be both what?

8 MS. WELLS: It can't be both planned and not
9 planned, because the statement was no, no, no, it was not
10 pre-planned. She was one of our activists. And then he
11 talks about bird-dogging, and it takes two weeks to plan
12 to get the bird-dogger --

13 THE COURT: He didn't say two weeks to plan. He
14 said two weeks to train.

15 MS. WELLS: To train the bird-dogger.

16 THE COURT: Training and planning are two
17 different things. I mean you train all season and then
18 you put together the game plan for the game. I mean
19 you're conflating two very different points, aren't you?
20 Maybe that's why I'm not understanding your argument.

21 MS. WELLS: You know, Your Honor, I respectfully
22 disagree. I think planning is -- training is a type of
23 planning. If you are engaging in training for two weeks,
24 that is planning. That is -- if I am investing two weeks
25 of my life to train someone --

1 THE COURT: In law school you were being trained
2 to be lawyer. For the last few weeks you've been
3 planning how to try this lawsuit. You were not planning
4 this lawsuit when you were in law school. I mean, isn't
5 that the difference? I mean I'm not arguing with you.
6 I'm trying to understand your argument, and I'm having an
7 awful lot of trouble doing it. Maybe it just goes to
8 show how thick-headed I am. You know, I want to give you
9 a fair shake; I want to give your client a fair shake. I
10 want to understand your argument so that I can, as close
11 as I can do, come out to the right answer on this. And
12 that's why -- that's why I keep, sort of, badgering you
13 about this because I'm having trouble grasping the
14 arguments you're giving me.

15 MS. WELLS: I appreciate that, Your Honor,
16 because then I know what is bothering you and what is
17 concerning you. You know, again, Your Honor, I
18 respectfully disagree that it was not pre-planned. We
19 did not -- you know, the idea -- he is saying we pick
20 people, we send them in; we pay them to incite violence.
21 Here Shirley Teter -- you know, he's saying it was not
22 pre-planned. We didn't know her. She wasn't one of
23 ours. We didn't know who she was ahead of time. If they
24 didn't know who she was ahead of time, how would they --

25 THE COURT: You've lost me on your argument. He

1 didn't say we didn't know who she was. On the video,
2 Scott Foval says she was one of ours. So I don't
3 understand what you're referring to.

4 MS. WELLS: I think -- and I can find the cite
5 for you. Your Honor, I believe he did say -- I believe
6 that Scott Foval did say we did not know that she -- "we
7 did not know who she was ahead of time." And, again, if
8 you don't know who she is ahead of time, how are you
9 spending two weeks training her? So where does that come
10 in? Why does that not raise questions?

11 Again, let me confer just a minute, Your Honor, to
12 make sure that I haven't missed anything.

13 THE COURT: That's fine.

14 MS. WELLS: Your Honor, in the transcript of the
15 interview and in the video clips of the undercover
16 interview, the undercover conversations, Scott Foval
17 says, "We didn't know who she was ahead of time. We just
18 had somebody who connected with her before that rally,
19 and we knew that she was putting herself out there to
20 draw fire. That's all we know." But, again, his own
21 definition of bird-dogging was two weeks of training, and
22 he says it was not pre-planned. When you put those
23 things together, Your Honor, it -- you know, it can't be
24 read to say that that's all consistent and that that
25 would be Shirley Teter.

1 THE COURT: Okay. Do you have anything else on
2 the actual malice issue? Because I do want to hear from
3 you on both the defamation issue and, also, on this
4 publication issue as well.

5 MS. WELLS: Sure. Your Honor, that's my argument
6 on the actual malice.

7 THE COURT: Okay. Let's move on to one of the
8 others then.

9 MS. WELLS: The publication. Your Honor, I guess
10 I should take up the per se since it affects all
11 defendants as well.

12 THE COURT: Okay.

13 MS. WELLS: Your Honor, when we look at the cases
14 they talk about the four corners of the video, or the
15 statement in this case. We're saying Video I implied
16 that she was paid to go in to the rally to incite
17 violence. Your Honor, the -- just a second. When Your
18 Honor looked at this at summary judgment and at the
19 pretrial conference, the video -- that was determined to
20 be the defamatory statement. And, Your Honor, if we look
21 at the video as a whole, as *Renwick* says that we should,
22 it talks about paying people to go in to rallies. It
23 talks about inciting violence. It talks about, you know,
24 this Clinton dark machine is also prepared for the
25 fallout from the violence they foment at the Trump

1 rallies and other demonstrations.

2 Ultimately, the whole endeavor is to get negative
3 press of Trump and his supporters in local and national
4 news. The statements in there that go toward this being
5 a per se that it was intended against Ms. Teter in the
6 -- that it was defamation per se, Your Honor. When we
7 look at -- it's not susceptible to more than one meaning.
8 It says, you know, the words themselves: These guys have
9 been doing dirty tricks for some time. We plant multiple
10 people in the front area. With the discussion right
11 before Ms. Teter's introduced where -- remember the Iowa
12 state thing, when Scott Walker grabbed a sign out of the
13 dude's hand? And then it transitions in to Shirley Teter
14 and she's one of our activists.

15 The whole purpose of the video, Your Honor, is
16 about inciting violence, and is about planting people --
17 the DNC planting people. And, again, that's back where I
18 come with the only person who was a "plant" that's talked
19 about in the video is Shirley Teter. So to then say the
20 comments in the video can't be interpreted to be
21 describing Shirley Teter is very disingenuous.

22 THE COURT: I'd like for you to address the
23 particular point though that Mr. Dean was making.
24 Because after Ms. Teter is introduced in Video I --

25 MS. WELLS: Yes, Your Honor.

1 THE COURT: -- and there is the statement that is
2 made there by Mr. Foval of "she's one of ours." It's
3 followed up -- at least my memory is it's followed up
4 with another clip from Mr. Foval, but from a different
5 period of time because he's wearing different clothing.
6 And he talks not only about hiring the mentally ill, et
7 cetera, but he also talks about the work that is done
8 with union members and all -- he gives lots of different
9 categories.

10 If I understand Mr. Dean's argument, his argument
11 is there are all these categories that Mr. Foval has put
12 out there, and you're wanting to pick and choose and say
13 there is only one interpretation that can be made; that
14 Ms. Teter falls within categories one, three and five
15 but not two, four and six. And that you can't exclude
16 her from two, four and six any more than you can exclude
17 her from one, three and five. In other words, what
18 you're doing is subjectively picking and choosing a
19 particular interpretation and then simply declaring it as
20 the only rational interpretation.

21 I said that in a very inarticulate way. Mr. Dean
22 said it a lot better than I just tried to repeat it. But
23 I'd like for you to address that particular point,
24 because I think that's the thrust of his point on the per
25 se issue regarding Video I.

1 MS. WELLS: Your Honor, proximity and where --
2 this is a clipped video. This is clipped and spliced.
3 They chose where to put the content.

4 THE COURT: But all of those categories are listed
5 right there together. At least that's my recollection of
6 the video. Maybe I need to look at it again.

7 MS. WELLS: Well, Your Honor, right after the
8 talk about she was -- you know, remember this woman:
9 Shirley Teter. Then Foval says, she was one of our
10 activists who had been trained up to bird-dog. He talks
11 about bird-dogging. He talks about how you start back
12 with people two weeks ahead of time and train them to ask
13 questions.

14 The very next thing is, "I'm saying we have
15 mentally ill people that we pay to do stuff. Make no
16 mistake." That's the very next sentence, Your Honor.

17 THE COURT: And the very next one after that is
18 about unions. So why isn't it a statement about
19 Ms. Teter being a union member?

20 MS. WELLS: Well, you know, there's a transition
21 there. There's space, Your Honor. He goes from mentally
22 ill people to homeless guys. And then he says, you know,
23 -- then he transitions to union guys. So you're getting
24 further and further away from where Ms. Teter appears.

25 THE COURT: Well but that's -- I think that's

1 Mr. Dean's point, that you get further and further away.
2 Where is the line? Because all of that part that you're
3 talking about right now is in that different clip where
4 he's wearing different clothing; it's obviously from a
5 different time. Where do you draw the line as to what is
6 in such close proximity to the reference to Ms. Teter
7 that it must as a matter of necessity be referring to
8 her?

9 Why do you draw the line at homelessness? Why
10 don't you draw the line only at mental illness? Why
11 don't you draw the line before mental illness with regard
12 to bird-dogging? You know, why is it that you draw the
13 line where you do? Because drawing the line is very
14 important. Under *Renwick* it is that there can be only
15 one interpretation. And you're saying there's one
16 interpretation and that line goes right here. Why?

17 MS. WELLS: Your Honor, proximity. They go from
18 talking about Shirley Teter -- they put her picture up.
19 And, again, I just keep coming back to she's the only
20 person that they talk about in the video. If you're
21 going to put out a video and you're going to talk about
22 sending people in to rallies to incite violence, and you
23 highlight one person, are you really only going to spend,
24 what, ten, 12 lines of text talking about them? It's the
25 prominence of the way they place her.

1 THE COURT: Well but here's the problem I have
2 with that. You talk about the prominence with which that
3 -- wherein they place her. But she's not in a prominent
4 place within the video. It's, like, a 16-minute video,
5 and she's 14 minutes in. She's not a prominent piece of
6 that video at all. That seems to undermine that
7 argument, doesn't it?

8 MS. WELLS: Well why not put the mentally ill and
9 homeless before that? You know consistent with Your
10 Honor's point if you're going to de-emphasize her and put
11 her at the end, why then add other stuff? Why not just
12 go ahead and put everything so that there's no question
13 that you're not talking about her Your Honor it flows
14 directly from you know she was one of our activists who
15 had been trained up to bird dog. I'm saying we have
16 mentally ill people, you know, dot, dot, dot. Your
17 Honor, I did skip over some description of "bird-dog."

18 But, you know, I'm saying we have mentally ill
19 people. They're the ones we chose to put that right
20 there. And if the jury doesn't agree, Your Honor, they
21 can -- they can certainly say so. That's --

22 THE COURT: If they don't agree with what?

23 MS. WELLS: If they don't agree that the mentally
24 ill goes with Shirley Teter.

25 THE COURT: But is that a jury question? Because,

1 under *Renwick*, isn't it the determination that the court
2 has to make as to whether there is only a single allowed
3 interpretation? I don't leave that to the jury, do I?

4 MS. WELLS: No, Your Honor. I think it is a
5 question of law. As a practical matter, if they don't
6 believe that, they will find that it's not defamatory.
7 So, you know, that's sort of the check, if you will, on
8 the question of law. But here we have right -- I don't
9 want to repeat my argument. I think you understand.

10 THE COURT: Well I think I grasp what you're
11 trying to say, but I'm having trouble figuring out why
12 the line must as a matter of law be right at the
13 particular point where you put it because you say it's a
14 matter of proximity. So, you know, is proximity a yard
15 away? Ten yards away? A hundred yards away? A mile
16 away? You know, it all depends. But what does it depend
17 on?

18 MS. WELLS: No.

19 THE COURT: I grasp your argument. If there's
20 anything else that you want to say on that I'll listen to
21 you. Otherwise, if you're done with that point, I want
22 to hear from you on this publication issue as well.

23 MS. WELLS: Yes, Your Honor. I'll move to the
24 publication argument. You know, I think Mr. Dean
25 conceded with respect to Project Veritas Action Fund.

1 There's a stipulation about that and, certainly, the
2 video at the beginning has their names. But, Your Honor,
3 when we look at the video itself we talk about
4 "published." The only narrator in the video is
5 Mr. O'Keefe. Mr. O'Keefe identifies himself as being
6 in the video.

7 And when we look at the defendant published the
8 statement or statements, and we go back to the North
9 Carolina pattern jury instructions. The pattern jury
10 instructions talk about, what does it mean to publish?
11 And they say, well, it means that you knowingly
12 communicated a statement. A communication is any act by
13 which a person brings an idea to another's attention. A
14 communication may be made by speaking or by writing words
15 or by any other act or combination of actions that
16 results in bringing an idea to another's attention. And
17 that's in footnote eight of the North Carolina pattern
18 jury instruction, 806.40.

19 THE COURT: But do you have any cases where there
20 is a corporate entity that is accused of a libelous act
21 and then the actors are likewise libel jointly and
22 severally with the corporate actor where there is no
23 piercing of the corporate veil? Do you have a case that
24 says that anywhere?

25 MS. WELLS: If I understand Your Honor's

1 question, I don't have a case that says exactly -- that
2 talks about you can hold both, but I think we can take
3 them separately. I do have a case that talks about when
4 an employer is libel under respondeat superior, and I
5 have a case --

6 THE COURT: That's the inverse of the situation
7 that you're arguing. You're saying that the corporation
8 is libel, therefore, the actor, the one who was acting on
9 behalf of the corporation, is likewise libel without
10 proving the piercing.

11 MS. WELLS: Your Honor, I'm sorry, that did not
12 intend to be my argument. My argument intends to be that
13 Mr. O'Keefe published the statement. Mr. O'Keefe is
14 the president of Project Veritas and, in doing so,
15 respondeat superior would put Project Veritas on the hook
16 for that, Your Honor.

17 And when we look at what the testimony is.
18 Christian Hartsock was designated as the 30(b)(6)
19 representative on Video I. He said that Video I was the
20 most successful ever on Project Veritas. The question
21 was put to him: "Is this the most successful video ever
22 by Project Veritas?" He said yes.

23 Mr. O'Keefe said that Video I was the most
24 watched of all the Project Veritas videos at the time.
25 We have Exhibit 38, Your Honor, and it is the exhibit

1 that talks about where Mr. O'Keefe sends an email about
2 paying bonuses -- proposing bonuses for the airing of a
3 videos. In that email he uses the words "we," and he
4 uses "organization(s)" to designate, you know, more than
5 one organization.

6 He, in that -- in that email, Your Honor, which is
7 from project -- his email address at ProjectVeritas.com,
8 he is talking about the bonus he is paying out. He says,
9 you know, we're entering -- we are entering a four-week
10 intense period that will determine millions in future
11 revenue.

12 Number 1. \$1,000 bonus to every employee if we
13 get a smoking gun on the Creamer - Foval story about the
14 next two weeks, or Trump brings up our videos to the
15 media.

16 THE COURT: Let me ask you this. What's your
17 understanding of why Project Veritas and Project Veritas
18 Action Fund are two different entities?

19 MS. WELLS: You know my understanding, Your
20 Honor, is it's got a 501(c)(3), and you can't advocate a
21 political position, so Project Veritas Action Fund was
22 set up so that they could do that. That's my
23 understanding.

24 THE COURT: Well and part of your stipulation was
25 that the 501(c)(4) is Project Veritas Action Fund.

1 MS. WELLS: Yes, Your Honor.

2 THE COURT: So, other than that, I don't remember
3 any other evidence on the point. But doesn't your
4 stipulation certainly indicate that it is the "action
5 fund" that was the party that was acting to produce and
6 distribute the video?

7 MS. WELLS: Your Honor, I think our stipulation
8 does do that. But I don't think it is -- I don't think
9 that means that -- I don't think there's only one answer
10 to that question. Certainly, Project Veritas Action Fund
11 did do those things.

12 Your Honor, let's look at Project Veritas and at
13 James O'Keefe. Because when we do that we have, who was
14 the chief architect behind the video? It was Christian
15 Hartsock and it was Mr. Halderman. That's what
16 Mr. Hartsock testified, that Mr. Halderman is an
17 employee of Project Veritas. Mr. Hartsock is an
18 employee of Project Veritas. So they were the ones who
19 were involved in the video where Mr. Hartsock says he
20 was the leader of the investigation. I think the word he
21 used is he said he was "undefined," and I think it was
22 producerial duties related to it. He says I helped see
23 it through to the final product. He's a producer and a
24 Project Veritas employee.

25 Your Honor, the idea -- we're certainly familiar

1 with corporations that keep separate -- you know,
2 different corporate entities that are related to each
3 other -- maybe they're subsidiaries -- but they keep
4 their separate existence. But here we have Mr. O'Keefe,
5 of Project Veritas, paying out bonuses for the video to
6 be seen. Those lines -- I'm not talking now about
7 whether it was proper or not, but those lines were
8 clearly blurred between who was doing what. Because we
9 have -- the employees of Project Veritas are the ones who
10 were doing the video. Without employees of Project
11 Veritas, Your Honor, we wouldn't have the video.

12 THE COURT: I like your term of lines being
13 clearly blurred. Go ahead.

14 MS. WELLS: Your Honor, you know, if we look at
15 Plaintiff's Exhibit 28, that's draft four of the script.
16 It was sent to Mr. O'Keefe. That's before the video was
17 published. You know, he is -- he is involved in every
18 step of it but then wants to say well, no, no, no, it's
19 just Project Veritas Action. It's their name on the
20 front so they're the only ones involved. But you can't
21 look at it that narrowly, Your Honor.

22 THE COURT: Maybe you're going to get to this
23 point; maybe I'm jumping ahead in your argument. What
24 constitutes the act of publication? I mean, obviously,
25 Mr. O'Keefe had a significant role in this. It's his

1 face and it's his voice. A lot of the times when his
2 face is not on the video, the deposition testimony was,
3 well, he's doing the voice-overs. He's clearly a
4 participant. But does that make him a publisher?

5 MS. WELLS: Absolutely, Your Honor.

6 THE COURT: Based on what? What is the fact that
7 makes him a publisher simply because his face is there?
8 Or is it because his voice is there? You know, is he the
9 one who pushed "enter" on the computer when it got sent
10 to YouTube? I mean what constitutes being a publisher?

11 MS. WELLS: Well I think, number one, it was --
12 it was a communication. He was the narrator in the
13 video. He knew the parts of the video that were being
14 put together. It was -- he testified it's my intent to
15 have this video seen by as many people as possible. So
16 to say -- you can say I'm going to do all the work on
17 putting together the statement, and I'm going to say I
18 want as many people as possible to see it, but the fact
19 that somebody else puts their name on it means I didn't
20 publish it. Your Honor --

21 THE COURT: Well the fact that his company puts
22 its name on it -- and that's really the heart of this
23 question, isn't it? It is by putting -- by doing these
24 things on behalf of the company, is the company the
25 publisher? Is Mr. O'Keefe the publisher or are they

1 both the publisher? And why do you come to that
2 conclusion? What is it in the law that says it is one or
3 the other, or both?

4 MS. WELLS: You say "his company." By that, do
5 you mean Project Veritas Action Fund?

6 THE COURT: Well that's the one -- you had me read
7 the admission from the answer, and that pertained to
8 Project Veritas Action Fund. So that -- you've put in
9 the evidence with regard to that one entity.

10 MS. WELLS: Your Honor, I don't think that
11 there's any evidence -- and I'll let my team correct me
12 if I'm wrong. I don't think there's any evidence that
13 Mr. O'Keefe is an officer with Project Veritas Action
14 Fund before the court. We've got that he is president of
15 Project Veritas. I believe there's evidence he was a
16 founder of Project Veritas Action Fund, but we don't have
17 evidence before the court that he's, you know, currently
18 involved with Project Veritas Action Fund.

19 THE COURT: Well then does that help your argument
20 or hurt your argument? Because if you've put in evidence
21 to say that the party that published was "action fund,"
22 and Mr. O'Keefe doesn't have any office or any current
23 direct connection you've just mentioned to "action fund,"
24 then how is he a publisher?

25 MS. WELLS: Because, Your Honor, he is the one

1 who is saying the words in the video.

2 THE COURT: So you're saying that the speaking of
3 the words -- in other words, if you hire some famous
4 actor to say certain -- read a script on a particular
5 video that happens to defame someone, that that actor
6 then becomes a publisher of the particular video even
7 though, you know, nothing else appearing? Simply being
8 the one doing the speaking constitutes publication?

9 MS. WELLS: Your Honor, I don't want to answer
10 that question because I haven't thought about how being
11 an actor may change the answer to that, and being a paid
12 person to do that who has no connection to what's being
13 said. That's not what we have here. We have someone who
14 is involved in every detail of the investigation. You
15 saw the video where he's jabbing at the computer screen
16 to ask about the violence. And then he -- you know, he's
17 doing more than an actor paid and told, here's the
18 script. Read it. He was involved in, you know, every
19 bit of that. So, yes, that makes him a publisher, Your
20 Honor.

21 THE COURT: Let me sort of cut to the chase on
22 this one. Is the question of publication a question of
23 fact for the jury?

24 MS. WELLS: I think it is, Your Honor. I think
25 defendant -- you know, when you look at the jury

1 instructions, the pattern jury instructions from North
2 Carolina, the --

3 THE COURT: Then what are the specific points
4 under the pattern jury instructions that are relevant to
5 the issue of publication? Is it speaking? Obviously,
6 most of the pattern jury instructions on libel are based
7 on the idea of a written thing. But is it the
8 composition? Because simply writing it down, that's not
9 publication. In fact, that's sort of the law school exam
10 question. If all you do is write it down in the notebook
11 and put the notebook in the drawer, have you committed
12 libel? No, you haven't. So writing it isn't
13 publication. So what are the pieces of evidence that
14 give rise to the jury being able to make a finding of
15 publication?

16 MS. WELLS: Well, Your Honor, I mean, straight
17 from the pattern jury instructions, it says: Published
18 means the defendant knowingly communicated the statement
19 so that it reached one or more persons other than the
20 plaintiff. And here we have Mr. O'Keefe -- I mean I
21 hope that we would all agree he was knowingly
22 communicating. He was reading the script in the video as
23 he was being filmed, and he did that so that it could
24 reach one or more persons. He said I wanted it to go to,
25 you know, as many people as it could. So that, I think

1 just answers that question squarely, Your Honor.

2 THE COURT: Well then you've addressed it with
3 regard to Mr. O'Keefe. What about with regard to
4 Project Veritas? Are you relying strictly on respondeat
5 superior?

6 MS. WELLS: Your Honor, yes. When we look at
7 respondeat superior, the -- I think Mr. O'Keefe, as the
8 president of Project Veritas, is communicating about the
9 bonuses that would be paid to the employees,
10 communicating about how there are cases in North Carolina
11 that say an employer can be libel under respondeat
12 superior for defamation. I think that's what we have
13 here, Your Honor.

14 THE COURT: Okay.

15 MS. WELLS: And we have them mixing where he's
16 saying, we are paying money these videos are going to get
17 money for the organizations. You know that -- I think
18 there's some evidence direct evidence about Project
19 Veritas but I think the bulk of the evidence is
20 respondeat superior.

21 THE COURT: You went back to a point that I meant
22 to ask you about, and now you've reminded me of my
23 question. This point in the email of that this is going
24 to generate money for the organizations. Does that mean
25 that any beneficiary becomes a publisher? You know, say,

1 for instance in a -- in this context, if Mr. O'Keefe
2 said, oh, this is going to cause great fundraising
3 opportunities for the RNC. Does that make the RNC a
4 publisher of this video? Because I don't think it does.
5 Just simply being a beneficiary doesn't seem to fit into
6 the mix, does it?

7 MS. WELLS: Your Honor, this is so much more than
8 being a beneficiary. Because the -- Your Honor, I am
9 intentionally filibustering a little bit because I'm
10 trying to sort in my mind what actually came into
11 evidence versus what did not. But when we look at the
12 evidence of -- Your Honor's question was -- can you
13 repeat the question, Your Honor?

14 THE COURT: Well I'm sitting here writing notes to
15 myself about this issue. The point that I'm driving at
16 here is with regard to Mr. O'Keefe saying it will
17 benefit the organizations, and you were arguing that as
18 being an element of publication. I was trying to explore
19 that point because I don't see how somebody benefiting
20 from a publication makes that entity or that person a
21 publisher. It seems to be something totally separate and
22 apart from the question of one who knowingly does that,
23 which causes the communication to reach others.

24 MS. WELLS: Well I think, Your Honor, we have
25 Mr. O'Keefe doing the things that the pattern jury

1 instructions say is publishing and which, of course,
2 would be a question for the jury. We have Mr. O'Keefe
3 doing those things. And then we have him -- when he's
4 talking about the organizations, he's sending that within
5 Project Veritas. His signature line is, "James O'Keefe,
6 Chairman and President, Project Veritas." He's giving
7 out bonuses to people, again, in Project Veritas who make
8 sure that the video gets certain play. So this is a very
9 targeted effort.

10 It's not a case of how I read about a child being
11 abused, or I'm driving in the car with my four year-old
12 who's just started learning to read she sees a sign
13 somebody's holding up that says "homeless," you know, or
14 "hungry, need food," and then I don't give money to that
15 person but I go and I give it to a charity that helps
16 people -- helps feed people, you know, and you can say
17 okay.

18 If you take my analogy and somehow say there's
19 defamation in it -- I take Your Honor's point that just
20 because I gave to this charity over here, they had
21 nothing to do with the defamation. Your Honor, that's
22 not what we have here. We have two very -- three very
23 closely connected defendants, and the work is going on on
24 behalf of them all. It's not an incidental thing for
25 sure; it's an intended beneficiary.

1 THE COURT: Okay. Do you have anything else?

2 MS. WELLS: Your Honor, I think that -- I thought
3 I had written a note to myself. Your Honor, I think
4 that's my argument. Thank you.

5 THE COURT: Okay. Thank you. And I appreciate
6 the attorneys for indulging the frustrated law professor
7 half of my brain. I will certainly read what has been
8 submitted. There are a number of things that both of you
9 have referred to that I obviously will need to go back
10 and look at in my notes. Obviously, I find -- I find it
11 to be a troubling question. Put it that way. Because on
12 the one hand I'm very concerned about making any ruling
13 that is not only detrimental to the First Amendment but
14 eviscerates the First Amendment. That's why I keep using
15 -- I keep running that Mike Wallace analogy through my
16 mind. If you made this argument against Mike Wallace,
17 would everybody in the room laugh? And, with candor, Ms.
18 Wells, there are some parts of your argument that, if you
19 made that argument about Mike Wallace, people in the room
20 would laugh but other parts not.

21 At the other end of the spectrum I do have some
22 concern because I think that the veracity of the media
23 has certainly come into question in recent years, and I
24 certainly don't mean in the last two years. Therefore,
25 if there are no boundaries at all then that causes a

1 different kind of problem. So somehow you-all are
2 calling on me to walk this tightrope in this case. I
3 need to try to figure out what all of that means, in
4 light of the evidence that's been presented, but I will
5 try to look at this overnight. Hopefully, I will have an
6 adequate opportunity to try to resolve what we have to
7 this point.

8 I will mention that, obviously, the outline has
9 been given for tomorrow. Both sides need to at least
10 count on the idea of the continued presentation of
11 evidence tomorrow. I Certainly don't want anybody to
12 think that what I have been asking about this evening is
13 an indication of any way that I'm going to rule.

14 Is there anything else that any of you need to
15 address? Yes, Ms. Wells.

16 MS. WELLS: Your Honor, one request, if I may.
17 To the extent that I did not fully address the arguments
18 made in the defendant's motion, may I file something
19 tomorrow morning, if necessary?

20 THE COURT: Let's talk about the logistics of
21 that. Because if you file it after midnight it will not
22 go into the ECF system for today, which means that when I
23 get my ECF summary I'm not going to have it.

24 MS. WELLS: Sure.

25 THE COURT: That means that I won't have it until

1 you hand it to me in the morning. Now if you want to be
2 here, say, at 7:30 tomorrow morning to hand it to me,
3 because I tend to get here about 6:30 in the morning
4 because I have stuff I need to read. I don't expect
5 anybody to be here at 6:30 in the morning; the marshals
6 won't let you no. But if you want to get here as early
7 as they will let you in tomorrow morning to hand up a
8 copy of it, I'll try to read it then. But that's a
9 little bit difficult. It's kind of short notice.

10 MS. WELLS: Your Honor, I'd be happy to do that.
11 Or I'd be happy to email it to Your Honor's law clerk. I
12 just -- or, if you'd like to take a ten-minute recess and
13 allow me to read it now to make sure there's nothing -- I
14 just didn't have time to read and listen to argument.

15 THE COURT: Your idea of emailing it to my law
16 clerk might be the best idea, but the earlier you do that
17 the better.

18 MS. WELLS: I understand.

19 THE COURT: Otherwise, you know, once she's taking
20 kids to school and everything else, you know, I might not
21 see it until 8:30, and then it's really too late.

22 MS. WELLS: If we are going to file something we
23 will do it before she would take children to school. How
24 about this, Your Honor? We will communicate with her
25 either way. You know, we may say we stand on our

1 argument in court and we won't be filing anything, or we
2 will file something.

3 THE COURT: Okay.

4 MS. WELLS: We'll file it with the ECF system,
5 and we'll also email it to her if --

6 THE COURT: I think that has the best possibility
7 for working. Okay.

8 MS. WELLS: Thank you, Your Honor.

9 THE COURT: Anything else? I appreciate all of
10 you staying here late. I appreciate all the security
11 officers who I've kept overtime here today. I apologize
12 for wrecking your evening schedule, but this way we can
13 keep this case moving along as we need to.

14 Marshal, go ahead and recess us until 9 o'clock
15 tomorrow morning.

16 (Off the record at 7:33 p.m.)

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CERTIFICATE

I, Tracy Rae Dunlap, RMR, CRR, an Official Court Reporter for the United States District Court for the Western District of North Carolina, do hereby certify that I transcribed, by machine shorthand, the proceedings had in the case of SHIRLEY TETER versus PROJECT VERITAS ACTION FUND, et al, Civil Action Number 1:17-CV-256, on May 21, 2019.

In witness whereof, I have hereto subscribed my name, this 23rd day of May, 2019.

___/S/___Tracy Rae Dunlap___
TRACY RAE DUNLAP, RMR, CRR
OFFICIAL COURT REPORTER

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