

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 :
8 FUND, ET AL, :
Defendants. :
9 -----x

10 Wednesday, May 22, 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 8:58 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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

	<u>Page</u>
Reporter's Certificate.....	20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: Is there anything that we need to address this morning before we resume where we left off yesterday?

MR. MONTECALVO: Yes, Your Honor. The plan for the first two witnesses -- the first witness will be Richard Campbell by video deposition -- by video testimony. There is one exhibit with Mr. Campbell, and it's Exhibit 27, that we would like to admit and to publish before the jury when that point comes into his deposition. I don't believe there is an objection on that from the plaintiff. We would like to offer that exhibit in to evidence at the -- prior to the start of that testimony.

The next witness would be Ms. Boyd. As allowed by this court we would be reading the testimony that's been designated. There is one exhibit with Ms. Boyd. That exhibit has been identified, and I believe the foundation has been established with Ms. Teter. That's Exhibit 8

THE COURT: What was the number?

MR. MONTECALVO: Exhibit 8 is the one with Ms. Boyd. Our plan was to ask Your Honor to read the stipulations that are specific to Ms. Boyd, and then we would do the designation of the transcript, and then introduce the exhibit.

1 THE COURT: Is that Plaintiff's 8 or Defendant's
2 8?

3 MR. MONTECALVO: Plaintiff's 8.

4 MR. DEAN: Defendant's.

5 MR. MONTECALVO: Defendant's 8, Your Honor.

6 THE COURT: Defendant's 8.

7 MR. MONTECALVO: I believe that one was is also
8 by stipulation of the parties.

9 And I believe before our next break there will be
10 an opportunity to show Ms. Comerford's deposition. Her
11 deposition is approximately 50 minutes or a little bit
12 longer maybe -- about 50 minutes, Your Honor. And there
13 are exhibits that are going to be referenced in her
14 testimony that we would like to introduce and publish to
15 the jury as well. Those are Exhibits 301, 302, 303, 304,
16 305, 307, 308, and 309. One of them is a video. I don't
17 believe there was objections on 303 forward with the
18 exception of the plaintiff's objection that the jury
19 should not see "public figure" evidence, but I think
20 that's been ruled on already.

21 THE COURT: I think if we're going that far into
22 the schedule we're getting a little bit ahead of
23 ourselves, because I'd rather do it like we did it
24 yesterday for the exhibits that pertain to the deposition
25 that we're going to go to. So let's hold off on that for

1 now.

2 MR. MONTECALVO: Okay. Thank you, Your Honor.

3 As far as the stipulations. With Your Honor's
4 permission, we would like to have the stipulations read
5 as to specific witnesses prior to the time that they
6 testify, whether live or by video. It's not all the
7 stipulations. It's Mr. Campbell. Prior to his
8 testimony, we would ask that stipulations 10 to 12 be
9 read.

10 For Ms. Boyd, prior to reading her designations,
11 that would be stipulations 25 through 28. And we would
12 like to ask whether Your Honor would prefer that we
13 actually put someone in the witness box in order to read
14 the answers, or whether we should just do it at counsel
15 table.

16 THE COURT: Oh. For the reading of the
17 deposition?

18 MR. MONTECALVO: Correct.

19 THE COURT: The only way I've ever seen a
20 deposition presented, other than on videotape, is that a
21 lawyer sits at table reading the questions, and some
22 person sits in the witness box reading the answers.

23 MR. MONTECALVO: Okay. Thank you, Your Honor.

24 THE COURT: The jury will be instructed in advance
25 of how that process works.

1 MR. MONTECALVO: Thank you, Your Honor. Nothing
2 further.

3 THE COURT: Okay. Anything else that we need to
4 address before we proceed with where we left off
5 yesterday?

6 MR. SASSER: Your Honor, with regard to
7 Ms. Comerford. I believe you ruled on at the pretrial
8 conference that there was a previous deposition that we
9 wanted to have read in as part of completeness for that
10 deposition. She was deposed --

11 THE COURT: She was the one who was deposed twice?

12 MR. SASSER: Yes, Your Honor. Exactly.

13 THE COURT: Okay.

14 MR. SASSER: So what we would propose is that,
15 after her video is shown, we read in the portions of the
16 2018 deposition that we had designated.

17 THE COURT: Okay. We'll need to deal with that
18 issue when we get to it because I've never addressed the
19 rule of completeness before as extending to a different
20 deposition of the same witness. We might have to discuss
21 that issue for a little bit but we'll see about that.
22 Anything else?

23 What I wanted to do next -- as I said, to pick up
24 where we left off yesterday. Because where we left off
25 yesterday, after a very late evening, was with regard to

1 the motions pursuant to Rule 50. And I wanted to let you
2 know kind of what I had in mind with regard to the
3 motions that were made on behalf of the defendants.

4 I will start with a point of admitting an extreme
5 bias on my part that I bring to the decision on this
6 particular point. And, that is, the extreme bias that I
7 have is that I have enormous confidence in the jury
8 system and the juries that we impanel for the cases that
9 we try in this court. I think it's the best system that
10 we have ever developed -- when I say "we," I think that
11 the human race has ever developed -- for settling
12 disputes. And, of course, the Rule 50 standard is one
13 that relates to whether there is sufficient evidence for
14 a reasonable jury to find in favor of the party with the
15 burden of proof.

16 So the reasonableness of juries is an integral
17 part, and my default is to let a reasonable jury decide
18 any case. And I will admit that part of that bias comes
19 from the fact that not only do I trust juries; not only
20 is it my experience that juries tend to act in very
21 reasonable ways; but we have involuntarily brought these
22 people here to decide a case that they didn't want to
23 decide. We've asked them to listen carefully and
24 contemplate this case. And if we, then, after a certain
25 period of time, just tell them, oh, never mind, I think

1 that we have in a way abused them. But I also recognize,
2 and I think the arguments on both sides yesterday evening
3 really have focused on the fact that because of the First
4 Amendment implications in this case, the issue of a Rule
5 50 motion, really warrants close examination.

6 Where there are First Amendment implications there
7 are great societal implications. And in addition to
8 that, because of the nature of the interplay between the
9 First Amendment and the common law on this topic, the
10 factual determinations that are placed with the court as
11 a matter of constitutional law, and the factual
12 determinations that would otherwise be placed with the
13 jury, are so intertwined that, of necessity, when
14 submitting a case to the jury it is -- well let's just
15 say that it is difficult not to end up with the jury
16 believing that they have been thrown some issues that are
17 not actually within their bailiwick.

18 I believe that the First Amendment implications
19 also extend to a greater degree in a case like this
20 because the court is being asked to walk a very fine
21 line. On the one hand, the free exchange of ideas
22 requires a very broad latitude for the media, and for
23 private citizens alike, to be able to express their
24 opinions, to express their views, to say what they feel
25 needs to be said, particularly on issues of great public

1 importance. And at the top of the list of issues of
2 great public importance would be an issue regarding who
3 should be elected as our president. Therefore, if
4 citizens and the media are handcuffed by a fear of
5 liability, that's detrimental to political discourse, it
6 is detrimental to society as a whole, and it is
7 detrimental, really, to our fundamental freedom.

8 At the same time, however, the law needs to impose
9 upon the media a degree of responsibility that there
10 needs to be some standard of responsibility in the law,
11 and I believe that that's underscored all the more by the
12 fact that in our current situation, as we have it today,
13 the media is trusted by the public on par with used car
14 salesmen and congress.

15 And while the Internet has broadened the number
16 and the variety of available voices in the marketplace of
17 ideas, it has also served to undermine the public's
18 confidence in the veracity of those sources. Therefore,
19 that fine line has to be walked. And I think that
20 walking that fine line required this court to take a
21 close look at what issues are really for this court and
22 what issues are really for this jury.

23 I appreciate the arguments that were made
24 yesterday. I kept you all here awfully late. I
25 appreciate the fact that Mr. Dean and Ms. Wells

1 dutifully entertained my badgering questions. But they
2 were -- the presentation of counsel on both sides was
3 very helpful to me in trying to navigate these issues,
4 and I appreciate your hard work. I appreciate your
5 candor as attorneys in making those arguments. I also
6 appreciate the briefs that were submitted by Mr. Dean
7 yesterday and by Ms. Wells this morning; and I have read
8 through those. I've read through them very carefully.

9 The bottom line is, as both of you have briefed
10 very carefully, that the -- the way in which the law
11 requires this court to walk that fine line between media
12 responsibility and the free exchange of ideas is governed
13 by this actual malice standard that has been set forth
14 through case law by the Supreme Court, and particularly
15 for this circuit by the Fourth Circuit Court of Appeals.

16 And whether we agree with that standard or not it
17 is the fine line that we are all required to walk. And
18 not only are we required to walk that fine line but the
19 law also imposes the standard, the burden of proof on the
20 plaintiff, to prove that particular element by clear and
21 convincing evidence because of the constitutional
22 implications. And the *Liberty Lobby* case, I think, is
23 very clear that that is something that the court is
24 required to take into account in a Rule 50 motion.

25 So what I have done is I have gone through the

1 particular points of evidence that have been set forth on
2 behalf of the plaintiff as to the evidence of actual
3 malice so as to make a determination about whether there
4 is sufficient evidence of actual malice whereby a
5 reasonable jury could find by clear and convincing
6 evidence that actual malice is present in this case.

7 There were five points in particular that the plaintiff
8 has made, four of which were made by Ms. Wells in the
9 brief filed this morning; a fifth one made by Ms. Wells
10 in the arguments yesterday in addition to the four.

11 I want to go through each one of those.

12 The first of those was the argument that there was
13 evidence that the defendants had a pre-conceived story.
14 In other words, that there is -- where there is evidence
15 of a storyline that has been conceived in advance of an
16 investigation, and then the defendants consciously set
17 out to make the evidence conform to the preconceived
18 story, is evidence of actual malice. The plaintiff
19 relies on Plaintiff's Exhibit 25 as the evidence for this
20 particular point, that being the so-called "draft number
21 three." I think it's actually the response to draft
22 number 3 of the video.

23 The problem with that argument is that the
24 evidence shows that the events occurred in the opposite
25 order. It wasn't that the storyline was preconceived and

1 then the defendants consciously set out to make the
2 evidence conform by a subsequent investigation. The
3 provision that was -- the clips that were used by the
4 defendant, the most operative one coming from September
5 15th with Mr. Foval, and then this concept of adding this
6 in to the video is in this memo of October 14th, a month
7 later. So this particular provision of the law does not
8 have any application to the evidence as presented by the
9 plaintiff.

10 The second point that was presented on behalf of
11 the plaintiff was that Mr. Hartsock never asked
12 Mr. Foval the name of the woman to whom he was referring.
13 I find that argument to be unpersuasive because it is
14 setting a standard of interview for journalists. For
15 instance, if an attorney doesn't ask that additional
16 question during a trial, or during a deposition, that's
17 not even a basis for a claim in negligence against an
18 attorney. There is no First Amendment liability on the
19 part of an attorney. I mean even under a *Strickland v*
20 *Washington* sort of analysis where an attorney is
21 questioning an attorney's method of interviewing or
22 deposing or examining a witness isn't held to that
23 standard. And, therefore, to impose that standard with
24 regard to a particular question, I believe, is a great,
25 great stretch with regard to the issue of what

1 constitutes evidence of actual malice.

2 The third point that was made by or on behalf of
3 the plaintiff was that Mr. Hartsock did not contact the
4 plaintiff to ask her view. But, again, under the
5 circumstances here, particularly with the nature of the
6 information that was before the defendants, it is very
7 questionable as to what that might yield. And the second
8 part, or the companion part of that point made on behalf
9 of the plaintiff, was that the defendants were on notice
10 by the *New York Times* article in which the plaintiff's
11 response was given. The problem with that argument is it
12 came after the publication of the video that is really
13 the one that is at question in this case. So, again, it
14 is a great stretch to refer to that as being evidence of
15 actual malice.

16 The fourth point that was made on behalf of the
17 plaintiff was that Mr. Foval was inherently unreliable as
18 a source and, therefore, Mr. Foval could not be believed
19 in assembling the video -- the statement. However,
20 Mr. Foval's statements were statements against interest.
21 As reflected in our rules of evidence, particularly Rule
22 804(b)(3), statements of interest are considered to be of
23 higher reliability, not lower reliability. So, once
24 again, I find it difficult to see how this constitutes
25 evidence of malice, particularly constitutional actual

1 malice, on the part of the defendants.

2 The fifth point that the plaintiff -- that was
3 made on behalf of the plaintiff was the excising from the
4 video the statement by Mr. Foval of, "we didn't know who
5 she was ahead of time," and that that should have led to
6 further investigation. However, it is clear from looking
7 at the raw video that whoever Mr. Foval was talking
8 about, when he said we didn't know who she was ahead of
9 time, that he was talking about precisely the same person
10 as to whom he was referring when he said, "She's one of
11 ours." Therefore, there is no contradiction as to there
12 being two different people being identified here and,
13 therefore, it does not give rise to an inference that the
14 defendants should have investigated further as to which
15 person Mr. Foval was talking about when it appeared that
16 he was talking about the elderly woman in North Carolina.

17 Any one of these points, if they are evidence at
18 all of actual malice, would constitute, really, the
19 thinnest of thin reeds. I think that this would be a
20 difficult question if we were deciding this element on a
21 preponderance of the evidence standard but we're not.
22 The law requires, and the Supreme Court has made clear
23 under the *Liberty Lobby* case, that I not only have to
24 look at this from the standpoint of whether or not there
25 is the thinnest of thin reeds, that scintilla of

1 evidence, but rather whether a jury could find by clear
2 and convincing evidence that there was actual malice.
3 And these very thin reeds, which I believe as to several
4 of these are really no evidence of malice at all, are
5 insufficient to meet that standard. Therefore, for that
6 reason, the defendant's motion -- defendant's motions
7 pursuant to Rule 50 will be granted.

8 Is there anything further that we need to address?

9 MS. WELLS: No, Your Honor. Thank you very much.

10 THE COURT: Anything else for the defendants?

11 MR. DEAN: No, Your Honor. Thank you.

12 THE COURT: Whenever I have something that is of
13 particular difficulty, such as this case, it is my
14 ordinary, knee-jerk reaction to tell the party that I've
15 ruled against that I urge you to have the court of
16 appeals go grade my paper. To that end, I will say that
17 I will follow this up with a written order before I enter
18 a judgment in this matter that will further elucidate
19 what I'm talking about.

20 And I do have an inclination to say exactly that.
21 I think that if I got this wrong I'd certainly like for
22 somebody to tell me that I got it wrong. I have a little
23 bit of hesitation in saying that this time. Because if
24 I've gotten this wrong, and the Fourth Circuit says that
25 this is not what the law is, I hesitate to think where

1 the First Amendment is going in this country.

2 Unless we have something else that we need to
3 address, I will bring the jury in and I will let them
4 know the result and then discharge the jury. So is there
5 anything else that needs to be discussed? Okay.

6 Marshal, please bring us the jury.

7 (Jury returns at 9:25 a.m.)

8 THE COURT: Ladies and gentlemen of the jury,
9 thank you again for being here on time this morning so
10 that we may continue with our proceedings. I thank you,
11 also, for your patience and for -- while you've been
12 waiting in the jury room for close to half an hour here,
13 since all of you have arrived, and I assure you it wasn't
14 because we were just fooling around in here. In fact,
15 after you went home for the evening yesterday we were all
16 here dealing with issues that the law requires that I
17 conduct outside of your presence. In fact, we were here
18 for a good hour and a half after you left yesterday
19 evening, and then we resumed again this morning with some
20 of those proceedings. So quite a bit has gone on since
21 you were in this courtroom last.

22 The conclusion of all of those proceedings is
23 that, after having entertained all of the evidence that
24 has been presented by the plaintiff in this case,
25 pursuant to the legal standards that are set out in the

1 law and in our rules of procedure, I have dismissed the
2 plaintiff's case and this case is concluded. That means
3 that your service as members of this jury is likewise
4 concluded. I realize that that comes with some
5 frustration on your part for having sat through two days,
6 and then returned here for a third day, and listening as
7 attentively as you have to all of these proceedings only
8 to have everything essentially pulled away from you. I
9 recognize that that's frustrating, and I apologize for
10 the frustration but, of course, it's the requirement that
11 we follow the law as the law is.

12 But I also assure you that your presence here has
13 not been in vain. Because it is as a result of your
14 being here, it is a result of our ability to impanel the
15 eight of you as the jury for this case, that has
16 facilitated this trial going forward, and our proceedings
17 and our process and our rules of procedure playing out
18 the way that the law dictates that they should. And it
19 is only because of that that we have come to the
20 conclusion that we have with regard to the dispute
21 between these parties. So, with that, I offer you my
22 great thanks for what you have done here in listening so
23 attentively and being here for two days and again here
24 today.

25 Before I discharge you, I want to mention a few

1 things that I've mentioned before but I want to remind
2 you of. First of all, all along I've been telling you
3 you can't talk to anybody about this case. As soon as I
4 discharge you, you may talk to whomever you want to but
5 you're not required to talk to anybody. That's entirely
6 your choice. You can go home and talk to your family and
7 friends, of course, but the attorneys in this case may
8 contact you. Members of the media may contact you. You
9 can talk to them if you want to but you sure don't have
10 to, and that's entirely up to you. That is your choice.

11 I mentioned to you about the notes that you have
12 taken. Please leave those on the table in the jury room.
13 No one will read them. Those notes will be shredded
14 without anybody ever looking at them. So you don't have
15 to worry about anybody finding your notes or anything
16 that you may have written down or said regarding these
17 proceedings.

18 Please make sure that you leave your cell phone
19 badges with the clerk, who will be in the jury room for
20 that purpose. Otherwise, the security officers will
21 tackle you on your way out of the building.

22 (Laughter.)

23 Please also remember if you have a cell phone that
24 is in the little lockers that are in the jury room to
25 make sure that you get you're your cell phone. Please

1 remember to leave the keys. Because retrieving those
2 keys, if you leave accidentally with them, becomes very
3 difficult.

4 The last thing that I want to mention is that it
5 is my practice that after a trial is concluded that I
6 come back to the jury room to talk to any members of the
7 jury who wish to stay. If they have any questions about
8 the court system or how the system works I'll be glad to
9 talk to you for a few minutes. There's no obligation
10 that you stay. That's entirely up to you as to whether
11 you want to or not.

12 Again, I thank you more than I can express
13 particularly under these circumstances where you no
14 longer get to make the decision that you were called here
15 to make. Your presence here, your attentiveness here,
16 has been invaluable to us, and I thank you very much for
17 that. I thank you for your service to this court. I
18 thank you for your service to these parties. I also
19 thank you for your service to your communities.

20 At this time, you're discharged from any further
21 service from this term of court. Thank you very much.

22 Marshal, please take the jury to the jury room.

23 (Jury excused at 9:30 a.m.)

24 THE COURT: Is there anything further that we need
25 to address before we recess court? Anything for the

1 plaintiffs?

2 MR. SASSER: Nothing from the plaintiffs, Your
3 Honor.

4 THE COURT: Anything for the defendants?

5 MR. DEAN: No, sir.

6 THE COURT: Okay. Once again, I appreciate all of
7 your hard work in this case; I appreciate the good
8 presentations that were made. Obviously, it's a
9 difficult case for everybody involved and to that end the
10 lawyers made it easy. In a way, I feel a little bit
11 badly about how much I badgered Ms. Wells yesterday, but
12 I was trying to extricate, you know, what are all of
13 those points? I assume it's obvious to you now that I
14 was very troubled about how to overcome the burdens of
15 the law. With that, we will go ahead and recess court
16 until further call.

17 (Off the record at 9:32 a.m.)

18 **CERTIFICATE**

19 I, Tracy Rae Dunlap, RMR, CRR, an Official Court
20 Reporter for the United States District Court for the
21 Western District of North Carolina, do hereby certify
22 that I transcribed, by machine shorthand, the proceedings
23 had in the case of SHIRLEY TETER versus PROJECT VERITAS
24 ACTION FUND, et al, Civil Action Number 1:17-CV-256, on
25 May 22, 2019.

23 In witness whereof, I have hereto subscribed my
24 name, this 22nd day of May, 2019.

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