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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-7015

J. ODELL ANDERS,

Appellant/Cross-Appellee,

v.

NEWSWEEK, INC.,

Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Mississippi
Western Division

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

J. Odell Anders, Plaintiff
Newsweek, Inc, Defendant
The Washington Post Company, Defendant's Parent Corporation
Tina A. Ravitz, Vice President and Chief Counsel of Defendant
Williams & Connolly, Attorneys for Defendant
Kevin T. Baine, Attorney for Defendant
Elena Kagan, Attorney for Defendant
Thomas, Price, Alston, Jones & Davis, Attorneys for Defendant
Alex A. Alston, Jr., Attorney for Defendant
Terryl K. Rushing, Attorney for Defendant
Mulhearn & Mulhearn, Attorneys for Plaintiff
John E. Mulhearn, Jr., Attorney for Plaintiff

Kevin T. Baine
Attorney of Record for
Appellee/Cross-Appellant

STATEMENT REGARDING ORAL ARGUMENT

For the following reasons, Appellee, Newsweek, Inc., submits that the judgment of the district court should be affirmed without oral argument:

1. The appeal does not present any substantial issues of law. The standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, as well as the principles of Mississippi law governing defamation actions, are firmly established and have been applied by this Court on numerous occasions. The appellant does not challenge any of the district court's instructions to the jury, and does not raise any significant legal questions.

2. The issues in this case are largely factual, and every factual issue was resolved by the jury in favor of the defendant/appellee. The plaintiff/appellant offers no substantial ground for attacking any of the jury's findings.

Appellee submits that for these reasons an affirmance without oral argument is entirely appropriate. Appellee is prepared to present oral argument, however, if the Court desires to hear it.

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IN THE
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Appellant/Cross-Appellee,

v.

NEWSWEEK, INC.,

Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of Mississippi
Western Division

BRIEF FOR APPELLEE/CROSS-APPELLANT

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal by virtue of 28 U.S.C. § 1291 and 28 U.S.C. § 1294.

COUNTER-STATEMENT OF ISSUES

1. Did the evidence permit the jury to find that the challenged article did not defame the plaintiff?

2. Did the evidence permit the jury to find that the challenged article was not materially false?

3. Did the evidence permit the jury to find that the challenged article was not published with actual malice?

4. Should the trial court have granted the defendant's motion for a directed verdict?

5. Did the trial judge abuse his discretion in excluding the testimony of a purported expert who would have commented on alleged departures from accepted standards of responsible journalism and who had no expertise on standards applicable to national weekly newsmagazines? If so, was the court's error harmless in view of the jury's findings that the article was not false and defamatory?

6. Did the trial judge abuse his discretion in admitting certain limited testimony concerning the effect of the challenged article on the plaintiff's reputation?

7. Did the trial judge abuse his discretion in admitting certain testimony that responded to testimony offered by the plaintiff, reiterated facts previously conceded by the plaintiff, and related to the truth of the challenged article?

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in Court Below

This is a libel action brought by a public official, in which a properly instructed jury, after a seven-day trial, returned a verdict for the defendant on every element of the plaintiff's claim.

Plaintiff-Appellant and Cross-Appellee J. Odell Anders ("plaintiff" or "Anders") filed the action in the Chancery Court of Adams County, Mississippi against Defendant-Appellee and Cross-Appellant Newsweek, Inc. ("defendant" or "Newsweek"), Natchez Newspapers, Inc., and two individuals associated with a Natchez newspaper. The Complaint alleged, *inter alia*, that the

Natchez Democrat had published a series of defamatory articles in May and June of 1987, and that Newsweek had published similarly defamatory statements about the plaintiff in the August 10, 1987 issue of *Newsweek* magazine.

Newsweek removed the case to the Western Division of the United States District Court for the Southern District of Mississippi. The District Court severed and remanded to Chancery Court the claims against the other three defendants.

The case against Newsweek was tried before the Hon. William H. Barbour, Jr., United States District Judge, and a jury in September 1990. Newsweek moved for a directed verdict at the close of the plaintiff's case and at the close of the evidence. *See* Appellee/Cross-Appellant's Record Excerpts ("R.E.") 70-73, 75-79.[1/] The plaintiff also moved for a directed verdict at the close of the defendant's case. *See* R.E. 16-18. The District Court denied these motions and submitted the case to the jury. *See* R.E. 19, 74, 80.

After a seven-day trial, the jury returned a verdict in favor of Newsweek, finding by a set of special interrogatories that the plaintiff had proved none of the elements of a defamation action. *See* R.E. 13-14. In accord with the jury verdict, the District Court entered final judgment dismissing plaintiff's

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[1/] Appellee/Cross-Appellant's Record Excerpts are numbered consecutively starting from R.E. 67. Thus, citations to R.E. 1 through R.E. 66 refer to materials in Appellant's Record Excerpts, whereas citations to R.E. 67 and higher refer to materials in Appellee/Cross-Appellant's Record Excerpts.

complaint on October 1, 1990. *See* R.E. 12. Plaintiff subsequently filed a motion for new trial, which the District Court denied on October 31, 1990. *See* R.E. 15. Plaintiff did not file a motion for judgment notwithstanding the verdict and therefore may not obtain an entry of judgment on this appeal.[2/]

Plaintiff timely filed a notice of appeal from the final judgment and the order denying a new trial. *See* R.E. 10. Newsweek then timely filed a notice of cross-appeal from the denials of its motions for a directed verdict. *See* R.E. 67-69.

II. Statement of Facts

Defendant publishes *Newsweek* magazine, a weekly national newsmagazine. The August 10, 1987 issue of *Newsweek* magazine contained an article entitled "Stinging the Good Ole Boys: The Feds crack down on Mississippi corruption." *See* R.E. 27.

The article had two main parts. The first part, to which the headline referred, concerned a federal investigation of county supervisors in Mississippi, which had led to the indictment of numerous supervisors on bribery and other charges. This aspect of the article, comprising the first long column, dis-

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[2/] Under well-settled law, a party's failure to move for judgment notwithstanding the verdict, although not precluding review of the denial of the party's earlier motion for a directed verdict, prevents the appellate court from entering judgment for the party. The only relief the appellate court may order is a new trial. *See Zervas v. Faulkner*, 861 F.2d 823, 832 n.9 (5th Cir. 1988); *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 162 n.8 (5th Cir. 1985); *Gorsalitz v. Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1038 (5th Cir. 1970).

cussed an FBI sting operation called Operation Pretense and the corrupt practices among county supervisors that the sting operation had uncovered. *See id.*

The second part of the article attempted to provide a broader context, showing that the federal investigation was but one component of a more general effort to reform local government in Mississippi. The transition sentence read: "Reformers say the federal probe is only the beginning of an overdue statewide cleanup." *Id.* The article then referred to one local practice which long had been the target of reformers—the system under which some local officials are authorized to take as their own (and, with certain limited restrictions, keep or use as they please) county fees.[3/] The article stated: "Mississippi's antiquated system gives local officials a free hand to spend the taxpayers' money, and some local barons have paid themselves handsomely." *Id.* In the next sentence, the article referred to Anders as an example of an individual who had profited from this antiquated system: "In Adams County, for example, Chancery Clerk Odell Anders reported a 1986 income of $63,000 for himself, $21,000 for his wife, $24,000 for his daughter away at law school

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[3/] In describing this system at trial, Anders explained that monies paid by local citizens for various governmental services, as well as certain funds from the county itself, "go[] into [the local official's] bank account, his personal bank account. And then he pays his labor out of that, his expenses, his insurance, and everything out of the money that's his." Trial Transcript ("Tr.") 329. Vern Smith, the reporter of the *Newsweek* article, provided a similar description of the fee system and noted reformers' objections to the system. *See* Tr. 20, 257, 262.

and $10,000 for another daughter listed as a part-time employee—all from county fees." *Id.* This part of the article concluded with Anders' defense of these payments to himself and family members: "'It's my money,' Anders declared indignantly when the local newspaper revealed the eye-catching totals." *Id.*[4]

The article in its final form was the product of *Newsweek* magazine's usual reporting, writing, and editing practices. *See* Trial Transcript ("Tr.") 674, 678. Vern Smith, the Atlanta Bureau Chief for *Newsweek* magazine, initially drafted and sent to the magazine's main offices a story suggestion. *See* Tr. 15-16. That suggestion, like the subsequent article, had two elements—the first, a discussion of the criminal investigation of county supervisors, and the second, a description of the fee system and its consequences, as illustrated by Anders' use of county fees. *See* R.E. 81.[5] Smith had obtained the information

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[4] Perhaps understandably, in light of the proven truth of every statement in the article referring to Anders, which will be discussed below, the Statement of Facts in Anders' brief quotes quite selectively from the article. The brief says only that "[t]he article cited Mr. Anders as an example of 'local barons [who] have paid themselves handsomely' with 'taxpayers' money.'" Brief of Appellant at 4; *see id.* at 9. If the article said only that much, it still would be true, but Anders' description hardly does justice to the actual language of the article, let alone to the context of that language.

[5] The story suggestion anticipated almost exactly the final article's discussion of the fee system and of Anders' conduct. It first described the fee system, then used as an example of the system's operation the income reported by Anders and members of his family, and finally stated Anders' defense of these payments. *See* R.E. 81; Tr. 217-18. The facts thus belie the repeated assertions in Anders' brief,

about Anders from a series of seven or eight articles appearing in the *Natchez Democrat* over a period of approximately two months. *See* Tr. 244, 260. Those articles had detailed the operation of Anders' office, published a summary of the income statement Anders was required to file with the Secretary of State's office, and reported Anders' confirmation and defense of the facts revealed in that statement. *See* Tr. 244-47.

After receiving authorization to proceed with the story, Smith traveled to Mississippi to do further investigation. *See* Tr. 240. Smith's research focused on the aspect of the story dealing with the federal criminal investigation of county supervisors, about which new facts were emerging daily. *See* Tr. 242, 248. Smith also spoke to two government officials about Mississippi's fee system and its consequences. *See* Tr. 243. Smith did not make an attempt to speak with Anders, because he had seen the *Democrat* series and its summary of Anders' income statement and knew, from Anders' statements in the *Democrat*, that the facts concerning his income and payments to family members were undisputed. *See* Tr. 244-47, 250-51. After completing his research, Smith drafted a preliminary version of the story and sent it to *Newsweek*'s main offices. *See* Tr. 251.

In accord with the magazine's standard practice, the material Smith transmitted was given to a writer, Colleen O'Con-

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see Brief of Appellant at 17, 19, 22, that the final article was the result of a "preconceived story line" dictated by editors remote from the initial investigation and reporting. The "story line" was conceived by the reporter himself after he had the facts about Anders.

nor. She "wrote [the story] to space"—that is, prepared a draft designed to fit a stipulated number of columns. *See* Tr. 251, 673-74. The story then went through numerous editorial and fact-checking stages. *See* Tr. 251, 673-74. Early versions of the article excluded all material about the fee system and Anders; at a later stage, Evan Thomas, then serving as the senior Nation editor, reinserted this material. *See* Tr. 674, 695-96.[6] Near the end of the process, the story was read to Bill Minor, one of the most knowledgeable journalists in the area of Mississippi government and politics. Minor, who worked as a stringer for *Newsweek* magazine, confirmed the story's accuracy. *See* Tr. 135, 252, 273. Subsequently, Smith reread and approved the story. *See* Tr. 251-52, 701. According to undisputed trial testimony, no member of *Newsweek*'s staff—including Smith, O'Connor, and Thomas—ever doubted the truth of any statement in the article. *See* Tr. 253-56, 676-77, 702-03.

The issue of *Newsweek* magazine in which the article appeared first was delivered to newsstands in Adams County during the week of August 10, 1987, about a week after a Democratic Party primary in which Anders was a candidate. *See* Tr. 647-

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[6] Anders' brief twice refers to an internal memorandum discussing an early version of the story, which contained the word "gonifs" (a Yiddish word meaning "thieves"). *See* Brief of Appellant at 19, 25. What the brief does not say is that the version of the story that was the subject of this memorandum—like all the early versions of the story—focused exclusively on the investigation of county supervisors, and made no mention of Anders or the fee system. *See* Tr. 117, 228-29. The word "gonifs" therefore could not have referred to Anders, but only to the county supervisors.

48.[7] The earliest date on which subscribers in Natchez could have received the issue was August 4, the day of the election. *See* Tr. 690-91.[8] In any event, publication of the article was in no way designed to coincide with the date of the election. The article originally was slated to appear earlier in the summer and was pushed back for routine reasons having nothing to do with the content of the article. *See* Tr. 38-41.

Anders never complained to Newsweek about the article and never sought a clarification, correction, or retraction. *See* Tr. 677, 702. He instead filed this lawsuit for defamation.

SUMMARY OF THE ARGUMENT

To prevail on this appeal, Anders must convince this Court to discard a jury verdict based on special findings that Anders failed to prove any of the essential elements of a defamation action. The jury, in reaching its verdict, determined that the challenged article did not contain a defamatory or a false statement clearly directed at the plaintiff, and that the defendant did not publish the article with actual malice. Anders has offered this Court no reason to doubt any—let alone all—of these determinations. Anders himself does not challenge the

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[7] Anders' brief makes repeated—and self-contradictory—misrepresentations about the date on which the August 10, 1987 issue of *Newsweek* magazine first appeared on Adams County newsstands. *See* Brief of Appellant at 4, 18.

[8] The issue was delivered to newsstands in Jackson, Mississippi on August 3, 1987. *See* Tr. 654-55. A person thus could have bought a copy of the issue in Jackson on August 3 and taken it to Natchez.

court's instructions to the jury; all of the jury's findings were supported by the evidence; and none was tainted by evidentiary error. Indeed, the only error below was the district court's failure to dismiss the plaintiff's claim before the jury could reject it; given the evidence, the trial court should have granted Newsweek's motion for a directed verdict.

The article, as the jury found, did not defame the plaintiff. Most of the article did not concern the plaintiff at all, and the part that did was non-defamatory under Mississippi law—the "words themselves," without regard to "innuendo, speculation or conjecture," did not convey a "clear and unmistakable" defamatory meaning. *Ferguson v. Watkins*, 448 So.2d 271, 275 (Miss. 1984). Contrary to the plaintiff's contentions, the article did not claim that he had been arrested or indicted; it did not charge him with illegal conduct; it did not accuse him of corruption.

The statements in the article concerning the plaintiff also were accurate in all material respects. The article essentially asserted that the plaintiff had used monies generated by Mississippi's fee system to pay himself and members of his family a handsome income. That allegation was true, as the trial testimony—including plaintiff's own testimony—showed.

Moreover, Newsweek did not publish the article with actual malice—that is, with knowledge that the article was false or with serious doubts as to its truth. *Bose v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984). The reporter, the writer, and the

editor of the article all testified at trial that they never doubted the truth of the statements made about the plaintiff. And, contrary to the plaintiff's extravagant claims, the trial record contains no evidence at all to the contrary.

The evidentiary rulings contested by the plaintiff were appropriate and well within the trial court's broad scope of discretion. Plaintiff's purported expert did not possess the requisite qualifications to offer expert testimony; in any event, his proposed testimony on journalistic standards was irrelevant to the issue of actual malice, would have confused the issues at trial, and would have misled the jury. The admission of Newsweek's testimony concerning the effect of the challenged article on the plaintiff's reputation was proper; how else is a libel defendant to challenge a plaintiff's allegation of reputational harm? And the testimony of the four particular witnesses challenged by the plaintiff concerned a subject that the plaintiff himself had raised and that related directly to Newsweek's defense of truth.

The plaintiff has offered no good reason to disturb the jury's verdict. This Court should deny his appeal and affirm the judgment summarily.

ARGUMENT

As a public official, the plaintiff was required to show at trial that the *Newsweek* magazine article contained defamatory statements about him that were false and that were published with actual malice. *See Philadelphia Newspapers, Inc.*

v. Hepps, 475 U.S. 767, 777-78 (1986); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The jury in this case found against the plaintiff on each of these issues.[9] The plaintiff thus bears an extraordinary burden on appeal. He must show that each of the jury's findings in this case was without any support in the record—that, contrary to the jury's express determinations, the article at issue contained statements about him that were false, that were defamatory, and that were published with actual malice. Newsweek is unaware of a single defamation case in which an appellate court has found that a losing plaintiff satisfied this burden.

Certainly, this plaintiff has not come close to meeting his burden on appeal. Declining to object to any of the trial court's instructions, plaintiff pins his hopes on rehashing (and mischaracterizing) the evidence presented at trial and on highlighting a few relatively insignificant evidentiary rulings. This Court, however, must view the evidence "in the light and with all reasonable inferences most favorable to" Newsweek; "it

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[9] The special interrogatories submitted to the jury consisted of four questions on liability: (1) whether the article contained a defamatory statement about Anders; (2) whether any such statement was false; (3) whether any false and defamatory statement was "clearly directed" at Anders; and (4) whether any such statement was published with actual malice. In discussing this case and the verdict below, this brief will discuss *seriatim* whether any statements in the article defamed Anders, whether the statements about Anders were true, and whether Newsweek published these statements with actual malice. The question whether any false and defamatory statements were "clearly directed" at Anders, which was separately submitted to the jury, will here be addressed within the portions of the brief dealing with defamation and falsity.

is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing Co. v. Shipman*, 422 F.2d 365, 374-75 (5th Cir. 1969); *see Liberty Mutual Ins. Co. v. Falgoust*, 386 F.2d 248, 253 (5th Cir. 1967) ("[W]here a jury has tried a matter upon correct instructions, the only inquiry is whether such conclusion could, with reason, be reached on the evidence."). Moreover, this Court may reverse evidentiary rulings only upon a "clear showing of prejudicial abuse of discretion." *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984).

Viewed in light of these standards, Anders' arguments for disturbing the jury's verdict must fail. Indeed, the only serious question presented by the record at trial was whether, as asserted in Newsweek's cross-appeal, the court should have granted Newsweek's motion for a directed verdict and refused to submit the case to the jury in the first place.

I. The Evidence Permitted the Jury To Find that the Article Did Not Defame the Plaintiff

The jury found specifically that the plaintiff failed to prove "by a preponderance of the evidence that the *Newsweek* article contained a defamatory statement or statements about him." R.E. 13. Anders now argues that the jury was wrong, and that the trial judge never should have submitted the issue to the jury—in other words, that the trial court should have found *as a matter of law* that the *Newsweek* article was defamatory. That

argument rests on two misstatements—one of law, the other of fact.

First, plaintiff contends that the court, rather than the jury, should determine whether a publication is defamatory. *See* Brief of Appellant at 7, 12. That statement of law is incorrect. It is well-settled that the court's role is to decide not whether a publication is defamatory, but whether a reasonable jury could find it so. Second, plaintiff asserts that the *Newsweek* magazine article accused him of criminal activity and corruption—or, more specifically, of "tak[ing] money that belongs to someone else." Brief of Appellant at 11; *see id.* at 9-10. That too is false. Nowhere does the article charge Anders with such misconduct. Thus, the jury's determination that the article did not defame Anders was wholly reasonable. Indeed, the absence of defamation in this case is so clear that the court should not have submitted the case to the jury.

Numerous cases have delineated the role of judge and jury in determining whether a statement is defamatory—and they have adopted a rule contrary to the one put forth by Anders. In a defamation case, "the court must decide whether the language is *capable of* the defamatory meaning asserted by the plaintiff; if so, the jury decides whether readers understood the article to mean that." *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1245 (5th Cir. 1980) (emphasis added), *cert. denied*, 452 U.S. 962 (1981); *see Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1257 (S.D. Miss. 1988), *aff'd*, 865 F.2d 664 (5th Cir. 1989); Restatement

(Second) of Torts § 614 (1977).[10] In other words, the court decides, given the language of the publication, whether a reasonable jury could find that the publication in fact defamed the plaintiff. If a reasonable jury could *not* make this finding, because the language of the publication is not susceptible to a defamatory meaning, the case is ended, *see Fulton v. Mississippi Publishers Corp.*, 498 So.2d 1215, 1216 (Miss. 1986); if a reasonable jury *could* make this finding, the question whether defamation in fact occurred goes to the jury, *see Brewer v. Memphis Pub. Co.*, 626 F.2d at 1245. Thus, Anders is simply incorrect in claiming that the trial court alone could have found that the article in *Newsweek* magazine defamed him.[11] Such a finding could

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[10] The language in *Fulton v. Mississippi Publishers Corp.*, 498 So. 2d 1215, 1216 (Miss. 1986), which Anders quotes, is not to the contrary. As Anders notes, *Fulton* cites *Brewer* and the Restatement to support its statement of the law, and those authorities make clear that the court is to decide only whether the language is capable of a defamatory meaning. In *Fulton*, the court held as a matter of law that the challenged publication was *not* defamatory. The language used in that case was intended to indicate only that when a statement clearly is not defamatory, the court need not send the case to the jury.

[11] Anders is also incorrect in claiming that the trial court decided this point in his favor when ruling on Newsweek's motion for summary judgment. *See* Brief of Appellant at 12-13. The trial court correctly stated that the question for the court was: "could a reasonable jury properly instructed under a clear and convincing evidentiary standard find that the language in question was (1) clearly directed toward the plaintiff and (2) clearly and unmistakably defamatory from the words themselves, without the jury having to rely upon innuendo, speculation, or conjecture?" *Anders v. Newsweek, Inc.*, 727 F. Supp. 1065, 1067 (S.D. Miss. 1989). The court found that a reasonable jury *could* make these findings and therefore ruled against Newsweek. The court did not hold, as plaintiff insinuates, that a reasonable jury would be required to make these findings.

only have been made by the jury. In this case, the jury found to the contrary, and its finding is fully supported by the law and the evidence.

In Mississippi, a jury may find that a publication defamed a plaintiff only if several exacting requirements are satisfied. First, "the words employed must have clearly been directed toward the plaintiff." *Ferguson v. Watkins,* 448 So.2d 271, 275 (Miss. 1984); *see Blake v. Gannett Co.*, 529 So.2d 595, 603 (Miss. 1988). Second, "the defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation or conjecture." *Ferguson v. Watkins,* 448 So.2d at 275; *see Mitchell v. Random House, Inc.*, 865 F.2d at 670; *Chatham v. Gulf Publishing Co.*, 502 So.2d 647, 650 (Miss. 1987). A defamatory meaning cannot be found by "read[ing] between the lines"; in other words, there is no such thing as libel by implication or omission. *Gulf Publishing Co. v. Lee,* 434 So.2d 687, 693 (Miss. 1983). Finally, for a statement to be defamatory, it "must be susceptible of only one meaning and that meaning must be an opprobrious one." *Meridian Star, Inc. v. Williams*, 549 So.2d 1332, 1334 (Miss. 1989). If a statement may be read in two ways, one of which is false and defamatory and the other of which is not, then the plaintiff cannot prevail.[12/]

[12/] The trial court's instructions to the jury accurately stated these principles of Mississippi law. *See* Tr. 748-49. Anders did not object—because he could not object—to the court's instructions.

Anders suggests that these principles *mandate* a conclusion that the *Newsweek* magazine article defamed him. He quotes unobjectionable (but for him, unhelpful) language that "a publication must be considered as a whole, and its meaning must be ascertained from the language used, as commonly understood." Brief of Appellant at 8-9 (quoting *Whitten v. Commercial Dispatch Publishing Co.*, 487 So.2d 843, 845 (Miss. 1986)). He then asserts that the language in the *Newsweek* magazine article falsely defamed him because it "clear[ly] and unmistakabl[y]" charged him with corrupt and criminal conduct. *Id.* at 11 (quoting *Ferguson v. Watkins*, 448 So.2d at 275). But as the jury found, and as an examination of the article reveals, the article accuses Anders of no such conduct. The evidence barred, rather than mandated, a finding that the article defamed him.

The article, as Anders notes, discusses corruption. It refers, as he says, to "kickbacks," "scandals," and "payoffs." The headline, as he contends, alludes to a sting operation. But what Anders does not say is what is most important: none of this discussion of illegal conduct makes reference to, concerns, or pertains to him.

The article, as noted earlier and as testified to by Newsweek's witnesses, had two essential elements. *See* Tr. 217-19, 695-96. The first part of the article, to which the headline referred,[13] concerned the sting operation directed against

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[13] Evan Thomas testified at trial that he wrote the headline, adapting it from the title of Vern Smith's story suggestion. *See* Tr. 696. Thomas said that the headline "refer[red] to

Mississippi's county supervisors and the corrupt practices that the sting revealed. *See id.* All but one of the references in Anders' brief come from this initial section of the article. But this part of the article—the part about corruption, illegality, and scandal—never mentions or refers to Anders in any way. *See* R.E. 27. It speaks only of county supervisors and, in particular, of one county supervisor named Junie Mixon. *See id.*[14]

The second part of the article, in which Anders is mentioned, concerns Mississippi's fee system. *See* Tr. 217-19, 695-96.[15] It states that this "antiquated system gives local

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the FBI, the federal probe into corruption, into the supervisors," and was not meant to refer to Anders in any way. He explained:

> [T]he purpose of a headline is to draw the reader into the story and to give them a sense of what's newsy or newsworthy. In this case it's about -- the headline tells you about a federal probe, which was the newsy part of the story.
>
> A headline is supposed to tell a reader to look at the story and give them a sense of what is newsworthy or the top of the news so to speak. . . . [Y]ou can't say everything in the headline or otherwise the headline would be as long as the story . . . .

Tr. 696-97; *see* Tr. 216-17.

[14] The jury recognized that the article's references to corruption, scandal, and illegality pertained to the county supervisors, not to Anders: it found specifically that there was no false and defamatory statement clearly directed at the plaintiff. *See* R.E. 13.

[15] Evan Thomas testified that the transition into this part of the article was the sentence reading: "Reformers say the federal probe is only the beginning of an overdue statewide cleanup." *See* Tr. 700. The discussion of the fee system itself commenced with the next sentence. *See* Tr. 218, 700.

officials a free hand to spend the taxpayers' money, and some local barons have paid themselves handsomely." R.E. 27. The article then cites Anders as an example, saying that he "reported a 1986 income of $63,000 for himself, $21,000 for his wife, $24,000 for his daughter away at law school and $10,000 for another daughter listed as a part-time employee—all from county fees." *Id.* And the article reported Anders' defense of these payments: "It's my money." *Id.*

It was Newsweek's contention at trial that this discussion did not charge Anders with corrupt or criminal conduct—that, to the contrary, the discussion made clear that the "antiquated system" gave Anders "a free hand" to do what he had done. The jury agreed, as evidenced by its special verdict finding that the article contained nothing defamatory about the plaintiff. R.E. 13.[16] To have found otherwise under Mississippi law, the jury would have had to find that the "words themselves," without resort to "innuendo, speculation, or conjecture," "clear-

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[16] In an attempt to show that the statements actually referring to him charged him with criminal conduct, Anders testified at trial that the phrase "taxpayers' money" meant money that taxpayers owned at the time, rather than money that initially came from taxpayers. *See* Tr. 423-24. Thus, Anders said, the article accused him of converting money currently in the hands of taxpayers. *See id.* The reporter and editor responsible for the article, by contrast, testified that "taxpayers' money" meant money that originally derived from taxpayers. *See* Tr. 219, 697-701. Plaintiff's counsel questioned them closely about the proper "use of an apostrophe in writing," Tr. 205, but the jury wisely concluded that this was not the proper stuff of libel suits. Plaintiff now appears to agree, for he does not make this argument on appeal. But he never provides an alternative explanation of how the statements in the article referring to him can reasonably be read to accuse him of criminal misconduct.

[ly] and "unmistakabl[y]" meant that Anders had committed a crime. *Ferguson v. Watkins*, 448 So.2d at 275. Understandably, the jury was unable to make such a finding.

II. The Evidence Permitted the Jury to Find that the Article Was Not False

In addition to proving that the article's words themselves conveyed a clear and unmistakable defamatory meaning, the plaintiff must prove that the words were false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986). Truthful statements cannot be the basis for a libel claim. And the words used need not be literally true in every detail; substantial truth is all that is required. *See Blake v. Gannett Co.*, 529 So.2d 595, 603 (Miss. 1988).

What is perhaps most noteworthy about Anders' argument on appeal—and what was remarkable about his case at trial—is how little he disputes in the statements that refer to him. Anders does not claim he was misquoted; indeed, he repeated the phrase "it's my money" numerous times at trial. Tr. 380, 404, 419. He does not claim that the income figures were overstated; he admitted at trial that he used the monies generated by the fee system to pay himself, his wife and his daughters these amounts (in fact, slightly more than these amounts). *See* Tr. 397. And he does not contest the implication that the payments he made to family members were out of proportion to the services they

rendered in his office.[17] What, then, does Anders think was wrong?

The only objection Anders' brief offers to the statements about him is that "he was included . . . as an example of a 'local baron' who 'paid [himself] handsomely' with 'the taxpayers' money' and 'county fees.'" Brief of Appellant at 9. But as trial testimony showed, even this version of the statements in the article about Anders accords well with the facts. The income Anders paid himself (and his family) derived entirely from fees collected directly from taxpayers or fees paid from the county coffers. *See* Tr. 321-29, 423-24. And that income was surely "handsome." As Anders himself stated at trial, "[W]hat's left from your fee system is a good sum of money, yes, sir." Tr. 422. In fact, Anders and his family received a total of $144,535.71 in 1986—more than the Governor, Lieutenant Governor and Secretary of State combined—and only Anders and his wife even claimed to work full time. *See* Tr. 402.

In short, the only argument Anders makes as to falsity is that the article falsely accused him of criminal conduct. But

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[17] Considerable testimony at trial focused on the amount of work Anders' daughters performed in the Chancery Clerk's office in consideration for the income he paid them. *See infra* at 41-42 & n.32. Anders himself admitted that he overpaid his daughters, testifying that "I paid them for their love" and that "if I committed a—am guilty of something, it's for loving them too much." Tr. 343, 407; *see* Tr. 374. At trial, however, Anders insisted that his daughters performed substantial work in his office, thus implying that the article's implication was, if not false, at least exaggerated. *See infra* at 41-42 & n.32. The jury must have disagreed, and Anders does not take this tack on appeal.

Newsweek already has shown that the jury's refusal to read the article in this manner was reasonable and proper. The statements made about Anders in the article (rather than Anders' contorted interpretation of them) were true in all material respects. For this reason, they cannot form the basis of a libel suit.

III. The Evidence Permitted the Jury To Find that Newsweek Did Not Publish the Article with Actual Malice

Anders claims that the trial court should have ruled as a matter of law not only that the *Newsweek* magazine article was false and defamatory, but also that Newsweek published it with actual malice. Once again, this argument confuses the respective roles of judge and jury in defamation cases. Moreover, the argument rests on a misapprehension of the actual malice standard and numerous misrepresentations about the evidence in this case. Anders was not entitled to a legal ruling that Newsweek acted with actual malice. Indeed, given the evidence at trial and the stringent requirements of the actual malice standard, Newsweek was the party entitled to a legal ruling—a ruling that the evidence of actual malice offered by Anders was insufficient even to send his defamation claim to the jury.

The actual malice standard requires a plaintiff to prove by clear and convincing evidence that the defendant published the challenged statements with knowledge that they were false or with reckless disregard of whether they were true or false. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964). A defendant may be held to have published a

statement with "reckless disregard" of truth or falsity only if he "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). As the Supreme Court has stated, "reckless conduct is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing." *Id.* Thus, the Court held in *Sullivan* that the newspaper had not acted with actual malice in publishing an advertisement even though the newspaper's employees had failed to check the accuracy of the copy against news stories in the paper's own files. *See* 376 U.S. at 287-88. Similarly, the Court held in *St. Amant* that the defendant had not acted with actual malice in quoting another person's defamatory statements even though (1) he had no personal knowledge of the truth of those statements, (2) he had no knowledge of the original speaker's reputation, and (3) he had not attempted in any way to verify the information. *See* 390 U.S. at 730. As these cases make clear, actual malice is worlds removed from negligence or sloppy journalistic practice.[18] To establish actual malice, the plaintiff must show that the publisher acted with knowledge of falsity or with a "*high degree of awareness of . . . probable falsity.*" *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (emphasis added).

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[18] Anders' brief quotes at length language in *Chatham v. Gulf Publishing Co.*, 502 So.2d 647, 650-51 (Miss. 1987), concerning the responsibilities of reporters. *See* Brief of Appellant at 23. But the *Chatham* decision did not involve application of the actual malice standard and therefore is irrelevant to this appeal.

Except in the rare case in which a defendant's awareness of falsity or probable falsity is undisputed, a court would act inappropriately were it to rule that a defendant acted with actual malice as a matter of law. The question whether the evidence in the record is *sufficient to support* a finding of actual malice under the clear-and-convincing standard properly is decided by the trial court. *See Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 685 (1989); *Bose v. Consumers Union,* 466 U.S. 485, 510-11 (1984). But if this threshold question is answered affirmatively, the decision whether the evidence *in fact shows* actual malice properly is made by the jury, with independent appellate review serving to ensure that any jury verdict against the defendant is permissible under the First Amendment. *See Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 686-89.[19] Thus, once again, the serious question is not whether the trial court should have ruled in favor of the plaintiff as a matter of law, but whether the trial

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[19] Plaintiff implies that the doctrine of independent appellate review of libel verdicts requires this Court to give his claim some kind of special attention. *See* Brief of Appellant at 15-16. This notion is fallacious. As the passage quoted in Anders' brief itself makes clear, the doctrine of independent review exists to make certain that libel verdicts do not impermissibly infringe on First Amendment freedoms. *See Harte-Hanks v. Connaughton,* 491 U.S. at 688; *Bose Corp. v. Consumers Union,* 466 U.S. at 510-11 ("The requirement of independent appellate review . . . reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."). That doctrine cannot properly be used to justify review under an especially stringent standard of a resounding jury verdict that itself vindicates First Amendment rights.

court should have decided, on one of Newsweek's motions for a directed verdict, that the evidence offered by the plaintiff was insufficient even to send the case to the jury. A fair examination of the record reveals that a reasonable jury could not have found actual malice by clear and convincing evidence, and thus that the court should have granted Newsweek's motion. The court certainly did not err in accepting the jury verdict that there was no actual malice.

Anders' brief sets forth a lengthy and repetitive list of "factors" purporting to indicate that Newsweek acted with actual malice. *See* Brief of Appellant at 17-18. These factors can be reduced, without any distortion, to a more manageable list of four. First, plaintiff states that the *Newsweek* magazine reporter knew that Anders had not engaged in illegality or corruption. *See id.* at 16-17. Second, plaintiff contends that the article was "written according to the guidelines of a preconceived story line." *Id.* at 17, 19. Third, plaintiff states that the reporter relied exclusively upon an independent source (the *Natchez Democrat*) and did not himself investigate the truth of the published statements. *See id.* at 18, 20-24. Finally, plaintiff claims that Newsweek "chose to publish the article timewise so that it appeared on the newsstands one day before election day in Adams County." *Id.* at 18. Examination of these contentions shows that they do not support a finding of actual malice.

Plaintiff's first claim—that Vern Smith believed Anders innocent of criminal wrongdoing—is true,[20] but also irrelevant. It is irrelevant because Smith did not believe that the article charged Anders with illegal conduct.[21] Smith testified:

> Mr. Anders, as I said, is in this article because he was the perfect illustration of what reformers, other people were talking about when they said that under the antiquated fee system some officials could pay themselves huge salaries even in counties that were hard strapped for money. That's the only point that he makes. Not that it's illegal. We don't say anything about it being illegal.
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> . . . .
>
> [W]e don't say Mr. Anders is corrupt at all in this article.

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[20] Plaintiff's fullest description of Smith's testimony is that "prior to publishing the article in question, [Smith] knew that Mr. Anders was not corrupt, knew that he was not under arrest or indictment, and knew that he had not used taxpayers' money *illegally*." Brief of Appellant at 16 (emphasis added). That description of parts of Smith's testimony is generally accurate. Plaintiff also states, however, that "the reporter testified that he knew before publishing that Mr. Anders did not spend taxpayers' money." *Id.* at 15. That is a distortion of Smith's testimony. Smith repeatedly testified that he believed (correctly) that Anders *did* spend taxpayers' money—meaning money deriving from taxpayers—but that the Mississippi fee system allowed Anders to do so. *See* Tr. 20, 219.

[21] Smith's understanding of the article was correct: as previously noted, the article did not charge Anders with criminal conduct. *See supra* at 17-20 & nn.13-16. Even if it had done so, however, Smith's belief that Anders was not a criminal could constitute evidence of actual malice only if Smith himself understood the article to accuse Anders of criminal behavior. As stated in the text, in the absence of such an understanding of the article, Smith could not have known the article to be false and could not have entertained serious doubts about its truth.

Tr. 256-57, 262. Thus, Smith's belief that Anders had not engaged in illegal conduct comported fully with Smith's understanding of the article. In these circumstances, Smith's belief that Anders had not committed any crimes cannot aid in establishing that Smith knew the article to be false or entertained serious doubts about its truth. *See Time, Inc. v. Pape*, 401 U.S. 279, 290-91 (1971); *Woods v. Evansville Press Co.*, 791 F.2d 480, 486-88 (7th Cir. 1986).

Plaintiff's second assertion—that Smith wrote the article to fit a preconceived story line established by *Newsweek* magazine's editors—is simply false. Smith himself initiated the article by submitting a story suggestion to his editors. *See Tr.* 15-16. That initial story suggestion included the material about Anders that ultimately appeared in the article. *Compare* R.E. 81 *with* R.E. 27. No *Newsweek* editor ever influenced Smith's treatment of that material. The two documents to which Anders refers in his brief—one using the phrase "courthouse scamsters," the other containing the Yiddish word "gonifs"—had nothing to do with the section of the article concerning Anders. The "gonifs" memorandum, as noted earlier, commented on a version of the story that did not even include any discussion of Anders or the fee system. *See* Tr. 117, 228-29. The word "gonifs" referred to the county supervisors caught in Operation Pretense, who at that stage of the editorial process were the sole subjects of the story. *See id.* The "scamster" memorandum likewise concerned only the aspect of the article discussing the supervisors. *See*

Tr. 27-31, 226. The evolution of the article, as reflected in Newsweek documents and as described at trial, thus contradicts plaintiff's notion of a preconceived story line. The reporter initiated the idea of discussing Anders and the fee system; no editor commented on how to handle this portion of the story; and the final article reflected almost exactly the reporter's conception of the material concerning Anders—a conception formed after, not before, that material was collected.

Plaintiff's actual malice claim by no means improves when he focuses on Smith's decision not to obtain independent verification of the facts published in the *Natchez Democrat*. As noted earlier, it is axiomatic that a failure to investigate statements made by a source does not establish actual malice. *See St. Amant v. Thompson*, 390 U.S. at 731. As this circuit has stated, a libel defendant

> is required to show only that the [challenged statement] was made on the basis of sources which were not believed to be false; defamation defendants will not be forced to defend, nor will a trial judge in a later libel case have to retry, the truthfulness of previous reports made by independent publishers.

Rosanova v. Playboy Enter., 580 F.2d 859, 862 (5th Cir. 1978); *see New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

In this case, moreover, Smith had good reason to rely on the truthfulness of the reports in the *Democrat*. Smith was familiar with the *Democrat*, knew that it had a good reputation, and had relied on it many times in the past. *See* Tr. 248-49.

Even more important, the critical facts published in the *Democrat* came from a public record—the income statement Anders was required by law to file with the Secretary of State's office. *See* Tr. 244-45. None of the seven or eight articles in the *Democrat* that Smith reviewed contained a denial, by Anders or anyone else, of the facts reported; indeed, Anders acknowledged in several articles the accuracy of the facts stated about his family's income. *See* Tr. 245-47.[22] As Smith testified at trial:

> [The] stories referred to those numbers [on the income statement] again and again and I also read Mr. Anders' response which, in fact, acknowledged that these numbers as reprinted were correct. . . . It seemed to me that this was, by the time I got to Natchez, a pretty cut-and-dried issue, that there didn't seem to be any question but that this was all true and accurate and that there was no problem with what was already on the public record.

Tr. 245.[23] In these circumstances, Smith's decision to rely on

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[22] Anders' brief states that the *Democrat* articles "contain[] a denial," presumably by Anders himself. *See* Brief of Appellant at 24. This assertion is misleading. The *Democrat* articles did contain statements by Anders defending his conduct. For example, Anders said: "'What difference does it make what I do with the fee money coming to me? . . . It's my money. I can buy groceries with it or pay house notes with it. I chose to give it to my daughter.'" Tr. 101 (quoting Anders as quoted in *Democrat* article). But such statements hardly constitute a *denial* of the facts reported in the *Democrat*. And even if they could be construed as a denial, publishing in the face of a denial does not establish actual malice. *See, e.g., Edwards v. National Audubon Soc'y*, 556 F.2d 113, 121 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

[23] Anders claims in his brief that "[w]hen asked if he did any investigation about Mr. Anders, [Smith] replied, 'No.'" Brief of Appellant at 21. The testimony at the page cited is Smith's response to a question whether he talked to Anders before writing the article. Smith responded:

the *Democrat* articles, rather than to question Anders personally, in no way shows actual malice.

Finally, the timing of the article's publication does not aid plaintiff's claim that Newsweek acted with actual malice. Plaintiff contends that the issue of *Newsweek* magazine containing the article appeared on the newsstands in Adams County one day (or, as stated in another section of his brief, two days) before the election in which he was a candidate. *See* Brief of Appellant at 4, 18. The testimony at trial belies these contentions. The undisputed testimony was that the issue was delivered to newsstands in Adams County during the week of August 10, 1987, about a week *after* the election. *See* Tr. 647-48. Subscribers in Natchez may have received the issue on August 4, the day of the election, but could not have received their subscription copy the day before. *See* Tr. 690-91. Anders himself at one point appears

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> No, I had Mr. Anders' summary of his income, as printed in the *Democrat*; I also had Mr. Anders' response. . . . I knew that [the numbers] were [accurate] because they were based on Mr. Anders' own filing with the Secretary of State's office. I also had the *Democrat* story, the six or seven *Democrat* articles, most of which had significant response from Mr. Anders, so that it was clear to me that there was no question but that the numbers were accurate. Mr. Anders acknowledged that in his remarks to the *Democrat*. And there was also a strong response to what the *Democrat* had reported, so I didn't see any need to seek Mr. Anders out and try to wring further concessions out of him or confessions. . . . There was no bone of contention in terms of the facts.

Tr. 163-64.

to concede that Newsweek's scheduling of the article was not linked to the election: he states in his brief that the article originally "had been scheduled to be printed at an earlier date, but was postponed in deference to another story." Brief of Appellant at 21; *see* Tr. 38-41.[24]

There is certainly no evidence in the record that either the original or the actual date of publication was intended to have any connection to the date of the election. Indeed, there is no evidence that anyone connected with the article even knew when the election was to take place. Thus, the article's timing cannot even be regarded as evidence of intent to injure, much less as evidence of actual malice.[25]

The state of the record on the actual malice issue makes clear that no reasonable jury could have found that Newsweek either knew the article to be false or entertained serious doubts about its truth. The notion that, on this record, the trial court could have ruled in favor of the plaintiff as a

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[24] The testimony shows that the delay occurred for routine reasons having nothing to do with the article's content. *See* Tr. 38-41.

[25] Even if the evidence had shown that the article was scheduled deliberately to coincide with the election—which it clearly did not—that would not support a finding of actual malice. Viewed in a light most favorable to the plaintiff—and at this stage the evidence must be viewed in a light most favorable to the defendant—such evidence could *at most* suggest an intent to damage the plaintiff's election prospects. But such an intent is not probative of actual malice. It is the publication of deliberate or "calculated falsehood[s]" that the actual malice standard proscribes, *Garrison v. Louisiana*, 379 U.S. at 75, not the mere publication of statements calculated to injure, *see id.* at 73.

matter of law is nothing short of ludicrous. Newsweek had every reason to believe that the article was true. Newsweek did believe that the article was true, as its reporter, writer, and editor all testified. *See* Tr. 253-56, 676-77, 702-03. Newsweek was entitled to a directed verdict on this issue—not the plaintiff.[26]

IV. The Trial Judge Did Not Abuse His Discretion in Excluding the Expert Testimony Offered by the Plaintiff

At trial, plaintiff sought to introduce expert testimony from Whitney Mundt to the effect that Newsweek departed from journalistic standards and that the jury therefore could infer actual malice. *See* R.E. 24 (Statement of Dr. Mundt). After a lengthy *voir dire* examination, the trial court determined that Dr. Mundt did "not have sufficient expertise . . . to be able to testify on that limited point." Tr. 312-313; *see* Tr. 289-303. This ruling on Dr. Mundt's expertise, which Anders' brief mischaracterizes, was well within the trial court's broad discretion. Moreover, the testimony offered by plaintiff was inadmissible because it would have confused the issues at trial and misled the jury. Finally, plaintiff cannot reasonably claim to

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[26] Part V of Anders' brief asserts that the trial court erred in failing to grant his motion for a directed verdict. Anders claims he was entitled to a directed verdict because the trial testimony established that the article was false and defamatory and that Newsweek published it with actual malice. Thus, this section of Anders' brief is merely a rehash of his claims that the trial court should have ruled as a matter of law that the article was false and defamatory and that Newsweek acted with actual malice. Newsweek has demonstrated the speciousness of these claims.

have suffered prejudice from the exclusion of Dr. Mundt's testimony, because it was offered on only one of the issues that the jury resolved against the plaintiff.

Examination of Dr. Mundt revealed that he had limited practical journalistic experience of any kind, and that he had no practical knowledge of national newsmagazines. Dr. Mundt worked for a single year—thirty years ago—for a local newspaper called the *Lake Charles American Press*. *See* Tr. 288. He had no experience at all with national newsmagazines such as *Newsweek*. *See* Tr. 309. In commenting on Dr. Mundt's experience, the trial court did not, as plaintiff suggests, draw a hard-and-fast distinction between the local and the national press. Rather, the court stated its concerns as follows:

> The witness . . . will be testifying on a very limited scale; that is, whether the practices followed by Newsweek in this case deviated from the norm enough so that the jury might use a—might use that as evidence of actual malice. It would appear to the Court that that testimony would have to be very specific and that the experience should be very specific, preferably having had some actual work with national news magazine so that gathering of news and verification of the facts would be familiar to the witness. I have heard no testimony from the witness that would show that he has that knowledge.

Tr. 304; *see* Tr. 305-06. The trial court thus questioned Dr. Mundt's experience and knowledge of the way in which a publication like *Newsweek* magazine actually operates.

This ruling on Dr. Mundt's qualifications was well within the trial court's broad range of discretion. As noted by the Supreme Court, "the trial judge has broad discretion in the

matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *see United States v. 41 Cases, More or Less*, 420 F.2d 1126, 1130-31 (5th Cir. 1970) ("The expert qualification of a witness is a question for the trial judge, whose discretion is conclusive unless clearly erroneous as a matter of law."). The trial court here responded to the paucity of Dr. Mundt's journalistic experience, particularly with respect to publications such as *Newsweek* magazine. The court's concern with the nature of the publication was entirely proper. It is mere common sense to recognize that no one single set of standards, conventions, and practices applies to all members of the media. *See, e.g., Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir.) (en banc) ("[N]ational newsmagazines . . . are not the same as local daily newspapers."), *cert. denied*, 479 U.S. 883 (1986); *Bank of Oregon v. Independent News, Inc.*, 65 Or. App. 29, 670 P.2d 616, 628 (Or. Ct. App. 1983) ("[T]he proper standard of care is that of a . . . skillful practitioner of the particular journalistic or other communicative school of which the defendant is a member."), *aff'd*, 298 Or. 434, 693 P.2d 35, *cert. denied*, 474 U.S. 826 (1985). The trial court's conclusion that Dr. Mundt's experience gave him no basis upon which to give an expert opinion on the practices followed by Newsweek in preparing the challenged article was a proper exercise of the court's discretionary authority.

In any event, Dr. Mundt's testimony was inadmissible for an independent reason.[27] The actual malice standard, as noted earlier, focuses on the defendant's subjective state of mind, not on his adherence to objective standards. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("reckless conduct is not measured by whether a reasonably prudent man would have published"); *Garrison v. Louisiana*, 379 U.S. 64, 74, 79 (1964) (distinguishing actual malice standard from reasonable belief standard). Thus, in *Brueggemeyer v. ABC*, 684 F. Supp. 452, 465-66 (N.D. Tex. 1988), the court held that expert testimony that a libel defendant had "failed in its newsgathering procedures to exercise due care" was "not probative of actual malice," that any arguably probative value was "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or mislead-

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[27] Indeed, it is more accurate to say that Dr. Mundt's testimony was inadmissible for *two* independent reasons. Aside from the reason discussed in the text, plaintiff waived his right to offer Dr. Mundt's testimony on the subject of actual malice. Plaintiff initially stated during discovery that "[a]t this time Plaintiff does not anticipate that Dr. Mundt will testify as to the malice issue as assumed by Defendant." Record on Appeal 422. In supplementing discovery, plaintiff indicated no change in this position. *See id.* 439-41. Indeed, Dr. Mundt testified at his deposition that he had no basis to believe that defendant had acted with actual malice. Mundt Deposition (Apr. 21, 1989) 53-54. Suddenly (and surprisingly, given the foregoing), plaintiff further supplemented discovery with a letter from Dr. Mundt stating that he believed that defendant acted with "reckless disregard of the truth." R.E. 24. Inasmuch as plaintiff twice represented to defendant that Dr. Mundt would not testify on the actual malice issue, and Dr. Mundt himself testified at his deposition that he had not basis to believe that Newsweek had acted with actual malice, the trial court should have held that plaintiff had waived his right to have Dr. Mundt testify on actual malice.

ing the jury," and that the testimony was therefore excludable under Fed. R. Evid. 403. In this case too, the admission of expert testimony on objective journalistic standards could have misled the jury into thinking that liability may be imposed based on a departure from objective standards of care, rather than actual malice.[28] Dr. Mundt's testimony therefore should have been excluded irrespective of his lack of qualifications.

Finally, like most of the contentions pressed by plaintiff, this argument addresses only one of the various determinations made by the jury. Even if the proffered expert testimony were relevant to the actual malice issue and otherwise admissible, such testimony has no bearing on the separate questions whether the challenged article was defamatory or whether it was false. The jury found not only that the defendant did not act with actual malice in publishing the article, but also that the article did not falsely defame the plaintiff. Thus, even if the trial court committed error in excluding Dr. Mundt's testimony, that error surely was harmless.

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[28] To the extent that Dr. Mundt proposed to testify not merely that Newsweek departed from journalistic standards, but also that Newsweek acted with actual malice, his testimony was inadmissible for another reason. An opinion on actual malice itself is an opinion on a "mental element" or state of mind. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 276 (1971). A party's subjective state of mind is not beyond the comprehension of jurors, and indeed is a subject on which they are at least as "expert" as a witness such as Dr. Mundt. *See World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1264 (S.D.N.Y. 1989)(excluding expert testimony on actual malice).

V. The Trial Judge Did Not Abuse His Discretion in Admitting Testimony as to the Effect of the Article on the Plaintiff's Reputation

At trial, Newsweek called three witnesses to testify about the effect of the challenged article on Anders' reputation in the community. *See* Tr. 637-644; 658-64. Newsweek called these witnesses to rebut testimony given by three witnesses for the plaintiff to the effect that the *Newsweek* magazine article hurt Anders' reputation for honesty and integrity within the community. *See* Tr. 506-69. The trial court ruled that all of this evidence was admissible.[29]

Anders now protests the admission of testimony given by Newsweek's three reputation witnesses, but the basis of his objection is unclear. At times, Anders appears to suggest that all testimony concerning the effect of a publication on a plaintiff's reputation is inadmissible, because such testimony "inherently require[s] an interpretation of the article by lay witnesses." Brief of Appellant at 28. Alternatively, Anders may mean to argue that the particular testimony given by Newsweek's witnesses was improper because these witnesses offered an interpretation of the article's meaning, rather than limiting their

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[29] The court noted that counsel needed to lay a proper foundation for testimony concerning the effect of the article on reputation by showing that "the witness knows the reputation of Plaintiff in the community both before and after the publication of the article." Tr. 656.

testimony to the article's reputational effects. *See id.*[30] In either event, Anders' argument is meritless.

It is pure nonsense to assert that all evidence concerning the effect of a publication on a plaintiff's reputation is inadmissible. Reputational harm is the principal measure of damages in a defamation suit. *See, e.g., Mitchell v. Random House, Inc.*, 703 F. Supp. 1250, 1259 n.12 (S.D. Miss. 1988), *aff'd*, 865 F.2d 664 (5th Cir. 1989). Both the plaintiff and the defendant therefore may introduce evidence on whether the publication caused such harm and, if so, in what amount.[31] Anders presented such evidence: three witnesses came to the stand and testified that his reputation in the community was "good" prior to publication of the article in *Newsweek* magazine and "bad" after publication. *See* Tr. 511-12; 528-29; 559-60. The three Newsweek witnesses testified to the contrary: they stated that

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[30] One sentence in Anders' brief lends itself to yet a third interpretation. Anders states: "[T]he Court permitted testimony permitting lay witnesses to testify as to the distinctions between certain newspaper articles that dealt with the plaintiff and the *Newsweek* magazine article." Brief of Appellant at 28. Presumably, Anders is here complaining of Newsweek's attempt to show that any injury to Anders' reputation occurred principally as a result of the *Natchez Democrat* articles, rather than as a result of the subsequent article in *Newsweek* magazine. Counsel for Anders, however, specifically declined to object to this line of inquiry at trial, *see* Tr. 656-57, and therefore has waived this argument. Moreover, this line of inquiry was wholly proper; prior publications of alleged defamatory statements constitute classic evidence in mitigation.

[31] Indeed, a plaintiff usually *must* present such evidence. *See Brewer v. Memphis Publishing Co.*, 538 F.2d 699, 702 (5th Cir. 1976) ("[A]wards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to injury.").

the article had no discernible effect on Anders' reputation. *See* Tr. 642-43; 659; 663-64. If testimony on the reputational effects of an article is inadmissible because it "inherently requires an interpretation of the article by lay witnesses," all six witnesses should have been excluded. But this result would be absurd. Testimony about whether a publication harmed a plaintiff's reputation in the community is what it purports to be: a comment on what the community thought of the plaintiff before and after publication. It is not an interpretation of the meaning of alleged defamatory statements.

Anders' argument thus must be more limited; it must be that Newsweek's witnesses, in addition to commenting on the reputational effect of the article, offered an explicit interpretation of the article's meaning. But Anders nowhere quotes any testimony to this effect, and for good reason: the Newsweek witnesses never attempted or purported to explain the article to the jury. Indeed, it was Anders' *own* witnesses who offered testimony about the article's meaning. One of his witnesses testified that "this magazine[] said Odell Anders, the man that we trusted[,] is now a thief." Tr. 511. Another stated that the article in *Newsweek* magazine "had sandwiched all that in there about corruption . . . . And Newsweek hammered the corruption part of the article and, of course, that's the way they sell *Newsweek*, I guess." Tr. 546. Such testimony recalls several old adages, involving pots and kettles and glass houses.

Perhaps most important, if testimony about the article's meaning crept into testimony on reputational harm—and Newsweek repeats that it did so only in the statements of Anders' witnesses—the trial court's instructions ensured that this seepage would cause no harm. The court told the jurors that their "own recollection and interpretation of the evidence . . . controls in the case," that they were to decide whether any statement in the *Newsweek* magazine article was defamatory, and that they were to do so by giving "the words used . . . their commonly understood meaning" and "read[ing] the article as the ordinary average reader would read it." Tr. 745-46, 749. In light of these instructions, stray statements by witnesses concerning their own interpretation of the article cannot reasonably be thought to have affected the jury's understanding of the article, let alone to have altered all aspects of the jury's verdict, including the actual malice determination.

VI. The Trial Judge Did Not Abuse His Discretion in Admitting Testimony as to Facts Reported in the Article

Lil McCollum, Fannie Campbell, and Lisa Whitam worked at the Chancery Clerk's office as full-time employees of the plaintiff. They testified, on Newsweek's behalf, that the plaintiff's daughters, Pamela Ferrington and Melissa Allain, worked only intermittently at the clerk's office—one or two mornings or afternoons each week, perhaps a few full days during the summer or Christmas holiday season. *See* Tr. 599-603, 615-19, 626-27. They also testified that their own salaries were considerably

smaller than the salaries of Allain and Ferrington. *See* Tr. 602, 621. Richard Hurt is the associate dean of the Mississippi College Law School, which Ferrington attended while she was receiving a salary from her father for work (purportedly) done at the Chancery Clerk's office. Hurt testified to the time commitment involved in working toward a degree at the Law School.

Anders now objects to the admission of all of this testimony on the grounds that it was irrelevant and/or prejudicial. As he concedes, such evidentiary rulings are reversed "rarely and only after a clear showing of prejudicial abuse of discretion." *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984); *see United States v. Duncan*, 919 F.2d 981, 985 (5th Cir. 1990). Anders cannot make this showing.

As an initial matter, Newsweek presented all of this evidence in response to extensive testimony offered by the plaintiff on exactly these subjects. Plaintiff's counsel repeatedly questioned (on direct examination) Anders himself, his wife, and each of his daughters about the time they spent and the work they performed in the Chancery Clerk's office. *See* Tr. 334-43, 442-49, 467-69, 487-88. The essential gist of this testimony was that Anders overpaid his daughters, but that they did perform some substantial amount of work for him in the Clerk's office. *See, e.g.*, Tr. 337-43, 487-88.[32] Newsweek called the four wit-

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[32] Anders, for example, testified on direct examination as follows:

nesses at issue here to sharpen Anders' own concession—that he overpaid his daughters—by undermining the notion that they did any substantial work for him. Plaintiff's counsel, in objecting to this testimony at trial, argued that "all of these witnesses will be testifying to facts that are now established in the record and which are noncontroverted," noting in particular that "[i]t has been admitted by Anders he overpaid his daughters for the amount of work that they did." Tr. 593. Newsweek's counsel responded that Anders had "brought [this matter] up in controversy," and that Newsweek now had a right to pursue it and establish a still more damaging version of the facts. Tr. 594. The trial court acted appropriately in ruling in favor of Newsweek. Having offered extensive testimony at trial on the amount of work performed by his daughters, and having admitted himself that they did less work than they were paid for, Anders cannot now claim that the testimony of Newsweek's witnesses on this subject was either irrelevant or prejudicial.

> [I]f you are asking me if I paid Lisa, Pam, and Blanche according to how much work they did, compared to the other people[,] they didn't do as much work out there, and I've never suggested that they did. I paid them not only for the work they did there, I paid them for their love and because I love them, and I've said that all along.

Tr. at 343. At the same time, however, Anders gave detailed testimony about the work his daughters and wife supposedly performed. *See* Tr. 334-35, 337-38, 342. Similarly, his daughter Melissa testified on direct examination that she did substantial work in the Clerk's office, but conceded, when asked about her salary, that "I suppose he paid that because he was my father and he loved me . . . ." Tr. 488.

Moreover, the testimony Newsweek offered would have been admissible even had Anders himself not raised the subject. The portion of the *Newsweek* magazine article concerning Anders included a statement about the amount of money he paid his daughters. *See* R.E. 27. The article also contained an implication that Anders paid them more than they had earned. *See id.* (noting that one daughter was attending law school). At no time during the course of this litigation did Anders stipulate that his defamation suit rested solely on *other* statements.[33/] Newsweek therefore was required to defend the truth of the published material relating to Anders' payments to his daughters. The four witnesses at issue here were crucial to that defense.

VII. The Trial Judge Did Not Err in Refusing To Submit the Issue of Punitive Damages to the Jury

Plaintiff's final argument on appeal relates to the trial court's refusal to instruct the jury on punitive damages. The court ruled that Anders was not entitled to such an instruction because to recover punitive damages in a libel case, a public official must show more than actual malice; he must show ill will or other egregious conduct. Plaintiff claims that the actual malice standard, which governs liability in a public-

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[33/] Anders' complaint did not specify the precise statements in the *Newsweek* magazine article he believed to be false and defamatory. Neither did any subsequent pleading ever specify these statements. At all times during the litigation, Newsweek bore the burden of defending the entire article.

official libel case, also governs the availability of punitive damages. *See* Brief of Appellant at 35-37.

Assuming *arguendo* plaintiff is correct, it is difficult to imagine a more harmless error. The jury in this case did not find actual malice. It did not rule in favor of the plaintiff. The level of damages the plaintiff *would* have received *if* the jury had found actual malice and *if* the jury had made the other findings necessary to return a verdict for the plaintiff should not occupy this Court's attention.

In any event, the trial court's ruling on punitive damages was correct. Numerous courts have held that in a public-official or public-figure libel case, the plaintiff must prove, in addition to actual malice, ill will or spite (customarily called "common-law malice") to recover an award of punitive damages. *See, e.g., McCoy v. Hearst Corp.*, 42 Cal.3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986) (in bank), *cert. denied*, 481 U.S. 1041 (1987); *DiSalle v. P.G. Publishing Co.*, 544 A.2d 1345 (Pa. Super. Ct. 1988), *appeal denied*, 521 Pa. 620, 557 A.2d 724, *cert. denied*, 109 S.Ct. 3216 (1989); *Hodgins v. Times Herald Co.*, 169 Mich. App. 245, 425 N.W.2d 522 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 895 (1989). These courts have understood that a plaintiff should receive punitive damages only if he exceeds the basic showing required for liability. Because Anders offered no evidence of common-law malice, he was not entitled to an instruction on punitive damages.

CONCLUSION

This libel case is uncommon. Most libel cases never get to a jury. *See, e.g.*, Franklin, *Suing Media for Libel*, 1981 Am. B. Found. Res. J. 795, 802-03. When a libel claim is sent to a jury, the verdict returned is more often than not for the plaintiff. *Id.* at 804. Thus, in reviewing jury verdicts in libel cases, appellate courts usually are in the position of carefully inspecting the evidence to make certain that the defendant's First Amendment rights have not been infringed. Here, the exercise of that weighty constitutional responsibility is unnecessary—because in this case a jury carefully inspected the evidence and reached the result that the facts commanded. The jury got this case right on all counts. The *Newsweek* magazine article was not defamatory; it was not false; and it was not published with actual malice. The judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 1991, two copies of the foregoing BRIEF FOR APPELLEE/CROSS-APPELLANT and RECORD EXCERPTS FOR APPELLEE/CROSS-APPELLANT were mailed first-class, postage prepaid to:

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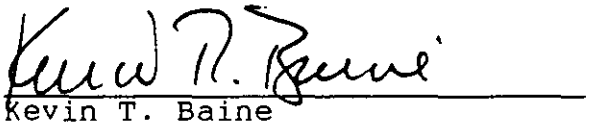

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