

FA COVER SHEET

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Comment:

Gerson asked me to fax this along. The
last paragraph shows how it may be
relevant to my dispute with Mr. Gaffey.
I received it from Gerry Ortvals.
--Peter Montague

able; no such statute exists. Therefore, the public's right of access to the records at issue in the present case is controlled solely by the terms of the Public Records Act as enacted by the General Assembly, rather than by this Court's view of what constitutes sound public policy. *News and Observer v. State*, 312 N.C. at 281, 322 S.E.2d at 137.

In defending the holding in the present case, the opinion of the majority advances the quite reasonable public policy concern that disclosure of records such as those at issue here could lead in other cases to the disclosure of names of confidential informants, undercover agents, or individuals who have been investigated for crimes but not charged. This Court has previously recognized the validity of such public policy concerns. In fact, in holding that SBI records were not subject to disclosure under the Public Records Act, we expressly stated that we assumed that the General Assembly had considered such valid "reasons for denying access to police records, as well as the common law and statutory history concerning such access, when it enacted the statute declaring S.B.I. records not to be public and, thereby, exempted them from disclosure under the Public Records Act." *Id.* at 283, 322 S.E.2d at 138 (emphasis added). In the nine years since we rendered that opinion highlighting the public policy reasons for denying access to police records, however, the General Assembly has not seen fit to adopt a statute exempting records of police departments from the Public Records Act like the specific exemption it enacted for SBI records.

The General Assembly has clearly demonstrated by enacting N.C.G.S. § 114-15 and other statutes that it knows how to create a specific exemption from the requirements of the Public Records Act for police department records if it desires to do so. Until the General Assembly enacts such an exception, however, it is the duty of this Court to apply the Public Records Act as written. Accordingly, we are required to resist all temptations to exceed our legitimate authority by adding public policy exceptions to the Public Records Act which have not been placed there by the General Assembly. *News and Observer Publishing Co. v. State*, 330 N.C. 465, 485-84, 412 S.E.2d 7, 18 [19 Med.L.Rptr. 1873] (1992); *Advance Publications, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70-71 [7 Med.L.Rptr.

2013] (1981). If we are to fulfill our duty as judges to apply the Public Records Act as written by the legislature, we are left with no choice in this case but to hold that the defendants must allow the plaintiffs access to the documents they seek.

For the foregoing reasons, I respectfully dissent from the decision of the majority which denies the plaintiffs access to public records.

Chief Justice Faux and Justice Fryc join in this dissenting opinion.

AUVIL v. CBS "60 MINUTES"

U.S. District Court
Eastern District of Washington

GRADY AUVIL, and LILLIE AUVIL, et al., v. CBS "60 MINUTES," et al., No. CS-90-0553-WFN, September 13, 1993

REGULATION OF MEDIA CONTENT

1. Defamation—Trial procedures—In general (§11.1701)

Expert testimony presented by television network, in product disparagement action based upon network broadcast concerning carcinogenic effects of pesticides used on apples, is admissible to extent such opinions were based on Environmental Protection Agency data and conclusions, since such conclusions are sufficiently reliable and relevant.

2. Defamation—Truth—In general (§11.4001)

Defamation—Related causes of action—In general (§11.5801)

Television network's statements about use of pesticide on apples, which apple growers claim disparaged their product, involve issue of public concern and, since statements cannot be proven by plaintiffs to be false, action must be dismissed.

Action for libel against network. Motion by plaintiffs to strike experts' opinions and for partial summary judgment. Motion by defendants for summary judgment.

Plaintiffs' motions denied.
Defendants' motion granted.

Prior decisions: 20 Med.L.Rptr. 1361, 19 Med.L.Rptr. 1830.

J. Jarrett Sandlin and Kevin W. Circan, Yakima, Wash.; Scott A. Jonsson and Peter A. Ozanne, of Schwabe, Williamson & Wyatt, Portland, Ore., and David H. Putney, Yakima, for plaintiffs.

Douglas P. Jacobs, Susanna M. Lowy, and Anthony M. Bongiorno, of CBS Inc., New York, N.Y.; Bruce E.H. Johnson, P. Cameron DeVore, Christopher Pesce, C. David Jennings, and William C. Komaroff, of Davis Wright Tremaine, Seattle, Wash., for defendant.

Full Text of Opinion

Nielsen, J:

Before the court are plaintiffs' Motions to Strike Experts' Opinions, Ct. Rec. 172, and for Partial Summary Judgment, Ct. Rec. 171, and defendants' Motion for Summary Judgment, Ct. Rec. 164, heard on August 26, 1993 before the undersigned. Appearing on behalf of plaintiffs were Scott Jonsson, Peter Ozanne and Jay Sandlin; appearing on behalf of defendants were Bruce Johnson and Cameron DeVore. Having heard the oral argument of counsel, having reviewed the record and being fully informed, this court DENIES plaintiffs' Motion to Strike Experts' Opinions; DENIES plaintiffs' Motion for Partial Summary Judgment; and GRANTS defendants' Motion for Summary Judgment.

The facts of this case have already been set out in *Auvel v. CBS "60 Minutes"*, 800 F.Supp. 928 [20 Med.L.Rptr. 1361] (E.D. Wa. 1992).

A. Plaintiffs' Motion to Strike Experts' Opinions.

Plaintiffs have moved to strike the opinions of CBS' experts claiming they are all inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993). In *Daubert*, the Supreme Court rejected the Ninth Circuit position that expert opinion is only admissible if it is based on a technique or methodology that is generally accepted by the scientific community. The thrust of *Daubert* was to move away from the focus on "general acceptance," as gauged by publication and the decisions of other courts" and to focus on whether "an expert's testimony both rests on a

reliable foundation and is relevant to the task at hand," *Id.* at 2799. The expert testimony is clearly relevant to the task at hand so the only issue is reliability.

[1] The plaintiffs maintain that the data underlying CBS' expert opinions is fundamentally flawed. However, this court finds that at least to the extent CBS' experts relied on the data and conclusions provided by the EPA, their conclusions are clearly sufficiently reliable for this inquiry.

B. Plaintiffs' Motion for Partial Summary Judgment Based on the Issue of Falsity.

In order to rule in plaintiffs' favor, this court would have to find there is no material issue of fact as to the falsity of CBS' broadcast. Fed. R. Civ. P. 56. This would be inappropriate in view of the fact that even the message of the broadcast is hotly contested. Since this court cannot find as a matter of law that the message of the broadcast is established, neither can it judge the falsity of that message.

C. Defendants' Motion for Summary Judgment.

CBS claims that it is entitled to summary judgment because the plaintiffs cannot prove that CBS' statements were false. As an initial matter, the burden and standard of proof must be established. In a disparagement case, plaintiff carries the initial burden of proof to show that an objectionable statement is false and made with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 [11 Med.L.Rptr. 1527] (1964); *Auvel*, 800 F. Supp. at 937. It is without dispute that malice must be established by clear and convincing evidence. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 [12 Med.L.Rptr. 2297] (1986). The Supreme Court and the Ninth Circuit have not ruled on whether falsity must also be established by clear and convincing evidence. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 [16 Med.L.Rptr. 1881] (1989); *Newton v. National Broadcasting Company, Inc.*, 930 F.2d 662, 669 n.7 [18 Med.L.Rptr. 1001] (9th Cir. 1990), cert. den. 112 S.Ct. 192 (1991). However, the Washington State Supreme Court has held that "[a]ll the elements of defamation must be shown with convincing clarity." *Herron v. King Broadcasting*, 112

ions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusions here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.

Hepps, 475 U.S. at 778 citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 [1 Med. L. Rptr. 1633] (1974). Here, the issue of the carcinogenic effect of pesticides in the food supply is speech that clearly matters.

[2] Even if CBS' statements are false, they were about an issue that mattered, cannot be proven as false and therefore must be protected. To hold as plaintiffs request would have required CBS to take the EPA report and perform a highly technical scientific study before issuing a public broadcast about that report. A news reporting service is not a scientific testing lab and these services should be able to rely on a scientific government report when they are relaying the report's results. The duty plaintiffs propose would chill debate that the freedom of speech would be at risk. Accordingly,

IT IS ORDERED that:

1. Plaintiffs' Motion to Strike Expert Testimony, Ct. Rec. 172, be and the same is hereby DENIED.

2. Plaintiffs' Motion for Partial Summary Judgment, Ct. Rec. 171, be and the same is hereby DENIED.

3. Defendants' Motion for Summary Judgment, Ct. Rec. 164, be and the same is hereby GRANTED.

The Clerk is directed to file this Order, enter judgment for defendants, provide copies to counsel and CLOSE THIS FILE.

FORETICH v. CHUNG

U.S. District Court
District of Columbia

ERIC A. FORETICH, D.D.S. v.
CONNIE CHUNG, et al., No. 91-0123,

Conceivably the EPA report was incorrect, but in that case, plaintiffs' dispute would be with the government decision and not CBS' reporting of the same.

July 29, 1993

REGULATION OF MEDIA CONTENT

Defamation—Pre-trial procedures—In general (§11.1201)

Defamation—Public figure/official—In general (§11.2001)

Label plaintiff's response, to defendants' request for admission, clearly denying that he is public figure is appropriate response pursuant to Fed.R.Civ.P. 36, regardless of accuracy of such response, nor does Rule 36 allow defendants to litigate, at this time, whether plaintiff was justified in denying their request to admit public figure status.

Action for libel against reporter, producer, and television network. On defendants' motion to determine the sufficiency of the plaintiff's response to defendants' request for admission and for costs.

Denied.

Stephen Andrew Armstrong, Falls Church, Va., for plaintiff.

Lee Levine, James E. Grossberg, and Seth D. Berlin, of Ross, Dixon & Masback, Washington, D.C., and Douglas P. Jacobs and Susanna M. Lowy, CBS Inc., New York, N.Y., for defendant.

Full Text of Opinion

Greene, J.:

I

This case involves one of the many pieces of litigation arising out of the highly publicized custody battle between Dr. Eric Foretich and his former wife, Dr. Elizabeth Morgan. In this particular action Dr. Foretich is suing Connie Chung, Peter Michaelis, and CBS Inc., for defamation arising out of telecasts aired by CBS on the dispute between Foretich and Morgan. Now pending before the Court is the defendants' motion to determine the sufficiency of the plaintiff's response to their request for admission and for costs. This motion is based on one specific request for admission served by the defendants in which they seek to determine whether the plaintiff is