

2003

# Holly Wayment v. Clear Channel Broadcasting Inc., and Jon Fischer, and Patrick Benedict : Reply Brief

Utah Supreme Court

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NO. 20030854

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IN THE  
UTAH SUPREME COURT

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Appeal from the Third Judicial District Court,  
Salt Lake County, State of Utah, The Honorable Stephen L. Henroid presiding

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**HOLLY WAYMENT**

**Plaintiff and Appellant**

vs.

**CLEAR CHANNEL BROADCASTING,  
INC., A Texas Corporation dba KTVX  
Channel 4, and JON FISCHER, and  
PATRICK BENEDICT, Individuals  
Defendants and Appellees.**

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**REPLY BRIEF**

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MAY 10 2004

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**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

Table of Contents.....	1
Table of Authorities .....	2
Argument .....	3
Reply Issue No. 1:	
Ms. Wayment is neither a “general purpose” public figure nor a “limited purpose” public figure as defined by the United States Supreme Court.....	3
A. Ms. Wayment had not achieved general fame or notoriety in the community, and did not have pervasive involvement in the affairs of society.....	4
B. Since there was no “public controversy,” Ms. Wayment is not a “limited purpose” public figure.....	7
Reply Issue No. 2:	
The qualified privilege is defeated by evidence that Mr. Benedict knowingly made false, defamatory statements about the reasons for Ms. Wayment’s leaving her employment.....	9
Conclusion .....	10

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bose Corp. v. Consumers Union</i> , 508 F. Supp. 1249, (D. Mass. 1981).....	7
<i>Bruno &amp; Stillman, Inc. v. Globe Newspaper Co.</i> , 633 F.2d 583 (1st Cir. 1980).....	7
<i>Fairley v. Peekskill Star Corp.</i> , 83 A.D.2d 294 (1981).....	8
<i>Fitzgerald v. Penthouse Int'l, Ltd.</i> , 691 F.2d 666 (4th Cir. 1982) .....	7
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323, (1974).....	3, 4
<i>Greenberg v. CBS</i> , 69 A.D.2d 693 (1979).....	8
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1978).....	7
<i>Russell v. Daily Spectrum</i> , 842 P.Wd 896 (Utah 1992) .....	3, 10
<i>San Antonio Express v. Dracos</i> , 922 S.W.2d 242 (Tex. App. 1996) .....	5, 6
<i>Time, Inc. v. Firestone</i> , 424 U.S. 448, 96 S.Ct. 958 (1976) .....	8
<i>Waldbaum v. Fairchild Publications</i> , 627 F.2d 1287, 1292 (D.C.Cir. 1980) .....	7
 <u>Law Review Articles</u>	
Frederick Schauer, <i>Public Figures</i> , 25 Wm. & Mary L. Rev. 906, 916 (1984).....	4

## ARGUMENT

It is axiomatic that in reviewing a summary judgment, this Court views all the facts and reasonable inferences in the light most favorable to the nonmoving party. Defendant's factual and legal arguments ignore this standard and would have the Court decide the case taking its version of the facts as true while ignoring the evidence proffered by Plaintiff. It is important to remember that Ms. Wayment had simply approached her managers with an idea for a public relations/ community involvement project for the station. She did not know that another reporter had already been hired to take over her health reporting. Her idea was used as a pretext for her firing, then used as the basis for defamatory statements which ruined her reputation and served as a rationale for management letting her go.

The remainder of this reply brief will be limited to addressing the arguments offered by Defendant regarding Ms. Wayment's status as a public figure and the operation of the qualified privilege.

### **REPLY ISSUE NO. 1:**

**Ms. Wayment is neither a "general purpose" public figure nor a "limited purpose" public figure as defined by the United States Supreme Court.**

As the Court noted in *Russell v. Daily Spectrum*, 842 P.2d 896, 903 n.20 (Utah 1992) citing, *Gertz v. Welch*, 418 U.S. 323, 345 (1974), "[f]or the heightened

protection of actual malice to apply, a plaintiff must be either a public figure or a public official. A public figure is one who has either (1) attained special prominence in the affairs of society and thus assumes a public figure role voluntarily, or (2) thrust himself or herself to the forefront of public controversies in order to affect the outcome of those controversies.” “Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” *Gertz*, 418 U.S. at 352. Contrary to Defendants’ assertions, Ms. Wayment is neither a general purpose public figure nor a limited purpose public figure.

**A. Ms. Wayment had not achieved general fame or notoriety in the community, and did not have pervasive involvement in the affairs of society.**

In *Gertz, supra*, the U.S. Supreme Court described general purpose, or all purpose, public figures as follows: “For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”

*Id.* at 345. As one commentator has phrased it:

“This description of a public figure immediately calls to mind certain types of individuals: the chairman of the board of General Motors; the president of the AFL-CIO; the archbishop of Boston; the publisher of the New York Times; the anchorman of the CBS Evening News; the chairman of the Democratic National Committee; the president of Harvard University; the head of the Ford Foundation; and so on. In each of these and in innumerable other cases, a nominally private person exercises as much, if not more, influence on the determination of public policy issues as do many public officials.”

Frederick Schauer, *Public Figures*, 25 Wm. & Mary L. Rev. 906, 916 (1984).

Ms. Wayment is not such figure; she was the health reporter for a local television station. In the hierarchy of KTVX, she was not a weekday anchor, nor was she even a weekend anchor, she was simply a reporter that covered health stories. Defendants failed to present evidence that Ms. Wayment had achieved “general fame or notoriety in the community, and pervasive involvement in the affairs of society” such as to warrant general purpose public figure status.

There is no judicially-formulated rule that journalists and television reporters are general purpose public figures. Defendant cites an intermediate appellate court in Texas to argue for this proposition. Looking more closely at the facts of that case, we find that it is the exception, rather than the rule.

In *San Antonio Express News v. Draco*, 922 S.W.2d 242 (Tex.App.—San Antonio 1996, no writ.), the plaintiff in a defamation case was Ted Draco, a television journalist.<sup>1</sup> Draco had quit his job at KENS-TV and his departure was reported unfavorably in Defendant’s newspaper, the San Antonio Express News. Mr. Draco was notorious for his own brand of “gotcha” journalism, “he developed highly popular and innovative news segments, both nationally and locally.” *Id.* at 253.

“His ‘Eyewitness-Wants-to-Know’ segment on KENS-TV became ‘one of the highest rated news segments in San Antonio and ‘received more view response than any segment in the South Texas market.’ The ‘Eyewitness-Wants-to-Know’ format was also highly accusatory in nature. To be the subject of one of these programs was not good news to the individual involved. There were no compliments, and the criticisms were harsh. Both private and public figures were put on the rack by Dracos, who did not hesitate to lay on the verbal whip.”

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<sup>1</sup> As denoted by its “no writ” designation, this case was never reviewed by the Texas Supreme Court.



*Id.* “He had frequently been featured in San Antonio newspapers.” *Id.* And the coverage was not favorable, as it called into question whether the alleged scandals he covered were real or fabricated. *Id.*

This was not the first time he had quit his job at KENS-TV, and it was not the first time he had sued the newspaper for defamation. In the prior litigation, “the parties had stipulated as evidenced by the signature of their counsel ... that for the purposes of this lawsuit Plaintiff was a public figure as that term is defined by the United States Supreme Court in the cases of *New York Times v. Sullivan* and *Gertz v. Welch*.” *Id.*

In short, Holly Wayment is no Ted Dracos. For obvious reasons, the court in *San Antonio Express News v. Draco* had no trouble finding that Ted Dracos was a general purpose public figure—he had stipulated to that fact in a prior defamation case. Furthermore, the finding that he was a public figure is nearly gratuitous on the part of the Texas court since it had already determined that the allegedly defamatory statements he alleged were, in fact, substantially true. This case does not stand for the proposition that all television journalists are general purpose public figures.

Finally, the cases cited by the *Dracos* court do not stand for the proposition that journalists and television reporters are routinely considered general purpose public figures. To the contrary, the *Dracos* court makes no such claim, and the cases it cites more often refer to journalist who became *limited* purpose public figures because they had injected themselves into ongoing public controversies. *Id.* at 252-

53. This distinction is crucial: a limited purpose public figure is one who has thrust himself into the forefront of a particular public controversy. This is an occupational hazard for journalists covering controversial events. In Ms. Wayment's case, however, there never was a public controversy.

**B. Since there was no "public controversy," Ms. Wayment is not a "limited purpose" public figure.**

A "limited purpose" public figure is a person who thrusts "himself or herself to the forefront of public controversies in order to affect the outcome of those controversies." *Russell, supra*. A public controversy is "a specific public dispute that has foreseeable and substantial ramifications beyond its immediate participants." *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1292 (D.C.Cir. 1980.)

The defamation itself cannot create the public controversy. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1978).

The controversy must pre-exist the defamatory statement. *Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666, 668-69 (4th Cir. 1982) (extensive press coverage of the military applications of dolphin technology pre-existed defendant's statements on that topic); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 591 (1st Cir. 1980) (no pre-existing controversy because no evidence anyone discussed plaintiff's fishing boats prior to defendant's criticism); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297, 1299 (D.C. Cir.) (controversies involving

plaintiff developed before defendant's allegedly defamatory publication), cert. denied, 449 U.S. 898 (1980); *Bose Corp. v. Consumers Union of the United States*, 508 F. Supp. 1249, 1272-73 (D. Mass. 1981) (defendant entered pre-existing controversy precipitated by plaintiff's advertising campaign); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 445 N.Y.S.2d 156 (1981) (no public controversy existed in which plaintiff could have participated); *Greenberg v. CBS*, 69 A.D.2d 693, 419 N.Y.S.2d 988, 993-94 (1979) (no public debate over amphetamines when plaintiff doctor prescribed amphetamine-type drugs for which he was criticized).

In the present case there simply was no pre-existing public controversy. Ms. Wayment approached management with an idea for helping kids who had cancer. Nothing ever became of it, except that it was used as a pretext for firing Ms. Wayment since KTVX had recently hired a more prominent journalist from another station to take her place. In fact, even after the defamation took place, there was no public controversy. Ms. Wayment's departure did not receive any contemporaneous media attention.<sup>2</sup> After this lawsuit was filed, she was interviewed by newspaper reporters; but responding to a newspaper's inquires after a lawsuit is filed does not turn a private dispute into a public controversy. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

Because Ms. Wayment did not inject herself into a pre-existing public controversy, she is not a limited purpose public figure.

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<sup>2</sup> This further underscores the fact that Ms. Wayment is not a general purpose public figure.

## REPLY ISSUE NO. 2

**The qualified privilege is defeated by evidence that Mr. Benedict knowingly made false, defamatory statements about the reasons for Ms. Wayment's leaving her employment.**

Defendant argues that an independent basis for affirming the summary judgment is that the defamation was protected by a qualified privilege between an employer and an employee. This is not correct because Mr. Benedict knew the defamatory statements were false, and a "knowing" mental state satisfies the common-law and statutory standards for malice.

Mr. Benedict told Jeremy Castellano, a photographer at Channel 4, that Ms. Wayment "abused her contacts as a reporter" and "she was in charge of a large sum of money"; and explained she was fired because "you can't do stories on a place you're receiving money from and just a lot about being unethical." (Castellano, p. 35, ll. 15 – 24, p. 36, l.2). In his deposition, Mr. Benedict admitted that he **knew** Ms. Wayment had "not accepted any monetary remuneration from The Huntsman." (Benedict, p. 13, l. 11)

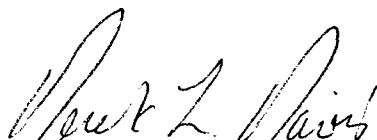
"The appropriate degree of malice that must be proven to successfully overcome the statutory privilege is the common law standard from which the statute derived. This standard creates, in effect, an absolute privilege of a defendant's statements unless the statements were made with ill will, were excessively published, **or the defendant did not reasonably believe his or her statements were true.**" *Russell*, 842 P.2d at 904-5 (emphasis supplied).

The summary judgment evidence in this case demonstrates that Mr. Benedict knew his statements were not true. Thus, the standard for common-law malice is satisfied.

### CONCLUSION

For purposes of this litigation, Ms. Wayment is neither a general purpose nor limited purpose public figure. Therefore, the constitutional actual malice standards do not apply to her defamation action. Even if they did, however, such standards would be satisfied given the evidence that defamatory statements were made with actual knowledge of their falsity. Actual knowledge of falsity also satisfies the common law definition of malice, so as to overcome any qualified privileges.

The granting of summary judgment in this case was inappropriate, and Plaintiff respectfully requests that the judgment be reversed and this case be remanded for trial on the merits.



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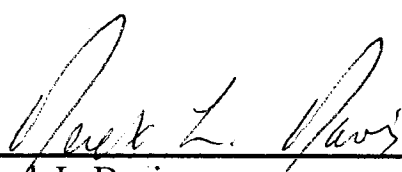
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**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF** was mailed this 7<sup>th</sup> day of May 2004 by first class mail, postage prepaid, to the following:

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