

2003

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

Utah Supreme Court

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NO. 20030854

**IN THE
UTAH SUPREME COURT**

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

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.**

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

LIST OF ALL PARTIES

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Holly Wayment
Appellant

Clear Channel Broadcasting, Inc.,
a Texas Corporation dba KTVX
Channel 4, and Jon Fischer, and
Patrick Benedict, Individuals
Appellee

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JURISDICTIONAL STATEMENT

The Supreme Court of Utah has jurisdiction in the matter pursuant to Section 78-2-2(j) (2001).

STATEMENT OF ISSUES & STANDARD OF REVIEW

ISSUE NO. 1

The trial court erred in granting defendants' Motion for Summary Judgment on the grounds that Ms. Wayment was a public figure and must prove that defendants acted "with malice".

ISSUE NO. 2

The trial court erred in granting defendants' Motion for Summary Judgment on the grounds that the defamatory statements were hearsay and inadmissible.

ISSUE NO. 3

The trial court erred in granting defendants' Motion for Summary Judgment on the grounds that Benedicts' statements were not recited in the complaint and are not actionable.

STANDARD OF REVIEW

Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P.56, et seq. *Higgins v. Salt Lake County*, 855 P.2d 231 (Utah 1993). The trial court's resolution of the legal issues in its "Memorandum Decision" is accorded no deference since entitlement to summary judgment is a question of law. This Court determines only whether the trial court erred in applying the governing law and whether the trial court correctly held that there was no disputed issues of material fact. In addition, in reviewing the trial court's action in granting defendant/appellees motion for summary judgment, this Court views the facts and all reasonable inferences in the light most favorable to the nonmoving party, plaintiff/appellant in this case. *Berenda v. Langford*, 914 P.2d 45 (Utah 1996).

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ATTORNEYS FOR PLAINTIFF/APPELLANT

**IN THE UTAH SUPREME COURT
SALT LAKE COUNTY, STATE OF UTAH**

HOLLY WAYMENT Plaintiff and Appellant	
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vs.
CLEAR CHANNEL BROADCASTING,
INC., A Texas Corporation dba KTVX
Channel 4, and JON FISCHER, and
PATRICK BENEDICT, Individuals,
Defendants and Appellees.

BRIEF OF APPELLANT

CASE No. 20030854-SC

ORAL ARGUMENT REQUESTED

TO THE HONORABLE UTAH SUPREME COURT:

COMES NOW, HOLLY WAYMENT, appellant herein, and presents this brief
and would respectfully show unto the court as follows:

STATEMENT OF THE CASE

Plaintiff, Holly Wayment, appeals the trial court's order granting summary judgment for defendant, Clear Channel Broadcasting, Inc., a Texas Corporation dba KTVX Channel 4, and Jon Fischer and Patrick Benedict, Individuals. Holly Wayment brought a private defamation action against television Channel 4's News Director, Jon Fischer, Assistant News Director, Patrick Benedict, and its owner, Clear Channel Broadcasting, Inc. Ms. Wayment alleges that Channel 4's management falsely accused her of using her reporting contacts to try to create a foundation for her benefit, taking money from the Huntsman Cancer Institute, and that she "was in bed" with the institute. These defamatory statements were made at a time when the management team knew these statements were false and, when asked to clarify the rumors by numerous station employees, management refused to do so.

Defendants' Motion for Summary Judgment was based primarily on Jon Fischer's version of what transpired during a meeting that he had with Ms. Wayment on Wednesday, May 1, 2002. Fischer's description of this meeting is hotly contested and was an inappropriate basis for granting summary judgment. Concerning Fischer's "version of what happened in this termination meeting", Ms. Wayment described his testimony as follows: "He is lying." (Wayment, p. 313, l. 11-16).

STATEMENT OF FACTS

Holly Wayment worked as the health reporter for KTVX, Channel 4, in Salt Lake City, Utah from April 1999 until May 14, 2002. She was hired on April 12,

1999 and signed a two-year contract with various provisions and extensions. Her contract was extended by agreement until January 1, 2002. (Wayment, Ex. 9, p. 33, l. 24; p. 65, l. 5).

In October 2001, Channel 4 was acquired by Defendant, Clear Channel Broadcasting, Inc. Jon Fischer was hired as the Director of Local Program Development and was in charge of the news department. (*Id.* p. 34, l. 16 – 24). Patrick Benedict was hired on May 1, 2002 by Mr. Fischer as the Assistant News Director at Channel 4. (Benedict, p.4, l. 22).

As the News Director, one of the principal tasks of Mr. Fischer's job was to increase Channel 4's market share. (Fischer, p. 32, l. 10). At that time, a competitor, Channel 5, was the market leader in Salt Lake City and Fischer let it be known that anyone from Channel 5 "is welcome" at Channel 4. (Rodriguez, p. 19, l. 2). Lisa Connelly was a reporter and weekend anchor at Channel 5. In December 2001, Jon Fischer contacted Ms. Connelly about the possibility of working at Channel 4. (Fischer, p. 106, l. 16). Unknown to Ms. Wayment, in February/March Ms. Connelly agreed to a contract with Channel 4 receiving a signing bonus of \$5,000.00, an annual salary of \$100,000.00, and a clothing/makeup allowance of \$7,000.00. Connelly's contract with Channel 4 was dated June 1, 2002¹. (Connelly Exhibit 14, p. 129-137).

¹ A dispute arose between Connelly and another T.V. station concerning an outstanding job offer. To resolve the dispute, Connelly agreed to stay off the air with Channel 4 until June 1, 2002.

After Clear Channel Broadcasting purchased Channel 4 in the fall of 2001, employees were told that to improve Channel 4 market share, they needed to get involved with the community and become Salt Lake City's community-oriented station. Employees were encouraged to get involved with charitable organizations. An outside consultant, The Broadcast Image Group, conducted seminars at Channel 4 on how employees could get involved and improve the station's market-share. (Wayment, p. 78, l. 24; p. 80, l. 6). Many Channel 4 employees were already involved in community affairs. Ms. Wayment, for example, had served on the board of Candelighters for Childhood Cancer, (Wayment p. 94, l. 9) participated in Race for the Cure (*Id.* p. 111, l. 9) and, with another Channel 4 reporter, Amy Troy, was the Master of Ceremonies for Race for the Cure. (*Id.* p. 111, l. 24). Wayment was also a speaker at a Walk America fundraiser for the March of Dimes (*Id.* p. 110, l. 6) and had been Master of Ceremonies for the Utah Diabetes Center Gala. (*Id.* at p. 113, l. 3).

In response to this emphasis on community involvement, on May 1, 2002, Ms. Wayment went to Fischer's office to describe an idea she had concerning community involvement. As the health reporter, she had extensive contacts in the Salt Lake City medical community. She explained to Fischer that she had become interested in the children at Huntsman's Cancer Institute and wanted to start a buddy program "to help kids with cancer and their families get their mind off the disease." (*Id.* p. 116, l. 14). What Ms. Wayment did not know when she presented her idea to Fischer was that

Fischer had not only hired Lisa Connelly as the weekend anchor, they had also discussed her taking over Ms. Wayment's health reporting duties at Channel 4.² When Fischer's secretary, Ms. Holt was asked, "When were you first aware that Lisa would be the health reporter?" She answered, "When she started." (Holt, p. 36, l. 21).

Ms. Wayment described to Fischer how she had done a story on a young girl, Tarrin, a four year-old child with ovarian cancer and that after getting to know Tarrin's family she realized the difficulty families had when their children were in Salt Lake City for chemotherapy treatment. Ms. Wayment developed a relationship with Tarrin's family and took Tarrin and her family out of the hospital to enjoy outside activities. She took Tarrin to the ballet, the Sundance Institute, dinners and movies – anything to keep the little girl's mind off her cancer. As a result of that experience Ms. Wayment saw a real need at Huntsman Cancer Institute to develop a "buddy system" whereby members of the Salt Lake City community could be paired with children in the Institute to assist their family as she had Tarrin's family. She had discussed this with the Director of the Center for Children at Huntsman's Cancer Institute and he thought it was a wonderful idea that should be pursued. Ms.

² Nicea Degering, another Channel 4 weekend anchor, testified, "When you're the weekend anchor you also report three days during the week," and she learned "a couple of days before she got there" or maybe even the week she got there "that being the health reporter had been discussed" with Lisa Connelly. (Degering, p. 36, l. 2-9). Pat Benedict acknowledged that Ms. Wayments "duties were assigned to Lisa Connelly." (Benedict, p. 40, l. 16). This was confirmed by other employees. (Christina Flores – McKane, p. 57, l. 16; Kim Miller, p. 6, l. 5; Adam Rodriguez, p. 20, l. 11).

Wayment's concept and additional background information can be found in Exhibit 1 to Plaintiff's Second Amended Complaint.

After listening to Ms. Wayment's concept, Fischer jolted Ms. Wayment by saying she had created a conflict of interest and a perception of bias by discussing the "buddy system" with Huntsman Cancer Institute!! (Wayment, p. 189, L. 16). To her astonishment, he called in his Assistant Director, Patrick Benedict, and asked Holly to repeat what she had told him. As she repeated her story to Benedict, "he seemed very pleased" and was nodding his head "and smiling," (Wayment, p. 257, l. 20) and then Jon Fischer cut him off and said, "Well wait a second, Pat. Don't you think there could be a perception for bias here?" Benedict then said, "Perhaps, there could be a perception for bias, but I know Holly and she wouldn't try to profit off of kids with cancer." Ms. Wayment "was flabbergasted" and said, "profit off of kids with cancer? Why would you even say that? Of course that is not even what this is about at all." (Wayment p. 258, l. 4 – 15). The conversation ended and Fischer thanked Ms. Wayment for her ideas and said he was going to run this past "corporate" to see if he could get it approved. He "gave me the impression he was going to bat for me with corporate." (*Id.* p. 268, l. 7). Ms. Wayment explained to both Fischer and Benedict that if anyone thought she shouldn't pursue the idea, she would not do so because she wanted to keep her job. (*Id.* p. 301, l. 1).

Several days later, on May 3rd, Fischer came up to Ms. Wayment "smiling on Friday afternoon and he said, "Great news, Holly. I've talked to corporate and I think

we're going to be able to work it out." "I just need an e-mail from you explaining the group." He said, "I need you to write the e-mail, and be sure to explain how you came up with the idea, . . . how you used your reporting contacts to start this foundation." At this point Ms. Wayment stopped him and said, "It's not a foundation. It's just an idea." He then said, "Be sure to include in there any money that's exchanged hands." Ms. Wayment, "looked at him perplexed and I said, "Jon, no money has exchanged hands," and he said, "Oh, okay, but include that part about the buses." (Wayment, p. 226, l. 6-22). Ms. Wayment sent the memo to him at 6:58 p.m. by e-mail and left a copy under his door at the station. (Wayment, p. 276, l. 12).

On Monday, May 6th, Ms. Wayment checked her voicemail and had a message from Mr. Fischer. He stated, "Thanks Holly. I think I have everything I need." (Wayment, p. 295, l. 3).

Another week passed and on Tuesday, May 14th, Mr. Fischer called Ms. Wayment into his office. To her complete "shock," he stated, "Holly, I know you were trying to do something wonderful, but you're getting screwed." He then said, "Corporate wants me to walk you out the door right now in front of everyone for what you've done . . . I tried to go to bat for you . . . talking to corporate and its not my decision." (*Id.*, p. 298, l. 12, p. 299, l. 7). She explained to Fischer that there had to be a huge misunderstanding and she would like to talk to the people in corporate to "set the record straight" because she "had not done anything wrong." (*Id.* p. 300, l. 19). Fischer told her that there was no need to call corporate, "they won't answer

your calls.” (*Id.* p. 300, l. 2). Fischer then stated that if she would resign and go quietly, he would say nice things to the other stations when they call and could pay her for two weeks vacation. Otherwise, he threatened, he would fire her now and she would “be escorted out of the newsroom in front of everyone.” (*Id.* p. 307, l. 5). When Wayment asked if she could think about it over night he said, “No, I need your letter of resignation within the next hour.” (*Id.* p. 319, l. 19). Fischer then said, “I want you to know, Holly, that you’re one of the few people who has her priorities straight in the world and I admire you for that. You want to help people. And I’d like to shake your hand.” He then added, “It’s said you’re not a true reporter until you’ve been fired once, and now you’re a true reporter.” (*Id.* p. 301, l. 14). After she had typed the letter of resignation with his instructions, he signed the letter below Holly Wayment’s signature, made a copy, and put one on her desk.

Jeremy Castellano, a photographer at KTVX Channel 4, concluded that after Jon Fischer hired Lisa Connelly in March, he had to make a hole in his staff so that Lisa Connelly could do the medical reporting when she started to work June 1. In Castellano’s words, “They just found any excuse they can, unfounded, just to let Holly go.” (Castellano, p. 13, l. 8).

As an “at-will employee,” Ms. Wayment could be fired for good cause, bad cause, or no cause at all. As an at-will employee, she had no contractual rights under Utah law. However, instead of letting the matter rest, Defendants maliciously defamed Ms. Wayment by making false statements that impeached her honesty,

integrity, virtue, and reputation as a reporter and eliminated her as a competing reporter in the Salt Lake City television market.³ Castellano testified, “They made up the story about how she was receiving money [from Huntsman] and how she was unethical when it wasn’t true.” (Castellano, p.13, l. 16). Castellano specifically went to Pat Benedict “because he’s the assistant news director and I figured he could give me some answers.” (Castellano, p. 30, l. 2). Benedict told him that Ms. Wayment was “unethical and she abused her contacts” because “you can’t do stories on a place you’re receiving money from,” “you can’t do unbiased stories from someone you’re receiving money from.” (*Id.* P. 36, L. 22 – 24). There is circumstantial evidence that Jon Fischer actually started these rumors through his secretary, Ms. Holt. “Everybody was talking about it.” (McKane, p. 19, l. 6). “If Jon Fischer, the news director’s secretary is going around telling people that Holly was receiving a salary, I think that’s pretty important for people to know. It’s not like, you know, someone from the studio crew is walking around with an unfounded opinion. I mean, she works for Jon Fischer. She, obviously, knows.” (Castellano, p. 67, l. 16). “A lot of management pushed the story that she was taking money from Huntsman.” (Castellano, p. 73, l. 19). “Management” was Fischer and Benedict. (Minium, p. 37, l. 22; p. 38, l. 3).

³ Repeated applications for employment in the Salt Lake City market have been rejected. Before she was fired, she had been approached by another T.V. station. (Wayment, p. 334 – 341)

These defamatory statements devastated Ms. Wayment's career. This is described in the testimony of two of Ms. Wayment's coworkers. Brent Hunsaker, a weekend anchor at Channel 4, testified that if a reporter had a reputation of taking money from a source, such would be very harmful to the career of a reporter. "A reporter's stock in trade is their reputation. If you have no reputation, then you've lost your ability to do your job." (Hunsaker, p. 14, l. 5 - 14). He further stated that he was "shocked" because "taking money from a source would be dishonest." (Hunsaker, p. 13, l. 22 - 25). Jeremy Castellano testified that "it's devastating" when a reporter is charged with "unethical behavior." "I honestly don't think there is anything more important than being ethical". (Castellano, p. 19, l. 21, p. 20, l. 5).

SUMMARY OF ARGUMENT

The trial court's legal analysis was flawed by concluding that Ms. Wayment was a public figure involved in a public controversy which invoked first amendment protections for the defendants. This case does not present "freedom of the press" issues protected by the first amendment. No media of any sort was involved in publishing the defamatory remarks concerning Ms. Wayment. The controversy between Ms. Wayment and her former employer is simply a private employee-employer issue wherein a former employer has impugned the integrity of a former employee. Such a dispute does not involve a public controversy requiring Ms. Wayment to prove actual malice.

There is both direct and circumstantial evidence that the defamation occurred. This defamation is established with non-hearsay evidence admissible under Utah R.

Evid. 801 (d)(2)(D), statements made by a party's agent, Utah R. Evid. 801(d)(2)(B), statements that become adoptive admissions, and Utah R. Evid. 801(c), statements not offered to prove the truth of the matter asserted.

Finally, Ms. Wayment's Second Amended Complaint clearly sets forth "in words or words to that affect," "the nature or substance of the acts or words" creating the defamation cause of action against Patrick Benedict.

ARGUMENT

ISSUE NO. 1:

The trial court erred in granting defendants' Motion for Summary Judgment on the grounds that Ms. Wayment was a public figure and must prove defendants acted "with malice".

The principle question in this case is whether this is a private defamation case between Ms. Wayment and her former employer or whether Ms. Wayment was a "public figure" involved in a public controversy. The trial court, without analyzing the nature of the controversy between Plaintiff and Defendant, concluded she was a public figure and therefore had to prove "actual malice." The court concluded that since she was a T.V. reporter, she was a public figure. The court's error was in failing to grasp the fact that: (1) no media of any sort was involved in publishing the defamatory remarks about Ms. Wayment; hence, there are no "freedom of the press" issues in this case, and (2) the controversy between Plaintiff and Defendants is simply a private employee-employer issue wherein a former employer has attacked the integrity of a former employee; hence, there is no "public controversy."

A. There are no “freedom of the press” issues in this case.

All of the cases cited by the trial court in its memorandum decision (and cited to the trial court by Defendants) are cases where a media defendant was sued for defamation and the vehicle used for publishing the defamation was the news media: radio, T.V., newspaper, magazine, etc. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, (1964) (newspaper article); *Rosenblatt v. Baer*, 383 U.S. 75, 86 S.Ct. 669, (1966) (newspaper article); *Van Dyke v. KUTV*, 663 P.2d 52 (Utah 1983) (television station broadcast); *San Antonio Express v. Dracos*, 922 S.W.2d 242 (Tex. App. 1996) (newspaper article); *Falls v. Sporting News Publishing Co.*, 714 F.Supp. 843 (E.D. Mich. 1989) (newspaper, letter to the editor response); *Adler v. Conde Nast Publications, Inc.*, 643 F.Supp. 1588 (S.D.N.Y. 1986) (magazine article); *Rybachek v. Sutton*, 761 P.2d 1013 (Alaska 1998) (newspaper, letter to the editor); *Seegmiller v. KSL Inc.* 626 P.2d 968 (Utah 1981) (television station broadcast).

In those cases, as Defendants correctly cited to the trial court:

In a series of decisions following *New York Times v. Sullivan*, the U.S. Supreme Court has held that the importance of a free press requires that proof of actual malice be made by clear and convincing evidence. (citing authority).⁴

This heightened requirement of proving actual malice is a constitutional safe guard imposed by the First Amendment’s guarantee of freedom of the press. In the present case, no media of any sort was used to publish the defamatory remarks concerning Ms. Wayment: “freedom of the press” is simply not at issue in this case.

⁴ P. 15, Memorandum in Support of Defendants’ Motion for Summary Judgment.

This court's historical review and analysis in *Seegmiller v. KSL Inc.* 626 P.2d 968 (Utah 1981) accurately identifies the competing interests and issues between "private" and "public" figures.

B. This is a private controversy between an ex-employer and ex-employee.

The nature of the controversy between a Plaintiff and Defendant establishes whether a public figure status exists in any defamation case. Public figures fall into two categories: (1) All-purpose, or general-purpose, public figures, and (2) limited-purpose public figures. General-purpose public figures are those individuals who have achieved such pervasive fame or notoriety that they become public figures for all purposes and in all contexts. *Getz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 3009 (1974). Limited-purpose public figures, on the other hand, are only public figures for a limited range of issues surrounding a particular public controversy. Several courts across the country have adopted a three-part test to determine whether or not an individual is a limited-purpose public figure. In *Trotter v. Jack Anderson Enter., Inc.* 818 F.2d 431, 433 (5th Cir. 1987), the Court adopted a three-part test:

- (1) The controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
- (2) The plaintiff must have more than a trivial or tangential role in the controversy; and

- (3) The alleged defamation must be germane to the plaintiff's participation in the controversy.

See also Tavoulareas v. Piro, 817 F.2d 762, 772-773 (D.C. Cir. 1987)(en banc); *Waldbaum v. Fairchild Publishing, Inc.*, 627 F.2d 1287, 1296-1298 (D.C. Cir. 1980).

Accordingly, the first issue to be determined is, what is the controversy at issue? In *Waldbaum*, the D.C. Circuit elaborated on the method for determining the existence and scope of a public controversy:

To determine whether a controversy in deed existed and, if so, to define it's contours, the judge must examine whether persons actually were discussing some specific question. A general concern or interest will not suffice. *The court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment.*

627 F2d at 1297 (emphasis added)

In the case at hand, the fact that Holly Wayment was fired by her employer was clearly not a matter of public concern. It was not an event covered by the press. There was no public controversy concerning the defamatory statements made about Ms. Wayment; there is no evidence that any commentators, analysts, journalists, or public officials were discussing Ms. Wayment's controversy with her employer. The trial court's conclusion that she was a public figure is wholly without merit. By the same token, the second and third prong of the analysis are inapplicable because there is no "public controversy" that Ms. Wayment played a tangential role in or

participated in any form or fashion. Ms. Wayment was fired by her employer. There the matter ends.

Moreover, the justification for limiting the rights of “public figures” do not apply to this controversy involving Ms. Wayment. Public figures are given less protection against defamation because they “enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy,” and therefore such individuals are “less vulnerable to injury from defamatory statements.” *Getz* 418 U.S. at 344, 94 S.Ct. at 3009 (1974). The second, and more significant reason, is that public figures “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,” and thus have invited “attention and comment.” *Id.* at 345, 94 S.Ct. at 3009.

The rationales for treating Ms. Wayment as a public figure do not exist because there was no public controversy and she had no public medium, no bully pulpit, to counteract the false statements at KTVX. In fact, Plaintiff has been forced to leave the community and seek work outside of Utah due to the false statements circulated to KTVX employees. She was not putting herself in the forefront of a public controversy. Just because her employer was a TV station does not subject this case to the analytic framework of anything more than a private defamation in the context of an employment termination.

Finally, Defendants reliance on newspaper articles which address the judicial proceedings now before the court as evidence of “public figure” status is flat wrong. Specifically, in the landmark case of *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958 (1976) the wife of a scion of a wealthy industrial family (Firestone) brought a libel action against the publisher of a nationally distributed weekly news magazine (Time) which allegedly contained false and defamatory reports of domestic relations litigation between the plaintiff and her husband. Despite the fact Mrs. Firestone held several press conferences, she was not considered a public figure. The Court reasoned as follows:

Imposing upon the law of private defamation the rather drastic limitations worked by *New York Times* cannot be justified by generalized references to the public interest in reports of judicial proceedings. The details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues thought to provide principal support for the decision in *New York Times*. And while participants in some litigation may be legitimate public figures, either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others.

Firestone at 457, 96 S.Ct at 966 (*citations omitted*).

For the same reasons that Mrs. Firestone was not a “public figure”, neither is Ms. Wayment. The reasons for her leaving KTVX were not public issues that implicate First Amendment considerations and protection by the drastic limitations put on public figure defamation cases. *Seegemiller v. KSL, Inc.* accurately identifies the interest of the private citizen that must be protected.

On the other hand, we recognize that the integrity of an individual's reputation is essential to his standing in society, in his vocation, and even in his family. It may indeed be indispensable to one's sense of self-worth. The dignity of virtually every human being depends in part upon his right to be known as the person he truly is. For centuries it has been recognized that an assault upon a person's character may be far more damaging and long-lasting than an assault upon his person. Indeed, freedom from false attacks on one's personality may be viewed as at least as essential to ordered liberty as freedom from physical abuse. (at page 973)

Seegemiller, 626 P.2d at 973

ISSUE NO. 2

The trial court erred in granting defendants' Motion for Summary Judgment on the grounds that the defamatory statements were hearsay and inadmissible.

There is direct evidence, circumstantial evidence, and admissions by defendants that defamatory statements were made about Ms. Wayment's journalistic ethics. It is undisputed by both Fischer and Benedict that they had actual knowledge that the defamatory statements were being made and that the statements were false. Both Fischer and Benedict confessed they knew Ms. Wayment had "not accepted any monetary remuneration from The Huntsman." (Fischer, p. 103, l. 12; p. 50, l. 13; Benedict, p. 13, l. 11)

A. Direct Evidence of Defamation.

Benedict, knowing that Ms. Wayment had not taken money from the Huntsman Cancer Institute, falsely told Jeremy Castellano, a photographer at Channel 4, "she 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, l. 15 – 24, p. 36, l.2). Benedict said, “She abused her contacts as a reporter to start this foundation and she was in charge of a large sum of money and it is unethical” (Castellano, p. 10, l. 6-9), “Holly was receiving money from Huntsman and that she was on their payroll and that’s why she was fired.” (Castellano, p. 11, l. 1-3). “A lot of management kept trying to push that. Like Pat Benedict. Pushed that.” (Castellano, p. 12, l. 19). When asked what Benedict and management were pushing, Castellano said, “That she was receiving a salary and she was unethical, she abused her contacts.” (Castellano p. 12, l. 24-25). Moreover, Fischer’s secretary⁵ reported Ms. Wayment “was getting paid by the Huntsman Institute,” “Jon told me.” (Rodriguez, p. 7, l. 16).

B. This Direct Evidence Is Not Hearsay.

These statements by Pat Benedict, the Assistant News Director at Channel 4, and M’Lissa Holt, Fischer’s secretary, are not hearsay. Under UTAH R. EVID. 801(d)(2)(D), statements which are not hearsay include prior statements by a witness when:

(2) the statement is offered against a party and is (D) a statement made by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

⁵ Various witnesses described Ms. Holt as Jon Fischer’s “secretary”. Actually she was more than a secretary, she was Jon Fischer’s “administrative assistant.” (Holt, p. 5, l. 2).

The statements by Benedict and Holt are statements that are offered against Defendants and are statements made by Defendants employees concerning matters within the scope of their employment and made during the existence of their employment relationship. Benedict cannot take any solace in the fact that he did not actually make the decision to fire Ms. Wayment. Whether a statement qualifies as non-hearsay under Rule 801(d)(2)(D), goes beyond simply determining if the declarant is a direct decision-maker with regard to the adverse employment action. *Carolyn Carter v. University of Toledo*, 349F.3d 269 (6th Cir. 2003). In *Carter*, the Court cited several cases establishing that the declarant need not be the direct decision-maker with regard to the decision to fire a person for statements to be classified as non-hearsay. See, *Hill v. Spiegel, Inc.*, 708 F.2d 233 (6th Cir. 1983); *Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003); *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921, 928, (6th Cir. 1999). In *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998), the court specifically rejected an employer's contention that an employee must be involved in the decision-making process leading up to the employer's action. The court said,

The precise reach of Rule 801(d)(2)(D) is sometimes difficult to discern, as there has been considerable debate about the justification for classifying various admissions as non-hearsay. We are reluctant to follow [the employer's] suggestion and read into the rule as generalized personal involvement requirement, especially in light of the Advisory Committee's admonition that the freedom which admissions have enjoyed from the restrictive influences of the rule requiring firsthand knowledge calls for generous treatment of this avenue to admissibility.

Williams , 137 F.3d at 950

C. Fischer's conduct in failing to refute the defamatory statement attributed to him as the reason he fired Ms. Wayment is an admission that manifests his adoption that the defamatory remarks were true.

Under UTAH R. EVID. 801(d)(2)(B), Fischer's conduct and participation in the defamation is proven through adoptive admissions. Rule 801(d)(2)(B) provides that statement are not hearsay if:

(2) The statement is offered against a party and is (B) a statement of which the party has manifested an adoption or belief in its truth.....

As the News Director, the entire staff looked to Jon Fischer for direction and leadership. Everyone on the staff knew Fischer had fired Ms. Wayment. Speculation was everywhere that she was fired for taking money from Huntsman, etc. At least three different employees came to Jon Fischer to try to get him to put an end to the defamatory remarks in the newsroom. He knew, of course, that Wayment had never taken money from Huntsman. Each time Fischer was presented with an opportunity to stop the defamatory remarks he refused to do so. Fischer admitted that Randall Carlisle, an evening anchor asked him about the slanderous remarks: "he [Carlisle] expressed that there was a lot of speculation going on in the newsroom and had I been made aware of it and was there any more information that I could give him." Fischer responded, "I said that I had been made aware of the discussions going on in the newsroom and that I was not prepared at that time to address any of the speculation and that it was a personal issue, and I think I pretty much left it at that." (Fischer, p. 100, l. 17; p. 101, l. 1) He went on, "I believe some of the speculation out there was that – and I don't even remember the sources of these comments, but that Holly had

accepted money or had been working at the Huntsman. I'd even heard that somebody speculated that she had made it – had a romantic involvement with someone at Huntsman.” (Fischer, p. 101, l. 15 – 20, emphasis added).

Under Rule 801(d)(2)(B) Fischer's conduct in failing to refute the defamatory statements circulating as to why he fired Ms. Wayment is an adoptive admission on his part that the statements were in fact true. Since Fischer is the person who fired Ms. Wayment, by failing to correct the defamatory statements, he adopts the remarks as the basis for firing Ms. Wayment. *See, State v. Carlsen*, 638 P.2d 512 (Utah 1981), *cert. denied*, 455 U.S. 958, 102, S. Ct. 1469 (1982).

Fischer confessed that he allowed the republication of defamatory comments concerning Ms. Wayment throughout the newsroom when he knew the rumors were false. “I did not address the rumors in any form.” (Fischer p. 104, l. 9). A jury might decide that the reasons for this may be two-fold. First, a jury could conclude that allowing Wayment's reputation to be trashed effectively eliminated her as a competing reporter in the Salt Lake City television market – no other station would touch her. Second, a jury could conclude that it wouldn't make sense for him to quash the rumors when other people in the newsroom knew he had made the defamatory remarks.

Evidence of Fischer's failure to act after he heard these defamatory remarks is also circumstantial evidence of his participation in the defamation. When considered with Adam Rodriguez's testimony that Fischer's secretary told him Fischer had

confirmed the defamatory remarks, a jury could conclude that Fischer was the likely originating source of the defamatory remarks. Mr. Rodriguez was still an employee at Channel 4 when his deposition was taken. When he heard these defamatory remarks he asked Jon Fischer's secretary, Ms. Holt, what happened to Ms. Wayment. She said, "they fired her because she was on the payroll with The Huntsman Institute..." (Rodriguez, p. 6, l. 25). When Rodriguez asked how she knew this, she replied, "Because Jon told me". (Rodriguez, p. 7, l. 16). This same information was repeated by Jeremy Castellano, another Channel 4 photographer. "If Jon Fischer the News Director's secretary is going around telling people that Holly was receiving a salary, I think that's pretty important for people to know. It's not like, you know, someone from the studio crew is walking around with an uninformed opinion. I mean, she works with Jon Fischer. She, obviously, knows." (Castellano p. 67, l. 18 – 24)

As to Defendants' contention that there is no evidence that Fischer actually made any defamatory remarks, the adoptive admission by Fischer is admissible nonhearsay. In addition, the testimony of Jeremy Castellano creates a fact issue. "A lot of management kept trying to push that" (that Holly was receiving a salary), (Castellano p. 123, l. 24). Who does "management" refer to? According to Steve Minium, Vice President of News for Defendant Clear Channel Television, "the management team in the newsroom at Channel 4 would be Jon Fischer, the news

director, ...and the assistant news director, Pat Benedict.” (Minium, p. 37, l. 22; p. 38, l. 3)

D. Under Rule 801(C), The Evidence of Defamatory Remarks Is Not Hearsay.

Under UTAH R. EVID. 801(c), statements are not hearsay if the statements are not offered, “to prove the truth of the matter asserted.” If the statements are simply offered to prove that the statements were made, they are not hearsay. *See, Durfey v. Board of Educ.*, 604 P.2d 480 (Utah 1979); *State v. Sorenson*, 617 P2d 333 (Utah 1980); *State v. Hutchison*, 655 P.2d 635 (Utah 1982); *Layton City. v. Noon*, 736 P.2d 1035 (Utah 1987). The defamation established by the statements concerning Ms. Wayment’s termination clearly is not offered to prove the *truth* of the matter asserted because Ms. Wayment contends they were *false*. In fact, there is no evidence from any source that plaintiff was guilty of what the statements accused her of doing.

The statement that she “took money from Huntsman and that’s why she was fired” (Degering, p. 27, l. 3) was false; the statement that “she had made it – had a romantic involvement with someone at the Huntsman” (Fischer, p. 101, l. 15 – 20) was false; the statement that she was “in bed with Huntsman people” (McKane, p. 27, l. 1) was false; the statement that “she was taking money from the Huntsman people” (McKane, p. 30, l. 25) was false; the statement that “she was taking money from a charity” (Miller, p. 13, l. 3) was false; and the statement that Holly had to leave because she was “getting money from a hospital” (Hertzke, p. 33, l. 7) was false. Yet

all of the statements are admissible to establish that the defamation occurred, not to prove the truth of the statements.

Hearsay does not encompass all extrajudicial statements, but only those offered for the purpose of proving the truth of the matter asserted in the statement. Therefore, when the mere making of the statement is relevant to establish a fact of consequence, hearsay is not involved. Such statements are offered solely for the fact they were said, not for the truth of their contents. *M.F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 172 (10th Cir. 1968). (“[T]estimony is not hearsay when it is offered to prove only that a statement was made and not the truth of the statement.”); *United States v. Sanders*, 639 F.2d 268, 270 (5th Cir. 1981). (“[I]f the statement was offered on a non-assertive basis, i.e., for proof only of the fact it was said, the statement would not be subject to the hearsay objection.”). *See also*, *Smith v. Great American Restaurants, Inc.*, 969 F.2d 430, 437 (7th Cir. 1992); *Lawlor v. Lowe*, 235 U.S. 522, 35 S.Ct. 170 (1914); *Greater New York Live Poultry etc. v. United States*, 47 F.2d 156 (2nd Cir) (1931).

All of the major treatises on evidence recognize this rule of admissibility when a statement is offered other than to prove the truth of the matter asserted. More specifically, in defamation cases the statements are relevant to establish the critical fact of consequence – that the defamation occurred. Commentators refer to these statements as “the verbal act” which has independent legal significance. In *HANDBOOK OF FEDERAL EVIDENCE*, VOL. 3., § 801.5 (5th ed. 2001), the authors offer

illustrations of non-hearsay statements including “statements offered as evidence of defamation.” At pages 30, 31. (Citing numerous authorities). *See also* WIGMORE ON EVIDENCE, VOL. 6., §§1789, 1729 (4th ed. 1976); MCCORMICK ON EVIDENCE, VOL.2., §249 (5th ed. 1999). A “defamatory utterance” is also given as an example of admissible verbal acts not subject to a hearsay objection in TEXAS PRACTICE SERIES VOL. 2., §8012 at 140 (3rd ed. 2002) (citing MCCORMICK ON EVIDENCE §249 (5th ed. 1999)).

In HANDBOOK OF FEDERAL EVIDENCE, VOL. 3., § 801.5 (5th ed. 2001), the author offers another basis for why these statements are not hearsay: “Another group falling outside the category of hearsay consists of statements made by one person which become known to another offered as a circumstance under which the latter acted and as bearing upon his conduct”. (p. 46). The circumstances under which Fischer heard the defamatory remarks were that he had just fired Ms. Wayment and he knew she wasn’t taking money from Huntsman. Yet, he does nothing to stop the defamatory remarks as to why he fired her. His conduct is an adoptive admission that the defamatory remarks were true⁶. Accordingly, the fact that defamatory remarks were made, that Fischer knew of them and did nothing is admissible because the remarks are “not submitted for the truth of the assertion, but rather for the action of the witness.” *United States v. Brown*, 110 F.3d 605, 609-610 (8th Cir. 1997).

⁶ In his deposition he excused his non action by saying, “I had been specifically asked by Holly not to discuss it, and, therefore, I did not.” (Fischer, p. 130, l. 15). Holly’s response was, “He is lying.” (Wayment, p. 313, l. 16).

ISSUE NO. 3:

The trial court erred in granting defendants' Motion for Summary Judgment on the grounds that Benedicts statements were not recited in the complaint and are not actionable.

Finally, the trial court concluded that Defendant Benedict's Motion for Summary Judgment should be granted for the additional reason that "None of the statements Castellano heard Defendant Benedict make are the defamatory statements which Plaintiff has pled in her complaint." First, the Court didn't consider all of Castellano's testimony. Second, the Court's requirement that Plaintiff must plead in her complaint the exact defamatory statements, which the Court's language implies, is incorrect.

UTAH R. CIV. PRO. 8(a)(1), requires that a pleading set forth "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." In addition, Rule 9(b) states that, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake, shall be stated with particularity." This Court's decisions have repeatedly construed these requirements and quoted with approval the following passage from *Hickman v. Taylor*, concerning the federal rules, from which the Utah Rules were taken:

Under the prior federal practice, the pretrial functions of notice giving, issue formulation and fact revelation were performed primarily and inadequately by pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice giving and invest the deposition - discovery process with a vital role in the preparation for trial.

Hickman, 329 U.S. 495, 500-01, 67 S. Ct. Ed. 385 (1947).

Blackham v. Snelgrove quoted the same provision from *Hickman v. Taylor* and stated:

Thus, it can very often be found stated in these cases that a complaint is required only to “****give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.

Blackham, 3 Utah 2d. 157, 160, 280 P.2d. 453, 455 1955)

Justice Crockett’s opinion for the Court in *Cheney v. Rucker*, 14 Utah 2d. 205, 381 P.2d 86 (1963) reiterated the purpose of the Rules:

“They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertaining to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if they so request.”

Id. p. 91.

In the context of a defamation case, this Court has held in *Dennett v. Smith*, 21 Utah 2d. 368, 445 P.2d 983, (1968), “that in defamation cases a certain degree of specificity is an essential in the pleadings, that the language complained of must be set forth in words or words to that affect”. *Id.* at 369, 445 P.2d at 984 (emphasis added). This Court expanded this statement in *Williams v. State Farm Insurance Company*, 656 P.2d. 966 (1982) when, after repeating the above-quoted phrase and citing additional authority, the Court said: “It appears from these precedents that when the pleader complains of

conduct described by such general terms as liable, intimidation, or false statements, the allegation of the conclusion is not sufficient; the pleading must describe the nature or substance of the acts or words complained of." at 973 (emphasis added).

It is apparent from Plaintiff's Second Amended Complaint (Index pp. 220 – 232) that she has set forth "in word or words to that affect", "the nature or substance of the acts or words" complained of which created the defamation cause of action. The allegations of fact beginning on page 2 and continuing to page 9 of the Complaint fully "describe the nature or substance of the acts or words complained of" as required in *Williams v. State Farm Insurance Company*. Plaintiff's allegation in paragraph 48 on page 9 that "CCB by and through its agents Fischer and Benedict forced the resignation of Wayment and then made false accusation that she was terminated because she was taking money from the Huntsman Cancer Institute, was in bed with the Institute, and had used her reporting contacts to try to set up a foundation for her benefit," is an adequate description of what occurred. This is clearly a description of what Defendant Benedict told the witness Castellano. Castellano testified that Benedict said, "She abused her contacts as a reporter to start this foundation and she was in charge of a large sum of money and it is unethical" (Castellano p.10, l. 6-9), "Holly was receiving money from Huntsman and that she was on their payroll as that's why she was fired."

(Castellano, p. 11, l. 1-3). "A lot of management kept trying to push that. Like Pat Benedict. Pushed that." (Castellano, p. 12, l. 19). When asked what Benedict and management were pushing, Castellano said, "that she was receiving a salary and she was unethical, she abused her contacts." (Castellano, p. 12, l. 24-25).


The pleading requirements relating to Benedict's defamatory statements is satisfied. This direct evidence of Defendant Benedict's defamatory remarks creates fact issues which preclude summary judgment.

CONCLUSION

This case does not present "freedom of the press" issues protected by the first amendment. No media of any sort was involved in publishing the defamatory remarks concerning Ms. Wayment. The controversy between Plaintiff and the Defendants is simply a private employee – employer issue wherein a former employer has impugned the integrity of a former employee. Such a dispute does not involve a "public controversy" which would require Plaintiff to prove actual malice. Finally, there is both direct and circumstantial evidence that the defamation occurred. This defamation is established with non-hearsay evidence that indicts both Fischer and Benedict and create a fact issue to be resolved by the jury. Appellant respectfully prays that upon hearing the Court reverse the trial court's judgment granting Defendants' Motion for Summary Judgment and remand the case for trial on the merits.

DATED this 3rd day of February 2004.

Respectfully submitted,



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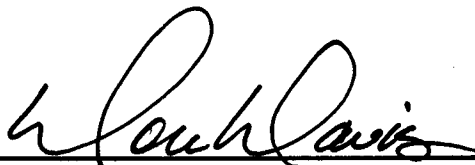
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was mailed this 3rd day of February 2004 by first class mail, postage prepaid, to the following:

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ADDENDUM

FILED DISTRICT COURT
Third Judicial District

AUG 25 2003

By
SALT LAKE COUNTY
Deputy Clerk

THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

HOLY WAYMENT,

Plaintiff,

v.

CLEAR CHANNEL BROADCASTING,
INC., a Texas corp., dba KTVX
Channel Four, and JON FISCHER,
an individual, PATRICK
BENEDICT, an individual,

Defendants.

MEMORANDUM DECISION

CASE NO. 020906919

JUDGE STEPHEN L. HENRIOD

This matter is before the above entitled Court on defendants' Motion for Summary Judgment. Oral arguments were heard on August 15, 2003, after which the Court took the matter under advisement. Now, having considered the parties' arguments along with the relevant legal authorities the Court rules as stated herein.

On February 6, 2003, plaintiff Holly Wayment filed her complaint against defendants alleging a single cause of action for defamation. Ms. Wayment's cause of action stems from the circumstances surrounding her allegedly forced resignation from employment at KTVX Channel 4 News as the local Heath Reporter. In connection with her resignation Wayment claims she was defamed when defendants Jon Fischer and Patrick Benedict made three false statements about her to others: a) "She was taking money from the

Huntsman Cancer Institute" b) "[She] was in bed with the Institute" and c) "[She] had used her reporting contacts to try to set up a foundation for her benefit." Second Amended Complaint, ¶ 48; Wayment Deposition p.428, lines 7-20.

As an initial matter, it is necessary to determine whether Ms. Wayment was a private or public figure. Such a determination dictates whether or not plaintiff must prove that defendants acted with "actual malice." New York Times Co. v. Sullivan 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). Determining whether plaintiff is a private or public figure is a question of law for the Court to decide. Rosenblatt v. Baer 383 U.S. 75, 88, 86 S. Ct. 669, 677, 15 L.Ed. 2d 597 (1966); Van Dyke v KUTV 663 P.2d 52 (Utah 1983). Generally, journalists and televisions reporters, such as Wayment, are considered public figures. San Antonio Express v Dracos 922 S.W.2d 242, 252 (Tex App. 1996); see also, Falls v Sporting News Publishing Co., 714 F. Supp 843, 847 (E.D. Mich. 1989) (sports columnist who made radio, television and speaking appearances was a public figure); Adler v Conde Nast Publications Inc., 643 F. Supp 1558, 1564 (S.D.N.Y. 1986) (general fame in literary and journalistic community combined with pervasive involvement in the affairs of society render plaintiff a public figure); Rybachek v Sutton 761 P.2d 1013, 1014 (Alaska 1998) (bi-weekly columnist was a public figure with respect to her column).

Here, the undisputed facts show that Wayment, through her job

at KUTV and other activities, was a highly visible public presence throughout Salt Lake and the surrounding area. Plaintiff broadcast over one thousand news stories and was exposed to thousands of local and national viewers. She participated in numerous community events and promoted and appeared at special functions and benefits. In her own words, Ms. Wayment was a "local celebrity." Defendants' Exhibit C. Accordingly, the Court concludes that Ms. Wayment is a public figure. As a public figure plaintiff receives less protection from libel suits and is required to show that defendants published the defamatory statements with actual malice or "with knowledge of its falsity or with reckless disregard of its truth or falsity." New York Times at 376 US 254; Seegmiller v KSL Inc. 626 P.2d 968 (Utah 1981).

Next, the Court examines the admissibility of the defendants' statements. In Utah, in order to be admissible, evidence must be based upon the personal knowledge of the witness. Utah Rules of Evidence, 801. Testimony in which a witness merely recounts what a third person allegedly heard from a defendant is prohibited as hearsay. Application of Utah's evidentiary rules indicate that Ms. Wayment is unable to produce a single witness who directly heard defendant Fischer make any of the defamatory statements pled. Instead, plaintiff relies upon inadmissible double and triple hearsay to connect statements made with Mr. Fischer. Wayment admits that she never heard Fischer make defamatory statements

about her. Furthermore, none of the seventeen witnesses deposed by plaintiff ever personally heard Mr. Fischer make defamatory statements about Wayment. Thus, lacking any admissible testimony to support her defamation claim against Mr. Fischer, defendants' Motion For Summary Judgment is granted with respect to Mr. Fischer.

With respect to defendant Benedict, Wayment is able to produce a single witness, Jerry Castellano, who claims to have directly heard Benedict make defamatory statements about plaintiff. Specifically, in his deposition, Mr. Castellano states that he approached Mr. Benedict upon learning of Wayment's termination, at which time, Benedict made the following specific statements to him about Ms. Wayment: a) "The worst thing is that she doesn't even know what she did was wrong" b) " She abused her contacts as a reporter" c) "She was in charge of a large sum of money" and d) "she was unethical." Deposition, Jeremy Castellano, p.35-36, lns 14-25. While the testimony of Mr. Castellano does overcome the hearsay problem noted with respect to defendant Fischer, the issue still remains that none of the statements Castellano heard defendant Benedict make are the defamatory statements which plaintiff has pled in her complaint. For this reason, defendants' Motion for Summary Judgment is also granted with respect to defendant Benedict.

Concluding that defendants' statements are inadmissible it is unnecessary for the Court to address the defamation analysis

further. Defendants' Motion For Summary Judgment is granted.

Defendants' counsel to prepare an Order consistent with this
Memorandum Decision.

Dated this 28 day of August, 2003.

BY THE COURT:



STEPHEN L. HENRIOD
DISTRICT COURT JUDGE



78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review

those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

UTAH RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

URE Rule 801 (2003)

Rule 801. Definitions.

The following definitions apply under this article:

(a) A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

Statement.

(b) A "declarant" is a person who makes a statement.

Declarant.

(c) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Hearsay.

(d) A statement is not hearsay if:

Statements which are not hearsay.

(1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or.

Prior statement by witness.

(2) The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.