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4th Civ. No. G031636

COPY

IN THE SUPREME COURT OF CALIFORNIA

BALBOA ISLAND VILLAGE INN, INC.,

Plaintiff/Respondent/ [REDACTED],

v.

ANNE LEMEN & [REDACTED],

Defendant/Appellant/ [REDACTED],

After a Decision By the Court of Appeal
Fourth Appellate District, Division Three
Case No. G031636
Orange County Superior Court Case No. 01CC13243

**NOTICE OF LODGING COPIES OF
FEDERAL AND NON-CALIFORNIA AUTHORITIES**

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BALBOA ISLAND VILLAGE INN, INC.

4th Civ. No. G031636

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BALBOA ISLAND VILLAGE INN, INC.

For the Court's convenience, Plaintiff/Respondent/Petitioner hereby lodges copies of the following Federal and Non-California Cases filed in support of its Petition for Review:

FEDERAL:

1. Lothshuetz v. Carpenter (6th Cir. 1990)
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NON-CALIFORNIA:

2. Advanced Training System v. Caswell Equipment Co.
(Minn 1984) 352 N.W.2d 1;
3. O'Brien v. University Community Tenants Union, Inc.
(1975) 42 Ohio St.2d 242; and
4. West Willow Realty Corp. v. Taylor (1960)
198 N.Y.S.2d 196.

DATED: September ____, 2004

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▷

United States Court of Appeals,
 Sixth Circuit.

John M. LOTHSCHUETZ; Carolyn C. Hill; and
 United Telecommunications, Inc.,
 Plaintiffs-Appellees and Cross-Appellants,

v.

James M. CARPENTER and Carpenter Radio Co.,
 Defendants-Appellants and Cross-
 Appellees.

Nos. 87-3905, 87-3906.

Submitted Jan. 26, 1990.
 Decided March 28, 1990.

Action was brought for libel and malicious prosecution by attorneys who worked for Federal Communications Commission (FCC) before taking jobs as counsel for telecommunications company and by telecommunications company which employed them. After sanctions were imposed and a default judgment on liability entered against defendants for failure to comply with discovery orders, the United States District Court for the Northern District of Ohio, Richard B. McQuade, Jr., J., conducted bench trial on issue of damages, which resulted in judgment for nominal award in favor of each plaintiff. Defendants appealed, and plaintiffs cross-appealed. The Court of Appeals, Ralph B. Guy, Jr., Circuit Judge, held that: (1) under District of Columbia law, presumption of damages in libel case entitled plaintiffs to nothing more than nominal damages and evidence supported award of \$1 nominal damages to compensate each plaintiff for harm established only through presumption; (2) under District of Columbia law, evidence supported rejection of request for punitive damages on libel claims; and, Wellford, Circuit Judge, held that: (3) injunction would issue to prohibit defendant in libel suit from reiterating statements which had been found in current and prior proceedings to be false and libelous to prevent future injury to libel plaintiff's personal reputation

and business relations.

Affirmed in part; reversed in part; and remanded.

Wellford, Circuit Judge, and Hull, Chief Judge, sitting by designation, filed opinions concurring in part and dissenting in part.

West Headnotes

[1] **Federal Courts** ⚡145
 170Bk145 Most Cited Cases

District of Columbia choice of law rules required application of District of Columbia substantive law in action for libel and malicious prosecution transferred from District of Columbia to Northern District of Ohio, where defamatory statements were circulated and groundless actions pursued almost exclusively in District of Columbia.

[2] **Libel and Slander** ⚡112(1)
 237k112(1) Most Cited Cases

[2] **Libel and Slander** ⚡112(2)
 237k112(2) Most Cited Cases

District of Columbia law requires private individual suing for defamation to prove negligence by a preponderance of evidence to recover compensatory damages, while public figures must prove actual malice by clear and convincing evidence.

[3] **Federal Courts** ⚡1066
 170Bk1066 Most Cited Cases

Liability was established by district court's entry of default judgment against defendants, so Court of Appeals did not need to consider whether defendants' conduct satisfied relevant standard of culpability applicable to action for libel under District of Columbia law.

[4] **Libel and Slander** ⚡101(1)
 237k101(1) Most Cited Cases

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Although plaintiffs in libel action governed by District of Columbia law could avail themselves of presumption that general damages were recoverable, that presumption entitled plaintiffs to nothing more than nominal damages.

[5] Constitutional Law ⚡90.1(5)
92k90.1(5) Most Cited Cases

Effect of Supreme Court *Dun & Bradstreet* decision was to lower permissible standard for awarding presumed and punitive damages in certain defamation cases by holding that permitting recovery of presumed and punitive damages in defamation cases without showing of actual malice does not violate First Amendment when defamatory statements do not involve matters of public concern; states still retain right to establish higher standards than constitutionally mandated minimums. U.S.C.A. Const.Amend. 1.

[6] Libel and Slander ⚡121(1)
237k121(1) Most Cited Cases

Under District of Columbia law, evidence supported awarding only \$1 nominal damages to compensate each libel plaintiff for harm established only by presumption in case in which default judgment was rendered against defendants, although \$2,500 nominal damages had been awarded in another case.

[7] Federal Courts ⚡1066
170Bk1066 Most Cited Cases

Under District of Columbia law, district court's determination concerning appropriate amount of nominal damages awarded in libel action is entitled to substantial deference.

[8] Libel and Slander ⚡114
237k114 Most Cited Cases

Under District of Columbia law, nominal damages are neither designed nor required to compensate plaintiff in libel action.

[9] Libel and Slander ⚡118
237k118 Most Cited Cases

Under District of Columbia law, libel plaintiff who obtained default judgment was not entitled to

special damages, although he claimed partnership opportunity with large law firm was scuttled by libelous charges which were made against him; no proof that plaintiff intended to do anything more than consider offer was adduced, and testimony supported conclusion that partnership offer was only temporarily withdrawn pending resolution of defamatory charges.

[10] Libel and Slander ⚡120(1)
237k120(1) Most Cited Cases

Libel plaintiffs were not entitled to punitive damages under District of Columbia law based solely upon admission of liability effectuated by entry of default judgment.

[11] Libel and Slander ⚡120(2)
237k120(2) Most Cited Cases

Under District of Columbia law, libel plaintiffs who obtained default judgment were not entitled to award of punitive damages on theory defendant acted with reckless disregard for truth in making defamatory statements about them, where record indicated that defendant merely reasoned, although erroneously, that telecommunications company's hiring of individuals after their tenure with Federal Communications Commission (FCC) was impermissible, and defendant's subjective belief in truth of his allegations was manifest.

[12] Malicious Prosecution ⚡14
249k14 Most Cited Cases

District of Columbia allows civil recovery for malicious prosecution, but only upon showing of special injury.

[13] Malicious Prosecution ⚡14
249k14 Most Cited Cases

Under District of Columbia law, only attorney who was subject of proceeding before Federal Communications Commission (FCC) and was named as third-party defendant had satisfied special injury requirement to permit civil recovery for malicious prosecution; another attorney named in FCC proceeding and a telecommunications company which employed the attorneys after they left the FCC and was named in a complaint filed

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with the FCC had each had to defend only one action.

[14] Federal Courts ↪945
170Bk945 Most Cited Cases

Under District of Columbia law, attorney who unquestionably incurred costs in defending himself twice against groundless charges should be given opportunity in malicious prosecution suit to substantiate claim for legal expenses resulting from second action which he defended, and case would be remanded for hearing to determine and itemize attorney fees legitimately expended in defense of second action, although evidence on attorney fees introduced by multiple plaintiffs in malicious prosecution action provided total defense costs figures pertaining to each of three actions brought by defendant and did not itemize legal services for which reimbursement was sought.

[15] Federal Courts ↪1061
170Bk1061 Most Cited Cases

Appellants' challenges to accuracy of transcripts from various hearings and trial on damages should be pursued before district court, not appellate court. F.R.A.P. Rule 10(e), 28 U.S.C.A.

[16] Federal Courts ↪113
170Bk113 Most Cited Cases

Libel and malicious prosecution suit transferred by federal district court for District of Columbia to Northern District of Ohio could properly be decided in Ohio, where both defendants resided in Ohio, so case could have been filed there in the first instance and therefore could be transferred to that district pursuant to statute. 28 U.S.C.A. §§ 1391(a), 1404(a).

[17] Injunction ↪98(1)
212k98(1) Most Cited Cases

[17] Injunction ↪98(2)
212k98(2) Most Cited Cases

Injunction would issue to prohibit defendant from reiterating statements which had been found in current and prior proceedings to be false and libelous to prevent future injury to libel plaintiff's

personal reputation and business relations. (Per opinion of Wellford, Circuit Judge, concurring in part and dissenting in part, with one Judge concurring.)

*1202 James M. Carpenter, Lima, Ohio, pro se.

Warren E. Baker, Prairie Village, Kan., John W. Solomon, Akron, Ohio, Douglas A. Baker, Columbus, Ohio, for plaintiffs-appellees and cross-appellants.

Before WELLFORD and GUY, Circuit Judges; and HULL, Chief District Judge. [FN*]

FN* Honorable Thomas G. Hull, Chief Judge, United States District Court, Eastern District of Tennessee, sitting by designation.

*1203 RALPH B. GUY, Jr., Circuit Judge.

In this libel and malicious prosecution action, the district court imposed sanctions and entered a default judgment as to liability against defendants James Carpenter and Carpenter Radio Company for failure to comply with discovery orders. The district court then conducted a bench trial on the issue of damages, which resulted in a judgment for only a nominal award in favor of each plaintiff. The defendants filed a notice of appeal, and the plaintiffs cross-appealed the adequacy of the relief granted by the district court. On review we affirm in part, reverse in part, and remand for further consideration of plaintiff John M. Lothschuetz's request for damages on his malicious prosecution claim. [FN1]

FN1. John Lothschuetz died in 1982 after this action was filed, and his widow, Mary Lothschuetz, was substituted as his legal representative on June 9, 1982. Cf. D.C. CODE ANN. § 12-101 (1989) (providing for survival of "all" causes of action accruing prior to death). For the sake of clarity, however, we shall refer to the surviving claims as those of John

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Lothschuetz, rather than of Mary
 Lothschuetz.

I.

Plaintiffs John Lothschuetz and Carolyn Hill served as attorneys for the Federal Communications Commission (FCC) before taking jobs as counsel for plaintiff United Telecommunications, Inc. (UTI), a company involved in telecommunications and related fields. Both before and during the employment of Lothschuetz and Hill with UTI, defendants James Carpenter and Carpenter Radio Company were embroiled in various judicial and administrative proceedings directly or indirectly involving UTI. As a result, Carpenter apparently developed a great deal of animosity towards UTI and its attorneys, particularly Lothschuetz and Hill.

In 1979, Carpenter filed a third-party complaint against Lothschuetz in an Ohio collection case brought by a UTI subsidiary, charging that Lothschuetz violated ethical standards by accepting a position with UTI after working for the FCC. Carpenter later moved for summary judgment alleging that Lothschuetz's career change contravened federal conflict-of-interest laws. Carpenter's motion also referred to unauthorized practice of law in the State of Ohio. The third-party complaint ultimately was dismissed in 1980. On the administrative front, Carpenter filed documents with the FCC in 1979 seeking damages and severe sanctions against Lothschuetz and Hill for their purportedly unethical behavior, and then submitted papers to the Commission in 1980 berating UTI for allegedly stealing Carpenter's equipment. Both proceedings were dismissed as unsupported. A 1980 letter from Carpenter to President Carter accused UTI of committing "genocide against [Carpenter's] small family business" and reiterated conflict-of-interest allegations against Lothschuetz. Other correspondence sent by Carpenter to several agencies and politicians repeated the general themes that Lothschuetz and UTI had violated conflict-of-interest laws, that Lothschuetz and Hill had ignored ethical responsibilities, and that UTI had stolen Carpenter's equipment.

[1] Lothschuetz, Hill, and UTI responded to

Carpenter's attacks by filing this diversity action against Carpenter and his partnership, Carpenter Radio Company, on November 20, 1980, in the United States District Court for the District of Columbia. The four-count complaint set forth a libel claim on behalf of each plaintiff as well as a single claim by all three plaintiffs for malicious prosecution. The case was transferred from the District of Columbia to the Northern District of Ohio in 1981 pursuant to 28 U.S.C. § 1404, yet the parties agree that District of Columbia law still controls the case. [FN2]

FN2. "[A] federal court in a diversity case applies the law of the state in which it sits, including the state's choice of law provisions." *Davis v. Sears, Roebuck and Co.*, 873 F.2d 888, 892 (6th Cir.1989). The Supreme Court recently decided that the "law of the forum" in a transferred case is the law of the state from which the case was transferred. *Ferens v. John Deere Co.*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990). District of Columbia choice of law rules require us to apply District of Columbia substantive law because the defamatory statements were circulated and the groundless actions were pursued almost exclusively in that locale. See, e.g., *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 n. 3 (D.C.Cir.) , cert. denied, 488 U.S. 825, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988).

*1204 While the case was pending in the Northern District of Ohio, the plaintiffs unsuccessfully attempted to obtain discovery from the defendants. Despite numerous court orders directing cooperation in the discovery process, Carpenter remained intransigent. On April 22, 1986, the district court granted the plaintiffs' Federal Rule of Civil Procedure 37(b) motion for monetary sanctions. The district court again sanctioned the defendants on January 27, 1987, imposing additional monetary penalties, striking the defendants' answer and jury demand, and ordering entry of a default judgment as to liability against both defendants.

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In March of 1987, the case proceeded to trial strictly on the issue of damages. The district court filed written findings of fact and conclusions of law on April 23, 1987. The district court's opinion and judgment, which focused exclusively upon the plaintiffs' libel claims, awarded each plaintiff \$1 in nominal damages and computed the total amount of sanctions for discovery violations to be \$2,743. [FN3] The district court expressly rejected the plaintiffs' demands for compensatory damages, punitive damages, and a permanent injunction. The plaintiffs promptly moved for additional findings on their malicious prosecution claim, which the district court issued on May 15, 1987. Specifically, the court determined that only Lothschuetz had sustained a "special injury," and that he failed to prove anything other than speculative damages. Accordingly, the district court amended the judgment to reflect that the defendants had engaged in malicious prosecution, but refused to modify the damage award. This appeal followed.

FN3. The plaintiffs requested nearly \$12,000 in sanctions, but the district court only awarded a fraction of that amount. We note in passing that court orders imposing Rule 37 sanctions "are reviewable only for abuse of discretion." *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 985 (6th Cir.1988). To the extent that the plaintiffs have raised an objection on appeal to the district court's sanctions award, we find no abuse of discretion.

In addressing the parties' various contentions, we shall initially consider the plaintiffs' cross-appeal, which raises several significant issues regarding libel and malicious prosecution. We then shall focus upon the defendants' appeal.

II.

Under District of Columbia law, "[a] successful libel plaintiff can recover three types of damages--nominal, compensatory [and] punitive." *Robertson v. McCloskey*, 680 F.Supp. 414, 415 (D.D.C.1988). Although the district court in this case awarded only nominal damages, the plaintiffs

contend that they should have received compensatory and punitive damages as well as injunctive relief. We shall address the plaintiffs' arguments concerning these potential components of recovery *seriatim*.

A.

[2][3][4][5][6][7][8] The plaintiffs' claims for compensatory damages involve two aspects--"general" and "special" damages. [FN4] "General damages compensate a plaintiff for harm to his reputation or emotional well-being; special damages, on the other hand, are awarded for losses of an economic or pecuniary nature." *Robertson*, 680 F.Supp. at 415 (citations omitted). Insofar as general damages are concerned, the plaintiffs ostensibly concede that they offered no significant evidence of harm to their reputations. Rather, they assert that general damages must be presumed. While the plaintiffs may avail themselves of the presumption*1205 concerning general damages, [FN5] the presumption entitles them to nothing more than what the district court awarded--nominal damages. See *Grossman v. Goemans*, 631 F.Supp. 972, 974 (D.D.C.1986) (quoting *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 337 F.Supp. 421, 431 (D.D.C.1972)). That the court in *Grossman* awarded \$2,500 in nominal damages does not perforce suggest that the \$1 nominal damage figure selected by the district court in this case is inadequate. The district court's determination concerning the appropriate amount of nominal damages is, in our view, entitled to substantial deference. [FN6] Here, we find no error in the award of \$1 in nominal damages to compensate each plaintiff for harm established only by presumption.

FN4. District of Columbia law requires private individuals suing for defamation to prove negligence by a preponderance of evidence in order to recover compensatory damages, whereas public figures must prove actual malice by clear and convincing evidence. See, e.g., *Pearce v. E.F. Hutton Group, Inc.*, 664 F.Supp. 1490, 1509 (D.D.C.), *rev'd on other grounds*, 828 F.2d 826 (D.C.Cir.1987). Because liability was established by the

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district court's entry of a default judgment, however, we need not consider whether the defendants' conduct satisfied the relevant standard of culpability.

FN5. In *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Supreme Court held that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349, 94 S.Ct. at 3011.

Justice Powell's plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), however, limited the *Gertz* rule to cases involving defamatory statements on "matters of public concern." *Id.* at 763, 105 S.Ct. at 2947. *Dun & Bradstreet* expressly indicated that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Id.* The effect of *Dun & Bradstreet*, therefore, was to lower the *permissible* threshold for presumed and punitive damages in certain cases; states still retain the right to establish higher standards than the constitutionally mandated minimums defined in *Gertz* and *Dun & Bradstreet*. The District of Columbia permits recovery of presumed damages, *see, e.g., Grossman v. Goemans*, 631 F.Supp. 972, 974 (D.D.C.1986), and the district court granted the plaintiffs' request for presumed damages in this case. Because the defendants failed to contest or even address the propriety of such an award, we need not consider whether this case involves a matter of public concern (thereby implicating *Gertz*) or not (thereby implicating *Dun & Bradstreet*).

FN6. Nominal damages are neither designed nor required to compensate a

plaintiff in a libel action. As Judge Leventhal observed for the *en banc* court in *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649 (D.C.Cir.1966), "[t]he allowance of nominal damages performs a vindicatory function by enabling the plaintiff to brand the defamatory publication as false." *Id.* at 660. The underlying purpose of nominal damages makes us especially reticent about second-guessing the size of such awards.

[9] Plaintiff Lothschuetz also contends that the district court incorrectly refused to award him special damages. Specifically, Lothschuetz argues that a nascent partnership opportunity with a large law firm was scuttled by the charges that Carpenter made against him. The district court, however, rejected this argument reasoning that the offer was only temporarily withdrawn and that Lothschuetz never had any firm intention of accepting the position. We must accept both of these findings unless they are clearly erroneous. *See Fed.R.Civ.P. 52(a); cf. also Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092, 1095-96 (1986) (whether defamation plaintiff suffered special damages is a question of fact). The plaintiffs adduced no proof that Lothschuetz intended to do anything more than simply consider the offer. Moreover, the testimony of Mary Lothschuetz supports the district court's conclusion that the partnership offer was only temporarily withdrawn pending resolution of Carpenter's defamatory charges. Upon reviewing the record as a whole, we find that the district court's refusal to award special damages was not clearly erroneous.

B.

[10] All three plaintiffs object to the district court's denial of punitive damages. District of Columbia law only permits punitive damages if a plaintiff proves actual malice by clear and convincing evidence. *See, e.g., Grossman*, 631 F.Supp. at 974 (collecting cases). The plaintiffs contend that the district court's entry of a default judgment as to liability resulted in the conclusive establishment of actual malice as alleged in the plaintiffs' complaint. We find this reliance upon the bare allegations in the complaint unpersuasive. A default judgment in

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a libel case "is only conclusive as to liability and does not constitute an admission as to damages." *Meehan v. Snow*, 494 F.Supp. 690, 698 (S.D.N.Y.1980), *rev'd on other grounds*, 652 F.2d 274 (2d Cir.1981). Therefore, "[n]o award for punitive *1206 damages should be made in a defamation action where the defendant has defaulted if plaintiff has 'produced no evidence upon the basis of which the Court can determine that either of the defendants was chargeable with actual malice.' " *Id.* (citation omitted). Applying this logic, we reject the plaintiffs' attempt to obtain punitive damages based solely upon the admission of liability effectuated by the entry of a default judgment.

[11] The plaintiffs further contend that the record conclusively displays the defendants' actual malice, thereby entitling each plaintiff to punitive damages. The plaintiffs' position, however, demonstrates a fundamental misapprehension of the "actual malice" concept. "[T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks Communications, Inc v. Connaughton*, 491 U.S. 657, ----, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562 (1989). Rather, actual malice "is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true." *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 601 (D.C.Cir.1988), *cert denied*, 489 U.S. 1010, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989). In making their argument that Carpenter acted with reckless disregard for the truth, the plaintiffs fail to recognize that reckless disregard "requires more than a departure from reasonably prudent conduct." *Connaughton*, 491 U.S. at ----, 109 S.Ct. at 2696. "There must be sufficient evidence to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). "The standard is a subjective one--there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity.' " *Connaughton*, 491 U.S. at ----, 109 S.Ct. at 2696 (citation omitted).

In this case, the record clearly indicates that Carpenter merely reasoned (albeit erroneously) that UTI's hiring of Lothschuetz and Hill after their

tenures with the FCC was impermissible. Carpenter's subjective belief in the truth of his allegations was manifested at the trial of this matter, where he vehemently reiterated many of the accusations that he raised in papers filed with the FCC and correspondence sent to various politicians. Although Carpenter's judgment and logic may not have been sound, we cannot conclude that he acted with actual malice. Our review of the district court's actual malice ruling as a question of law subject to detailed consideration, *see Connaughton*, 491 U.S. at ----, 109 S.Ct. at 2694; *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), leads us to the conclusion that the district court correctly rejected the plaintiffs' request for punitive damages.

C.

Insofar as the plaintiffs' demand for a permanent injunction is concerned, "[t]he usual rule is 'that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages.' " *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C.Cir.1987). The district court, which characterized the injunction requested by the plaintiffs as an unwarranted prior restraint on freedom of speech, refused to award injunctive relief. I would adhere to the general rule identified by the District of Columbia Circuit and uphold the district court's decision. Judge Wellford, joined by Judge Hull, is of a contrary view and thus the dissent becomes the opinion of the court on this issue.

III.

[12] The District of Columbia allows civil recovery for malicious prosecution, but only upon a showing of "special injury." [FN7] *See, e.g., Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C.App.1980) (reaffirming "special injury requirement"). Special injury contemplates more than the mere expenditure of the "costs incident to any litigation[.]" *See id.* Even though such expenses resulting *1207 from a single, unsuccessful action are not compensable under the District of Columbia's law of malicious prosecution, "[t]he burden of being compelled to defend *successive* unconscionable suits" meets the special injury standard. [FN8] *Soffos v. Eaton*, 152

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F.2d 682, 683 (D.C.Cir.1945) (emphasis added). According to *Soffos*, as the district court recognized, the plaintiffs could establish a right to recover for malicious prosecution by proving that the defendants repeatedly asserted a groundless legal claim against them.

FN7. In addition to "special injury," the District of Columbia requires three elements to establish malicious prosecution: "(1) the underlying suit terminated in the plaintiff's favor; (2) malice on the part of the defendant; [and] (3) lack of probable cause for the underlying suit [.]" *Brown v Carr*, 503 A.2d 1241, 1244 (D.C.App.1986). These three elements are not at issue because of the default judgment as to liability entered by the district court.

FN8. This rule, which was devised by the United States Court of Appeals for the D.C. Circuit in 1945, is binding in the District of Columbia. As the District of Columbia Court of Appeals has explained, "decisions of the United States Court of Appeals rendered prior to February 1, 1971," like the decisions of the D.C. Court of Appeals, "constitute the case law of the District of Columbia." *M.A.P. v Ryan*, 285 A.2d 310, 312 (D.C.App.1971).

[13] The district court addressed the malicious prosecution claim by reviewing the plaintiffs' amended complaint, which identified three separate actions initiated by Carpenter. The first proceeding, a 1979 "Motion for Censure and Suspension" before the FCC, was directed at plaintiffs Lothschuetz and Hill as well as other UTI attorneys. [FN9] A third-party complaint filed in December of 1979 against Lothschuetz in the Allen County Court of Common Pleas essentially restated the charges made in the FCC motion. [FN10] Finally, Carpenter filed a complaint against UTI with the FCC in August of 1980. Analyzing the plaintiffs' malicious prosecution claim in light of the District of Columbia's special injury requirement, the district court reasoned that only Lothschuetz

could recover damages for having been sued twice. The other plaintiffs, Hill and UTI, each had to defend only one action filed by Carpenter. We find this analysis to be sound; only plaintiff Lothschuetz met the special injury standard set forth in *Soffos*.

FN9. Carpenter's subsequent appeal to the Commission itself from an administrative law judge's adverse determination on the motion for censure does refer to UTI in addition to its lawyers, but the appeal does not even offer an argument in support of any claim against UTI.

FN10. Despite plaintiff UTI's protestations, the district court determined that the third-party complaint was directed solely against Lothschuetz, rather than against both Lothschuetz and UTI. We find that the district court's conclusion concerning the third-party complaint is not clearly erroneous. *Cf. Anderson v. Bessemer City, North Carolina*, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985) (findings of fact are subject to "clearly erroneous" review under Federal Rule of Civil Procedure 52(a) even when the findings are based "on physical or documentary evidence"). The document itself refers to Carpenter's "third-party complaint against John M. Lothschuetz, Esq." and requests damages only from "the third-party defendant, John M. Lothschuetz, Esq."

[14] Turning to Lothschuetz's specific request for damages on the malicious prosecution claim, the district court found that Lothschuetz failed to prove any type of emotional harm or injury to his reputation. This finding apparently is not contested on appeal. The district court further denied Lothschuetz compensation for the costs of defending the actions against him because, in the district court's view, he failed to prove with sufficient particularity the amount of attorney fees he incurred in his own defense. The evidence on attorney fees introduced by the plaintiffs provides total defense cost figures pertaining to each of the

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three actions brought by Carpenter. [FN11] The district court faulted the plaintiffs for failing to offer any itemization of the legal services for which they sought reimbursement, thereby precluding accurate calculation of their recoverable damages. Because plaintiff Lothschuetz unquestionably incurred costs in defending himself twice against groundless charges, we find that the plaintiff should be given the opportunity to substantiate his claim for legal expenses resulting from the second action. Accordingly, we reverse this *1208 aspect of the district court's ruling and remand the case to the district court for a hearing to determine and itemize the attorney fees plaintiff Lothschuetz legitimately expended in his own defense in the Allen County Court of Common Pleas third-party action.

FN11. Affidavits from several sources indicate that Lothschuetz spent \$3,715.50 defending himself from the third-party complaint. In addition, total sums of \$1,050 in outside fees and \$1,430 in UTI in-house fees were expended in the course of defeating the "Motion for Censure and Suspension."

IV.

[15] With respect to the defendants' appeal, their notice of appeal and their appellate briefs make it virtually impossible to discern which aspects of the district court's decisions they find objectionable. [FN12] Nevertheless, we can detect several arguments relating to various rulings made by the district court that warrant discussion. First, the defendants repeatedly attack the accuracy of the transcripts from various hearings and the trial on damages. Federal Rule of Appellate Procedure 10(e) provides that "[i]f any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court [.]". Thus, the defendants must pursue their challenges to the record's accuracy before the district court. *See* Fed.R.App.P. 10(e).

FN12. While the defendants' notice of appeal is hardly a model of lucidity, we are

mindful of Federal Rule of Appellate Procedure 3(c)'s admonition that "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Accordingly, we shall address the defendants' appeal on the merits.

[16] Second, the defendants contend that this case should be decided in the District of Columbia District Court and Circuit Court of Appeals. The United States District Court for the District of Columbia transferred the case to the Northern District of Ohio pursuant to 28 U.S.C. § 1404(a), which permits the "transfer [of] any civil action to any other district or division where it might have been brought." According to 28 U.S.C. § 1391(a), a diversity action may be filed "in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." Because both defendants in this case reside in the Northern District of Ohio, the case could have been filed in that court in the first instance, and therefore could be transferred to that district under the authority of 28 U.S.C. § 1404(a). Moreover, "[o]n change of venue the overwhelming authority holds that the jurisdiction and powers of the transferee court are coextensive with that of the transferor court[.]" *Danner v. Himmelfarb*, 858 F.2d 515, 521 (9th Cir.1988), *cert. denied*, 490 U.S. 1067, 109 S.Ct. 2067, 104 L.Ed.2d 632 (1989). Thus, the District Court for the Northern District of Ohio could "make any order to render any judgment that might have been rendered by the transferor court in the absence of transfer." *Id.* We find no merit in the defendants' contention that this case cannot be properly decided in the Northern District of Ohio and reviewed by this court on appeal.

Finally, the defendants object to the trial judge's refusal to recuse himself for bias. This circuit follows the stringent rule requiring recusal whenever "judicial bias and/or hostility is found to have been exhibited at any stage of a judicial proceeding." *Anderson v. Sheppard*, 856 F.2d 741, 746- 47 (6th Cir.1988). We have repeatedly emphasized that " 'great care must be taken by a judge to 'always be calmly judicial, dispassionate and impartial.' " *Id.* at 745 (quoting *United States v. Hickman*, 592 F.2d 931, 933 (6th Cir.1979)). Our review of the record reveals that the district

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judge who tried this case exhibited precisely this type of professional behavior throughout the course of the proceedings. We find the defendants' argument to the contrary meritless.

END OF DOCUMENT

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED.

WELLFORD, Circuit Judge, concurring in part and dissenting in part:

[17] I agree in all respects with the disposition of the majority with one exception in part II C. I would grant a narrow and limited injunction to prohibit Carpenter from continuing and reiterating the same libelous and defamatory charges he and his company have made against Carolyn C. Hill as described in the majority opinion.

With regard to plaintiffs' demand for a permanent injunction, I would find that, in *1209 view of Carpenter's frequent and continuing defamatory statements, an injunction is necessary to prevent future injury to Carolyn Hill's personal reputation and business relations. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390, 93 S.Ct. 2553, 2561, 37 L.Ed.2d 669 (1973); see also *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F.Supp. 602, 609 (D.C.Colo.1983). I, however, would limit the application of such injunction to the statements which have been found in this and prior proceedings to be false and libelous.

I dissent, then, only with respect to entrance of an injunction as set out herein, and would remand to the district court for entry of such an injunction.

HULL, District Judge, concurring in part and dissenting in part.

I concur in all of Judge Guy's opinion except part II C. On the issue of the injunction, I concur with Judge Wellford.

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▷

Supreme Court of Minnesota.

ADVANCED TRAINING SYSTEMS, INC. and
 Edwin J. Taylor, Appellants,

v.

CASWELL EQUIPMENT COMPANY, INC.,
 Theodore N. Busch, and Sente Company, Inc.,
 Respondents.

No. C3-82-966.

May 25, 1984.

Manufacturer of firearms training equipment and its president brought action against competitor, its president, and close corporation owned by president and his wife, alleging, inter alia, libel and disparagement of products, and defendants counterclaimed. Following jury verdict in favor of plaintiffs on libel and disparagement of products issues, the District Court, Hennepin County, Robert E. Bowen, J., granted judgment n.o.v. on plaintiffs' claim of product disparagement, ordered new trial on damages, and concluded that individual plaintiff's libel claim was time barred. On appeal, the Supreme Court, Scott, J., held that: (1) evidence was sufficient to support jury's finding of personal libel within time limits of statute of limitations; (2) plaintiffs were not entitled to recover on product disparagement claim; (3) defendants were entitled to a new trial on damage question for libel only; (4) plaintiffs were not required to prove special damages to support their libel claims; (5) trial court did not abuse its discretion in refusing to grant new trial on grounds of excessive damages; (6) injunction restraining defendants from publishing materials found to be libelous or disparaging after jury trial was not unconstitutional; and (7) defendants' contentions that plaintiffs' unfair competition infringement suits were asserted in bad faith and were brought with predatory intent were without evidentiary support.

Affirmed in part and reversed in part.

West Headnotes

[1] Limitation of Actions ⤵ 197(1)
 241k197(1) Most Cited Cases

In libel action, evidence, including publisher's record that it received income from sales of allegedly libelous book totaling \$2,217 in 1979, but that did not indicate whether any of those such sales occurred after February 1, was sufficient to support jury's finding of personal libel after February 1, 1979, and thus, personal libel of defendant occurred within two years statute of limitations period. M.S.A. § 541.07(1).

[2] Libel and Slander ⤵ 130
 237k130 Most Cited Cases

Plaintiff may not recover for "product disparagement" unless plaintiff is able to prove special damages in form of pecuniary loss directly attributable to defendant's false statements.

[3] Libel and Slander ⤵ 130
 237k130 Most Cited Cases

Where plaintiff cannot show loss of specific sales as a result of product disparagement, plaintiff may prove a general decline of business, so long as such is shown to be the result of defendant's disparaging statements and other possible causes are eliminated.

[4] Libel and Slander ⤵ 139
 237k139 Most Cited Cases

In product disparagement action by manufacturer of firearms training equipment, manufacturer's allegation that their business would have been more successful in its early years had competitor not disparaged their products was too speculative to meet requirement that special pecuniary loss in a disparagement case be proved with particularity; furthermore, manufacturer did quite well despite disparagement, and in fact captured 97% of market for portable firearms training equipment.

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[5] Libel and Slander ⚡139
 237k139 Most Cited Cases

In product disparagement action brought by president of manufacturer of firearms training devices, expenses allegedly incurred by president in counteracting defendant's propaganda, to mitigate losses were not an item of "special damage" and could not be recovered, since president failed to prove that defendant's conduct was tortious.

[6] Damages ⚡42
 115k42 Most Cited Cases

Efforts to mitigate damages in tort are not compensable unless plaintiff proves a tort.

[7] Damages ⚡42
 115k42 Most Cited Cases

Where special damages are an essential element of plaintiff's action, they must be proved before mitigation expenses may be considered.

[8] New Trial ⚡9
 275k9 Most Cited Cases

Defendant was entitled to new trial for damages from libel only, since trial court improperly allowed jury to award damages for product disparagement absent proof of special damages, since jury calculated damages resulting from product disparagement and from libel together, and since not all of disparaging material would be admissible on retrial for damages from libel only.

[9] Libel and Slander ⚡9(7)
 237k9(7) Most Cited Cases

Defendants' allegations that plaintiff produced unsound or "shoddy" goods merely disparaged product and did not libel plaintiff.

[10] Libel and Slander ⚡139
 237k139 Most Cited Cases

Trial court erred in instructing jury to "add up" harm to plaintiffs caused by product disparagement and libel, since plaintiff failed to prove special damages as a result of product disparagement; even if disparaging material would be admissible to

prove libel, jury should have been instructed to consider harm to plaintiffs' business reputation from libel only, and should not consider libel and disparagement as independent causes of harm.

[11] Libel and Slander ⚡33
 237k33 Most Cited Cases

Phrase "libel per se" refers to statements that are defamatory as a matter of law; such term is not used to distinguish libel per se that is actionable without proof or special damages from libel "per quod" that is not.

[12] Libel and Slander ⚡73
 237k73 Most Cited Cases

Corporation may recover in libel without showing special pecuniary damages.

[13] Libel and Slander ⚡73
 237k73 Most Cited Cases

To recover in libel, a corporation must show that defendant's written statements directly tended to affect the credit, property or business of corporate plaintiff.

[14] Libel and Slander ⚡120(1)
 237k120(1) Most Cited Cases

Punitive damages are recoverable in a libel action.

[15] Libel and Slander ⚡139
 237k139 Most Cited Cases

In libel action brought by corporation and its president, statements that president was a "thoroughly bad egg" and "very careless with law," and other remarks, although time barred as to merits of libel claims, tended to show willfulness and defendants' indifference to plaintiffs' rights, and thus, were admissible for purposes of determining whether to award punitive damages pursuant to statute. M.S.A. § 549.20, subd. 1.

[16] Appeal and Error ⚡979(5)
 30k979(5) Most Cited Cases

[16] New Trial ⚡76(1)
 275k76(1) Most Cited Cases

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Discretion to grant a new trial on ground of excessive damages rests with trial court, whose determination will only be overturned for abuse of such discretion.

[17] New Trial ↪76(6)
 275k76(6) Most Cited Cases

In libel action, trial court, which expressly concluded that actual damages of \$75,000 and punitive damages of \$250,000 to individual plaintiff did not appear excessive or to have been given by jury under influence of passion or prejudice, did not abuse its discretion in refusing to grant new trial on ground of alleged excessiveness of damages.

[18] Trade Regulation ↪641
 382k641 Most Cited Cases

Injunctive relief against false and misleading product disparagement is specifically authorized by the Deceptive Trade Practices Act. M.S.A. § 325D.45, subd. 1.

[19] Constitutional Law ↪90.2
 92k90.2 Most Cited Cases

Under the First Amendment, false or misleading "commercial speech" may be forbidden. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law ↪90.1(5)
 92k90.1(5) Most Cited Cases

Where material disparaging manufacturer's product had been circulated for a number of years, and where judicial tribunal, after full jury trial, found that such criticism of product constituted false or misleading product disparagement, injunction restraining publication of material found either libelous or disparaging was not unconstitutional under the First Amendment. U.S.C.A. Const.Amend. 1.

[21] Appeal and Error ↪866(3)
 30k866(3) Most Cited Cases

When reviewing trial court's granting of a directed verdict, Supreme Court applies same standard as trial court, which is that such a motion should be granted only when it would clearly be trial court's

duty to set aside a contrary verdict as manifestly against evidence or when such a verdict would not comply with applicable law.

[22] Monopolies ↪12(2)
 265k12(2) Most Cited Cases

Defendant may prevail on an antitrust counterclaim alleging that suit was brought against it as part of and in furtherance of an attempt to monopolize only where plaintiff has brought a groundless suit in bad faith and defendant can prove this by clear and convincing evidence, or where plaintiff has sued with a predatory intent to destroy competition and lawsuit forms an integral part of plan to do so.

[23] Monopolies ↪28(7.5)
 265k28(7.5) Most Cited Cases
 (Formerly 265k28(7.4))

Defendants' contention that plaintiffs' unfair competition and infringement suits against it, which were based on theory that use of plaintiffs' corporate name by competitors posed risk of confusing market and appropriating plaintiffs' good will, and that suits were brought by plaintiff with a predatory intent and as part of an overall anticompetitive scheme, were without evidentiary support; therefore, defendants were not entitled to treble damages based on claim that plaintiffs' suits were part of and in furtherance of an attempt to monopolize. M.S.A. § 325D.52.

[24] Monopolies ↪12(2)
 265k12(2) Most Cited Cases

For purpose of determining whether suit was in furtherance of an attempt to monopolize in violation of statute, mere fact that court eventually dismissed a number of claims in no way proves that such claims were groundless or brought in bad faith. M.S.A. § 325D.52.

*3 Syllabus by the Court

1. The plaintiffs introduced sufficient evidence to support the jury's finding of personal libel within the time limits of the statute of limitations.

2. The plaintiffs failed to prove special damages and therefore failed to support their claim for product disparagement. A new trial is proper, submitting a single damage question for libel only.

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3. Proof of special damages is not required to support claims for libel.

4. Evidence of publication by a defendant of statements demonstrating a willful disregard of plaintiff's rights is admissible without regard to the statute of limitations.

5. We find no abuse of discretion in the refusal by the trial court to grant a new trial on the ground of excessive damages.

6. Under recent standards announced by this court and the United States Supreme Court, the permanent injunction issued by the trial court is not unconstitutional.

7. The trial court did not err in dismissing the defendants' counterclaims.

Eric J. Magnuson, Mary W. Mason, Minneapolis, for appellants.

Laura S. Underkuffler, Charles A. Mays, Minneapolis, for respondents.

Heard, considered and decided by the court en banc.

SCOTT, Justice.

Plaintiffs appeal from the order of the Hennepin County District Court granting *4 in part defendants' motions for judgment n.o.v. and a new trial. Plaintiff Advanced Training Systems, Inc. (ATS) brought suit against Caswell Equipment Company, its president Theodore Busch, and the Sente Corporation, Inc., a close corporation owned by Busch and his wife, Sente Busch. In an amended complaint plaintiffs added Edwin J. Taylor, president of ATS, individually as party plaintiff. The amended complaint alleged that defendants had libeled ATS as well as Edwin Taylor personally, and had disparaged the company's products. Plaintiffs also alleged trademark and service mark infringement, unfair competition, abuse of process, and various violations of the Uniform Deceptive Trade Practices

Act, Minn.Stat. §§ 325D.43-48 (1982). By counterclaim, defendants charged plaintiffs with violations of the Deceptive Practices Act and the state antitrust laws, as well as unfair competition, trademark and service mark infringement, abuse of process and malicious prosecution. At the close of the evidence, the trial court directed a verdict for plaintiffs on all of defendants' counterclaims. The court submitted only plaintiffs' libel and disparagement claims to the jury.

The jury returned a special verdict in favor of plaintiffs. It found that defendants had libeled both plaintiffs and had disparaged their products. The jury then assessed the damages to the corporation resulting from both the libel and the disparagement in a single answer on the special verdict form, as the trial court had instructed it to do. It awarded ATS \$250,000 in actual damages and \$450,000 in punitive damages for both torts. The jury awarded plaintiff Taylor \$75,000 in actual and \$250,000 in punitive damages.

The defendants moved for judgment n.o.v. or a new trial on all issues. The court granted judgment notwithstanding the verdict on ATS' claim of product disparagement, ruling that ATS had failed to prove special damages as required for a cause of action. The court felt compelled to order a new trial on ATS' damages as a result, because the jury had erroneously been asked to assess the damages to ATS as a result of both the libel of the corporation and the disparagement of its products. A new trial was thus necessary on the issue of damages to ATS flowing from the defendants' libelous statements only. The trial court also concluded that plaintiff Taylor had failed to prove the publication of any libel within the two-year statutory period and that his claim was time-barred. The court therefore granted defendants' motion for judgment notwithstanding the verdict on Taylor's libel claim as well. Finally, the court awarded plaintiff attorney fees and a permanent injunction under the Uniform Deceptive Trade Practices Act, Minn.Stat. § 345D.45 (1982).

Advanced Training Systems and Caswell Equipment Company are competing manufacturers of firearms training equipment. Municipalities and police departments make up almost the only market for these products. The equipment is designed to

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train police officers to use their weapons wisely even under the extreme stress of a gun battle. The equipment selectively presents human-figure targets to the police trainee by rapidly turning the target from an edged or "hidden" position to a frontal or "exposed" one. When the target is exposed, the trainee fires. The training officer can also unpredictably present "friend" or "foe" targets that require the trainee to decide very quickly whether to fire. When a group of these targets is arranged in sequence, the training officer is able to create stress in the shooter by forcing the trainee to make that decision a number of times in rapid succession.

In 1973 Caswell Equipment Company began experiencing financial difficulties and asked its bank for a small business loan. The bankers told Caswell's principals that the company needed a professional manager in order to qualify for the loan, and called their attention to a newspaper advertisement placed by an experienced corporate manager who held an MBA degree. In the advertisement, plaintiff Edwin J. Taylor offered his services to a firm seeking to expand. Caswell hired Taylor as its chief executive officer shortly thereafter. *5 Taylor and Caswell's principals soon became embroiled in a bitter dispute over management philosophies, and Taylor had a number of heated arguments with defendant Busch in particular. Taylor met with two key employees of Caswell during this time and discussed with them the possibility of joining him in a competing firm. The three also approached a supplier of Caswell to ask whether it would be interested in supplying such a company. In the meantime, Taylor and Busch's relationship continued to deteriorate, and Taylor left Caswell in October of 1973 after less than four months with the company. Taylor began organizing his competing firm, Advanced Training Systems, within a week. The two Caswell employees followed him a short time later.

In 1974 or 1975, defendant Busch first wrote what he called "Technical Bulletin 1217" in an attempt to persuade potential customers to buy from Caswell rather than ATS. Busch revised this bulletin slightly in 1976. The 1976 version asserted that while ATS equipment was inferior to Caswell's, it nevertheless repeatedly appeared in bid solicitations that "might otherwise have specified sound products." Caswell therefore wanted customers "to

be aware of the following facts:

- "1. That the ATS equipment substitutes gimmicks for needed features.
2. That it does not provide its most publicized features.
3. That the premises it is based upon are unsound."

The bulletin charged that while ATS equipment was "apparently copied from [Caswell's] concepts," it was not in the buyer's "best interest." Busch also alleged that Edwin Taylor, mentioned by name as president of Advanced Training Systems, had organized his competing firm while still an employee of Caswell. Busch distributed this document to many customers of both firms by enclosing it with his company's bids when bidding in competition with ATS.

Busch continued the attack in personal letters to customers and friends in the business. At about the time Taylor incorporated ATS, Busch stated in a letter to another firearms training manufacturer that he intended to "thoroughly neutralize" Taylor. Busch elsewhere called Taylor a "thoroughly bad egg" who was "very careless with the law," and whose company apparently thought it had a "license to steal". By letter of February 2, 1976, Busch described his experience with Taylor at Caswell as follows: "Our banker convinced us that what we needed was a sharp young MBA to run the company. What we got was an unprincipled SOB." He labeled ATS's products "shoddy" in a letter to Sergeant Burns of the Los Angeles County Sheriff's Department, and said he suspected ATS and other companies of bid- or price-rigging in a letter to another prospective customer. In a letter to Butte Community College dated September 28, 1978, Busch labeled various ATS product features "nuisance[s]" that were "of no real value" or "too difficult to use."

In 1978 Busch again revised "Bulletin 1217," this time apparently on advice of counsel. Busch deleted the assertion that Taylor had organized ATS while still a Caswell employee. Also gone was the implication that bids based on ATS specifications called for equipment that was not "sound." The charges that ATS equipment was based on unsound

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"premises" and contained "gimmicks" in place of "needed features" were retained, but the bulletin now stated that these were Caswell's opinions rather than "facts," as the earlier version had alleged. Taylor was mentioned only as the person "now doing business as Advanced Training Systems."

In 1977, Busch published a book called "Guidelines for Police Shooting Ranges," and continued his campaign against ATS in this new forum. In the original version of this book, Busch labeled Advanced Training Systems a "fly-by-night" company. Busch explained that while such fly-by-night firms sometimes offer attractive "gimmicks," they nevertheless are "dangerous because their simplistic solutions delay responsible decisions by training officers." Busch also claimed that the founder *6 of ATS had been an employee of Caswell "and actually started his operation while still with that company before he was discovered." By November of 1977, defendant Sente Company had distributed 169 copies of this book to various individuals and organizations, including law enforcement agencies, book shops, and several public libraries. In April of 1980, however, Busch deleted the allegation that Taylor had started ATS while still with Caswell from subsequent editions of the "Guidelines."

Plaintiff ATS filed suit on November 7, 1977. On or about February 10, 1981, plaintiff filed a second amended complaint adding Edwin Taylor for the first time as party plaintiff, and alleged that defendants had libeled Taylor personally. The trial court held that this amendment would not relate back to the date of the original filing. No appeal is taken from that ruling. February 1, 1979, is therefore the accepted cut-off date for the two-year statute of limitations on Taylor's libel claim. *See* Minn.Stat. § 541.07, subd. 1 (1982). The trial court instructed the jury not to consider any statements made before this for purposes of Taylor's claim. The jury by special verdict found that defendants had libeled both the corporate plaintiff and Edwin Taylor personally, and had disparaged plaintiffs' products.

After the return of the verdict, the trial court submitted a detailed memorandum explaining its own as well as the jury's conclusions. Based on the verdict, the court found that the pre-1978 version of

"Bulletin 1217" libeled both plaintiffs by falsely charging that Taylor had started ATS while still with Caswell. Busch deleted this allegation in 1978, and thereafter the bulletin contained no libelous material. The bulletin nevertheless disparaged plaintiffs' products in all of its versions, and the jury could find that the bulletin contained false or misleading assertions of fact even after Busch relabeled the disparaging statements "opinions." *See* Minn.Stat. § 325D.44, subd. 1(8) (1982). The court concluded that the 1977 version of the "Guidelines" book also libeled both plaintiffs and disparaged their products, while the 1980 version was merely disparaging.

The trial court, however, found itself unable to sustain the jury's verdict in two important respects. First, the court ruled that "special damages" were an essential element of a cause of action for product disparagement, and that the plaintiffs had failed to prove such damages. Therefore, the jury's combined award of damages to the corporation based on both libel and disparagement had to be reversed. Second, the court held that plaintiffs had not introduced sufficient evidence of a personal libel of Taylor within the statutory period. The court reversed the jury's contrary conclusion and granted judgment notwithstanding the verdict to defendants on this claim. We affirm in part, reverse in part, and remand for further proceedings.

The following issues are before this court:

- (1) Whether the evidence supported the jury's finding that defendants libeled plaintiff Taylor personally after February 1, 1979.
- (2) Whether plaintiff ATS was required to prove special damages in support of its claim for product disparagement, and whether it has proven such damages.
- (3) Whether special damages were required to support either plaintiff's libel claim.
- (4) Whether the trial court erred in allowing the jury to consider time-barred statements of defendants in its award of punitive damages.
- (5) Whether the damages awarded are excessive.

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(6) Whether the trial court properly enjoined publication of the original "Guidelines" book and the pre-1978 versions of "Bulletin 1217".

(7) Whether the trial court erred in refusing to submit to the jury the defendants' claims of anti-trust violations, abuse of process and malicious prosecution, and for attorney fees under the Uniform Deceptive Practices Act.

*7 1. The trial court held that the "single publication" rule did not apply to this action because the Guidelines book was neither mass-produced nor mass-distributed. With this we agree. It must therefore be determined whether the trial court erroneously ruled that there was insufficient evidence to support the jury's finding of a personal libel of Taylor after February 1, 1979. This factual dispute revolves around defendants' distribution of the "Guidelines" book, which the jury found had libeled Taylor.

[1] The evidence at trial indicated that, of a total of 500-1000 copies of this book distributed by defendants overall, 169 went out prior to November 1977. Another 50 were the non-libelous version of April 1980. This leaves some 300 to 800 libelous copies unaccounted for that were distributed after November of 1977. Plaintiffs introduced the sales records of the Sente Company in an attempt to prove publication of the libel after January of 1979. These indicate that Sente recorded income from the sales of books totaling \$2,217.00 in 1979. The purchase price of the Guidelines book was \$17.50. From these facts plaintiffs conclude that 126 copies of the book were sold in 1979, and that it was reasonable for the jury to infer that at least some went out after February 1. Defendants point out that no evidence showed that the sales recorded by Sente in 1979 were actually made in that year, or that any 1979 sales were made after the first month of the year. It seems the parties simply failed to produce any evidence at all on these issues. There was evidence that Sente was not primarily in the publishing business, and no evidence that it ever published anything except the "Guidelines" book. Defendant Busch testified that the 1980 revised version of the book went out "continuously," and that Sente mailed out a copy of the earlier version whenever someone ordered it. The jury apparently concluded that Sente has continuously distributed

this book since it was first published, and that at least some copies of the libelous edition went out between February of 1979 and April of 1980. This inference appears more reasonable than the theory advanced by defendant, that perhaps the otherwise continuous distribution stopped for some reason during this time. Defendants, moreover, produced no evidence in support of their theory at trial. Defendant Sente Company's own records allowed the jury to infer that sales recorded in 1979 were made in that year. This reasonable inference was not rebutted. When viewed in the light most favorable to the jury's conclusion, the evidence was sufficient to support the verdict. We therefore reverse the trial court on this issue and order the reinstatement of the jury verdict.

2. The trial court submitted a single damage question to the jury for plaintiff ATS. The jury was asked to assess the damages the corporation had suffered as the result of both libel and disparagement, in the event the jury found that defendants had committed both torts. The court submitted the single damage question because it felt the jury would have great difficulty separating the damages ATS suffered as the result of the libel from those it incurred from the disparagement. Neither party objected to this. Nevertheless, the court became convinced in the course of argument on the post-trial motions that this submission had been in error, because while "special damages" were not required for libel, they were required for disparagement.

[2][3] This ruling of the trial court is correct. It has long been the law that plaintiff may not recover for product disparagement unless plaintiff is able to prove special damages in the form of pecuniary loss directly attributable to defendant's false statements. *See Wilson v. Dubois*, 35 Minn. 471, 473, 29 N.W. 68, 69 (1886); *see also Hayward Farms Co. v. Union Savings Bank & Trust Co.*, 194 Minn. 473, 475, 260 N.W. 868, 869 (1935); *Quevli Farms, Inc. v. Union Savings Bank & Trust Co.*, 178 Minn. 27, 28-29, 226 N.W. 191, 192 (1929); W. Prosser, *Handbook of the Law of Torts* § 128, at 922-24 (4th ed. 1971). Where plaintiff cannot show loss of specific sales, the modern view allows plaintiff to prove a general decline of business,*8 so long as this is shown to be the result of defendant's disparaging statements and other possible causes

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are eliminated. See *Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, Inc.*, 17 F.2d 255, 260 (8th Cir.1926); cf. *Wilson*, 35 Minn. at 473, 29 N.W. at 69. Here, the trial court held that plaintiffs failed to prove either the loss of a specific sale or a general decline in business. Plaintiffs do not challenge those factual conclusions.

[4] Plaintiffs make two arguments in support of their contention that they nevertheless proved special damages at trial. First, they argue that ATS suffered pecuniary loss because defendants' disparaging statements prevented the company from growing as fast as it otherwise would have. The company has done quite well despite defendant's campaign, and in fact has captured about 97 percent of the market for portable firearms training equipment. Plaintiffs nevertheless contend that their business would probably have been more successful in its early years had defendant not disparaged their products. This allegation of damage is clearly "too speculative" to meet the requirement that special pecuniary loss in a disparagement case be proved with particularity. See Comment, *The Law of Commercial Disparagement: Business Defamation's Impotent Ally*, 63 Yale L.J. 65, 90-91 (1953); see also Restatement (Second) of Torts § 633 comment h (1977); *Maytag Co. v. Meadows Manufacturing Co.*, 45 F.2d 299, 302 (7th Cir.1930) ("whether the development of the company, its natural growth, and conditions generally are such as to produce belief that the company would otherwise have grown much more rapidly, is manifestly speculative and argumentative"); *Erick Bowman Remedy Co.*, 17 F.2d at 261.

[5][6][7] Plaintiffs also argue that Edwin Taylor suffered special pecuniary loss when he expended time and money attempting to counteract defendant's propaganda. Plaintiffs contend that these expenses were reasonably incurred in an effort to mitigate their losses and should have been considered an item of special damage. Taylor may not collect his expenses from defendant, however, unless defendant's conduct was tortious. Efforts to mitigate damages in tort are not compensable unless plaintiff proves a tort, and where special damages are an essential element of plaintiff's action, they must be proved before mitigation expenses may be considered. See *Bigelow v. Brumley*, 138 Ohio St.

574, 594, 37 N.E.2d 584, 594 (1941); Prosser, *supra*, § 112 at 761. Until they are, "[t]here is, in effect, no tort demonstrated." *Electric Furnace Corp. v. Deering Milliken Research Corp.*, 383 F.2d 352, 356 (6th Cir.1967). Plaintiff cannot create a cause of action in disparagement through his own conduct where defendant has otherwise failed to provide him with one.

[8][9][10] Finally, plaintiffs argue that special damages should not be required in this case because all of the disparaging statements also libel ATS, or are contained in documents that do so. The thrust of this argument appears to be that no new trial is necessary because all of the disparaging material will be admissible on a retrial for damages from the libel only. Plainly, not all of defendants' disparaging statements are also libelous. The defendants' allegations that ATS produced unsound or "shoddy" goods, for example, merely disparage the product and do not libel the producer. See *National Refining Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763, 771 (8th Cir.1927); see also Hibschan, *Defamation or Disparagement?*, 24 Minn.L.Rev. 625, 630 (1940). Even if the disparaging material is admissible on the retrial for libel, moreover, the jury will be instructed to consider the harm to ATS' business reputation from the libel only, and will not be told to consider the libel and the disparagement as independent causes of harm. The jury below was clearly told to "add up" the harm to ATS caused by these two torts. Because plaintiffs have proved one tort rather than two, this was improper. Therefore, we agree with the trial court that there must be a new trial for damages only, on the single issue of libel of the corporate plaintiff.

*9 3. The trial court ruled that defendants had written defamatory statements "which tended to injure [ATS] in its business generally and in its dealings with its customers and potential customers." The corporate plaintiff was therefore "entitled to recover actual and punitive damages for injury to its business reputation without proof of special damages." Defendants make two arguments in their attempt to avoid this holding, and the relevance of the second depends on the validity of the first. Defendants initially argue that Minnesota draws a distinction between libel per se and libel per quod. They then assert that the statements made by defendant Busch do not fall into

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any of the slander per se categories, and specifically fail to "unambiguously impute fraud, deceit, dishonesty, or reprehensible business methods" to plaintiff ATS. As a result, these remarks fall into the residual category of "libel per quod" and are not actionable absent proof of special damages. Because plaintiffs could not prove such damages, defendants contend that they may not recover.

[11] Courts at common law presumed damages from any libel. [FN1] *Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng.Rep. 367 (1812); Prosser, *Libel Per Quod*, 46 Va.L.Rev. 839, 842 (1960). The commentators, including Dean Prosser, appear to agree that this remains the rule in Minnesota, even though they disagree about whether the competing rule of "libel per quod" even exists as settled legal doctrine. Prosser, *supra*, 46 Va.L.Rev. at 847; Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv.L.Rev. 733, 748 (1966); Note, *Minnesota Defamation Law and the Constitution: First Amendment Limitations on the Common Law Torts of Libel and Slander*, 3 Wm.Mitchell L.Rev. 81, 86 (1977). Perhaps the clearest statement of Minnesota's common law position is the statement of Justice Mitchell in *Byram v. Aikin*, 65 Minn. 87, 67 N.W. 807 (1896):

FN1. Prosser maintained that a majority of American courts had abandoned the common law presumption by 1960 and adopted the rule of "libel per quod." Under this approach, if statements were not defamatory on their face, and thus extrinsic evidence was required to prove that a defamatory meaning was understood by readers, the libel would be actionable only where slander would be. Thus plaintiff was required to plead and prove special damages unless the case fell into one of the "slander per se" categories, *i.e.*, imputation of crime, loathesome disease, defamation affecting business, or unchastity in a woman. Prosser, *Libel Per Quod*, 46 Va.L.Rev. 839, 844 (1960); *Hinkle v. Alexander*, 244 Or. 267, 271, 273, 417 P.2d 586, 587 (1966). In a common law jurisdiction, on the other hand, if a statement is only "capable of a defamatory meaning," the jury determines

both whether a defamatory meaning was understood and the amount of plaintiff's damages. *Morey v. Barnes*, 212 Minn. 153, 156, 2 N.W.2d 829, 831 (1942); *Hinkle*, 244 Or. at 277-79, 417 P.2d at 590; Restatement (Second) of Torts § 614-16 (1977). The lower court concluded that the meaning of "libel per se" in Minnesota is unclear. Indeed, the fact that the phrase is capable of two meanings may be responsible for the entire development of the "rule" of libel per quod. See Prosser, *supra*, 46 Va.L.Rev. at 848; see also Eldredge, *The Spurious Rule of Libel Per Quod*, 79 Harv.L.Rev. 733, 735-36 (1966).

Written publications calculated to expose one to public contempt or ridicule, and thus induce an ill opinion of him, and impair him in the good opinion and respect of others, are libelous although they involve no imputation of crime, and are actionable without any allegation of special damages.

Id. at 87, 67 N.W. at 808; see also *Gadach v. Benton County Co-op Association*, 236 Minn. 507, 510, 53 N.W.2d 230, 232 (1952). Under Minnesota's common law approach, therefore, the phrase "libel per se" refers to statements that are defamatory as a matter of law. These terms are not used to distinguish libel "per se" that is actionable without proof of special damages from libel "per quod" that is not. See *Morey v. Barnes*, 212 Minn. 153, 156, 2 N.W.2d 829, 831 (1942) ("To be libelous per se, words must be of such a nature that the court can say, as a matter of law, that they will tend to disgrace and degrade * * *").

The trial court held that a corporation may maintain an action for defamation on a showing that defendant's words tended to prejudice it in the conduct of its business or to deter third persons from dealing with it, and that the corporation need not prove *10 any special pecuniary damages to do so. The court therefore found that ATS was entitled to recover "actual and punitive damages for injury to its business reputation."

[12][13] The trial court's holding that a corporation may recover in libel without showing special pecuniary damages was correct under present

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Minnesota libel law. This court has suggested that corporate plaintiffs stand on the same footing as individuals in defamation actions. See *Martin County Bank v. Day*, 73 Minn. 195, 197, 75 N.W. 1115, 1115 (1898). The only distinction generally recognized is one that the trial judge called to the jury's attention. To recover in libel, a corporation must show that defendant's written statements directly tended to affect the credit, property or business of the corporate plaintiff. See *National Refining Co.*, 20 F.2d at 766; *Erick Bowman Remedy Co.*, 17 F.2d at 257; Prosser, *supra*, § 111 at 745. This, of course, is only one category of words that may be defamatory when they refer to an individual.

4. The court properly instructed the jury not to consider on the merits any publication made prior to February 1, 1979, for purposes of Taylor's libel claim, and not to consider any made prior to November 7, 1975, for purposes of the libel claim made by ATS. The trial court nevertheless admitted into evidence a number of statements made prior to one or both of those dates, and plaintiffs pointedly called them to the jury's attention on final argument. For example, the court admitted the "thoroughly neutralize," the "thoroughly bad egg," the "very careless with the law," and the "license to steal" statements which were all time-barred as to the merits of plaintiffs' libel claims. The jury was also instructed not to consider the letter of February 2, 1976, in which Busch called Taylor "an unprincipled SOB," for purposes of Taylor's libel claim.

Defendant, citing no authority, argues that allowing the jury to consider these statements, even solely on the issue of defendant's state of mind or the duration of his conduct in order to assess punitive damages, violates the policy of repose underlying the statute of limitations. This position finds no support in Minnesota law.

[14][15] Punitive damages are clearly recoverable in a libel action in Minnesota. *Loftsgaarden v. Reiling*, 267 Minn. 181, 126 N.W.2d 154, *cert. denied*, 379 U.S. 845, 85 S.Ct. 31, 13 L.Ed.2d 50 (1964); *Hammersten v. Reiling*, 262 Minn. 200, 115 N.W.2d 259, *cert. denied*, 371 U.S. 862, 83 S.Ct. 120, 9 L.Ed.2d 100 (1962). In *Hammersten* the trial court admitted, over defendant's objection,

material published by defendant over six years before suit that contained substantially similar charges to those in issue. 262 Minn. at 202-03, 115 N.W.2d at 262. Plaintiff also testified that defendant, some two to three years before the matter complained of, had called him a "son of a bitch." *Id.* at 203, 115 N.W.2d at 262. This court ruled the admission of this evidence proper on the issue of defendant's "malice," and did not find the statute of limitations relevant. *Id.* at 208, 115 N.W.2d at 265. Thus, the purely personal vituperation in *Hammersten* was admissible without regard to the statute of limitations, because it tended to show malice. *Id.* at 207, 115 N.W.2d at 265. The result is the same under the statutory test for punitive damages as under the older rule requiring commonlaw "malice." The statements quoted above tend to show the "willfull [ness]" of defendant's "indifference" to plaintiff's rights. The punitive damages statute requires plaintiff to show this by "clear and convincing evidence" in order to recover such damages. Minn.Stat. § 549.20, subd. (1)(1982). The case for admissibility is perhaps even stronger under this statute than under the "malice" test employed in *Hammersten*, because subdivision 3 expressly instructs the trier of fact to consider the duration of defendant's conduct. The jury was so instructed in this case. We find no error.

[16][17] 5. Defendants object to each damage award as "so excessive as to be unreasonable." See *Hammersten*, 262 Minn. at 209, 115 N.W.2d at 265-66. We *11 need only consider the libel award in plaintiff Taylor's favor, since that is all that is being reinstated by this opinion. The jury awarded \$75,000 in actual damages and \$250,000 in punitive damages to Taylor. The discretion to grant a new trial on the ground of excessive damages rests with the trial court, whose determination will only be overturned for abuse of that discretion. *Stenzel v. Bach*, 295 Minn. 257, 261, 203 N.W.2d 819, 822 (1973). Here, the trial court has expressly concluded that the punitive and "actual" damages awarded Taylor do not "appear * * * excessive" or to have been given "under the influence of passion or prejudice." We agree.

6. On May 24, 1981, the district court entered an "Order for Temporary Injunction." On February 22, 1982, the court permanently enjoined

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publication of the pre-1978 versions of "Bulletin 1217," addenda 1 and 2, and the original version of "Guidelines." The court based its actions on the Minnesota Uniform Deceptive Trade Practices Act, Minn.Stat. §§ 325D.44 and 325D.45. Defendants contend that the permanent injunction is an unconstitutional prior restraint on speech.

The United States Supreme Court has treated a number of different kinds of injunctions as prior restraints, typically with a citation to *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), and has stricken them. See *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). These cases may once have stood for the proposition that any injunction against speech activity was a "prior restraint" on speech. See Blasi, *Toward a Theory of Prior Restraint. The Central Linkage*, 66 Minn.L.Rev. 11, 12 (1981). More recently, however, the Supreme Court has stated that "[t]he special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Commission on Human Relations*, 413 U.S. 376, 390, 93 S.Ct. 2553, 2561, 37 L.Ed.2d 669 (1973). This court has stated that "[p]rior restraint" usually refers to judicial suppression, prior to publication, of expression alleged to be 'dangerous' or 'defamatory.'" *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 94 n.9 (Minn.1979) (citing *Near*, 283 U.S. 697, 51 S.Ct. 625).

[18][19][20] Under the recent decisions of this court and the United States Supreme Court, the permanent injunction below is not unconstitutional. Here, as in *Cherne*, defendants have circulated their material for a number of years, and the court and jury have had the opportunity to gauge its actual impact. A judicial tribunal has, after full adversarial proceedings, found that defendant's criticism of ATS' equipment constituted "false or misleading" product disparagement. Injunctive relief against such disparagement is specifically

authorized by the Deceptive Trade Practices Act, Minn.Stat. § 325D.45, subd. (1). Clearly, false or misleading "commercial speech" may be forbidden. *Virginia State Board Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72, 96 S.Ct. 1817, 1830-31, 48 L.Ed.2d 346 (1976). Other courts have also upheld the suppression of libel, so long as the suppression is limited to the precise statements found libelous after a full and fair adversary proceeding. See *O'Brien v. University Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 246, 327 N.E.2d 753, 755 (1975); *Retail Credit Co. v. Russell*, 234 Ga. 765, 778, 218 S.E.2d 54, 62-63 (1975). We therefore hold that the injunction below, limited as it is to material found either libelous or disparaging after a full jury trial, is not unconstitutional and may stand.

[21] 7. Defendants contend that the district court erred by directing a verdict in favor of plaintiffs on Counts I, III and IV of their counterclaim. When reviewing the trial court's granting of a directed verdict, *12 this court applies the same standard as the trial court. *Midland National Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 409 (Minn.1980). "The trial court should grant the motion only when it would clearly be its duty to set aside a contrary verdict as manifestly against the evidence or when such a verdict would not comply with applicable law." *Id.*

In Count I of their counterclaim, defendants sought treble damages for plaintiffs' alleged attempt to monopolize in violation of Minn.Stat. § 325D.52 (1982). Defendants claim there was sufficient evidence at trial from which the jury could have found that plaintiffs brought this suit as part of and in furtherance of an attempt to monopolize. They claim they proved resulting antitrust damages by having to defend against plaintiffs' allegedly groundless infringement and unfair competition claims. Defendants' theory of recovery is not entirely clear and, furthermore, they have cited no authority to support their legal assertions.

[22][23][24] Under the federal antitrust laws, courts have allowed defendants to recover treble damages for being forced to defend lawsuits under certain limited circumstances. Courts have been reluctant to encourage such claims, as they conflict with the general policy favoring unrestricted access

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to the courts. *See Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416, 424-25 (10th Cir.), *cert. denied*, 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651 (1952). Defendant may therefore prevail on such a claim only where plaintiff has brought a groundless suit in bad faith and defendant can prove this by clear and convincing evidence, *see Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir.1979), *cert. denied*, 444 U.S. 1025, 100 S.Ct. 688, 62 L.Ed.2d 659 (1980), or where plaintiff has sued with a predatory intent to destroy competition and the lawsuit forms an "integral part of a plan" to do so. *Rex Chainbelt, Inc. v Harco Products, Inc.*, 512 F.2d 993, 1006 (9th Cir.), *cert. denied*, 423 U.S. 831, 96 S.Ct. 52, 46 L.Ed.2d 49 (1975); *Kobe*, 198 F.2d at 425. Here, defendants have produced no evidence, and certainly no clear and convincing evidence, that plaintiffs' unfair competition and infringement suits were asserted in bad faith. Defendants contend that the groundlessness of plaintiffs' infringement claims was demonstrated by Taylor's admission that he only objected to use of the phrase "advanced training systems" by his competitors. Plaintiffs' entire claim, however, was based on the theory that use of plaintiffs' corporate name by competitors posed the risk of confusing the market and appropriating plaintiffs' good will. *Cf. Lawyers Title Insurance Co. v. Lawyers Title Insurance Corp.*, 109 F.2d 35 (D.C. Cir.1939). Nor is there any evidence that this suit was brought with a predatory intent and as part of an overall anti-competitive scheme. The mere fact that the court eventually dismissed a number of plaintiffs' claims in no way proves these were groundless or brought in bad faith. Defendants' counterclaims for malicious prosecution, abuse of process, and their prayer for attorney fees were also properly rejected, and for similar reasons. "The course of litigation is rarely predictable," *Scott v. Mego International, Inc.*, 524 F.Supp. 74, 75 (D.Minn.1981) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978)), and the dismissal of a claim even for failure of proof does not necessarily demonstrate that it was groundless or frivolous. We see no reason to disturb the trial court's rulings on these issues.

The order of the Hennepin County District Court granting judgment notwithstanding the verdict and the judgment entered therein is partially reversed insofar as it held plaintiff Taylor's claim of personal

libel time-barred. We hereby order the reinstatement of the jury verdict in favor of Taylor personally. We affirm in all other respects and order a new trial for damages only on the single issue of libel of ATS.

Affirmed in part and reversed in part.

COYNE, J., took no part in the consideration or decision of this case.

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Supreme Court of Ohio.

O'BRIEN, Appellee,
 v.
 UNIVERSITY COMMUNITY TENANTS
 UNION, INC., Appellant.

No. 74-400.

May 7, 1975.

Landlord brought action against tenants union for various forms of injunctive relief by reason of defendant's dissemination of information concerning landlords about whom defendant received the most complaints. The Trial Court dismissed the action because landlord had not 'met the heavy burden of justifying prior restraints,' and the Court of Appeals reversed and motion to certify record was allowed. The Supreme Court, Celebrezze, J., held that although most of the relief prayed for by landlord was purely prospective in nature, allegation that files of a false and defamatory nature were being used to coerce public into refusing to rent from landlord might entitle landlord to injunctive relief.

Affirmed.

West Headnotes

[1] Injunction ↻98(1)
 212k98(1) Most Cited Cases

Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued publication of that same speech may be proper. U.S.C.A.Const. Amend. 1.

[2] Injunction ↻118(3)
 212k118(3) Most Cited Cases
 (Formerly 212k18(3))

Landlord's allegation that tenants union was using files of a false and defamatory nature to coerce the public into refusing to rent from landlord stated claim upon which injunctive relief might be granted. U.S.C.A.Const. Amend. 1; Civ.R. 12(B).
 **753 Syllabus by the Court

*242 In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. (Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, followed.)

On May 4, 1973, Charles William O'Brien filed a complaint against University Community Tenants Union, Inc., alleging, in pertinent part, that:

'5. Plaintiff says that the defendant, acting through its agents, has compiled a numerical list of at least ten landlords which list reflects those landlords about whom the defendant alleges it received the most complaints. Plaintiff says that said list is posted on a bulletin board and in plain view of the public and that said list has the effect of being a 'Blacklist.'

'6. Plaintiff further says that the defendant has files corresponding to each landlord on said list and that these files contain information which is false and defamatory as to the plaintiff and that such information is being disseminated to the public and prospective tenants in reckless disregard of plaintiff's rights.

*243 '7. Plaintiff says that the defendant is misleading the public by not indicating to them that these complaints are merely unverified statements or phone complaints and may or may not be true.

'8. Plaintiff further says that defendant is advising prospective tenants not to enter into leases with the plaintiff based not only on information in these files but also because plaintiff has refused to enter into a contract with the defendant.

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'9. Plaintiff says that the actions of the defendant are designed to coerce and intimidate the public into refusing to rent **754 from the plaintiff and will result in irreparable injury to his business unless the defendant is enjoined from such actions.

'10. Plaintiff says that he had no adequate remedy at law.'

After the above recital, plaintiff asked for various forms of injunctive relief. [FN*]

FN* 'Wherefore, plaintiff prays that:

'a.) Defendant, his agents, and employees, be temporarily restrained from urging prospective tenants not to rent from the plaintiff and other members of the class until a hearing for a preliminary and permanent injunction can be held.

'b.) the defendant, his agents, and employees, be temporarily restrained from disseminating to the public that information contained in their files relating to complaints against the plaintiff and other members of the class until a hearing for a preliminary and permanent injunction can be held.

'c.) the defendant, his agents, and employees, be temporarily restrained from showing or keeping in plain view of the public a list of landlords about whom it alleges they have received the most complaints.

'd.) a prohibitory injunction be issued against the defendant, its agents, and employees, prohibiting them from keeping a numerical list of landlords about whom they received the most complaints and disseminating said list to the public.

'e.) a mandatory injunction be issued against the defendant, its agents, and employees requiring them to inform the plaintiff and all members of the class of any and all complaints received against them and allowing said landlord to make a written statement in rebuttal of said complaint which statement shall become a part of the defendant's file.

'f.) a mandatory injunction be issued against the defendant, its agents, and

employees, requiring them to have all complaints signed and addressed by the complaining party and all statements in rebuttal to said complaints signed and addressed by the landlord.

'g.) a mandatory injunction be issued against the defendant, its agents, and employees, requiring them to inform the public that the information may or may not be true prior to giving out any information about said landlord.

'h.) for his costs herein and for such other relief as may be just and equitable.'

244 The defendant, in its answer, stated that plaintiff's complaint 'should be dismissed because it fails to state a claim upon which relief can be granted.' Defendant later filed two motions to dismiss. Each was filed subsequent to the answer, and so contravened the Civ.R. 12(B) requirement that: ' * * A motion making any of these defenses shall be made before pleading if a further pleading is permitted. * * *' Thus, the only question before the trial court was whether the complaint stated a claim upon which relief could be granted.

The trial court determined the relief which plaintiff requested was injunctive relief 'for possible future defamatory statements.' That court dismissed the action because the plaintiff had not 'met the heavy burden of justifying prior restraint.'

The Court of Appeals reversed, holding that 'the plaintiff has stated a cause of action by alleging in essence that there will be future repetition of past defamatory statements made by defendant.'

The cause is now before this court pursuant to the allowance of appellant's motion to certify the record.

Charles W. O'Brien, in pro per.

Patchen, Murphy & Allison and Terrence J. Morse,
 Columbus, for appellant.

CELEBREZZE, Justice.

Appellant urges that appellee's prayer for injunctive

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relief was a request to the trial court to impose a prior restraint on appellant's First Amendment protected speech.

*245 Appellee, on the other hand, urges that there is no prior restraint involved and that he only asked for restraint of repetition of 'speech' already determined by a court to be defamatory.

This cause comes before the court on a procedural question. The test for determining whether to dismiss a complaint for failure to state a claim is that:

'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed **755 for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson (1957), 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80.

The Court of Appeals determined that if the trial court found statements made by appellant about appellee libelous or slanderous, then the question whether defendant should be enjoined from future repetition of the same statements could properly be before the court.

Although we agreed that there can be a set of facts which would entitle appellee to relief, and for that reason affirm, further comment is required to emphasize the narrow ground upon which this affirmance is based.

The United States Supreme Court, referring to freedom of speech, said:

'* * * Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.' Palko v. Connecticut (1937), 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288.

[1] However, some narrow classes of speech are unprotected by the First Amendment, *Cantwell v. Connecticut* (1940), 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213. Once speech has judicially been found libelous, if all the requirements for injunctive relief are met, an injunction for restraint of continued

publication of that same speech may be proper. The judicial determination that specific speech is defamatory must be made prior to any restraint. *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, 149, 87 S.Ct. 1975, 18 L.Ed.2d 1094.

In an analogous area, dealing with obscene materials, the *246 United States Supreme Court, in *Southeastern Promotions v. Conrad* (1975), -- U.S. --, 95 S.Ct. 1239, 43 L.Ed.2d 448, said:

'* * * The presumption against prior restraints is heavier-and the degree of protection broader-than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958) .'

Speaking of allowable remedies available, that same court, in *Kingsley Books v. Brown* (1957), 354 U.S. 436, 437, 77 S.Ct. 1325, 1326, 1 L.Ed.2d 1469, said:

'* * * 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene (may be allowed) * * *.' (Emphasis added.) See, also, *State, ex rel. Ewing, v. Without A Stitch* (1974), 37 Ohio St.2d 95, 307 N.E.2d 911, for another form of allowable restraint.

[2] An examination of the complaint in this case reveals that most of the relief prayed for by appellee is purely prospective in nature. However, appellee does allege that files of a false and defamatory nature are being used to coerce the public into refusing to rent from him. If those allegations can be substantiated, a claim for proper injunctive relief might be granted. See *Yood v. Daly* (1930), 37 Ohio App. 574, 174 N.E. 779, 9 Ohio Law Abs. 197; *Wolf v. Gold* (1959), 9 App.Div.2d 257, 193 N.Y.S.2d 36.

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327 N.E.2d 753
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Since it does not appear beyond doubt that appellee can prove no set of facts which would entitle him to relief, the judgment **756 of the Court of Appeals must be affirmed.

Judgment affirmed.

C. WILLIAM O'NEILL, C. J., and HERBERT, CORRIGAN, STERN, WILLIAM B. BROWN and PAUL W. BROWN, JJ., concur.

42 Ohio St.2d 242, 327 N.E.2d 753, 71 O.O.2d 223

END OF DOCUMENT

Westlaw.

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▷

Supreme Court, Rockland County, New York,
 Special Term.

WEST WILLOW REALTY CORP. and Leonard
 Kohl, Plaintiffs,
 v.
 Robert W. **TAYLOR**, Defendant.

Feb. 15, 1960.

Injunction suit. On motion for temporary injunction, the Supreme Court, Samuel W. Eager, J., held that if defendant had just cause for complaint against corporation which had built his home, law afforded him remedy, and that it was improper for him to take law into his own hands and, by picketing another corporation's housing development, attempt to exert pressure to compel that corporation and its president to influence defendant's builder to settle defendant's claims against it, even though other corporation's president was officer and stockholder of both corporations.

Order accordingly.

West Headnotes

[1] Injunction ⚡98(1)
 212k98(1) Most Cited Cases

Generally, courts of equity will not take jurisdiction merely to restrain alleged libel or slander of person, his property or his business, but where statements which are libelous or slanderous with respect to person, his property or business are published or made as part and parcel of course of conduct deliberately carried on to further fraudulent or other unlawful purpose, court may grant injunctive relief to prevent irreparable injury.

[2] Constitutional Law ⚡89(4)
 92k89(4) Most Cited Cases
 (Formerly 92k90)

[2] Injunction ⚡138.75
 212k138.75 Most Cited Cases
 (Formerly 212k136(3))

If defendant had just cause for complaint against corporation which built his home, law afforded him remedy, and it was improper for him to take law into his own hands and, by picketing another corporation's housing development, attempt to exert pressure to compel that corporation and its president to influence defendant's builder to settle defendant's claims against it, even though president of other corporation was officer and stockholder of both corporations, and temporary injunction against such picketing would be granted notwithstanding defendant's contention that there was no threat of irreparable injury and that injunction would constitute an unlawful restraint of his constitutional right of free speech.

****197 *867** Edward G. Roepe, New City, for plaintiffs.

Robert R. Ranni, New York City, for defendant.

SAMUEL W. EAGER, Justice.

This is a motion for temporary injunction in an action brought to enjoin defendant, an individual, from wilfully and maliciously carrying on certain activities allegedly designed to injure plaintiffs in the conduct of their business of development and sale of residential properties.

The plaintiff, West Willow Realty Corp., is engaged in the construction, erection and sale of private homes on property owned by it and situate in Town of Ramapo, Rockland County, New York. The individual plaintiff, Leonard Kohl, is the president and major stockholder of the plaintiff corporation.

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*868 The defendant, Robert W. Taylor, is an owner of a private residence situate at 74 Lyncrest Avenue, New City, N. Y., which he purchased in November, 1956, from a corporation, to wit, Whitewood Estates, Inc. There is no connection between the plaintiff, West Willow Realty Corp., and Whitewood Estates, Inc., but it does appear that the plaintiff Leonard Kohl is an officer and stockholder of both corporations. Since the purchase by defendant of his home in New City, N. Y., he has complained about defects in its construction and of misrepresentation concerning the same, and he claims substantial damages on account thereof. An action was commenced by him against Whitewood Estates, Inc. in or about April, 1959, to recover damages for breach of warranty and for fraud and deceit in connection with the sale of the residence property to him.

The said action brought by defendant against Whitewood Estates, Inc. has not yet been reached for trial. There have, however, been negotiations between the parties in an effort to settle the action, but they have been unavailing. In the meantime, and on two week-ends in January, 1960, the defendant with his two infant children did appear and stand or parade on the public highway near the entrance to plaintiff's present development with a sandwich board type of sign reading: 'I bought a home from this builder. Before you buy, see mine. 74 Lyncrest Avenue, New City, N. Y.'

It is alleged, and not disputed, that viewers and prospective purchasers of homes built by plaintiffs are attracted by this sign and approach and talk with the defendant. It is disputed as to what the defendant has **198 said to these persons, but it is admitted that he or his children have handed to a number of these persons a written statement as follows:---

'I, Robert W. Taylor, am suing Whitewood Estates, Inc.

'Mr. Leonard Kohl was an owner of this corporation and is one of the principals involved in this Dutch Village.

'Whitewood Estates, Inc., constructed a development in New City which I believed failed to conform to specifications. This is the basis of my law suit.

'Problems and complaints are extensive and especially drainage and sewerage. If you desire

any further information--call New City 4-5854.'

The plaintiffs allege that the conduct of the defendant has resulted, and if continued, will result in irreparable damage to them in that there has been and will be thereby occasioned a serious loss in the sales of homes by the plaintiffs. The *869 defendant claims the right to continue his conduct as aforesaid, which amounts to a picketing of the plaintiffs' development, and he does intend to continue the same unless or until his lawsuit is settled.

[1] The defendant, relying upon *Marlin Firearms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 163, 59 L.R.A. 310 and *Singer v. Romerrick Realty Corp.*, 255 App.Div. 715, 5 N.Y.S.2d 607, claims that this court may not intervene to afford plaintiffs injunctive relief under the circumstances here. It is true, as demonstrated by these decisions, that, generally speaking, courts of equity have not assumed and will not take jurisdiction merely to restrain the alleged libel or slander of a person, his property or his business. See also, Vol. 43, C.J.S. Injunctions § 134, and cases cited. Where, however, statements which are libelous or slanderous with respect to a person, his property or business, are published or made as a part and parcel of a course of conduct deliberately carried on to further a fraudulent or other unlawful purpose, a court may grant injunctive relief to prevent irreparable injury. See *Minnesota Law Review Article*, published N.Y.L.J. Jan. 6, 1956; Note, 144 A.L.R. page 1181, et seq. and cases cited; *Saxon Motor Sales v. Torino*, 166 Misc. 863, 2 N.Y.S.2d 885; *American Malting Co. v. Keitel*, 2 Cir., 209 F. 351; *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436; *Carter v. Knapp Motor Co.*, 243 Ala. 600, 11 So.2d 383, 144 A.L.R. 1177. Also, *Wolf v. Gold*, 9 A.D.2d 257, 193 N.Y.S.2d 36.

The power of this court to act to protect plaintiffs under the circumstances here finds support in the decisions of our Court of Appeals. 'Equity does not intervene to restrain the publication of words on a mere showing of their falsity. *Marlin Firearms Co. v. Shields*, (supra). It intervenes in those cases where restraint becomes essential to the preservation of a business or of other property interests threatened with impairment by illegal combinations or by other tortious acts, the **199

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publication of the words being merely an instrument and incident * * *. Nann v. Raimist, 255 N.Y. 307, 317, 174 N.E. 690, 694, 73 A.L.R. 669. Threatened and unjustified interference with the lawful business of a person will be restrained. Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130. Acts which are 'wrongfully and continuously done to cause damage to plaintiff by coercive methods' will be restrained where such damage is difficult of proof. Wilner v. Bless, 243 N.Y. 544, 154 N.E. 598.

[2] The words and conduct of the defendant here are obviously designed and put into effect for the purpose of intimidating plaintiffs and coercing a settlement of the claims of and the action brought by defendant against Whitewood Estates, Inc. Whether or not defendant has just cause for complaints against this third party is immaterial. The law affords him a remedy *870 for the prosecution thereof. It is improper for him in effect to take the law into his own hands and by the means being employed by him to exert pressure against these plaintiffs to compel them to influence Whitewood Estates, Inc. to settle the defendant's lawsuit. The defendant's purposes in his picketing of plaintiffs' development and in giving statements to and talking with their prospective customers is improper and unlawful.

The defendant's claim that the issuance of an injunction under the circumstances here would constitute an unlawful restraint of his constitutional right of free speech is readily rejected. It is a fundamental principle, long established, that the freedom of speech * * * secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose * * *. Gitlow v. People of State of New York, 268 U.S. 652, 666-668, 45 S.Ct. 625, 630, 69 L.Ed. 1138, 1145-1146. Freedom of speech is not an unqualified right, and the privilege of free speech does not confer on one individual the right to use that privilege of the purpose of maliciously injuring another. See Vol. 16, C.J.S. Constitutional Law § 213 and cases cited.

The defendant's further claim that the plaintiffs do not show an irreparable injury is also without merit. It is clear that the plaintiffs will lose sales of homes by the conduct of defendant, and, in fact, this is

undoubtedly the purpose of defendant's conduct. In fact, it is clear that the plaintiffs' investment in the particular development can be jeopardized and even destroyed by the conduct of the defendant.

The decision of Singer v. Romerrick Realty Corporation, supra, is distinguishable because here the course of conduct of the defendant is directed against third persons (the plaintiffs herein) and not against the corporation which allegedly sold a home to defendant and against which defendant has an alleged claim for defects in construction and misrepresentations. In this connection, it is noted that the sandwich type sign **200 displayed by the defendant here is patently false in its statement that defendant bought a home 'from this builder'. Starting with that premise, the defendant's statements would be taken to mean that the plaintiffs were responsible for the alleged defects in construction in defendant's home and this is not so. The plaintiff West Willow Realty Corp. is a corporate entity separate and distinct from the Whitewood Estates, Inc. being sued by defendant.

The Singer decision is further distinguishable in that the signs complained of in that case were exhibited upon private property, namely, on the building alleged to have been defectively *871 constructed and the disparaging words were uttered in the vicinity thereof. Here, the signs and statements are displayed and delivered on the public highway far removed from the site of defendant's property, and the defendant here is in effect picketing the plaintiffs' development.

A temporary injunction will be granted, but it will be limited to enjoining defendant from picketing the plaintiffs' development and from displaying or delivering to any person signs or written or printed statements in any manner derogatory to the buildings, development or business activities of the plaintiff.

Settle order on notice. Undertaking to be furnished in sum of \$1,000.

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END OF DOCUMENT

PROOF OF SERVICE

(CCP §1013A(3) Revised)

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the above County, State of California. I am over the age of 18 and not a party to the within action. My business address is 2 Park Plaza, Suite 300, Irvine, California 92614.

On **September 20, 2004**, I served the foregoing document described as: **NOTICE OF LODGING COPIES OF FEDERAL AND NON-CALIFORNIA AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action in the manner indicated below and as further indicated on the attached service/mailling list:

[XXX] by placing a true copy thereof enclosed in a sealed envelope addressed to each of the interested parties as indicated on the attached service/mailling list.

[] by placing [] the original [] a true copy thereof in a sealed envelope addressed to each of the following interested parties:

[XXX] **BY MAIL** I deposited such envelopes in the mail at Irvine, California. The envelopes were mailed with postage thereon fully prepaid. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit. Executed on **September 20, 2004**, at Irvine, California.

[XXX] **BY PERSONAL SERVICE** I caused such envelope to be personally delivered to the addressee indicated on the attached service/mailling list. Executed on **September 20, 2004**, at Irvine, California.

[] **BY TELECOPIER** I forwarded the above document via telecopier to the above interested parties to the telecopier numbers noted on the attached service/mailling list. Each transmission was completed, without error or interruption. Executed on _____, at Irvine, California.

[] **BY OVERNIGHT DELIVERY:** I am readily familiar with Dubia, Erickson, Tenerelli & Russo, LLP's practice for collection and processing of correspondence for overnight delivery with Overnite Express. Pursuant to such practice, all correspondence is deposited in a regularly maintained box or delivered to any authorized Overnite Express courier in the ordinary course of business on the date it is generated. I know that the envelope was sealed, and with delivery fees thereon fully prepaid, placed for collection on this date, following ordinary business practices in the United States, at Irvine, California. Executed on _____, at Irvine, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 20, 2004**, at Irvine, California.


Kelley L. Saunders

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