

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 30**

-----X  
CHARLES HUGGINS,

Plaintiff,

-against-

MELBA MOORE, THE DAILY NEWS  
and LINDA STASI,

Defendants.

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**SHERRY KLEIN HEITLER, J.:**

Index No. 118787/93

002  
**DECISION & ORDER**

**INTRODUCTION**

This is a ten year old case which has been partially decided by the Court of Appeals and remanded to this court. It presents many interesting issues.

The Supreme Court in Gertz v. Robert Welch, 418 U.S. 323 (1974), obtained a majority in a case in which the plaintiff was a private figure (and a sympathetic one at that); he ~~was~~ was a respected lawyer who was labeled a "Leninist" by a publication of the John Birch Society). Justice Powell's majority opinion engaged in a characteristic exercise in balancing. On the one hand, Justice Powell noted that "punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionality guaranteed freedoms of speech and press"; on the other hand, he recognized that "the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." He therefore split the baby. Suits by public officials and other public figures would be governed by the demanding New York Times standard. But for actions by private individuals, Gertz adopted the liability standard proposed by Justice Marshall's Rosenbloom dissent: "~~we~~ hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

*The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 19 Yale L & Pol'y Rev. 165 2000, Yale Law & Policy Review.

Our State's Court of Appeals has held that in this case to succeed in his defamation action, plaintiff must "show that defendants were 'grossly irresponsible' in publishing any damaging falsehoods in the articles on Moore's plight." In addition, the Court of Appeals in Prozeralik v. Capital Cities Communications, 82 N.Y.2d 466 (1993) has held that for plaintiff to obtain punitive damages, he must also prove common law malice. With these standards in mind, we consider these applications.

### **MOTION SEQUENCE**

Motion Sequence Nos. 005,006 and 007 are consolidated for disposition.

In Sequence No. 005, defendants Daily News and Linda Stasi (hereinafter "Stasi") move, pursuant to CPLR §3212, for an order granting summary judgment dismissing the libel complaint of plaintiff Charles Huggins (hereinafter "Huggins"). The motion is three-fold: (1) the defendants seek *summary* judgment on the ground that the factual statements contained in the articles authored by Stasi and published by the Daily News are substantially true; (2) the defendants claim that **this** action should be dismissed because Huggins cannot establish that the articles were published in a grossly irresponsible manner; and (3) the defendants seek summary judgment dismissing Huggins' claim for punitive damages on the ground that he cannot establish both constitutional **and** common law malice. Defendants also move for an order, pursuant to CPLR §3 126, either precluding plaintiff from using certain evidence, making certain arguments, or otherwise imposing sanctions upon the plaintiff or his counsel for their misconduct during the discovery phase of this proceeding.

In Sequence No. 006, defendants move *in limine* for the exclusion of plaintiff's expert report, which was submitted by plaintiff in support of his *summary* judgment motion.

In Sequence No. 007, Huggins moves, pursuant to CPLR §3212, for partial summary judgment (1) determining that the defendants' statements which gave rise to this action were false, (2) striking that portion of the defendants' Second Affirmative Defense that asserts that the actionable statements are true or substantially true, and (3) declaring that defendants published the actionable statements in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

In the instant action, plaintiff seeks damages from the defendants, alleging that he suffered injuries to his character and reputation due to three Daily News articles by columnist Stasi; the articles reported the views and statements of Huggins' ex-wife, Melba Moore (hereinafter "Moore"), regarding their divorce.'

#### **BACKGROUND**

Moore and Huggins met in the 1970's when Moore was a successful actress and Huggins was in the nightclub business. They married in 1976 and have one child. During their marriage, Huggins formed a recording and management company called Hush Productions (hereinafter "Hush"). Initially, Moore was the only client, but by the late 1980's, Hush represented several well-known artists and had a gross annual income of \$25 million.

In 1989, Huggins asked his attorney to draft a Post-Nuptial agreement. The Post-Nuptial provided that Huggins would have sole ownership of Hush, as well as several other businesses and ownership of most of the real estate owned and acquired during the marriage. This agreement provided Moore with a townhouse in Tamiment, Pennsylvania, her personal checking account and

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<sup>1</sup> Moore was severed from this action after she filed for bankruptcy.

her recently formed corporation, Lips & Mouth Communications.

In 1990, an uncontested divorce dissolved this marriage in the Commonwealth of Pennsylvania. Moore alleged that this divorce was obtained through fraud by her husband's use of forged documents and his representation that he was a resident of Pennsylvania. Moore claimed that she first became aware of the divorce when she received a copy of the divorce judgment by mail. At the time she learned of the divorce, they were living together in New York County. The Pennsylvania divorce decree incorporated the 1989 Post-Nuptial agreement. It is noted, however, that it made no provision for custody or child support for Charli, the parties' 13 year old daughter. In 1992 Moore brought an action in Supreme Court, New York County seeking a declaration that the Pennsylvania divorce decree was invalid. The court granted Moore's relief and dissolved the marriage on the basis of Huggins' constructive abandonment of Moore.

During the New York action, Moore obtained an ex parte temporary order of protection, claiming that Huggins had physically intimidated her in an attempt to get her to drop the action. On February 16, 1993 the parties entered into a Separation Agreement by which the New York divorce action was settled. As part of the agreement, Huggins agreed that the Pennsylvania Court did not have jurisdiction to grant the divorce. The division of assets did not significantly change from the Post-Nuptial agreement, but Moore was awarded the sum of \$250,000, along with child support and custody of their minor daughter. The Separation Agreement also contained a confidentiality clause which required that Huggins and Moore maintain confidences about each other, refrain from disparaging each other and, refrain from contributing to the publication of any article describing either the other party or the marriage.

In May of 1993, after receiving only a small portion of her matrimonial settlement, Moore commenced a Federal action for fraud or, alternatively, negligence against Huggins' divorce attorney. She alleged that the attorney acted in concert with Huggins in obtaining a fraudulent Pennsylvania divorce. As a result she sought actual and punitive damages.

After the commencement of the Federal action, Gregory Walker, Moore's press agent, contacted Stasi, a columnist for the Daily News and conveyed the story of the alleged fraudulent divorce. Stasi then spoke to Moore directly. As a result of their conversations, Stasi wrote, and the Daily News published, an article on June 11, 1993. Following the publication of this article, plaintiffs counsel sent a certified letter on June 17, 1993 to the Editor-In-Chief of the Daily News. The letter stated that the article contained numerous falsehoods which were defamatory. It specifically stated that several of the allegations allege criminal activity which constitutes per se libel. The Daily News and Stasi do not dispute that this letter was sent. However, Stasi claims that she never saw the letter. Thereafter, two more stories were written; one was published on June 28, 1993 and another on July 9, 1993. It is these three articles which form the basis of this defamation action.

Huggins brought this action based upon 18 statements made throughout the three articles. In granting the defendant's motion for summary judgment dismissing the complaint, Justice Elliott Wilk found that all 18 statements were opinions, not facts, and were therefore not actionable.

In modifying the decision of Justice Wilk, the Appellate Division, in an opinion dated April 8, 1999 (253 A.D.2d 297), held that six of the 18 statements were factual and were therefore actionable. In holding that the other 12 statements were not actionable, the Appellate Division stated that nine of these 12 statements were not actionable opinions and three of these 12 statements were

protected by Civil Rights Law §74, which prevents defamation actions from being brought against an entity for the “fair and true” reporting of any judicial proceeding. Also, the Appellate Division held that Huggins is not a public person and the matters publicized were not of public concern; therefore, Huggins need only prove that the defendants were negligent in publishing the statements.

The Appellate-Division found the following **six** statements actionable:

From the June 11, 1993 Article:

(1) “She says, ‘MyName was forged on documents.’ ...Such as? Such as tax returns, and yes, divorce papers, claims Moore.”

(2) “But why would he divorce her without her ever knowing she was even having marital problems? ‘For the purpose of embezzling me out of all my assets. We started a management company together, Hush Productions, and signed [several enumerated performers] and I just figured that he took care of the business end.’”

From the July 9, 1993 Article:

(3) “She maintained that he had someone else sign her name on the divorce papers.”

(4) “Now, many months after the divorce, she’s gotten another order of protection against Huggins, who, she’s told us and a judge, was physically abusive to her.”

(5) “Moore said she is near-destitute because the big-money management company she and Huggins started together was also, she claims, taken completely by Huggins.”

(6) “Moore said that the same employee who signed the divorce papers (who had power of attorney for Moore) signed her name and gave all holdings in the company to Huggins without her knowledge.”

The defendants appealed that part of the decision that declared that the matters publicized were not of public concern. On December 20, 1999 (94 N.Y.2d 296), the Court of Appeals, in reversing part of the Appellate Division's decision, held that the six actionable statements were "arguably within the sphere of legitimate public concern" and therefore, to succeed in his defamation action, Huggins must "show that defendants were 'grossly irresponsible' in publishing any damaging falsehoods in the articles on Moore's plight."

### **THE TRUTH OR FALSITY OF THE STATEMENTS AT ISSUE**

In the first part of their motion for summary judgment, the Daily News and Stasi move for summary judgment on the ground that the factual statements contained in the articles are substantially true. This ground is based in case law which states that "[t]ruth is a complete defense to an action to recover damages for libel, regardless of the harm done by the statement"; "truth need not be established to an extreme literal degree." Love v. William Morrow & Co., 193 A.D.2d 586 (2nd Dept. 1993). "Provided that the defamatory material on which the action is based is substantially true (minor inaccuracies are acceptable), the claim to recover damages for libel must fail." Id.

For the court to grant *summary* judgment to the Daily News and Stasi upon the defense of substantial truth, "it is necessary that [the Daily News and Stasi] establish ... [their] defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [their] favor...and [they] must do so by tender of evidentiary proof in admissible form." Friends of Animals, Inc. v. Associated Fur Mfrs., 46 N.Y.2d 1065 (1979) (quoting CPLR §3212(b)).

Statements (1), (3), and (6) allege that Huggins forged Moore's name on tax returns and divorce papers. However, in their voluminous affidavits and exhibits, the Daily News and Stasi fail

to submit any admissible evidentiary proof that Huggins forged Moore's name on any documents. The only "proof" that is submitted to the court to support the forgery allegations are a copy of Moore's complaint in the Federal fraud action and a sworn statement from Moore from 1993 stating that the charges against Huggins attributed to her in the Daily News are reported accurately and are truthful. This "proof" is insufficient for the court to find, as a matter of law, that the forgery statements are substantially true.

Statements (2) and (5) allege that Huggins embezzled Moore's assets. "The essence of the crime of larceny by embezzlement is the conversion by the embezzler of property belonging to another which has been entrusted to the embezzler to hold on behalf of the owner." People v. Yannett, 49 N.Y.2d 296 (1980). The court recognizes that during Moore's deposition in an unrelated action, Moore explicitly stated that she does not have nor did she ever have an ownership interest in Hush. See Deposition of Melba Moore, p. 9 (attached as Ex. JJ to Ex. 4 of Affirmation of Bradley C. Rosen, Esa. In Support of Plaintiff's Motion for Summary Judgment). However, as this company was formed during the marriage, Moore would have had an equitable distribution claim with regard to same. At the time of the divorce, she would have had to prove her contribution to Hush. See, Hartog v. Hartog, 85 N.Y.2d 36 (1995). Further, plaintiff does not deny that on numerous occasions Moore and others publically stated that she was an owner of Hush (see, *The Washington Post*, January 18, 1980, which reported that Melba Moore "now heads her own recording studio and management company, Hush Productions, Inc."; similarly, the *Daily News*, November 9, 1987, which stated that Melba Moore was helping her husband run Hush...; See, Exhibit 9. Affidavit of Linda Stasi in support of Defendants' motion for summary judgment).

On the information presented, the Court cannot determine as a matter of law that the embezzlement statement is substantially true.

Statement (4) alleges that a court granted Moore “another order of protection” to protect her from Huggins. It is undisputed that Moore was not granted two orders of protection; instead, she was granted a temporary restraining order and an ex parte temporary order of protection. See Defendants’ Memorandum of Law in Opposition to Plaintiffs Motion for Summary Judgment, pp. 12-13. The court notes that although Justice Wilk crossed out the words “Order of Protection”, he left the exact directive provided by the order which stated “defendant is hereby restrained and enjoined from harassing, menacing, striking or physically endangering the plaintiff and from entering or attempting to enter Apartment 8R, occupied by the plaintiff, at 200 Central Park South, New York, New York”. Further, this order provided for personal delivery on Mr. Huggins. The order clearly was designed to provide protection to Moore; however, it was not labeled as an Order of Protection. **As such, the court is denying summary judgment re same.**

In the first and second parts of Huggins’ motion for partial summary judgment, Huggins moves for a declaration that the defendants’ statements which gave rise to this action were false and to strike that portion of the defendants’ Second Affirmative Defense that asserts that the actionable statements are true or substantially true.

The U.S. Supreme Court has decreed that the plaintiff in a libel suit bears the burden of proving that the alleged false statements are, in fact, false. Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776-77 (1986). The Court of Appeals has repeatedly declared that the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Alvarez v. Prospect Hosp., 68 N.Y.2d

320, 324 (1986) (citing Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985), etc.).

Statements (1), (3), and (6) allege that Huggins forged Moore's name on tax returns and divorce papers. Just as the defendants failed to proffer any evidence showing that these statements are substantially true, Huggins has also failed to provide the court with any evidence showing that, as a matter of law, these statements are false. Instead of providing the court with evidence, counsel for the plaintiff states that "Huggins denies having forged, or causing someone else to forge, Moore's name on court documents and tax returns." Memorandum of Law in Support of Plaintiffs Motion for Partial Summary Judgment, p. 15. This is merely a conclusory denial. A conclusory denial, without supporting evidence, is insufficient to establish a prima facie case that the statements are false; therefore, the court declines to grant the plaintiff *summary* judgment re this issue. See, e.g., Team Star Contr. Inc. v. Dynamic Painting Corp., 263 A.D.2d 504 (2nd Dept. 1999).

Statements (2) and (5) allege that Huggins embezzled Moore's assets. As previously stated, there are triable issues of fact as to whether Moore had an entitlement to a portion of Hush. Therefore, summary judgment cannot be granted in Huggins' favor on statements (2) and (5).

Statement (4) alleges that a court granted Moore "another order of protection" to protect her from Huggins. As previously discussed, the court cannot rule, as a matter of law, that the lay public can differentiate between a temporary restraining order and an order of protection.

Accordingly, Huggins' motion for partial summary judgment, seeking a declaration that the defendants' statements which gave rise to this action were false, is denied. For the same reasons, and those stated above in the discussion of the defendants' motion for summary judgment, Huggins' motion to strike that portion of the defendants' Second Affirmative Defense that asserts that the

actionable statements are true or substantially true is denied.

### **GROSS IRRESPONSIBLE**

In considering whether the defendants were grossly irresponsible, the court notes that the state provides strong protections for free speech and requires more than mere negligence when publishing matters of public concern. An article published in 1996 states:

The First Amendment's protection of news sources is particularly appropriate in New York, where the State Constitution provides a broader scope of protection for speech than does the Federal Constitution, New York, therefore, imposes a greater burden on the plaintiff in a civil libel suit against a private party than does the Federal Law. To warrant recovery, a defamed party in New York "must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." The New York Court of Appeals has created a presumption that statements included in an article or broadcast involve matters of "public concern", and has refused to impose standards of defamation liability that would limit the free flows of communication within such media."

See, *Defamation In Cyberspace: Stratton Oakmont, Inc. v. Prodigy Services Co.*, Albany Law Journal of Science and Technology, 5 ALB LJST 229, 1996.

Further, in the seminal case in libel law, New York Times v. Sullivan, 376 U.S. 254, 299 (1964), Justice Goldberg noted in his concurrence that "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on a matter..." Id. 299

The Court of Appeals ruled that Huggins "must prove that defendants were grossly irresponsible in publishing any untruths injurious to his reputation in the articles in order to prevail in this libel action." Huggins v. Moore, 94 N.Y.2d 296 (1999). In the second part of their motion for summary judgment to dismiss the complaint, the defendants claim that this action should be dismissed because Huggins cannot establish that the articles contained untruths which were

published in a grossly irresponsible manner which would cause to injury to plaintiffs reputation (See. Huggins v. Moore, *supra*).

Under the “gross irresponsibility” standard, the party allegedly defamed can recover only by establishing, by a preponderance of evidence, that “the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196 (1975). This standard is objective. Ortiz v. Valdescastilla, 102 A.D.2d 513 (1st Dept. 1984). In determining whether the defendants acted in a grossly irresponsible manner, the court must consider whether they “(1) followed ‘sound journalistic practices’ in preparing the allegedly defamatory article; (2) followed ‘normal procedures,’ including editorial review of the copy; (3) had any reason to doubt the accuracy of the source relied upon and thus a duty to make further inquiry to verify the information; and (4) could easily verify the truth.” Chaiken v. VV Publ. Corp., 119 F.3d 1018 (2nd Cir. 1997), cert denied, 522 U.S. 1149 (1998).

In regard to Stasi, there is no “bright line” rule on what constitutes gross irresponsibility on the part of a journalist. However, in regard to the Daily News, the case law is very clear. “[W]ithout ‘substantial reasons’ to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer.” Weiner v. Doubledav & Co., 74 N.Y.2d 586 (1989) (quoting Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369 (1977), cert denied 434 U.S. 969 (1977)). A publisher must merely “utilize methods of verification that are reasonably calculated to produce accurate copy.” Karaduman v. Newsdav, Inc., 51 N.Y.2d 531 (1980). The court finds that the defendants have met the first two criteria of the Chapadeau rule. It is not disputed that Stasi did the following before writing and publishing the article:

My review of the court documents and the corroboration of her story that they provided reinforced my conclusion that Ms. Moore was a credible source. Based on this investigation and confirmation, my knowledge concerning previously published reports of Ms. Moore's charges in the New York Post, my personal interview with Ms. Moore and her counsel and my call to **Mr. Huggins'** counsel in the Pennsylvania divorce, I drafted a brief (approximately 400 word) story. At the time I wrote this article, I had absolutely no doubt as to the truth of the statements made therein.

When I finished the article, it was passed on to my editor, Hap Hairston, for his review. Again, because of the passage of time, I do not recall the specifics of any conversation I may have had with **Mr. Hairston** about this article, but I can say for certain that it would not have made it into the paper unless he had reviewed and approved it. If he had any questions, I'm sure he would have called me and I would have answered his questions.

See, Linda Stasi's Affidavit, paragraphs 32 and 33.

In response to the defendants' motion for *summary* judgment, however, Huggins alleges that after the publication of the first article, his attorney wrote a letter to the Daily News which actually notified the Daily News of the falsity of the claims. A copy of this letter appears as **Ex. 14** to the Affidavit of Linda Stasi in Support of Defendants' Motion for Summary Judgment. The letter was never answered. This letter raises a triable issue of fact as to whether Stasi or the Daily News should have "had any reason to doubt the accuracy of [the information supplied by Moore] and thus a duty to make further inquiry to verify the information." Chaiken, supra. Stasi claims that she did not see this letter until this litigation.

Accordingly, the second part of the defendants' motion for summary judgment to dismiss the complaint (the part seeking *summary* judgment on the ground that the articles were not published in a grossly irresponsible manner) is denied. The court finds that the issue of defendants' conduct should be resolved by a **jury**.

In the third part of his motion for partial summary judgment, Huggins moves for a declaration that the defendants published the actionable statements in a grossly irresponsible manner. As previously mentioned, there are triable issues of fact as to whether Stasi or the Daily News were grossly irresponsible. Accordingly, the third part of Huggins' motion for partial *summary* judgment is denied.

### **PUNITIVE DAMAGES**

In the third part of their motion, the defendants seek summary judgment dismissing Huggins' claim for punitive damages on the ground that he cannot establish both constitutional and common law malice. The Court of Appeals found that Huggins "must prove constitutional malice to recover ... punitive damages." Huggins, supra at 302. Constitutional malice, in this context, is also referred to as "actual malice." See, e.g., Khan v. New York Times Co., 269 A.D.2d 74 (1st Dept. 2000). Punitive damages are intended "to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights" & Crucey v. Jackall, 275 A.D.2d 258 (1<sup>st</sup> Dept., 2000), citing Prozeralik v. Capital Cities Communications, 82 N.Y.2d 466, 479-480, 626 N.E.2d 34, 605 N.Y.S.2d 218 (1993). Mere negligent reliance upon a source, or a failure to conduct further investigation, does not suffice. See, Suozzi v. Parente, 202 A.D.2d 94, 101-102, 616 N.Y.S.2d 355, lv. Dismissed and denied 85 N.Y.2d 923, 650 N.E.2d 1323, 627 N.Y.S.2d 321 (1995). The U.S. Supreme Court held that "[t]he burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). Of course, "it would be rare for a defendant to admit such doubts." Bose Corp. v. Consumers Union, 692 F.2d 189 (1st Cir. 1982).

In St. Amant v. Thompson, 390 U.S. 727 (1968), the U.S. Supreme Court provided examples of the kind of proof that would support a conclusion of actual malice: evidence that the story was (1) “fabricated”; (2) a “product of [the defendant’s] imagination”; (3) or “based wholly on an unverified anonymous telephone call.”

In short, to succeed on their summary judgment motion to dismiss Huggins’ punitive damages claim, the defendants have to show that Huggins cannot prove that the “statements [were] made with [a] **high** degree of awareness of their probable falsity.” Garrison v. State of Louisiana, 379 U.S. 64 (1964) *over’d on other grounds by* 388 U.S. 130 (1967). The defendants have met this burden.

To have a viable claim for punitive damages, Huggins must also be able to prove common law malice. Prozeralik v. Capital Cities Communs., 82 N.Y.2d 466 (1993); see also Liberman v. Gelstein, 80 N.Y.2d 429 (1992). Common law malice requires a showing that the defendant acted maliciously, ~~wantonly~~ only, recklessly, or “in willful disregard for another’s rights.” Prozeralik, supra. “[A] triable issue of common-law malice is raised only if a **jury** could reasonably conclude that ‘malice was the one and only cause for the publication’ ‘of the allegedly defamatory statement.’” Thanasoulis v. National Ass’n for the Specialty Foods Trade, 226 A.D.2d 227 (1st Dept. 1996) (quoting Liberman, supra).

Huggins alleges that Stasi maliciously authored the articles in order to further her own agenda of creating interest in Moore’s biography, which Stasi planned to ghost-write. See Affirmation of Bradley C. Rosen in Opposition to Defendants’ Motion for Summary Judgment ..., pp. 28-29; see also Walker Deposition, pp. 36-37. A more complete reading of Walker’s deposition, however, calls into question whether Stasi ever considered a book deal and, consequently, whether Stasi would have

had a reason to act maliciously in the authoring of the articles. See Walker Deposition, pp. 73-76. Stasi denies that she ever had discussions about a book deal and there is no concrete information presented which would allow a ruling that malice was the sole purpose of publishing the articles. It is undisputed that at the time of publication this story had been reported in various newspapers and on television. The court concedes that “arguably the distinction between the elements of “grossly irresponsible” conduct and “actual malice” are rather fine, but it is established that there is a higher degree of proof required for actual malice”. See, O’Brien v. Troy Publishinn Company, Inc., 121 A.D.2d 794 (Third Dept., 1986).

As such, the third part of the defendants’ motion which seeks summary judgment dismissing Huggins’ claim for punitive damages on the ground that he cannot establish both constitutional and common law malice is granted.

**J**

The defendants allege that, *inter alia*, Huggins destroyed pertinent evidence pertaining to this case. Spoliation sanctions should be granted where evidence is destroyed intentionally or negligently **prior** to the adversary’s opportunity to review same. Kirkland v. New York City Hous. Auth., 236 A.D.2d 170 (1st Dept. 1997).

In considering this application, the court notes that:

Traditionally, courts have a number of remedies to redress situations in which a party is responsible for the spoliation of evidence. When selecting a remedy and deciding how severe the sanction should be, a court’s decision is based on the balancing of several of factors: (1) the degree of fault of the party who spoliated the evidence; (2) the degree of prejudice suffered by the opposing party; (3) the availability of a lesser sanction that will avoid substantial unfairness to the opposing party; and **(4)**the potential of the sanction deterring such conduct by others.

See, *Recognizing An Independent Tort Action ~~will~~ Spoil A Spoliator's Splendor*, Hofstra Law Review, 26 HOF LR 1003 (1998).

A party seeking sanctions for spoliation has the burden of proving three elements: (1) that the [alleged spoliator] had an obligation to preserve the evidence; (2) that the [alleged spoliator] acted culpably in destroying the evidence; and (3) that the evidence would have been relevant to [the alleged party's] case, in that a reasonable jury could conclude that the evidence would have been favorable to [the aggrieved party]. See, Riddle v. Liz Claiborne, 2003 WL 21976403, citing Golia v. Leslie Fay Co., 2003 WL 21878788.

These are very serious allegations which must be carefully examined. From the papers before it, however, the court cannot determine whether Huggins destroyed pertinent and crucial evidence such as documents showing the value of marital assets or tax returns. The issue of whether Huggins destroyed pertinent and crucial evidence, such as documents showing the value of marital assets or tax returns, is referred to a Special Referee to hear and report, as per separate order of today's date.

### **THE REPORT OF THE EXPERT**

The defendants move *in limine* for the court not to consider the expert report that details the reasons why the court should find that the defendant acted with gross irresponsibility. The expert report was written by Rodney A. Smolla, a law professor at Richmond Law School. The defendants' application with regard to this expert report is granted. Although the expert report states the manner in which the defendants deviated from acceptable journalistic practices, it goes further to address the central legal issue of whether or not defendants' conduct was grossly irresponsible. An expert report on legal issues is impermissible. Therefore, the court will not consider same. See, Music Sales

Corp. v. Morris, 73 F.Supp.2d 364 (S.D.N.Y. 1999). (Testimony of an expert on matters of domestic law is inadmissible for any purpose.)

During a conference on July 29, 2003, the court instituted a discovery schedule to which the parties must adhere. According to the schedule, there is a November 30, 2003 deadline to complete discovery pertaining to the actual damages that Huggins allegedly suffered due to the publication of the articles. The parties are directed to have a conference call with the court on **Monday, September 29, 2003 at 11:00 AM.**

This shall constitute the decision and order of the court.

DATED: SEPTEMBER 12, 2003

  
SHERRY KLEIN HEITLER  
J.S.C.